You can see at p 275 he refers to Lord Wright's judgment in Fibrosa and then he basically states the restitutionary principle. He quotes from the American restatement and then over the page he said there was no fiduciary relationship. Basically what your Honour said yesterday is almost an echo of this, it is shoddy conduct for Reading to be able to hang on to the money.

"When the case reached the Court of Appeal ..." and at the bottom of p 235 he said, "Mr Salmon ... no part of our law." It is not a very impressive case, for reasons which I will come to. "A key element ... benefit of the Crown."

"The House of Lords similarly found ... fiduciaries of any meaning". "I agree with ... sum which he receives" and then he quotes the judgment, and says, "The second branch of Lord Asquith's statement ... fiduciary obligation." And he goes on that theme.

What his Lordship was saying as I note it was endorsed by Sir Harry Gibbs and that is simply that because there is a duty, be it a contract, be it of a statute, it does not follow that there is a fiduciary duty as well.

HIS HONOUR: I think if one takes it back to its origin, fiduciary duty arose out of the concept of an obligation to account, either because one held property for another or received property from another. If that concept is maintained and if property is given its full sense, then information, so our courts would suggest, is not property and Mr Wright never held or had obligation to account for any property.

MR TURNBULL: One can get into a lot of trouble in this building quoting academics, particularly Canadian academics.

HIS HONOUR: Having been one myself, I will let you do it.

MR TURNBULL: I have to be careful citing academics who failed judges many years ago in exams. But I think Dr Klippert is too remote and too young to have done that. He puts his finger on it when he says in his book "Unjust Enrichment" at p 282 "The technique ... enrichment principle."

The problem with Reading - there was Mr Justice Denning coming to the right conclusion for the right reason. He said it has got nothing to do with fiduciary, it is just unfair, why should this bloke make a quid out of using the Queen's uniform, therefore the money belongs to the Queen. So it then gets up to the Court of Appeal and Mr Cyril Salmon as he then was says "Revolution in the court, new principles" and such, and they say okay, we will call it a fiduciary obligation and we are back in familiar territory. If I could just divert from these notes for a moment.

When you consider the nature of public officers in the 18th century one recognises from history that a lot of these officers were truly officers of profit under the Crown.

HIS HONOUR: I always wanted to be Lord Chancellor.

MR TURNBULL: They were really officers of profit under the Crown. What if the commanding officer in Cairo in Sgt Reading's case had met with his colleagues in the headquarters tent and said: Look, these boys have not been paid for six weeks because Hitler has stopped all the convoys, or whatever, what are we going to do, we don't really care that much about the Egyptians, why don't we let them run a bit of blackmarket liquor to make a few bob on the side. That would have been a normal decision in the 18th century. Obviously that is unattractive in 19 - - whatever. Assuming other soldiers had been authorised, would Reading have been obliged to disgorge his profit? Of course not. It would not be unjust for him to do so. Restitution is all about the justice of one person benefiting from a wrong which he has done vis a vis another.

The question then was what was the justice of Reading's position? Obviously none. What was the justice of the Crown's position? It was paying him, giving him a uniform, he was defending the liberty of the Egyptian people. So, flogging blackmarket grog, probably of the poorest quality, to make a profit for himself? So justice was on Reading's side.

When you apply the principles to the facts in this case, the facts are of a very different complexion. You do not have the purest of pure on Mr Simos' side and the blackest of black on my side. You have got people who have authorised or at least acquiesced in at least a number of publications. They had no regard to keeping it a secret. It is not as though you have that black and white restitutionary situation that you have with Reading.

Warming to the topic of restitution, which I bashed into my head for a couple of years at Oxford, you get the cases of the change of position. Say I give someone money under a mistake of fact and he thinks it is his and relying on that he invests in a company which promptly loses its shareholders' funds. My ability to recover the money from him is not absolute, it is subject to the equities and justice, the fairness on his side. So the problem with this concept of fiduciary - and I will come to what Lord Justice Fletcher Moulton said in a moment, but it is the situation of whether there are boxes - we will put right in there, that box, and therefore the Crown can get any conceivable equitable remedy. That is just not right. There are no such boxes. As Lord Fletcher Moulton said in Coomber, in a great example of judicial common sense, "Fiduciary relations are of many different types ... with regard to them."

HIS HONOUR: Of course this is picked out, although in a slightly different way in the High Court in Bailey v The Stock Exchange where I was prepared to hold - and I was held right in so doing - that there was a fiduciary relationship. The court held that I was right in so holding that there was not a trust relationship which involved the right thereafter to recover because the relationship that arose out of the transaction was not one of trust. I am not entirely sure I am too fond of the High Court judgment except that they said I did the right thing.

MR TURNBULL: I regret to say I am not familiar with that case. I shall certainly study it with some care tonight. What has fallen from your Honour illustrates the point Lord Justice Fletcher Moulton was making that all of these cases have to be looked at carefully on the facts. There is no such box called "fiduciary relationships". Also a box for "trustees", a box for persons who made money under a mistake of fact and so forth. There is not this general box.

HIS HONOUR: There may be a general box, but I think certainly a point I tried to make at first instance and I think the High court makes the same point in a different way is that there is not always the same remedy.

MR TURNBULL: "IN any event, even if there were some form of fiduciary obligation ... remains bound by the Official Secrets Act 1911-1939 (UK)".

(Paragraph 4.18; 4.19; 4.20 read.)

If I can just take your Honour back to a discussion of the GCHQ case. The point I am making, the Royal prerogative is described in precisely those terms as being part of the residues of sovereign power that is not picked up by everything else. At p 416F, Lord Roskill's judgment, he cites Dicey and Morris. "The prerogative ...". So if this statement of the rule in Dicey is correct, then any obligation flowing from the royal prerogative is similarly unenforceable outside the kingdom where it is created.

(Paragraphs 4.21, 4.22 and 4.23 read.)

Does your Honour wish to go back to GCHQ?

HIS HONOUR: While you might be right, I am having trouble grappling with it. Not that it is not well stated. I think it is another one of these cases where people have been guilty of loose language in some authorities. I can understand, and well understand, that one will not, for example in a court here enter upon an examination of the validity or otherwise of a purported forfeiture of property, as for example the Russian Revolution cases. Or indeed, if my recollection of it is correct, the recent decision in England relating to Maori artefact . But here it is not a case of the sovereign seeking to gather in the fruits of the exercise of power but rather the sovereign seeking to say that there is an obligation arising out of a relationship which we entered into, so that it is not a unilateral act which is the exercise of sovereign power but a consensual, albeit not contractual relationship which may well be the distinction, I am not too sure. But that is the difficulty I have in merely taking the submissions on board and saying that this is really a Attrill case.

MR TURNBULL: There is nothing I would like better than for your Honour to decide this case on a point of law, for reasons which ought to be obvious. I am a facts man myself.

HIS HONOUR: The Court of Appeal have now decided that even when I decide a case on matters of credibility and demeanour they can ignore that and overthrow me on the facts.

MR TURNBULL: I am sure Mr Simos was not listening to that. In Huntington v Attrill the government in that case - the claim was a claim by one individual, it was not the State of New York. The interesting thing is this. In those Russian Revolution cases and in the Maori artefact case, the issue there is this. A government, be it revolutionary or whatever, can make any decree concerning property within its jurisdiction and if that property is then taken out of its jurisdiction the foreign government title will be upheld in the Australian or English courts because the title passed pursuant to a valid act of the State, or legislative act in that foreign country. What the courts will not do - and this is referred to in Banco de Vizcaya, is to allow a government to expropriate property from one of its subjects if that it outside of its jurisdiction. The situation we have here is not truly a consensual relationship. I am not suggesting Mr Wright was a conscript, but at least so far as confidentiality was concerned, it was not a confidence that he was bound by the Official Secrets Act.

HIS HONOUR: If that is the only obligation. But if one embarks on to the relationship and obligation of confidence and one does that for a variety of reasons, inter alia, the part of the background fact is that there is a stated public policy that public servants should keep their mouth shut, one is not enforcing the Official Secrets Act but one is enforcing one of the obligations engrafted on to the consensual relationship. The important distinction is, for example, that expropriation is a true exercise of sovereign power and it is merely another manifestation of the old concept derived from the feudal system.

Undoubtedly, if there were a provision in the Official Secrets Act that said that any MI5 agent who was guilty of an offence, even after he left the country could have all these assets wherever they might be sequestered, we would tell Her Majesty to go and take a running jump.

MR TURNBULL: May I say this. I am probably being excessively candid but I do not think that is a fault in an advocate. It is not going to trouble us if your Honour is going to find that there was a duty of confidence.

HIS HONOUR: You will not be disappointed.

MR TURNBULL: Having said that, the question then is: what is the scope.

HIS HONOUR: Two things: what is its scope and what remedies are available to enforce it. Certainly the way I am thinking at the moment, I think it is difficult to avoid concluding that there was a relation of confidence not derived from contract but derived in a sense from status or derived from the circumstances in which the relationship was entered into.

MR TURNBULL: One of the problems that my friend has is the phrase "Direct or indirect". Huntington v Attrill. That phrase is used in hundreds of statutes. It has to be given a content. Indirect must mean something, and if bringing a civil suit to stop someone publishing "secrets" or "information obtained" etc. and pleading as a particular to support that civil obligation the Official Secrets Act, if that is not an indirect enforcement then, rhetorically, pray tell me what is. It is so blatant. It cannot be anything other than an indirect enforcement. It is precisely what the judicial committee in Huntington v Attrill was talking about.

"4.23 ... in Government of India v Taylor ... against the company in England". "Lord Keith of Avonholm explained ... independent sovereignties."

"Lord Somervell of Harrow said at 514: tax gathering ... within its jurisdiction".

A lot of these revenue cases are devoted to revenue law.

In this case, whether it is penal law does not need to be argued. "Their Lordships approved ... must be refused." The thing that comes out of these authorities pretty clearly, and it is accepted by an authority like Dicey and Morris - - I don't know what Professor Morris' status is, but there is this concept of indirect enforcement. What the cases say is: don't look at the form of the action. This case, is it really an Official Secrets Act case? Here we have Wright, the government says to him: You step one foot back here and we will put you in the slammer for the Official Secrets Act. Mr Wright quite wisely does not get the plane back to England, so the Official Secrets Act comes to him in the shape of an action for breach of confidence which is then jollied up into all these other contractual and judiciary and equitable obligations.

Insofar as "force and authority", consider Mr Wright's position. The law had no obligation or rights to him, they had no obligations to him at all. They had certain rights that he owed to them under the Official Secrets Act and under the status relationship he had. Again, reading what is said in State of Colorado v Harbeck, we can say that the enforcement of right obligation rests, not on consent, but on force and authority.

It is perfectly open for the British Government to bind their intelligence officers by contracts just like the Americans do. Then there would be no issue. If Mr Wright had signed a contract which said: Any book you want to write you have to submit to us for vetting or you cannot write any book, if you sign a contract which said that, then subject to questions of iniquities and public interests, we would not have a case. So what the Crown has done, it has decided that it suits their purpose not to be bound to do anything for the people that work for them. They want to be able to act in a discretionary way with pensions, and the like, they want to be able to refuse to pay the money. They want, as it may be reasonable - we all try to achieve this in commercial relations - they want the greatest

flexibility. Everybody loves an option, as someone said. That is basically what the Crown has with these status relationships. It calls on the option day by day. The moment it does not want to call on the option it says: Off you go, you are out. That is very beneficial to them. They know it, they have chosen to keep it on that basis. If they should not be able to get benefits which would flow from truly consensual relationships with obligations on each side when there is no such mutual promise or mutual obligations.

(Paragraph 4.25 read.)

MR TURNBULL: ... entitled to the securities in question."

HIS HONOUR: We have the $44 question for the day: what did Mr Justice Lawrence later become?

MR TURNBULL: I have no idea; what did he become?

HIS HONOUR: Lord Oaksey.

MR TURNBULL: "4.26 It is submitted ...in the statement of claim." There may be a subtle distinction but it does not appear to be very apparent, at least to me. "Thus these obligations ... similarly unenforceable." Your Honour will recall in the language of paragraphs 6, 6A, 9, 9A and 16A there is reference to Wright's appointment. That is a very significant phrase. Look at 6, "at all times both during the after the termination of his service or appointment ..". The same in 6A. And then note the reference to the various documents which include most importantly the security notes which refer to the OSA and also the acknowledgment that he was appointed by the OSA. Then in 9 and 9A they talk about "at all times both during and after the termination of his service or appointment .." Appointment is a very significant word because it connotes "to an office". The same through (A and then 16A again, they talk about service or appointment, so it is an interesting use of language and one more comfortably suited to a status rather than a contractual master/servant relationship.

The claim that the duty is absolute irrespective of prior publication - truth falsity content and irrespective of damage - that is s 2 of the Official Secrets Act broadly stated. An obligation of confidence simply based on the fact that information was given to him in confidence. I have got a greater difficulty persuading you of that. I won't waste a lot of your Honour's time on that point but that is covered by a number of things; the requirement for detriment and of course, the question of is it truly confidential.

"4.27 Furthermore insofar as any obligation ... the King himself or his ministers." There cannot be two rules for the royal prerogative. If you consider the Banco de Vizcaya case, the first decree was a decree by the President and did not purport to be a legislative act - that was the decree of October 1931. That was plainly an exercise of not the royal prerogative because he was no longer a monarchy, but it was a manifestation of the sov ereign prerogative, whoever the sovereign may be.

The problem nowadays is that sovereigns do not have as much prerogative power as they used to have; I suppose it is a problem to sovereigns not to their subjects. But that case is an example of a decree of a sovereign in his prerogative right which is regarded as unenforceable.

HIS HONOUR: There are some limitations in the broadness of this principle. I am sorry if I intrude back into the protective area, but that is a classic example of it, because the law relating to the protection of the mentally ill or the mentally infirm or perhaps developmentally disabled, is clearly a public law of the State wherever the law applies. And even though it may be a court that makes the appropriate order or declaration, it is an exercise by the State of sovereign power. For example, when I sit here as the protective judge and I act not under the Protective Estates Act but under the inherent jurisdiction, I am going back to the prerogatives historically and legally because that is where it comes from under the third charter of justice.

There is certainly an area of the law where, for example, the court of New South Wales would recognise a decree or order of a foreign court or a foreign State appointing a manager. You can do it certainly in relation to moveable property although it will not

automatically do it in relation to immovable property.

MR TURNBULL: Could I say this, one would need - and it is not a jurisdiction I am familiar with -

HIS HONOUR: I am the only one.

MR TURNBULL: I suppose it is a question of whether one is the Master of lunacy or the Master in lunacy.

HIS HONOUR: We got rid of him.

MR TURNBULL: The real question is of course on what basis such an enforcement is there. Obviously in bankruptcy there is a statutory basis for that sort of enforcement. I know the Defence Visiting Forces Act 1963 -

HIS HONOUR: Recently the Viscount of the Royal Court of Jersey seeks the enforcement in Australia under the Bankruptcy Act, and indeed under the companies legislation of decrees homme disastre. (?) One of the English banks where it was held, I think in the Kings Bench division, that a foreign curator could sue in England for the recovery of the movable property of his patient without obtaining a further order appointing him as a curator under the Mental Health Act, or I think it is still the Lunacy Regulation Act in England. I have certainly taken a similar view here in relation to foreign curators. So that there are some limitations on this broad statement of principle. It may be that it is only in cases of penal enforcement or something of that nature that one declines to recognise and enforce an exercise of the prerogative power.

MR TURNBULL: As I say, categorising the relevant law as penal is not a problem for us in this case. "4.28 thus it is plain ... not enforceable in this State." I'm not sure that the plaintiff is properly described in this case because I have a suspicion he is the Attorney General of England and Wales, not of the United Kingdom.

HIS HONOUR: According to a letter I got in the mail that would be the greatest insult to my ancestors because that letter, of which counsel had a copy, points out that the law was given to the Welsh long before the English ever arrived on the scene, and declined to recognise him in his Welsh hat.

MR TURNBULL: Under Welsh law there is an acceptance of the Official Secrets Act as long as the information is put into the public domain in song. Our fall back position is for Mr Wright to sing the song of MI5 on the steps of the court in Welsh.

"In short the only likely candidate ... the relevant principles:- " they have been read so often I won't go over them. "It is unacceptable says Sir Anthony Mason ... as a Government." What phrase could be better suited to describe this book, even if it be not public property, so long as it does not prejudice the community in other respects.

There is a case that Messrs Meagher Gummow and Lehane have criticised unjustly, and Mr Simos picked up on that, Coco v Clarke which is quoted by Mason J; it is the case where McGarry J said you need to have detriment (1969) Reports Patent Cases; p 47 is the classic formulation of Lord Green in the Saltman case which McGarry J adopts. He says (reads). Meagher Gummow and Lehane, aided and followed along by Mr Simos draw attention to the fact that at p 48.25 McGarry J seems to walk away from that statement somewhat: "Thirdly there must be an unauthorised use of the information ... detriment to him." This is the bit neither Meagher Gummow and Lehane nor Mr Simos referred to, "As when the confidential information ... wishes to protect."

One can readily understand a communication such as this. A wife writes to her sister in a private letter noting that her husband is suffering from an unpleasant and perhaps embarrassing illness, a social illness, or something of that kind. That is a confidential communication. Let us say it is stolen out of the post. She suffers no detriment from it being published because no-one is going to think the less of her because her husband has a particular disease. However, it is obviously going to be particularly embarrassing for him, and that is the sort of case that McGarry J is talking about. What he is saying is not that you do not need detriment. He is saying that the plaintiff may not need detriment in the strict sense that he or she is suffering. Rather, there has to be an apprehension of detriment caused to someone at least and that is the significance of that qualification.

It is not what it is put up to be by Messrs M G and L. It is McGarry J walking away from Saltman Engineering. Nothing further from the truth. He is just putting in context this notion of detriment, so that it is not limited to cases where the plaintiff personally suffers particular personal detriment, directly.

"The decision of Mason J ...in a case of this kind." It has often been said in our common law system that the right of free speech is what is left after bits andpieces have been chopped out by the rules of obscenity, defamation, contempt of court and so on. That is a view that is not universally held, but when a constitutional provision does no more than state the same proposition the other way, I would submit it does not add anything to the situation.

As you can see on p 2 of the learned judge's decision the laws or Ireland protect confidential commercial confidence just as they do here, but she expressly adopts Mason J and has no difficulty, as indeed your Honour should have no difficulty, in distinguishing Sir John Donaldson's remarks in the Guardian Observer case.

Just on the question of detriment, the Irish decision is diabolical to the plaintiff's case because Ireland is just a hop, skip and a jump from England. The one thing that is perfect-

plain is that unless the English Government imposes some sort of contractual position, any former MI5 officer can publish in Ireland and once he publishes in Ireland, it is out. Secondly it is also obvious they can publish in the United States because of the rules on prior restraint. That is the fundamental stupidity, if I may say so, of this case, of the argument in terms of detriment, because we know that you can publish in the United States. We know you can publish in Ireland now. This judgment has not even been appealed against. It makes the context of this case so bizarre in terms of if this is to be a great test case, to stop the flood gates, as Mr Simos seemed to suggest it was, it is quite inappropriate. It is a pointless exercise in fact, if it is designed to demonstrate once and for all MI5 officers can't talk. All it would prove at the most is that they can't talk in New South Wales.

"5.2 Views even less favourable to the Government ... persons other than the government." Such as Patrick Gordon Walker gave evidence and a number of other people did, and that is apparent from the judgment."Furthermore if the burden ... witnesses of the Government." - which would be a proposition unique in our jurisprudence to say the burden of proof on an issue is on me, but I can't call any witness on it.

HIS HONOUR: I'm not too sure that either proposition is capable of being sustained in its fullest form. I think it may well be, as Mr Simos submitted at the time, that public interest is not a question which admits of acquired expertise and thus admits of opinion evidence being given. Non-constant, that persons who have held public office in the relevant context may not give evidence to enable the court to determine against the background of the evidence which they give, what is or is not in the public interest.

MR TURNBULL: I would not differ from that point.

HIS HONOUR: And that is why it seemed to me that Mr Whitlam, who had held high office and who was directly involved in the security service, could provide a view of what happened, and while it may be that I am not bound by his opinion, technically it is evidence.

MR TURNBULL: Indeed the bulk of Mr Whitlam's evidence related to matters relevant to your consideration of the public interest. Then obviously, having got him, you asked him the magic question. It won't surprise me if your Honour says that is not a matter for evidence.

"The plaintiff in this case ...to suit its ends."

HIS HONOUR: Justice Carroll did not seem to have any problem about that. It says it is a foreign Government for some purposes but it is not a foreign Government when putting forward the public interest. However, this judgment gives me great courage. I observe

that her Ladyship read the publication overnight and found no difficulty in dismissing it in four and a half pages. So if you care to come back on Saturday morning I will tell you the answer.

MR TURNBULL: "5.2A The nature of the balancing exercise ... Royal Air Force Officer did the same?"

HIS HONOUR: I missed the opportunity while Sir Robert was here to raise with him just such a question.

MR TURNBULL: All that illustrates is that this insider/outsider distinction is, at worst, nonsense; at best, just the beginning of the analysis. "The answer is not very much different ... insider or outsider?" I don't think Sir Robert would give Mr Wright a reference like that. "It is relevant here to note ... without considerable inside access." There is no doubt about this - they are both distinguished academics. In terms of detail that book makes Wright's book a complete horse laugh. It is staggering. Of course that is a book that the great Mr Codd had not even got around to read.

"The same is true to a lesser extent ... between 410 and 400 BC." I have set out Pts XXI and XXII. Thucydides set out to demonstrate his historical method as distinct from the approach taken by Herodotus.

HIS HONOUR: What happened 370 years later when a little man sat down and wrote (Latin).

MR TURNBULL: You are talking about Ceasar's Gallic wars, but the problem is so little has come down to us. Even in Roman times Ceasar's works were seen very much as Ceasar's work. They were not regarded as the last urrah on history any more than Winston Churchill's autobiography and his record of the second World War is regarded as authority.

HIS HONOUR: I suppose they are a piece in the mosaic.

MR TURNBULL: Exactly, there is no doubt about that. Once one accepts that proposition then my learned friend has got a problem because what they are saying is there is a difference between insiders and outsiders.

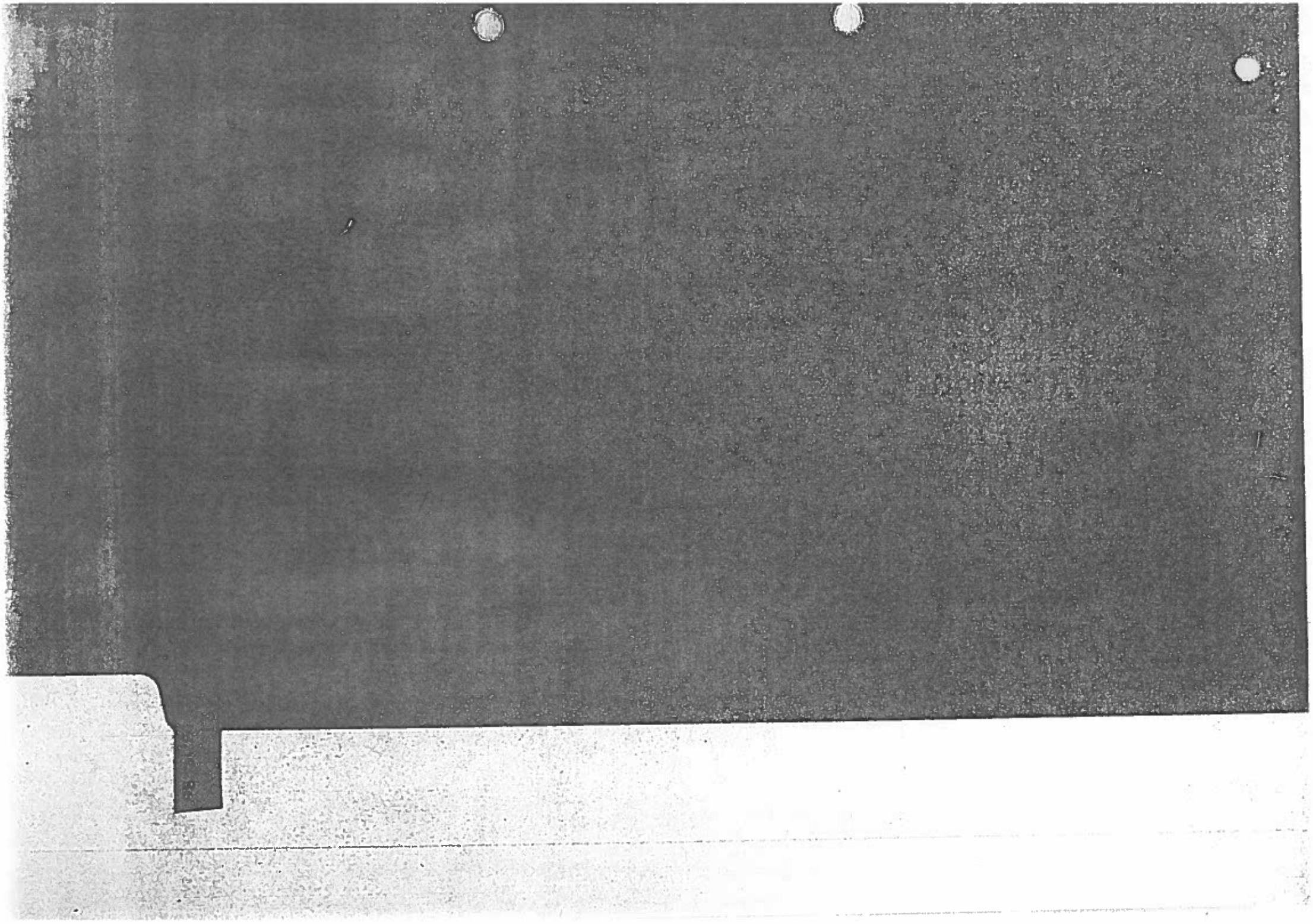
HIS HONOUR: I do not know that he would recognise the problem. He would say Mr Wright might provide the missing piece in the mosaic.

MR TURNBULL: If he can demonstrate a piece in that book which has not been previously published - he has admitted all the consolidated particulars now - if he can say to us that is going to be a problem, subject to it being a sensible request, we will take it out. If this book is ever blue-pencilled - and he has got to establish that on the balance of probabilities - we must receive a full order for costs because we have asked them to blue-pencil it practially every week since the manuscript has been handed over. It has been said in open court, in correspo:

to your Honour, to Mr Simos. If your Honour ends up blue-pencilling this book I say, without any exaggeration, your Honour's time will have been wasted, my time will have been wasted, the British Government's time and money will have been wasted, because that was always on the table for them to do it.

We will return to Thucydides in the morning.

(Further hearing adjourned to 10.00 am on Thursday, 18 December 1986)



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

CORAM: POWELL, J.

HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE UNITED KINGDOM

v

HEINEMANN PUBLISHERS AUSTRALIA PTY LIMITED & ANOR

TWENTY-FIRST DAY: THURSDAY, 18 DECEMBER,1986.

MR TURNBULL: Yesterday, before we adjourned I was addressing your Honour about the distinction between insiders and outsiders, with particular reference to what I contended was the superior objectivity and, indeed, perceived objectivity of the historian as opposed to a participant.

In these submissions I have set out chapters 21 and 22 from book 1 of Thucydides Palapanasian War. I will not read chapter 21 but I think there may be some value in drawing your Honour's attention to chapter 22 where Thucydides writes"but as to the facts of the occurrences... enough for me". And in those immortal words:

> "And,indeed, it has been composed, not as a prize essay to be had for the moment, but as a possession for all time".(Spoken in Latin)

HIS HONOUR: Did he get it right Mr Simos?

MR SIMOS:I would ask: Does this apply to submissions as well as to history.

MR TURNBULL: It does to mine:

> "The significance of ...partial participant"

And we would say simply this, your Honour, if in 400 BC any educated man - or woman for that matter - in Greece was able to read Thucydides and absorb his, with respect to him, fairly self evident news, although expressed for the first time, if that was the case in 400 B C how much more is it the case today?

> "6.8.Wright's principal concern... I wonder ?)"- I suppose she is - "at T288...'Too Secret Too Long".

Sir Robert has obviously got a clippings book of Wright - bashing articles.

"If at least a large...as you know".

"6.9. Sir Robert then ...repeated by him?"

"6.10. The fundamental question ... of the various books."

As your Honour would recall Mr Schapp from New York explained in great detail how this very process is done with the CIA.

"In failing to particularise... entirely unanswered".

And unanswered, your Honour, by theparty that, according to the claims in Sir Robert's affidavits, is the one most able to provide the answer.

Moving on, your Honour, to the concept of the necessary quality of confidence. Before I commence this I wish to say a few preliminary points. The fundamental problem with the plaintiff's case on the necessary quality of confidence is that it is an abuse of language to say that something which all the world knows can still be confidential. In other words, an obligation not public information which is public knowledge cannot be part of the law of confidence, it may be part of some other branch of the law, contract, but it certainly cannot be part of the law of confidence. To invent a new Latin tag with acknowledgement to Trevor Fishlock:

"You cannot put the baby back in the mother's womb"
(Spoken in Latin)

The proposition simply is that once it is out and it is , you know, widely out and not just out in a Japanese publication or an obscure journal,once the whole world knows- or thewhole world that wants to know, knows - it is no longer confidential and whatever remedies or rights the plaintiff might have, they do not lie in confidence:

"7.1. It has long been... Fairfax".

The case has been read to your Honour so often the point of what his Honour says there is that it is basic that the information must be public property and public knowledge . I cite Lord Greene when he says:

"That the plaintiff must show... communicating it ".

"7.2.Commonwealth v Fairfax is ...United States Embassy".

So there was material in the public domain but it was a very limited publication.

"For the defendant... any length"

And indeed the arguments for the defendant are not either.

HIS HONOUR: I think you do Mr Hughes a disservice.

MR TURNBULL: That is far from my thoughts your Honour.

HIS HONOUR: No Christmas dinner for you.

MR TURNBULL:Not much to cook actually.

HIS HONOUR:At p 41 the evidence shows that the material which the Commonwealth seeks to protect is already widely known.

MR TURNBULL: You are absolutely correct your Honour.I am grateful to your Honour for that.

MR SIMOS: Thucydides would be appalled.

MR TURNBULL:He would indeed. Anyway, your Honour, I am grateful for that because that demonstrates that the prior public domain was plainly put to the High Court of Australia.

"Mr Justice Mason said that the ... of confidential information"

The test for interim protection is much less on this final application.

"In any event... including foreign governments".

"7.3. In this case the plaintiff...this fact."

MR SIMOS: We have always said it all is.

MR TURNBULL:I refer to that passage from Commonwealth v Fairfax and also the report of the Law Commission on breach of confidence.

"7.4. In any event the defendants...had ceased to exist ".

This is a terribly important point, albeit on one view of it anyway fairly obvious. This is a law of secrets, a law of confidences. Once it ceased to be confidential, once everyone knows about it, it moves out of this branch of the law. There may be some other branch which this plaintiff can get relief in but he cannot get relief in confidence.

Once we start developing a doctrine for confidential information that includes information for development in Australia, England and America, then it will have to be renamed. It will have to be called something else - and I do not know what it can be called - but certainly not the law of confidence.

"7.5. Another case... 33 ALR 31)"

Although Mr Justice Sheppard in Allied Mills and TCP in the Federal Court was not so critical and, in fact, differed from Mr Justice Raft in that regard.

"That case has ... in the series ".

The significance of that, of course, is that assuming everybody in the jumbo jet knew what Messrs Humperdink and others were up to, it may only be a few hundred people at the most and that was a pretty limited publication and, of course, it is interesting to contrast that with what Sir Robert said about Massiter where he said the programme had gone into the public domain because it had been shown in a committee room in the House of Commons.

"7.6.Most of the cases... out of duty" -

Your Honour has a wealth of evidence on that -

"(hence no detriment)... by any test."

"7.7. One of the ... work and expertise ".

In other words something he could take out of the factory in his head.

"This concept has ...The Real Spy World".

Miles Copeland, as your Honour is aware, was the head of the London station for the CIA.

"In Ansell Rubber...duplicated by others ".

All of those points, your Honour, if analysed in the context of this case, would come down very much in our favour. The information is well known. The extent to which itis known by employees and others in the business is obviously high. The extent of measures taken to guard the secrecy of the information is, of course, minimal. That is one thing that is plain. The value of the information: It does not have much value when it ceases to be secret. The amount of effort or money, that is probably not very relevant. The ease or difficulty with which the information could be properly acquired or duplicated by others was, I mean, other than the personal element, Mr Wright's book could be written out of those books that your Honour has got in evidence. That is the truth of it.

HIS HONOUR:I think the point that Mr Simos would seek to make is that while it may be true that, in the abstract, information as, for example, as to how one constructs or uses a probe microphone may be available to other intelligence services around the world. The real secret is that MI5 had used it and perhaps still uses probe microphones. It is the aglomoration of facts rather than a single fact, I think he says, is the matter which is confidential.

MR SIMOS: And theprominence of it.

MR TURNBULL:I am glad your Honour raised that because if that was, in fact, a matter foremost in my friend's mind, he would have objected to chapters 2,3 and 4 which contained a detailed description of the design of the probe microphone and its use and no douut in his concern to stop the enemy knowing about it,

he would be aware of the facts that there is considerable evidence that the agents of the Soviet Union were fully aware of the probe microphone, indeed a few specimens of them were tabled by Kruschev in the United Nations when they were dug out of the wall of the Embassy in Ottawa.

Finally, the Satyr microphone which is one of the probe microphones used in the system was, in fact, first found by the Americans when they dug it out of the great seal of the United States which hung over the Ambassador's desk in his office in Moscow. All I can say is that I do not think there would be anyone staying up late to get the first editions of "Spy Catcher" and the KGB Embassy in Canberra if it was ever published here.

"7.8. If the trade secret...obligation of confidence".

"7.9. The plaintiff of course... of MI6".

It was a big secret.

"The doctrinal basis... the case wrong in principle"

That is a view that we would respectfully adopt.

"7.10. Schering Chemicals made ... and Thames "- made the big mistake - "of saying the ... for an injunction".

"7.11. Lord Denning concluded... from the course " - this is the training course for the executives - "I am clearly... to receive it "

and that is, with respect, something that my learned friend has overlooked. There is a great public interest in the reception of interest of the free dissemination of information.

"It is not to be... for such restraint".

That is a term he has picked out of the Human Rights Convention on law but it is plain that he regards it as applicable in the Common Law Context and we would submit that is a correct view.

"In order to warrant...to the public at large."

"His brethren were not so minded ... (para 7.12 read)" I don't know whether that can be said about Sir Roger Hollis.

Now that statement is correct in principle. The last statement is correct in principle, we would agree, with respect. But we would say that the first part where he suggests that even though facts are widely known, they can still be confidential, we say it is simply an abuse, in the nicest possible way, of the languag

"Templeman LJ's reasoning ... confidential in his hands" - Now that is correct. "But by agreeing to advise ... harmful to their cause."

"So far as the GMH case ... with any approval." He cites the whole passage. We would submit so far as that is concerned, so far as the Chief Justice's reference is concerned, that the statement by Lord Justice Shaw may be right when applied to the facts in David Syme, and the GMH case. (para 7.14 read)

"The Law Commission ... tort of breach of confidence." (para 7.15)

HIS HONOUR: But there is at least a line of authority dealing with information in the public domain, albeit the various elements which are in the public domain have been collated in a particular way. My recollection is that confidence certainly extends to the collation, even though the various elements are in the public domain.

MR TURNBULL: The classic example is a customer list or possibly there is a case involving the Daily Telegraph, involving racing results. It is possible for something to be common knowledge, say, at the track in Melbourne, but still be momentarily perhaps in the modern age confidential in Sydney. A good example would be the number of companies nowadays that run through various publicly accessible documents, such as electoral rolls, and get a list of every solicitor in Sydney and they sell that list. That list obviously has a degree of confidentiality in the sense of being a collation.

Our submission would be that as a matter of principle that is better covered by the law of copyright rather than the law of confidence, because it plainly is - the compilation, the anthology, is a separate distinct literary work in the law of copyright. Again, it is important in the efforts of the courts to find a remedy for an obvious wrong not to cluster up concepts which ought not be cluttered up.

"In any event ... of the KGB." (para 7.16)

"More importantly, it is difficult to see ... bound by some form of contract." (para 7.17)

I am afraid to say that that is not the end. Can I hand up to Your Honour part 2 of the final submissions. Does Your Honour have the document entitled Consolidated Particulars of Public Domain?

HIS HONOUR: That is a matter I wish to raise with you. Because technically I think if we are to proceed on the basis that matters

as to public domain arepart of the evidence, one ought to record that that is an agreed fact.

MR SIMOS: Our position in relation to that which I gave my learned friend yesterday is on this piece of paper. (Document handed up)

HIS HONOUR: It should then be joined with the particulars as an exhibit.

MR TURNBULL: With respect my learned friend pleaded to my new defence which referred to the Consolidated Particulars in its particulars and if he wants to amend his reply again, he can make an application, but he has pleaded to it and admitted them.

Going to the final submissions, Part 2. "Paragraph 2 (c) of the latest Reply ... allegations made in para 4 (a)" (para 8.1) I think it is now the sixth reply filed with leave - -

MR SIMOS: The reply is perfectly consistent with the piece of paper I have handed to Your Honour.

MR TURNBULL: If it is, there is no need to hand His Honour the piece of paper. The pleading should not need a glossary.

MR SIMOS: The point is clear, if in the public domain there are two lines on a particular subject matter and in Mr Wright's book there are ten pages, that is a material distinction, that is the only distinction we are calling. It is self evident.

HIS HONOUR: I am not sure it is.

MR SIMOS: I appreciate Your Honour is entitled to take the view, and we do not say that it is not open to Your Honour to take the view, although we submit otherwise, that if two lines had been written on a particular subject matter that means an open slather in relation to that particular subject matter. Our submission is otherwise.

MR TURNBULL: I just rely on the pleadings. I am perfectly happy with the reply. The construction of the pleadings is a matter for Your Honour.

HIS HONOUR: It seems to be posing a very restricted meaning on the word "information".

MR SIMOS: With respect, no, Your Honour. Let's take an example. If a person's name is mentioned in another publication merely and says - let's say it says Mr X was an officer of MI5 at this time and then the manuscript in issue gives ten pages about that gentleman's activities, it cannot be said that the ten pages dealing with his activities are in the public domain by reason of the fact only that his name has been mentioned as an officer.

HIS HONOUR: I suppose I should restrain my temper, but let us assume that there are half a dozen lines in Mr Chapman Pincher's book Their Trade is Trachery which say: It was widely thought by a number of officers holding senior positions within MI5 that Sir Roger Hollis was the Fifth Man and a Soviet mole; by virtue of

their concern in this regard those officers over a period of ten years conducted most detailed investigations with the view to establishing the truth of that belief, and at the end they hauled him in for interrogation, but he did not confess.

Now, is it only that collection of words that is in the public domain?

MR SIMOS: Not necessarily.

HIS HONOUR: See, that is the point.

MR SIMOS: We do not say that.

HIS HONOUR: If I may say so, I am now asked to interpret pleadings with a view to deciding what you mean on the one hand and what Mr Turnbull believes on the other.

MR SIMOS: No, it is a question of fact. It involves - if Your Honour wishes us to do the exercise in toto - to produce a full schedule showing what is in Mr Wright's book and what is in the other book and it will be a matter of just conparing the two and saying: Does what is in Mr Wright's book go beyond what is in the public domain with a sensible approach.

HIS HONOUR: If I may say so, if that is an exercise which you require me to undertake, you will not get the judgment before 1990. This is really merely another example of what I have complained about before. What am I to understand Her Majesty's Government to say? You say that the example I have given does not necessarily mean that only the words in that collection of six lines is in the public domain. It is perhaps something more. But in order to determine the question, I must examine each of 26 books and compare each of 26 books and, two television programmes, I add, with every line in Mr Wright's manuscript.

MR SIMOS: If that becomes material, we will do schedules for Your Honour.

HIS HONOUR: All I can say, Mr Simos, is you have just made it material and that is an exercise you now require me to undertake.

MR SIMOS: No, Your Honour.

HIS HONOUR: What am I to take from the pleadings?

MR SIMOS: With great respect, Your Honour can decide it is a matter of principle.

HIS HONOUR: I am not going to proceed on the basis that it is just the collection or specific words in two lines.

MR SIMOS: I am not asking Your Honour to do that.

HIS HONOUR: It is the subject matter.

MR SIMOS: We submit that the question of principle can be determined by looking at examples. To take an extreme example, if there were

two words in one of the other publications and fifty pages in Mr Wright's book, it could not, with great respect, possibly be said by anybody that the fifty pages in Mr Wright's book are in the public domain by reason of the fact that there are two words about it in one only other publication.

HIS HONOUR: But if the words are extended to say that MI5 embarked on a wholesale programme of breaking both the domestic and international law of the United Kingdom by tapping telephones wholesale, by intercepting diplomatic mail and other communications, and somebody sets out chapter and verse each and every intercept, what is in the public domain and what isn't?

MR SIMOS: That is a matter for Your Honour to determine as a question of principle. We invite Your Honour to do so.

HIS HONOUR: In what way is the subject matter expanded if one gives chapter and verse?

MR SIMOS: We are not saying that it is not open to Your Honour, and if that is Your Honour's view we only invite Your Honour to state it as Your Honour's view.

HIS HONOUR: All I can say, I do find this utterly intolerable.

MR SIMOS: With great respect, if Your Honour were to say in Your Honour's judgment exactly what Your Honour has said to me here now, and said "In my opinion the general statement in the other publications means that the material in Mr Wright's book of a more detailed nature is in the public domain for the purposes of the application of the present principles", Your Honour would have determined the matter in principle and we submit that that is all that is needed.

HIS HONOUR: It does require me to examine every one of them.

MR SIMOS: No, Your Honour.

HIS HONOUR: It does, Mr Simos, with great respect.

MR SIMOS: Your Honour, with great respect, could do it by a sampling and we do not ask Your Honour to do any more. If Your Honour wishes us to give a number of particular examples by way of sample which can be done on a few sheets of paper, we will do it and we will be content that Your Honour should determine that issue by reference to these few samples that we will give to Your Honour.

HIS HONOUR: If you will forgive me for saying so - and this is not directed at you - I cannot accept that because I believe that I will be told the opposite tomorrow.

MR SIMOS: No, Your Honour. Your Honour will not be told the opposite.

HIS HONOUR: Very well. The judgment, I fear, may be rather delayed.

MR TURNBULL: May I simply on that matter say this. My clients have been restrained by an interim undertaking given in the face of obvious interim orders. This question of public domain has been on the table and particularised at some considerable length for over six months. We have asked the British Government to give us particulars of what they say is not in the public domain. We have asked them to controvert those particulars. They have pleaded to them, admitted them; they have pleaded to the new particulars only yesterday and the day before and admitted them.

For the British Government to say that it is now going to give Your Honour some schedules as the case draws to a close indicates the worst sort of bad faith with this Court because this issue has been on the table from the outset. In my submission - and I will develop this later - Your Honour has enough material to dismiss these proceedings as an abuse of the court's process and this is just one part of the evidence of that. It is the same old problem, they do not want to give anything that will let the matter get resolved. The longer Your Honour sits on this judgment, the longer Mr Wright is kept out of his rights, the happier the British Government will be.

HIS HONOUR: I appreciate that, Mr Turnbull. You may bear in mind that I do have certain special powers to exercise if I come to the conclusion that the proceedings of this Court have been abused or time has been wasted, whether deliberately or otherwise. Whether I come to either conclusion, and if so, whether I accept that it is proper to use the powers is, I regret to say, a matter that I will have to spend some time thinking about. But if the point is taken I cannot just throw it out the window, I must decide it. In your client's interest I do not propose to decide it by having a straw poll because the first ground of appeal, if I find for your clients, would be that I found on the basis of a straw poll. To say that I am disillusioned would be an understatement of the season. If you will go back to your submissions?

MR TURNBULL: I am now turning to the defence. Where I got to in my submissions is hopefully to persuade Your Honour that the highest obligation the plaintiffs can establish is an equitable duty of confidence. I suppose we have a broad submission that that should not be available because of all the arguments that I have addressed to Your Honour yesterday and today, but we can readily understand why Your Honour would find that there is at least a confidential relationship and the information Mr Wright learned or was given was impressed without the duty of confidence at least at the time he learned it or was given it.

(Para 8.1; 8.2; 9.1; 9.2; 9.2 and 9.4 read)

Having set what we submit, with respect, are the correct principles of evidence, we turn to the circumstances surrounding Their Trade is Treachery.

"In 1979 Andrew Boyle ... time bomb waiting to go off." (para 10.1)

(Paras 10.2; and 10.3 read)

The Government's pattern was to react to a disclosure somewhere else. That was how they liked to do things, that was how the Government had done things, that was the pattern.

"Chapman Pincher was a journalist ... servants and politicians (T.111)" (para 10.4)

I will not read the next paragraph, if Your Honour can read that.

HIS HONOUR: Yes, I read that. You might white it out if you are to widely distribute it.

MR TURNBULL: Yes, I have taken care of that.

"Pincher was on social terms ... Chief of MI6." (para 10.6)

(Paras 10. 7, 10.8, 10.10 read)

"10.10 Rothschild then proposed to Wright that ... Mr Simos read this part of Wright's evidence with an intonation worthy of a ham actor in a melodrama."

HIS HONOUR: Mr Turnbull, you are not doing badly yourself.

MR TURNBULL: I guess I walked right into that one. "He described it as full of cliches ... must be accepted as true." (Para 10.10) Unless Your Honour took the view that on its face it was unbelieveable

(Paras 10.11; 10.12 and 10.13 read)

More importantly the probability was, from looking at that synposis, that the book had not yet been written, there weren't any galleys, there weren't any page proofs; just Harry Pincher presumeably with a couple of notebooks, or belting away at a typewriter and striking his "e's " below his "r's". That is the perfect time to strike, you go straight around to Pincher's house and say, OK Harry, we know what you are up to, old son, let's have a look. You call around to the publishers and say, do you really want to get involved in a brawl in the court? Not many publishers are game to do that. (Paras 10.14 and 10.15 read)

HIS HONOUR: That very fact is what suggests to me an alternative hypothesis to your conspiracy theory.

MR TURNBULL: I would be grateful for it.

HIS HONOUR: I am not sure whether Sir Robert says the synopsis was not stolen. I think at that stage we only hear about the page proofs. But I am prepared to assume that it was not. I am equally prepared to assume that the synopsis was prepared by Mr Pincher. I am equally prepared to assume, as you have suggested, that it was a document prepared for the purpose of "selling the book". It seems to me that a publisher who received a synopsis like that could see golden pound signs in each eye and would also be singularly

afflicted by tremors at the thought of the Official Secrets Act and of his avarice on the one hand but fear equally on the other. It could be that despite all Mr Pincher's later boasting about how secret it was all kept, the publisher decided to speak with Sir Arthur Franks or somebody else and say: Harry wants to write this book, we would like to publish it but of course we would not do so if there were strong pressure from on top, and in particular we would not enter into a contract binding ourselves to pay Harry a lot of money until we get a clearance in advance; now will you pass that up the line and tell us what you think.

If that were the fact, it would make equally believeable the fact that the page proofs went up the line and were not stolen before they went up the line to get a clearance from head office. It may not do your case any great harm if that is the truth of the matter.

MR TURNBULL: I do not think it makes any difference.

HIS HONOUR: But it does provide a hypothesis which, to me at least, has feathers to fly with, whether it is more probable than the conspiracy theory or less probable than the conspiracy theory at the moment, I don't know. But for the benefit of the press, I did not work that one out when I was in the garden; that was done in the darkness of the night.

It seems to me that it fits perhaps a little bit better. I don't know, Mr Turnbull.

MR TURNBULL: Perhaps this would be a convenient time to adjourn, Your Honour?

HIS HONOUR: I propose, unless counsel have any great objections, to have my Associate speak with Ms Koorey at the Court Reporting Branch because I am becoming deeply concerned about the time. I would propose that if counsel are available and if the Court Reporting Branch can provide us with the appropriate assistance, I would sit beyond the normal time today and if need be tomorrow to try and finish this case. I think 5 o'clock is the limit on Friday.

(Short adjournment)

(His Honour stated he wished to formally record that having discussed the matter with counsel the court would sit today until 5 p.m. and would start at 9.30 tomorrow morning and if need be sit through to 5 o'clock.)

MR TURNBULL: The point I was making was that Pincher was hardly a hard-headed communist who the Security people could not have spoken to. They certainly had enough evidence on the synopsis to get an injunction.

"10.16 In February 1981 ... and the page proofs. 10.17 There is not doubt ... would have handled the synopsis."

As the source the contrary suggestion is absolute humbug and the persistence in that argument is humbuggery.

HIS HONOUR: And that is an obscenity.

MR TURNBULL: It is in the dictionary as a non obscenity. "According the fact of possession of the page proofs ... plenty of copies of the page proofs."

So this legal advice explanation is with great respect to those who dreamed it up absolute garbage. The legal advice explanation is so old, really so inconceivable it was not given as a cover other than to conceal the real truth. Thos of us who are lawyers in this Court and probably some of the laymen recognise how often people in business and public try to cover up their real motive by saying "It is the legal advice, we went to see Mr Bloggs, our solicitor said we had to do such and such, but for legal reasons". It happens all the time as we all know and this is precisely what happened in this case.

"10.18 Despite all this ... which view was later recorded." Again we would say more humbug.

"10.19 That advice apparently came from a number of lawyers whose names ... historic legal advice".

Here we have this legal advice about the proposed revelation of something Sir Robert admits at transcript 50, was as grave a revelation as in terms of its detriment to the Security Service that could be imagined and we do not have a scrap of paper relating to the advice and we cannot identify who the lawyers were.

"10.20 Sir Robert originally said ... concering interim injunctions."

Your Honour will recall my eliciting from Sir Robert that the MI5 lawyer would have very little experience in litigation. It is not his job to go to court and instruct counsel. He is the last bloke you would go to to get an injunction, absolutely the last, but we believe Sir Robert, he is one of the people who have this splendid advice.

"10.21 So returning to where we began ... and act as a channel for the royalties."

Rothschild was exposing himself to charges of corruption and bribery. Why? A man at the end of his distinguished career. Why

would he embark on something so bizarre? It could not be simply because he wanted to put the dirt on someone else and protect himself. He had Wright's list of achievements for that and Rothschild knew he had been cleared by MI5. He knew if the push came to a shove that assurances would have to come out, as it did a week or two ago. Rothschild cannot be laid simply as a desire to make smoke and allow himself to slip out of the public eye while everyone was chasing Hollis.

"(b) Why did Rothschild ... give the courier."

"(c) Why would someone ... draw an injunction."

That is the most improbable thing in Mr Simos's theory. That is so silly. The publisher was not His Majesty's Stationery Office, at least from the service.

(Paragraph (d) read.)

(Paragraph (e) read.)

Although there was this synopsis, some or a little bit of manuscript written by Pincher, nopage proofs, no printers involved, no copies winging their way to America, the perfect time for a pre-emptive strike and Pincher was a man to listen to the call of duty and do the right thing by the Government.

(Paragraphs (f), (g), (h), (i) and (j) read.)

That is out of his own mouth. That was a general statement. So here we have a situation which was typically a case for the Attorney and it was not sent to him. The transcript reference is p 46.

(Paragraph (k) read.)

Your Honour has been faced in this case with false testimony from Sir Robert, admittedly, testimony which even if Sir Robert and Mr Bailey and Mr Codd, I notice he is not here, even if they were innocent idiots, careless sloths who did not check anything and got all mucked up, accept all that for a moment, Sir Michael Havers knew a lie was being told to this Court. Why did they tough it out so long? Why was the explanation given the instruction to answer and tell the truth, why did it come hours after Kinnock really put the screws on Mrs Thatcher in the House of Commons?

(Paragraph (l) and (m) read.)

The Franks/Pincher connection is very important because that was obviously Pincher's contact in the Security world, the intelligence world. It may have been someone else gave the synopsis but that was the man that Pincher knew and that was where his synopsis went.

(Paragraph (n) read.)

Sir Arthur Franks MI6 officer reports to the Foreign Secretary. we know that, he had just retired at that point, why didn't he go to to the Foreign Secretary? He went straight to Sir Robert Armstrong

the man who said he was only peripherally involved in the decision not to stop "Their Trade is Treachery", a statement which was demonstrably false when we finally got some information about what these documents contained. Sir Robert Armstrong was right in the centre of this conspiracy and we submit the truest answer he gave when I said to him in that in camera section which was subsequently made public: What was Sir Michael Havers' part in the conspiracy? He said: He was not part of the conspiracy. In the next question I denied there had been a conspiracy. For the moment he dropped his guard, there was a conspiracy, Armstrong was in it and Havers was not. They knew Havers as an honest lawyer, as a talented lawyer. No doubt they ran the risk that Havers would give them the advice they did not want to hear. They kept him out and Sir Michael Havers has been forced to keep mum as part of that great team spirit known as collective responsibility.

(Paragraph (o) read.)

We knew it had come from people in MI5 and we could not identify the particular source. It was only a matter of making routine inquiries about Pincher's movements. Call the immigration people, a routine inquiry: Has Harry Pincher left the country? He had to have a visa and has gone to Australia. Quick. That would happen in fifteen minutes. The Senior Constable of Police would have access to that information let alone the British Security Service. What about getting the Police to interview the local suspected informants, Martin and de Mowbray. Why did not someone go down and see them? Armstrong seemed to suggest they would not co-operate. It would be worth a try. Mowbray - we have not spoken to Pincher, no, I was in France, with my aunt in Lincolnshire. They may have been able to exculpate themselves completely and point the finger absolutely in Wright's direction. So you see they did nothing at all to narrow it down. Why, why, why? Because they knew who the source was or if they did not know precisely who the source was the last thing they wanted to know was who it was.

"10.22 Each of the matters set out ... affidavit at par 72."

That is also set out at 10.4 at p 7. Paragraph 72 of Mr Wright's affidavit.

"It is difficult to see ... investigation by Police or intelligence agencies (10.23)"

Turning to your Honour's tentative formulation that your Honour put up in argument, this is the idea that the publisher out of an abundance of caution sent it off to MI5 who passed it on to MI6 who passed the word "go for your life". That is sufficient for my purposes but what it does not explain is the involvement of Rothschild. It is very difficult to see why Rothschild would have lent himself to this scheme other than if he was acting in a covert but authorised way. There is a lot of material about his background and so forth in Wright's affidavit which would support those sort of inferences. That is really the fundamental problem with the sort of publisher getting it cleared theory. Of course, the other problem with there being no sort of authorisation at the outset is that it is just a little bit too much of a coincidence, is it not? Here you have a Government with a problem, Sir Robert acknowledges that. What they

need to do, obviously, is to get themselves swept out into the open, let it all get hystericalised over by the members of the public, assure everyone that the coast is clear now and get back to the business of running of the Secret Services. It is just a little bit too much of a coincidence that at that time within six months of the Aitken letter to Thatcher Victor Rothschild flies Peter Wright over to England. It is just a little bit too coincidental. What we are really faced with is a denialable operation in the same mould in the same way the English King said to his knights: Who will rid me of this troublesome priest? Obviously, there was a problem. Someone in Government must have, and we submit, must have been at the top, someone must have said How are we going to get this flushed out and then you have this combination of Rothschild, a very unlikely crimin. if I may say so. Chapman Pincher, a very unlikely person to be subverting the British way of life, a trusted journalist. He's brought together with Wright.

The interesting thing about Wright is Wright was close to Rothschild and Rothschild trusted him. Wright lived in Tasmania. Wright's level of knowledge, he may complain about this, was probably no greater than other people living in England. He was not the only man on those committees. Why Wright? Because if it blew up, like Westland, if it blew up Wright was out of the country and there would not be an embarrassing situation with the Labour Party saying: Charge Wright and Wright saying to the chaps from the DPP, you put me in the bloody box and I will sink. That was the perfect thing. Wright as the nominated source, Wright can take the rap, Wright can hide out in Tasmania and there will never be an embarrassing prosecution.

We are dealing with circumstance and we are dealing with inferences and I do not wish to be seen to be dissenting too strongly from your Honour's formulation. I submit ours is more probable than that because there are elements in this that sit uncomfortably with your Honour's formulation but not, of course, as many as sit uncomfortably with Mr Simos's.

HIS HONOUR: The oddest thing about either formulation and, indeed, even at the British Government's present postulated position is, Mr Wright still gets his pension.

MR TURNBULL: I can explain that. Your Honour has asked that - apparently, I think it was Baroness Young in a previous administration who took a policy that they would not remove anyone's pension unless the pensioner had been convicted, as a matter of policy, unless he had been convicted of a serious offence.

HIS HONOUR: I must set that aside then.

MR TURNBULL: I have to say that to you out of candour but as I understand it that is the practice, although, of course, that does not bind them but, of course, the problem they face they would face anyway with Wright, as your Honour says, as sort of a vengeance pol. on Wright. One can see the political consequence of what it has taken to date. They obviously changed their mind about it at some stage.

"Too Secret Too Long", that was the second Pincher book in late 1985.

"11.1 If the court accepts ... Channel J said at 604-5".

The most important thing about that case is I think it was counsel for the appellant in the case of a barber who had a razor was Mr Todd QC.

"In civil proceedings the rules ... plaintiff's case also."

I do not put my case too high on similar facts. It is a very discretionary area of the law. The principles have been stated the to the authoritative cases of similar facts in similar cases. It very much a matter of common sense and clear thinking and that is what we would ask your Honour to do, to be realistic about these facts.

"11.5 In the case of ... Robert Armstong."

The same old players back again starring in Chapman Pincher writes a book, act II.

"11.5 In any event ... seek an injunction. (T 558-9.)"

HIS HONOUR: Just stopping there, quite apart from the fact that "Their Trade is Treachery" is a much slimmer book I find it diffic to accept that there is not much new in it. It seems to me having read that that there is a lot in it that was new. The whole of the if I can use it, Shanghai Connection and the Smedley case the Soni allegations and the Oxford connection is all new material as I understand it.

MR TURNBULL: We do not dissent from that. We are quite happy to accept Sir Robert's view of it to the detriment of this case. We submit that answer of his was patently false. Your Honour has realised it is false just from reading the book. Why did Sir Robe give us a false answer? Again because he had to cover up the truth

HIS HONOUR: It may be it is an accurate answer if that is the way I am meant to interpret the pleading.

MR TURNBULL: Good luck, your Honour.

HIS HONOUR: If that is nothing new then I have a very broad brush with which to interpret.

MR TURNBULL: All I can say is I cannot interpret the pleadings.

HIS HONOUR: I am intrigued now having read the second book to acce that assessment that there is nothing new. However, be that as it may.

MR TURNBULL: What we basically say about "Too Secret Too Long" is it has too similar circumstances to find anything other than it was the same deal. I am not suggesting that "Too Secret Too Long" was instigated by Pincher, 21 months before it is written when he is presumably just nutting out in his own mind. HE has lunch with Fr tells him about it, Franks goes off to Armstrong and Franks and Armstrong conclude there is nothing to worry about and this patent false observation that there was nothing new in the book. When

Quoting Service documents verbatim indicates West got hold of the documents and that leads to the sort of reasoning I have just put to your Honour.

"Their removal made ... even more so perhaps than Pincher's".

Nigel West, an endorsed conservative candidate for Parliament and Sir Robert agreed. Here we have, once again, the curious combination of conservative writer having access to remarkably good sources and not getting into trouble other than a quick injunction, quick negotiation and deletion of a few bits and pieces. Obviously, Mr West did not quite know the rules as well as Harry Pincher, a view that Mr Pincher would have no difficulty agreeing with.

"12.4 If authorisation ... Government White Paper."

There was a positive act recorded in a consent order in the Royal Courts of Justice and that positive act said "We consent to this book with agreed deletions being published." If that is not authorisation I do not know what is. That must be as high an authorisation as anything except putting it out of His Majesty's Stationery Office.

Just before I go to "Cloak without Dagger" there are a couple of points I should make about other authorised publications. There are references to certain Security Commission Reports. There are references to statements in Parliament, all of these are unquestionably authorised. The Alexander Foot book, "Notebook for Spies", evidence actually disclosed it was written by a serving officer of MI5 in the course of his employment with the appendix written by Peter Wright. So that, too, is plainly authorised. I have only dealt with the two Pincher books because as your Honour knows from the particulars they are the principal books. That is probably three-quarters of the consolidated particulars.

Finally, on the books actually authorised we have "Cloak without Dagger".

"13.1 This is the Memoirs, ... an authorised work."

Overtly authorised we would say given Mr Clement Attlee's forward to it and the concession by Sir Robert Armstrong when he was cross-examined on it.

Does your Honour have the consolidated particulars there?

HIS HONOUR: We have another sealed envelope. Seeing that they are referred to in the pleadings as well I think they formally ought to be an exhibit.

(Consolidated particulars admitted without objection and marked Ex 52.)

MR TURNBULL: I am sorry the pace of those submissions has not kept pace with my ability to write them out so I will have to ad lib for a little while. If your Honour goes to p 27 of the particulars you will see that we say there: We contend that all of the information particularised herein as being in the public domain has thereby lost

any necessary quality of confidence. Further, we say the following books and programmes are published in circumstances where the plaintiff had sufficient prior knowledge of the book and/or programme and its content to serve an injunction and by failing to serve an application for injunction and by failing to do so authorised the publication by acquiescence.

The first one is "Their Trade is Treachery", "Too Secret Too Long" "A Matter of Trust MI5 1945 to 1972" I will deal with that later. "A Matter of Trust" we have dealt with. "MI6" Nigel West's book, we will come to that later.

Tony Motion is the first one I would first like to deal with at this point. I put to Sir Robert Armstrong when he was cross-examined that the Tony Motion programme, which your Honour has accepted was broadcast with some prior knowledge to the Government, and if I just find the reference to that. That programme, you will recall, has a great deal of detail about the techniques of watching. Page 299F I said to Sir Robert at point 7, "Could you cast your mind back ... if you tell me so I accept it." We have Sir Robert accepting what was put to him, namely, that there was prior knowledge of the Motion interview.

HIS HONOUR: I am not sure you can make that out of that evidence.

MR TURNBULL: I can tender some press clippings.

HIS HONOUR: The difficulty quite simply is this, that while Sir Robert has been the spokesman for the plaintiff he is not the plaintiff and while a party may make admissions a witness cannot.

MR TURNBULL: I will just foreshadow not if there is going to be an issue about that, I will just tender some press clippings.

MR SIMOS : We do not wish to make my learned friend's case difficult in that respect but we would, for the reasons your Honour said, prefer that the press clippings go in to which we will not object.

MR TURNBULL: I will bring them back at 2 o'clock.

HIS HONOUR: We do have this problem when one is dealing with jurisdictic people rather than human beings. However, I see the point you make. You can establish prior notice and you can build on that by saying they did nothing about it.

MR TURNBULL: Yes. The point is there we have an example of a programme, interviewed by insider with prior knowledge to the Government, the same Government as this Government, Mrs Thatcher and Sir Robert Armstrong and nothing is done to stop it. Some of that Motion material is relevant as being part of the public domain and, of course, it is also relevant, we submit, in respect of our challenge of the Government's claimed policy and practice which the Government is consistent. We say it is obviously not. The next programme, No. 7 on p 27 is the Peter Wright interview. Before going to the transcript, that is an example of the extraordinary dissembling of the Government in this case because they gave the distinct impression in their answers to interrogatories on this point that the first they heard of the programme was when they read the article in The Times.

Your Honour will recall my cross-examining Sir Robert about that and the suggestion being made by him that there just was not enough time to seek an injunction. Before we adjourn I will just refer your Honour to that.

HIS HONOUR: I recall that. I think Sir Robert suggested the first he knew about it was the mention of it in the copy of the morning Times.

MR TURNBULL: I think I put to Sir Robert if they only got eleven hours notice of the Cruise Missile which has been an overworked metaphor in this case, they would have worked a bit quicker. We know from Mr Simos's admissions at p 558 of the transcript the following matter about the Peter Wright interview. The Security Service had informatic by 4 May, remember the interview went to air on 16 July, that there were plans for World in Action programme and Wright was assisting and might take part. "Security Service had information by 3 July that Granada ... in a letter of that date".

Of course, we did not get a copy of the letter but why is MI5 writing to the Treasury Solicitor? For only two reasons: Give us some advice, can we get an injunction, or, get going and get an injunction. They did not need advice from the Treasury Solicitor abou detriment of prior publication. They know about that presumably. It is a letter seeking advice on action or asking for action and no action was taken.

(Luncheon adjournment.)

UPON RESUMPTION:

MR TURNBULL: Just to put what I was saying before lunch into context, what we were developing then was the public domain defence which is par 4(a) of the latest defence. What I would seek to do now is to work through the various elements of the defence which we submit are all plainly defendes to the ordinary equitable duty of confidence.

I mentioned some articles in the press. All I am in a position to tender, this is about the Tony Motion programme, are two articles in The Guardian dated 30 and 31 January 1981 by David Lee. It is not relevant to this prior notice point. It is an article on 24 February 1981 in the Daily Telegraph.

MR SIMOS: I have no objection.

(Three newspaper articles tendered; admitted without objection and marked Ex 53.)

MR TURNBULL: We dealt with the matter of trust. We dealt with "Their Trade is Treachery" and we dealt with "Too Secret Too Long". The Granada Television interview, the Security Serviceknew by 4 May 1984 there were plans for a programme in which Wright was assisting and would take part. By 3 July it knew that Granada intended to show an interview with Wright and this interview would reopen the Hollis allegations and present the case against it.

We had some touching evidence from Sir Robert when he suggested at one point that they were not, they had no reason to believe that

Mr Wright was going to breach the Official Secreta Act. Of course, the lie to that is given by the information that came out in the documents and it is a fantastic suggestion because by that stage they knew that Mr Wright had been the informant for Chapman Pincher and it was hardly likely, as I think I put to Sir Robert Armstrong, that Granada would be very interested if Mr Wright was simply going to say: I am bound by the Official Secrets Act, I cannot help you.

The relevant transcript references are at p 100 and following. Sir Robert said at p 100 and this is the example of this witness's distinct lack of candour and unwillingness to help the court. "In 1984 there was a television programme broadcast ... weeks possibly".

The point is that there are probably one hundred examples of this. Sir Robert only, it was not a matter of him just being economical with the truth. He said whatever he felt was the minimum he could get away with given what he perceived the cross-examiners state of knowledg was and when he realised the cross-examiner knew a bit more than he thought, he would give a little bit of ground. Page 101.3 "You said they a few minutes ago ... programme". That is contradicted by the fact that the Security Service knew on 4 May 1984 there were plans for a programme with which Wright was assisting and might take part and it knew by 3 July 1984 that it was intended to reopen the Hollis allegations. Given what they knew about Peter Wright did they really imagine he would be doing anything other than hammering his so familiar theme of Soviet penetration, the treachery of Hollis - it is just again a nonsensical answer, a supercillious answer. In a sense it is as though Sir Robert believed he could just give an answer like that and it would be accepted without question. He was questioned about tha at the bottom of the page. He agreed that Wright was likely to express views about Hollis and so forth. I said to him, "I see but you took no steps ... but I do not think they did".

At p 102 he tried to defend that position by saying there was some complication in the times about the day of the broadcast. I do not quite understand what that was about. I probably should have explored it further. Anyway he claimed that MI5 had good investigators and so forth but the truth is nothing was done. His evidence, his statement that nothing was done is understandable when you consider what the document showed about "Too Secret Too Long". That is to say after the Pincher book came out with the assistance of the Government. The Government did not mind if more detail came out about the old mole hunts. It was just really a matter of putting a little more colour into the picture and they did not care and they did not stop "Too Secret Too Long". They did not stop Wright's programme. They knew about it in plenty of time and they took no steps to find out. So the question arises Why do they want to stop this book?

It has nothing to do with Mr Wright's ancient technology. It has nothing to do with Satyr Microphones. It has nothing to do with the mole hunts. It has a great deal with chapter 18 and former English Prime Minister because that is the only material which is still politically sensitive and that is the only material which if authoritatively published by an insider like Wright will possibly result in the sort of full inquiry into MI5 that the Security Service is anxious to avoid. I am not suggesting that material is new, it is old hat, but the Government has taken a stony silence on it nothwithstanding the enormous public interest. We submit that is the only rational justification for the Government seeking to stop this book.

So with the Wright programme, your Honour has seen it, it contair a great deal of detail and I think your Honour would agree with me that it contains a great deal more detail once viewed than it does by reading the transcript because of the very excellent graphics and diagrams and so forth. It is a very compelling programme and it has now been to air twice without objection.

All this humbug about the detriment caused by insiders republishing, that was not raised when Granada Television put the programme to air last night. If I could take your Honour to p 559 of the transcript. Following the article in The Times, at point 6, this is Mr Simos's admissions concerning the documents, "the possibili of asking for a preview of the programme".

Again the view was expressed, by who we do not know, presumably the Treasurer Solicitors Department, that if a preview was refused going for an injunction would undoubtedly be a hard fight. If a preview was agreed the Government may be put in a position of having approved it, whether or not it asked for it.

Now what absolute rot. Whoever these gloomy fellows are in the legal reaches of the British Government I wish they were still in place. We would not have this case on. They have obviously got some hard headed types there.

Here it was: The perfect case. An insider going to air revealing all this information. Outside lay down mizaire that Lord Justice Donaldson had no claims about stopping,it on an interim basis. You see, that is the other problem with all these legal opinions. You are talking about interim injunctions and the balance of convenience on an interlocutory application, particularly when questions of national security and confidential information are raised, invariably, with the plaintiff.

It is the same as, your Honour, the GMH case. If the plaintiff does have a case, if he has even got a reasonable argument of a case, and you do not give the injunction, then there is never going to be a final hearing because the information is out in the public domain and he has lost all the interest he was trying to protect.

Then Mr Simos's summary goes on "After that discussion .. at that stage". So we say again: Why are the interests of the Security Service served well now in seeking to stop the republicati of very similar material? If that was the Security Services view in 1984 why have we not been told that they do not object to Wright rehearsing the case against Hollis. What is the difference between 1984 and 1985? The difference is that there is something else in the book, something else that they feared was going to be in the book at the outset and, of course, they are not in a position to own up to that.

So we have the real objective of the Government clouded by what I have to respectfully say to the authors of Sir Robert's affidavit is a great deal of waffle about insiders and outsiders and so forth.

Then, of course, Mr Simos's summary goes on: "Although the question ... jurisdiction", so they obviously, from a penalogical point of view at MI5, obviously believe in punishment rather than prevention as an approach to conduct of this kind.

It is very hard to justify rationally away Wright's decision. They had plenty of time. They took a decision based on detriment. A position which is totally at odds with the submission that are made to your Honour and when you think about it - and I hope your Honour will not think I am biased about it - but televisi has a great deal more impact than a book. In that programme - it was quite a startling programme to see Mr Wright glaring baleful out at the picture tube stating his views - it was a much much more powerful piece of argument, communication, than is contained in the book and, I might add your Honour, unquestionably calculated to reach a much wider audience.

HIS HONOUR: I am not sure that point necessarily rubs. In many respects it is against you, particularly in the light of what occurred again last week because it is undoubtedly the fact that Mr Wright has had an opportunity to speak out and speak out, as you very rightly say, in a very dramatic way and the impression I retain, which I will need to confirm by reading the transcript again, is that for the most part Mr Wright was allowed to argue his case rather than controlled in the manner of the interview.

When one adds to that the fact that two years later the programme has gone to air again in full in England, the fact that - I am not sure whether I can have regard to this as a piece of evidence - but it is the fact that it attracted a great degree of attention again here on the television last week. The argument can be put against you: Well, he has had his day. What more can he do?

MR. TURNBULL: Your Honour, with respect, that is an argument but it is not one based in any legal principle whatsoever.

HIS HONOUR: I only raise it because -

MR. TURNBULL: I am grateful for your Honour raising it.

HIS HONOUR: - assuming one comes to the conclusion: Yes, there is an obligation of confidence. It is a subsisting obligation and one that has not been exhausted and while he may have been in breach in going public, that was a justifiable breach. Why does the public interest require - so Mr Simos would say - that he be permitted to continue and perpetually commit breaches.

Now, I can see that the unanswered middle is that if it is all public there is no longer any breach but for this purpose I am merely taking Mr Simos's argument, that if each breach continues to be a breach, as it were, and is not excused by material having gone public, then you have had your day in the public forum.

MR. TURNBULL: Let me answer it this way: Firstly, I accept the proposition, for the sake of argument, but it is fundamentally misconceived, with respect to my learned friend. Once it is out in that authoratitive way, certainly it is out. But let us look again at Winston Churchill. No doubt all the fascist sympathisers in the British establishment, all the jew haters, would have been very happy for Winston Churchill to stop breaching the Official Secrets Act and revealing confidential information given to him by civil servants in Whitehall. Enough is enough Mr Churchill. We have heard enough about the german air force, we have heard enough about the jews. We have heard enough of all that.

The fact of the matter is that nothing is achieved in this world, particularly politically, other than with persistence and persistence involves repetition and it involves argument and reargument and there is a great public interest in that today, just as there was in Churchill's time and just as it was not possible in 1936 to say that Winston Churchill was right or wrong - although we now know, of course, that he was right - so it is not possible today to say that Peter Wright is right or wrong. We may in ten years time, in 100 years time, know but that is what free speech is all about.

The problem inherent in Mr Simos's argument is that it misconceives the whole nature of the freedom of speech. The public interest in free speech is not just in truthful speech, incorrect speech, in fair speech, in speech one point at a time and never to be repeated. The interest is in the debate and that - I mean, I would submit to your Honour that this interest in free speech is as powerful in our jurisprudence and in our democracy as it is in the United States.

The only difference between this country and the United States is that they have a constitutional amendment which has caused them, the judiciary and the people of that country, to focus on the issue but the democracy is the same, the principles are the same.

It is wonderful, Mr Simos talks about the American constitutional problems, that they have got the First Amendment. It is hardly a problem for people who want to criticise the Government and are unpopular.

You see, every person who has ultimately changed the course of history has started off being unpopular. The examples are legion. When the Australian Workers Union was founded under a tree in the bush; when unionists were not permitted to even go on to squatters properties. There were plenty of people - and I am afraid to say plenty of judges in those far off days - who supported the establishment against those people, who they fought and they spoke, and they spoke again and they said the same thing a great deal more than once and finally they changed history and there are few people today that would say that the struggle of the labour movement in this country and the struggle of other people who have been unpopular - Winston Churchill if you like - was not in the public interest, because, ultimately these ideas are tested in debate and it is that debate in which there is a public interest, not in having a say once and once only. I hope that answers your Honour's observations.

The next book I wanted to refer to was the "Conspiracy of Silence" which, as your Honour knows, is the book about Mr Anthony Blount as he was once and later became. That is referred to at p 286 and following of the transcript.

The facts about that book are not in dispute. I notice that Sir Robert Armstrong assured me that Mr Bailey, the Treasury Solicitor, is a man sleepless.

HIS HONOUR: That goes for the lot of us at the moment.

MR. TURNBULL: No wonder he is so hard to forget.

HIS HONOUR: Back to p 286.

MR. TURNBULL: The book, Sir Robert conceives, has a great many quotes from former intelligence officers concerning matters they learnt during their time in the service. That book was attained, you can see at the top of p 286, by the Treasury Solicitor prior to publication. He entered into discussions with the authors of the book and he resolved ultimately not to seek any order restrainin its publication. Sir Robert agreed that a great many people had breached their duty of confidentiality.

Once again there was a case just as with the Granada Television interview where it was perfectly open for the plaintiff, if the law in England was as the plaintiff contends it ought to be in this city, it was open to the plaintiff to go to Court and restrain the publication of that book. They chose not to do so.

Why? Because, presumably, they had regard to the content of the book and decided there was insufficient detriment and, therefore, they made a qualititive decision about the content of the book. A decision which they have declined to make in this case. They declined to give your Honour any guidance on that point whatsoever.

We dealt with the Tony Motion interview. I will just get these consolidated particulars together. I dealt with that ; I dealt with Peter Wright. Kathy Massiter: There was a lot of evidence on Massiter. Copies of the interview were sent to the Prime Minister's office after the Independent Broadcasting Authority had decided the programme should not be shown. That is at p 166 of the transcript.

Your Honour will see at the top of the page the programme was sent, as it must be, to the IBA in Britain. The IBA in Britain, your Honour - I am not sure whether this has been the subject of evidence - but the IBA is, in fact, the broadcasting authority of the independent television companies, their legal status is as programme contractors so they have the same legal relationship with the IBA as, say, Reg Grundy has with Channel 9 or a similar relationship anyway.

The IBA viewed the programme, decided it would not be permitted to go on air. The procedure is that copies of the programme and the manuscript were sent to the Attorney and to the Prime Minister. Sir Robert says a copy was sent to the Prime Minister. He does not know if it was sent to the Attorney General. He sent it down for some investigation and analysis. He considered it with some care. He said he agreed the programme contained grave allegations about the domestic surveillance operations of MI5 by a former member of MI5. He agreed she had retired only recently. He said her information was about a year old and, therefore, by definition, vastly more up to date than any information Mr Wright could tell us about.

The Security Service apparently expressed the view that the programme was damaging but, he said, the programme was privately shown to some Members of Parliament. Then there was material in The Times about the programme and in other newspapers.

I asked him, on the next page "Q. What were the ... in newspapers". One may well ask: What is so different about this case? Mr Campbell-Savers has been busily purporting to reveal all the juicy bits in the book for six months in the House of Commons under privilege. He is quite free from the Master of the Roles there. What is so different about Wright's book?

Curiously enough we then fell into this argument about what "comprehensive" meant. Sir Robert argued initially that Mr Wright's book was comprehensive, whereas Massiter's programme was not and he finally agreed, after some difficulty, that Wright's book

was not, in fact, comprehensive and, of course, your Honour knows now, having seen Mr Wright's affidavit, that is far from being a comprehensive book about his work.

MR. SIMOS: I might just interpose on a matter of no importance but the dictionary meaning of "comprehensive" is" "Including much, not complete or full".

HIS HONOUR: Is that the Oxford Dictionary?

MR. SIMOS: Yes your Honour.

MR. TURNBULL: Obviously that raises some doubts about Sir Robert's qualifications because over the page at p 168 he said "It is comprehensive ... of his service".

HIS HONOUR: I do not think this goes to anything much.

MR. TURNBULL: The thing about Massiter that is most important is, (1), the allegations were new; (2) they were undoubtedly likely to do more damage than Wright because they are so new. I mean, at the end of the day whatever skullduggery Mr Wright and his colleagues got up to in the mid 1950's is not going to cause a great deal of heartache to anybody running the Security Service today, and certainly not to any politicians.

Miss Katherine Massiter's interview was a very very different programme and it is difficult to see the consistency between Sir Robert's proposition that because it had been shown to some politicians and because there had been some reference to it in the press - and these press clippings are not in evidence, only in the sense that they have not been tendered by my learned friend, it seems to be part of his case - Sir Robert then said that the information was already "virtually out" - were the words he used at p 167.

The Duncan Campbell series of articles are a whole series of excruciatingly boring detailed facts about eavesdropping and GCHQ and so forth and they were tendered and discussed at T295 and following.

I just might say there is some reference, your Honour, in the particulars of public domain to Duncan Campbell. However, because Duncan Campbell material is much more detailed and much more current than Mr Wright's it is relevant to public domain and or detriment in a different way.

Your Honour will recall the intriguing argument of Sir Robert's that you can infer modern technology methods by reference to the methods of thirty years ago, a view which Mr Wright, a fairly accomplished and distinguished scientist has, I trust, laid to rest in his affidavit.

Accepting for a moment the validity of Sir Robert's argument the fact that actual current material has been put into the public domain surely makes it unnecessary for someone to undertake the perilous task of trying to infer what modern eavesdropping equipment are from the, you know, bow and arrow systems that Mr Wright used.

The key point about these articles is that they were a series of articles and it is plain on their face - despite what Sir Robert says, and he suggests that they do not have a basis for restraint at T297 - it is clear on their face that Mr Campbell had access to very good inside sources. You simply cannot get access to that sort of detail without that, and so much we submit is painfully obvious.

The same sort of thing is true of "ties that bind". The book speaks for itself. It is obviously well sourced, obviously detailed and the Campbell articles are in that category and they actually have photographs of all the intelligence and security service buildings, photographs, not just descriptions, as there are, of some of the sort of streets they are in in Wright's book, actual pictures. Of course we see pictures of them in Massiter's programme too and, indeed, in the Wright programme. So this material about the fear of exposing positions to terrorists is complete humbug once again. Those buildings are blown, if ever, finally.

The Campbell articles, as I say, on their face plainly involve inside information. Secondly, they were published in a series and were represented to be so published. It follows, therefore that even if Mr Campbell had been shrewd enough to get the odd first article out under Sir Robert's guard, there was no reason for the second article to have been published or the third, fourth or sixth article. Duncan Campbell, we would say, is plainly a man with a reputation for having access to good information.

Sir Robert does not rate him quite as highly as Chapman Pinder but comparing Mr Pincher's work and Mr Campbell's articles one wonders whether that indicates a personal as opposed to a professional preference.

Mr Campbell, of course, Sir Robert said that he would be surprised if Mr Campbell had been a young conservative.

Now, the Nick Davies articles your Honour, your Honour will recall these. They were three Guardian articles. The publication of these articles was not restrained, notwithstanding that at least some of the information appeared to be sourced from Michael Bettaney and, indeed, the Security Commission Report on Bettaney which your Honour has says as much.

No steps were taken to restrain publication of the last two articles after it became apparent that much of the information was sensitive. The reason that the subsequent articles were not restrained, as stated by Sir Robert at T301, was that the source was already imprisoned.

So this is another interesting facet to the Official Secrets Policy. As long as the source is a guest of Her Majesty he will be able to sing like a canary even though he is not free to go out. Maybe the best thing for Mr Wright to do to be able to get his message across would be to go back to England and give himself up.

HIS HONOUR: We do have a free bus to the seaside resort but we do not have a free plane Mr Turnbull.

MR. TURNBULL: Indeed your Honour. I refer to p 301.7 of the transcript: "Did you take any steps ... Official Secrets Act". He says that he did not think the information Nick Davies gave about the structure of MI5 was any more detailed than that which West purported to give.

Like your Honour I have read so many of these things they are starting to fog up in my brain but the Nick Davies article stated that as the work of a branch of the Security Service, that it included the MI5 officers and burgled properties, photographed properties, planted bugs, talks about the transcription of telephone calls, static surveillance describes the work of B Branch and C Branch. Actually breaks F branch down into six categories.

HIS HONOUR: West's book stopped at the 1975 organization I think. I think from memory Sir Michael Hanley did not even get a mention.

MR. TURNBULL: The short point is about Davies that his material is extremely current. The proposition that the source was in gaol is neither here nor there. It does not make disclosure of the information any less heinous by Sir Robert Armstrong's evidence and it does not give a consistent or probable justification for not seeking restraint.

I asked him at the bottom of p 302 what the reason was for not seeking restraint and I put to him that it was because there was insufficient damage to justify an application. Then he said - and this is a curious answer - "The reason was ... as they were". What possible damage could be done to security? This was the similar answer he gave in respect of Massiter.

HIS HONOUR: This proposition is put forward in a variety of ways, not only in the evidence but in some of the books I think.

HIS HONOUR: And I must say that I find the argument almost completely circular. As I understand it, it is you cause damage by having proceedings which would thereby validate the information that you are trying to stop getting out. If this is the argument Mr Wright has the greatest commendation anybody has got from anybody.

MR TURNBULL: Assuming your Honour allowed this book to be published and assuming all the appeal courts that are waiting to look at it, whatever your Honour's decision is I have very little doubt that there would be a very quick statement from Parliament saying, "It is all wrong."

But the real point is, and this is again another example - I am sorry to keep coming back to Sir Robert Armstrong's credit but it is fundamental, the man cannot be given credit in these proceedings. Where he sees the problem is, and he said this in respect of Maseda (sic) and indicated the problem is information might leak out in proceedings. Every official prosecution in England has been conducted largely in closed court and they are criminal proceedings; it is much more easy to get a civil, confidential information case into cloased court. In the Bettaney trial the defence lawyers were not even allowed to see the information that Bettaney was alleged to have given.

HIS HONOUR: Quite frankly and I hope I do not sound flippant, because I do not intend to, this sort of answer does not suggest to me that Sir Robert was deliberately lying. This suggests to me, if I may say so, the type of mind and at the risk of being guilty of breach of copyright and whatever, I think you will find recorded in the last chapter of the most recent diaries of the Right Honourable James Hacker a record of a discussion between the Prime Minister, Mr Hacker and the Director General of MI5 in which the Director General said there is nothing more damaging than accurate, ill-informed media circulation and that is the sort of mind that the bureaucrat has I think, and that is the sort of gobbledygook that bureaucrats talk.

MR TURNBULL: The difficulty is, however, when I say "credit" I do not want your Honour to understand that I am - I have submitted that Sir Robert Armstrong had told some lies in these proceedings and I obviously stand by that. What I am really trying to say is not so much that he is deliberately lying, in the sense that he appears to be incapable and this is probably the point your Honour is making, incapable of giving a straight answer. He gives answers which are what he believes will sound right.

The difficulty is that he appears to come from a world where answers are not questioned; where propositions are not decided; where the smugest, most superficial explanations are glossed over and accepted by all around. Throughout his evidence we have this problem and I have not set out to trap Sir Robert at any time Your Honour has in fact warned me on a number of occasions about the perils of asking one question too many. Now that Sir Robert

is gone I didnot often take your Honour's advice because I wante to be sure that he had the opportunity to correct himself and so often he was still unable to give a straight answer. What we were trying to do was to get to the truth of the matter.

I think I have said enough about Duncan Campbell. Philip Knightley's 'Second Oldest Profession" again there is a degree of material in there we rely on in the public domain, again that book has been published without objection. I do not think there was any evidence on that.

HIS HONOUR: That is another one, I think, that really savages Mr Wright. That is the one I think I saw a review in the Herald

MR TURNBULL: It is a book and indeed this was something I refer to yesterday morning, when Sir Robert and I were discussing the question of Mr Wright's status as an espionage gospel writer or not, he actually referred to an article by Philip Knightley after the Pincher books in which Wright had been attacked.

"The Cambridge Comintern" by Robert Cecil: that is simply an article in a book about intelligence matters. It is referre to at p313. I do not think Sir Robert knew anything about it. In fact, he did not know anything about it but the article speaks for itself.

Mr Cecil claims to have worked for MI6. He describes part of his work there appropos Mr Philby. Sir Robert does not know anything about it so I suppose all we can say is that the article was published. It was an account of inside information, which is another example.

"Through the Looking Glass" by Anthony Verrier, is a book that came to, not in the sense that we got a copy of it, unfortunately after Sir Robert had left, but it is relevant to public domain It is, on its face, in its acknowledgements a book about the history of MI6 largely, very detailed and scholarly book. It contains acknowledgements to a great many former intelligence officers,. The fact that it is available and not suppressed is some evidence of acquiescence.

One has the distinct impression of a Government lurching from one extreme to another, at the moment. You have all these books coming out with considerable foreknowledge and you have the rather comic effort to restrain the wartime memoirs of a lady who worked for MI5 in the courts in Dublin and in that I now have copies of the affidavits that are being used to try and restrain them in London, which I am sure Mr Codd will be able to confirm their accuracy, ultimately, if I seek to tender them but an interesting thing about those facts is there is no reference to cont_ract at all, just a reference to employment.

"Cloak without Dagger" we have dealt with. "The Philby Affair" that is referred to at 313, the top of 313.

Sir Robert says he heard of Hugh Trevor Roper. He agreed he worked for MI6 dring the war. He agreed in 1968 he published a book called "The Philby Affair" and he said he had no knowled of any effort to stop Hugh Trevor Roper's publication of that book but the book, on its face, I am not sure whether it is an ex hibit before your Honour or not, it is probably not. There is not much I can usefully say about it except it is another case of an insider writing about intelligence matters and that is probably all there is to be said about it and there is inform ion to found that conclusion in the evidence at the top of 313.

"My Silent War" by John Philby: Mr Wright has a special interest in that book, having vetted it for MI5. That was a book obviously published by Mr Philby who, your Honour will recall from that television interview that was played during the Wright programme, was a man conscious of his obligations under the Official Secrets Act, subject to certain exceptions relating to the intelligence service. There was a book, an insider, written by a former MI6 officer who had spied for Moscow and was alive and living in Moscow and that book was published in Britain without any objection.

Mr Simos, with great respect to him, has the gall to stand up here on behalf of the British Government and talk about the blots on Mr Wright's conscience. Where was the conscience when that man, who betrayed his own nation, had given secrets to the Russians, had betrayed hundreds of his own colleagues as he allowed operations to be relayed to the Russians and British men and women to be killed. That man, where was the court of conscience then? Mr Philby was allowed to publish his book. Is it the case in England, we ask, is it only traitors who can publish their inside accounts?

The other books referred to in the list, "The Penkovsky Papers I do not think your Honour has a copy of this. They are refer to but they are plainly - they are publications admitted by reason of these particulars being admitted but you know who Oleg Penkovsky was. He was a Russian defector. Your Honour will recall that startling bibliography of Mr Constantinides about intelligence questions and of defector memoirs. Anatoly Golystin, he was also a defector. Indeed, I think it is true, with one exception, every defector mentioned in Mr Wright's book has published his biography.

"The Double Cross System" by Sir John Masterman. I do not believe there is anything I can usefully say to your Honour about it. "The Climate of Treason" by Andrew Boyle, once again that was the book that drew Blunt. Once again that was published without objection. "GCHQ 1986" that is an exhibit. That, of course, is about the Government communicati headquarters. Again that contains a degree of information and curiously enough it refers to an operation called Black Jum which was one of the operations deleted out of "A Matter of Tr There we have Black Jumbo got the chop in 1982 and in 1986 he has reappeared.

Finally, your Honour, the "Jock Cain" interview on Granada Television. That is referred to at 298 to 299. Again, the evidence is that whilst Mr Cain was stopped from publishing his

book, he was not stopped from publishing or from giving an interview to the New Statesman nor was he stopped fromgiving an interview, that is at .6 of p299, nor was he stopped from giving an interview about "GCHQ" on Granada Television, which is a few weeks -

HIS HONOUR: Nor was Mr Le Carre stopped from describing the "Big Moo's" disappearance from the top of the hill in Hong Kong in "The Honourable Schoolboy".

MR TURNBULL: Your Honour has read Mr Wright's evidence about Mr Le Carre. So, subject to taking your Honour, just winding up on the public domain, to a few small points, the evidence is plain. There is very little in this book, from an information-al point of view, that has not been published. Mr Wright has been careful to ensure, in his own mind at least, there is nothing in the book which will damage the Security Service. He has exercised a degree of care and discretion, which his former employers have failed to do in this case, although they have in many other cases.

Their conduct in this case - and I am not referring to their various interlocutory skirmishes and so forth - but their failure to provide any particulars of that kind have to call into doubt their motivation because if they were truly defending a consistent principle, which had been consistently maintained, one would have some sympathy, but there is no principle. Sir Robert, at one point, suggested there was a consistent principle but a sort of a policy that was decided from time to time but that is not what he says. I believe paragraph 3 of his third affidavit, he says the policy and practice is consistent. By that he says are consistent.

They are only consistent to the extent to which the stated policy is not followed. Now paragraph 4B releates to detriment. The defendants say that all of the information contained in Peter Wright's manuscript is already known to the security forces of the Soviet Union and evidence comes about of that firstly and most overwhelmingly is that it is in the public domain and the Russians read the papers and the books and watch television as much as anyone else does and probably with much greater care. Secondly, it is part of Mr Wright's case and admitted as true that there were senior Soviet moles or a mole at least in MI5 right up to the mid-60's. That is admitted as true for the purposes of this case.

So, for the purposes of this case anything in that book which pre-dates 1965 which is of any significance at all, went straight back to Moscow Centre. As your Honour knows, there is very little in the book, only a couple of instances which post-date 1965, and each of them is very well-known. So if they are worried about the Russians, they have not got a worry because they have made those admissions and by their admissions they have admitted that it has all gone across the water.

(C) So out of date is publication, would not even, if it were still confidential and not known to the Soviet Union and/or its allies otherwise breach the legitimate interests and activities of the plaintiff. In so far as Mr Wright's book has no really

precise details in terms of technology or methodology, it all relates to technical surveillance and so forth and that is, I think, fairly plain from his affidavits.

Those parts of his affidavit were not read in court but they are not contradicted. They come from an acknowledged expert and they make it perfectly plain that in so far as there is nothing technical inthe book it is totally out of date, of historical interest only and furthermore very well-known already through other publications and details of that are given both in his affidavit and Consolidated Press.

One of the points Mr Simos drew to your Honour's attention, in respect of Mr Whitlam's evidence, was where he, Mr Simos, succeeded in getting Mr Whitlam to admit that his knowledge of technical matters was limited to the time when he was in charge of our country; I think that was in chief. Mr Whitlam obviously has had the opportunity to be involved with intelligence technology and it was limited to when he was Prime Minister and when he had that high level of access, after he ceased being Prime Minister.

On p448, on what Mr Whitlam says there is that the informati of a technical kind, in the book, was out of date circa 1975 and around that time. If it is out of date then it is certainl out of date today. About the middle of p448, "Mr Whitlam, when you were Prime Minister ... it was already out of date at the time." That is very strong evidence froma person who was in a position of great responsibility, great access to information and the one thing that I think your Honour can take judicial notice of is that Mr Whitlam, as Prime Minister, was not a Jim Hacker and not a Prime Minister that allowed any civil servant to snow him and indeed a number of them found themselves in othe positions when they tried to and that is all part of the history of this country of which your Honour can take judicial notice.

I know it is a matter for me to address your Honour in whatever way I consider best suits my client's interests. I am endeavouring to be as brief as possible. If there are any matters that your Honour has some doubts on, as I go through thi I would be very grateful for any interjections or questions that your Honour might raise so -

HIS HONOUR: The fact that I have not, for the last half an hour, does not suggest that I am just exhausted. It is just that at the moment I am following the argument and I am not having a problem with any propositions thus far. I am just following through the pleading at the moment.

MR TURNBULL: Paragraph (D) refers to evidence of crimes including treachery and other actions. Your Honour will recall that in August I gave your Honour some written submi ions about the interrogatories which referred, in some detail, to the issue of inequalities. That began on p5 of those writt submissions. I would really adopt and rely on those submissior and if I cald just make a number of brief points, your Honour has been through the cases once, in this case.

HIS HONOUR: We started off with Vice-Chancellor Page-Wood.

MR TURNBULL: That is right. Gartside v Outram, that was a clerk who knew his master was defrauding his customers and so forth. Vice Chancellor Page-Wood found that inequity defence to be part of the culpable maxim of unclean hands, a view which was adopted by the Court of Appeal in 1919 1 KB Reports. Of course Christie & Trim(sic) was a master and servant case. The inequities pleaded were far less heinous than the inequities in this case. The Vice-Chancellor said, at p114 in that decision, "The true doctrine is ...".

A number of cases referred to by my learned friend, and in particular he was referring to the Francome v Mirror Newspaper decision but it is a concept throughout the cases is this questi of should disclosure be to the public at large or should it simpl be to the police or the proper authorities? In Initial Services v Patterill, p405, Lord Denning says, "The disclosure must inform it to one who has a proper interest to receive the information." That is, I suppose, a concept of reasonableness in response. It is relevant in cases such as Francome v Mirror Newspapers where it is arguable that the proper recipient for the information is the police or the Stewards Jockey Club but this is a different case.

This is a case of the Government breaking the law. It is n a case of a jockey rigging races. It is not a case of a wool grower dudding his creditors. It is a case of a large departme of Government systematically breaking the law and doing so with the approval of the Government itself.

You would have to have a touching faith in the independence of the Attorney General, a faith which, if one held before the start of this case one would not hold now, if one took the view that the appropriate receipient for such information was the Attorney General Sir Michael Hayes or perhaps the -

HIS HONOUR: I think we have a couple of problems with this particular defence. First of all, I maintain that it really is not a matter of defence, although a lot of cases suggest that it is. My own view, which I may need to recant when I go back and read the cases, is that it circumscribes a cause of action. Because if what Lord Heatherly says is right, namely you cannot impose on me a confidence in relation to inequity, then an essential element in the cause of action is missing and it is n a matter of defence. Some of the later cases, particularly wha Lord Denning says in Initial Services and Petterill, again what was said in Francome & Mirror newspapers, suggested that it is, to a certain extent, a matter of defence. It may in some cases, though it is suggested, enable you to defend if all you propose to do is to disclose to the proper authority, whoever th may be. In other cases it may be a matter of defence if you propose to publish to the world at large.

But whether it be an element inthe cause of action or a matt of defence which has its own problems, because it is a big question where the onus lies, it seems to me that it may be the plaintiff who is guilty and if that be so, then of necessity you cannot rely on it in relation to treachery, because by

definition, the Crown is not authorising or permitting its servants to commit an act of treachery. You are thus limited in relation to the evidence of crimes if the crimes can be regarded as having been authorised.

However, the authority of the Director General is wide enough I guess, in most cases one could regard things as being authorised unless it is some mad lunatic who wants to play games down at the Sheraton Hotel in Melbourne. But you do get the odd case of a lunatic, off on a frolic of his own as well.

MR TURNBULL: Appropos treachery, if I can just explore that thought of your Honour's, I do not thinkit is quite right to say that the inequity has to be an inequity of the plaintiff. Let me pose this example: let us say that one of these gentlemen of the Press revealed to me that he was committing some scandalous thing, receiving official secrets, perhaps from an official of the Foreign Office or something of that kind and if, and let us assume that was an inequity and I said to Mr Simos: I will tell you this in the darkest confidence but you must not tell anyone. You undertake not to tell anyone and he said Yes. The public interest in disclosure of inequity is not, it seems to me, related solely to the plaintiff because the public interest in disclosing that inequity of the third party would still be present, even though it is not my inequity.

HIS HONOUR: Just imagine what would be the piece of litigation that would arise, would you be suilng Mr Simos? The invisible journalist, in that situation, if he were to sue then it is his inequity. If you were to sue, what is it that you seek to restrain?

MR TURNBULL: No. Let us say it was not a journalist. Let us say it was my brother and he had committed a crime and I told Mr Simos about it in the darkest confidence and bound him by ode of blood and everything else not to speak about it. According to the slightly extended doctrine of determined that McGarry J referred to in Coco v Clark, I would have enough debt because it was someone I had an interest in. I confided confidential information to Mr Simos. I can bring the action to restrain the breach of confidence and then, presumably, it would be Mr Simos who would say: Hang on, there is the public interest in me telling the world about what a crook your brother is and that seems to me to be the problem. I know it is normal in that context but I do not think it is so limited. It may be.

HIS HONOUR: Well, it may be again that the inequity could be raised, it was your failure to report it to the authorities.

MR TURNBULL: That would be right, if it was a felony. If it was a misdemeanour I would not be committing any offence and the law on imprison of felony is fairly -

HIS HONOUR: It is a very delicate area. The postulate seems to be you cannot impose on me an obligation of confidence in respect of your inequity.

MR TURNBULL: Those really part company, because -

HIS HONOUR: That is merely the language that Lord Hetherley used in Christie.

MR TURNBULL: The test, if I may say so, your Honour hit the nail on the head some time ago in respect of public interest and informers and your Honour said if the informer ... why is there not the balancing process and your Honour held that there was a balancing process in respect of informers. The point I am simply making is that if the inequity ruling is part of the public interest contending, which it plainly is, and there can be no question about that, and if it is subject to a balancing effect, why is it limited to the inequity of the plaintiff?

HIS HONOUR: May I just stop you there and say that if your proposition is correct then one must rethink the whole of this area of the law and go back to matters of ultimate principle and work out what is the whole philosophy behind this business of protecting confidential information.

MR TURNBULL: We say that the principle is stated in Woodward and Hutchings as referred to by Samuels J in Syme v GMH where Lord Denning said it is a balancing exercise. You are balancin on the one hand the interest in community, the confidence and the other hand the interest in telling the truth.

HIS HONOUR: That is merely playing with words, if I may say so. Why does one have to worry about the interest in protecting confidences? What is the reason that the law does, prima facie give a cause of action so as to enable confidences and confidential information to be protected? Is it, as Mr Simos would wish me to say, merely another example of equality not being beyond the edge of childbearing and producing a new child out of the womb of shonky conduct and seeking then to hedge it around with the proper safeguard.

MR TURNBULL: When one considers the way the law has developed, there are some very distinct strands. You have your trade secret cases which are sui generis because you are dealing with a very distinct sort of property. There is not a lot of difference between a --

HIS HONOUR: It is a query whether it is within a property. If it takes a particular form because of the industrial property area but in other cases there is no property information.

MR TURNBULL: Indeed and under the Commonwealth Crimes Act information is certainly not property as it is not regarded as a thing under the definition of property of the Commonwealth. You have got trade secrets which are analogous to intellectual property. There is not a hell of a difference between my unpatented fish hook and my patented fish hook because there is a patent in respect of one.

Then you have the matrimonial area if one was to go back to taws and reanalyse the law one could probably put indeed a new light on privacy. It certainly fits comfortably there. Argyle and Argyle has, it seems to me, more to do with privacy than it does to do with -- and then of course you have the Master/Servant case which are more of a contractual kind or an implied contract situation.

HIS HONOUR: They are easy to justify in terms of jurisprudentia theory. They are a manifestationof the obligation to be just and favourable.

MR TURNBULL: Indeed. Then you have this separate area of Governmental secrets and that is the significance of what Mason J said because you have trade secrets, domestic-type confidences, Master/Servant-type cases and that would constitute, we would submit, 95 per cent of the case law, those three classes.

Then you have Governmental secrets which are ina special category because of the nature of the confidence. Just because something is said in confidence does not mean it can be kept confidential. If I am walking down the street with my friend and I say something to him which is confidential and you are walking past in the other direction and overheard it you are not bound to keep that confidential even though you know full-well, because I was whispering into his ear with the sofest possible voice, that I was telling him a secret.

One of the decisions - and your Honour may remember the name of the case but at the moment I can't recall the name - in England the court said anyone who talked on the telephone had no legitimate expectation of not being overheard which would state the position fairly accurately inSydney at the moment.

That is a very important limit. In other words, just because you want to keep it confidential does not mean that it has to be confidential. It is a very difficult area of the law and our submission is that whilst Lord Denning's statement may be playing with words and maybe fairly obvious that he and your

honour are not very far apart, because your Honour says, I think probably equity boils down to shonky conduct, unconscionable conduct and what Lord Denning is saying is in the circumstances where the revealing of confidential information amounts to shonky conduct there is nonetheless the balancing exercise.

HIS HONOUR: I would look at it in a different way. I would say what is shonky about reporting a crime?

MR TURNBULL: There is nothing shonky about it.

HIS HONOUR: That is why I say I would look at it rather differently. I do not know that one gets into the area of the balancing exercise if you say that the nature of the information circumscribes the potential cause of action.

MR TURNBULL: That is consistent with all those cases about illegal, immoral contracts. If I contract with the Mafia not to reveal their drug-trafficking activities that contract is void. In other words, it has not got to first base and I think that is consistent with what your Honour is saying.

But on this question of inequities, all of the inequities in the book, with the exception of the issues of treachery, are inequities and -- almost without exception -- are crimes against International law and diplomatic premises. It is very much a matter of Australia's public interest both on the evidence of Mr Codd and the evidence of Mr Whitlam that these International conventions be complied with and Mr Codd went through a period of agreeing to passages within Hope J's report and did not elaborate very much but Mr Whitlam characteristically summed-up it up very nicely when he said we are a small nation. We cannot afford to go round breaking International law. We are the little boy in the playground. We survive by reason of the school rules and it is in our interest to see them complied with it is in our interest to let people know that in our courts those agreements will not be disclosed because that will act as an incentive because if there is a part of the world where you cannot shut up the mouth of a former intelligence officer in respect of inequities that is going to discourage people from permitting those inequities and whatever one may think of the CIA, which is going through one of its rituals at the moment, imagine how much worse that agency would be if the democratic process in America did not bring these things to light.

The witness Mr Shapp gave evidence the pre-Church Committee days of horrendous experiments, on altering people's minds and consciousness, a collective lunacy in many respects and those are things the public interest requires be brought out into the open so Australia can be a great service to the International community by seeing these things are not hushed up.

One of the other problems is a lot of these inequities involve crimes being committed by officers of Britain against countries with whom we have equally similarly friendly relations. We have a residual constitutional connection with Britain by the person of Her Majesty The Queen but that is all. Britain

is happily dumping what in Egypt. There is our exports prevented from entering the European Economic Community of which Britain is a part. There is no special defence arrangements with Britain because Britain does not have any defence present in this part of the world and, just warming to this presence of British insignificance in the Australian scheme of things, your Honour would remember the percentage Mr Wright put on the amount of information from America which is received in Britain, a very high percentage.

How much higher would commonsense dictate it would be here? Mr Whitlam said Britain's contribution to Australia's intelligence work was diminishing. I forget the exact words. He said it was small. "Can you give his Honour a view of the comparative importance of the ... (quoted) ... the diminution of the powers of the United Kingdom and its withdrawal from the Pacific."

Every witness has agreed that Big Brother is the CIA and in our case it is the very Big Brother because it is acknowledged that the principal intelligence relationships are between Canada, Australia, New Zealand, America and Britain. New Zealand is a very small country. Canada has no presence, other than on the northern part of the Pacific. The big Pacific Powers are Japan and America and we sit down here at the bottom.

Really, in the part of the world this country is situated, surrounded by countries which are not part of the old white Commonwealth Club, we as Australians are part of Asia. We have anobligation to recognise that our neighbours expect us to respect International law and ensure that crimes against International law are not revealed, regardless of our historical relations with the committer of those crimes. I do not wish to be seen to be hostile to the British but their claim of any special treatment from this country just does not exist. It really does not exist except in sentimental terms which has no place in matters of this kind.

So I think we were talking about inequities. Suffice it to say that yes, your Honour and I are not apart on most of the inequities. Your Honour has postulated the view that acts of treachery and breaches of s 1 of the Official Secrets Act and so forth are not covered by the inequity rule because they are not inequities of the plaintiff.

I have put to your Honour a proposition that the inequity does not have to be an inequity of the plaintiff because the public interest is in the revelation of inequity regardless of who commits it.

HIS HONOUR: There may be merely a difference in language between us because while I say, as I understand the authorities, that the relevant inequity must be that of the plaintiff non constat that there is not a public interest in exposing treachery, particularly if the treachery could easily be exposed has weakened the institution that is set there to protect us and that fact is being withheld from the public so there may be a general public interest defence anyway.

MR TURNBULL: Yes. It is difficult to discuss those matters in any detail in open court so I put them off.

HIS HONOUR: I appreciate that although I think it is proper that we discuss principles and work those out in open court but I can well appreciate that you would not wish to go further than that.

MR TURNBULL: It does not worry me. We say it is a matter of public interest the book should bepublished because it demonstrates the Prime Minister of the United Kingdom, Mrs Thatcher, made a materially false statement to the House of Commons on March 26 1981 concerning Sir Roger Hollis.

Sir Roger twisted and turned on this on the relevant issue that we focussed in on and he ended up saying that what Mrs Thatcher was meaning to say was that all the evidence which caused the commencement of the investigation of Sir Roger Hollis was evidence of penetration of MI 5 from the 2nd World War. Your Honour has been presented by ample evidence in Mr Wright's book and Mr Wright's affidavit that that statement is false. No one has gainsaid Mr Wright and no one could because he was in charge of the investigationand it is not a question of whether the evidence was correct or not, it is a question of what was the evidence that caused the investigation to take place.

We would submit that your Honour, not just on the evidence in the book but on the evidence in Wright's affidavit, will hold and should hold that that part of the defence for what it is worth has been made out. That is to say that the Prime Minister lied or made a false statement to the House of Commons.

What is the significance of that in the Australian public interest? Mr Simos would say what boots it in Bondi that Mrs Thatcher is telling fibs in the House of Commons? The significance of it is this, that by their own case there is a degree of intelligence-sharing, a degree of relationship between Australia and Britain and more importantly, between American and Britain and between America and Australia. These CAZAB countries, given the way they share information, are rather like, put together, a bucket and if there is a leak inone corner of the bucket the bucket has a leak in it and will drain dry. It does not matter if it is in their corner or our corner, and your Honour does not have to be a student of intelligence literature to realise that one of the great bones of contention between the Americans and the British was the Philby, Burgess, McLean, Blunt episodes. The Americans were for quite a long time extremelybitter about the loss of their shared secrets to the Soviet Union from the British spies. Sir Robert said the CIA has had as many spies as MI5 has had. That may be right and no doubt the CIA would say to the contrary but the point is that that has been a real bone of contention.

Given our relationship with the Americans - and this is the way I would couch this interest - there is a real detriment to Australia if Britain, which gets information from the Americans which may come from us, leaks informatinn or is penetrated by the Soviets.

The relevance of Mrs Thatcher making a false statement of course is that it causes the public to be lulled into a false sense of security and that is plainlywhat the statement was designed to do. The message of that statement was,yes, there was a terrible to-do about Hollis. We think he was innocent. Obviously you cannot prove a negative however everything is okay now. There was only a few people involved.

Mr Wright has taken that statement to pieces line-by-line with his own firsthand knowledge and demonstrated beyond a shadow of a doubt that it was false. Mrs Thatcher was misled by MI 5. There is no doubt about that and that was part of the programme. That was the final cherry on the top of that culinary exercise involving the creation of traders' treachery and the whole scene and it was a fraud on the public. Whether it was a fraud on the Australian Secret Intelligence Organisation, who knows? No doubt they were just as fooled by it as the rest of the Australian Public was .

But the important thing is if people in Britain are lulled into a sense of false awareness and told lies by the Government about security issues, if they are unaware of security issues then that security is going to be diminished and that will in-turn affect the interests of other countries.

The perspective is different from between us and the other side. They basically take the ingelligence establishment view and they say if you are in the club you should not talk to anyone outside the club. What Mr Wright is saying is, I was in the club and just between you and I I was a pretty good member but I think the club committee is mucking things up and I think it is about time everybody knew about it so that they could elect a new committee.

Really that is, I suppose, the greatest public interest in this book given the fact that the data in the book, the information in the book is of such a nature that its publication is not going to affect or damage anyone. The only real detriment that the Government claims is the fact that a former officer is seen to be speaking without authority and, with due respect to him, Millick, J in The Strand earlier this year picked that up straightaway inhis judgment. Page 9 he quotes some familiar passages from Sir Robert's affidavit and Millick, J says, "It is clear from those passages that the ... (quoted) directed principally to the first." The point is Sir Robert was here to keep up the pretence and the image that the security service is leakproof. Mellick, J had no evidence of anything infront of him and certainly nothing of the kind your Honour has.

We say the truth is that the security serviee is not leakproof and has beenallowed to leak by the Government and it is too late in the day for the Government to say, particularly appropos this information that its publication would cause further damage by the service being seen to be leaky.

One of the important things about the law of confidence is whilst it is true that the prevailing view in Australia is

information is not property, there is a problem with that view and that is this, that it is wrong to focus too much on the recipient of the confidence. One has to look at the nature of the information because whilst an obligation of confidence might -- I will start again. It is very important in the concept of acquiescence. In general equity principles if I acquiesce to Mr Simos doing something to my property that does not allow Mr Caldwell to do the same. My acquiescence in respect of Simos is not transferable to Caldwell.

HIS HONOUR: Prima facie that is right because the whole theory of acquiescence is that one has acted in a way which has led another to act to his disadvantage and from which disadvantage he cannot recover and therefore it would be shonky conduct for the plaintiff to allow him to maintain the cause of action. It is merely an abbreviation by way of defence in that way.

MR TURNBULL: What we would say is that our thin argument, my first argument would be in any event that the acquiescence is natural authority in respect of the Pincher and the acquiescence in respect of the Wright book is acquiescence and authority in respect of Wright and the Government must have known he was the source of Pincher and on the programme. We say that is not the right test because given the requirements of the necessary equality of confidence. Acquiescence in this sense, and your Honour will recall those elements that were referred to by Gowen J in the Ansell Rubber Case, acquiescence referred to the informationand the proposition which would seem to us to be eminently just is this, I cannot allow Mr Simos to publish my confidential document to the world, he being boundby an obligation of confidence to me, then stop Mr Caldwell doing the same thing and that is of course the criticism the Law Commission makes on Schering Chemicals.

HIS HONOUR: I must say the more I think about this, themore I tend towards the view that success or failure in this case will depend on what are the essential elements in the cause of action, whether they be three as some of the cases suggest, or only two, and in particular on what is the effect of the evidence on the second element, namely, the quality of information.

MR TURNBULL: That is the confidential quality of it?

HIS HONOUR: Yes. If the test is only that it must be confidential at the time of its being passed and received, then it may be that Mr Simos is right that in the absence of express authorisation, which would be acquiescence under another name, one cannot do much about it. If the test is a compound one, was it confidential at the time and is it still confidential at the time of the arising of the alleged cause of action, then you are free to say well, maybe I am a naughty lad and it's been out there for so long it doesn't matter, I am free to publish it.

MR TURNBULL: The difficulty with Mr Simos' argument on that first test is what is the position, say, if Mr Wright had been told confidentially about Geoffrey Prime and the Security Commission publishes a report, a detailed report at any rate, all about Prime. Is Mr Wright prohibited from saying anything about Prime except, yes, the Security Commission says such and such

HIS HONOUR: Maybe prohibited from saying "I was told that five years ago".

MR TURNBULL: The difficulty is that you are either in contract or you are not. If you are in contract you can bind someone by agreement, you can bind someone by agreement not to say, whatever, in his life, and one shilling a year and you can enforce that no doubt. But the problem that Mr Simos faces is that great hurdle of the Commonwealth v Fairfax, a case which is plainly binding on your Honour. The only distinction that my learned friend could suggest is this curious one which involves him arguing that because the Government is theBritish Government it is not a governmental plaintiff for the purpose of that decision. Notwithstanding that one of their witnesses is the Cabinet Secretary who comes here arguing the Australian public interest and notwithstanding that, Mr Simos' case, he now says it is founded in the Australian public interest. One has to ask this question: What is the principle which justifies Mr Justice Mason's decision in Commonwealth v Fairfax? A. The Australian Public interest. Therefore if the case is being determined by reference to theAustralian public interest, the Commonwealth and Fairfax principle holds good.

Your Honour should, with respect, steer clear of some of these cases, like Schering and that is the only one I see as raising any real issue and I think we have confronted that in a detailed way. Your Honour should be careful of the cases which commit this hearsay that information can be confidential qua one person even though it is known to the whole world. If there is a contract he can be prohibited from saying, but not, we would respectfully submit, in an action for confidence. Because there

is nothing, if you look at the trade secret cases which are closer to the contract because they always employ master employee cases. There are dozens of decisions which say that once it is in thepublic domain and freely available, it is out. That is what is said in Coco v Clark and Saltman Engineer, to name just two. The springboard doctrine is a bit of a wrinkle on that. There is the question of collating it all and so forth, putting a mosaic together, that is not relevant to this case.

HIS HONOUR: It is one of the problems of the whole area which has troubled me for years and that is that there is a lot of loose talk. What does Sir Robert McGarry mean when he talks about publishing? Why I struggle, and I don't always succeed, and I suppose most of the time, in trying to reduce things alternately to their essential principles rather than overloading things with words than can cause more trouble than they solve. I have not been free of the error myself of using the phrase "public domain" in this very case.

MR TURNBULL: Has your Honour got Coco v Clark. The relevant passage is at p 47. At about point 20 Mr Justice McGarry says "First the information ... commonplace its component." One could criticise that for confusing principles. I would agee with Lord Justice McGarry because assuming one can think of a proper example of something thathas resulted in some new idea that is not yet published, even though it may have been something that could have been done by other people having that public knowledge. But that is not apt to this case because we are not talking about a compilation of gems; we are not talking about a compilation of all the solicitors over the age of 42 in the electoral role; the information is not of that character at all.-

The key issue in this case is that the information is public property and public knowledge. Of course that statement has been approved by the High Court in Commonwealth and Fairfax.

HIS HONOUR: But with great respect to Lord Green and Sir Robert McGarry this is a classical example of what I mean. Sir Robert, in an attempt to expound and clarify serves only to obfuscate the already obscure. What is common knowledge. What is public domain? Mr Simos would say having regard to our slightly heated passage this morning, the one thing that is not in the public domain yet is the chapter and verse in Mr Wright's book; individual items are, but theparticular elements of the matrix have never been found in this form before so this form is not in the public domain.

MR TURNBULL: I do not think that is what he was saying.

HIS HONOUR: I think it is.

MR SIMOS: We do say that as well.

MR TURNBULL: What you have to do in interpretation of information is boil it down to the nuggets of information or intelligence in it. It is rather like the exercise of a person drafting a statement of claim for defamation does when he looks at the article and says, right, what are the implications, what a.

the stings of this article? He cuts through all the guff and comes down with imputation (A) the plaintiff is a thief; imputation (B), he runs a gambling joint, or whatever. You boil it down. What you have to do with the Wright book and the public domain is look at what the information is. For example, just assume there was a description of theBerlin Tunnel operation in the book. That operation has been described extensively in Wilderness of Mirrors, MI5 1909-45; Their Trade is Treachery; Too Secret Too Long; Matter of Trust. Really that being the case, the plaintiff would have to say that really there is a bit of information about it that has not come out and it has got some significance. If it is simply that George Bloggs wore red when he was checking the condensers, or something, it is not at all relevant.

Mr Simos has to be very careful he does not try to frame his case in copyright because if he is starting to say there is a special character in the particular words then he really ought to read Cleary.

In respect of confidential information we would submit that what your Honour should do is go for the mainstream concept. If it is in the public domain in the sense that that information is known, your Honour has only got to ask this question: Is it still a secret? That is all that confidence equals - secret. Is it a secret that Sir Roger Hollis was investigated three times? A. : No. Therefore that cannot be subject to an obligation of confidence. That is precisely the procedure that has been adopted.

If your Honour needs some moral support for that, your Honour can see in the American Cases in Marchetti and in McGehee, the CIA Manuscripts Review Board doing exactly that. There is no mucking around there. Their jurisprudence was sufficiently straightforward to understand that if it had been published in the main media books, bit circulation newspapers, it is out there.

Perhaps at this point I can address your Honour on the subject of the CIA and detriment. I do not have a detailed transcript reference that I would like to have, but I do not think I am misrepresenting the evidence in any way in this point. It is common ground in respect of Britain and in respect of Australia that the CIA is the biggest intelligence partner. That was certainly admitted by Sir Robert Armstrong. He is corroborated by Mr Wright and Mr Codd and Mr Whitlam has said the same in respect of Australia. The argument put up by Sir Robert firstly is that our partners in intelligence, that is to say, the Americans, will think less of us if an ex officer of our service is seen to be publishing a book of this kind. We have said to that that is nonsense, look at what the Americans do.

If I can take your Honour to p 478 of the transcript where your Honour will find the statement of Mr Schaap. The first six paragraphs, he there qualifies himself as an expert. He observes that between 1967 and 1974 there were a number of major journalistic exposes of CIA activity. Then he refers to the Marchetti Case which has been the subject of submission here. He notes that in the course

of the proceedings the deletions were reduced to 168 only, which it would seem by rough calculation would have been about 5 to 10 per cent of the book. The important thing about the Marchetti case and the CIA Manuscript Review Board policy is that it does not depend for its existence on the First Amendment because it has never been the law in America that the First Amendment allows you to publish the secrets of the security service

HIS HONOUR: But the First Amendment is the source of the present CIA approach, is it not, on the basis that they must protect their information somehow, they say: We want to do it in absolute terms because there is the First Amendment which has been construed in such a way as to apply to executive action and not merely legislative action and therefore these are what we believe will survive the first amendment attack on a contract and we can say, well, this contract is not contrary to public policy because it is not absolute. That is the origin of all of that, is it not?

MR TURNBULL: The government places its case in these proceedings on the basis thatthe publication of the material in Wright's book will damage the national security of Britain. If that contention were well founded and it were placed in an American context, there could be no argument that if Mr Wright had been found by the Manuscript Review Board that he wouldn't be able to publish his book, if the government could establish to the satisfaction of the court or the Manuscript Review Board to establish that that contention was well made out. Whilst it may be true that the First Amendment influences the Manuscript review Board policy in the sense that that causes them to hold that unless there is prejudice to national security you can publish, nonetheless, if that is the case, which is what is alleged to be the case here, you are not allowed to publish.

I referred a little while ago to the idea of the Cazab Countries being a bucket and if there is a hole in one they will all leak together. This is particularly pertinent in respect of America. It is plain from Mr Shaap's evidence that the CIA allows former officers to publish books containing information about allied operations.

Kermit Roosevelt's book about Iran is all about MI6/CIA operations. So the Americans have no hang up about revealing information they picked up from MI6 or MI5. There is a book called FBI/KGB War by a gentleman called Robert Lamphere which has been tendered, which details intercepts; about Philby, detailed information, contains his own view that Hollis is a spy. That is an officially cleared book written by the man who was in some respects Peter Wright's counterpart in the FBI. Sir Robert was happy to concede that the Americans would have to be illogical if they thought less of MI5 for adopting the same policies as America. That, with respect to Sir Robert, was a cute answer.

The truth of the matter is the Americans would not even think about it. The Americans regard this as a wonderful example of English eccentricity. It is noteworthy the British, notwithsta-ing their profound concern about the Americans, have not been abl-

to produce one witness from the CIA, not even a lawyer to give some decent evidence about the CIA manuscript clearance policy.

The relationship between the CIA and Australia is again so close in intelligence terms that the same points are made here.

So who are the intelligence agencies that are going to think less of the British or less of ASIO if your Honour allows this book to be published?Certainly not the Americans. Who are they - New Zealanders, the Canadians? The truth of the matter is that the Americans set the standard for disclosure. The American policy we submit is not simply because of the first amendment. It is very plain from Mr Shaap's evidence that the real motivation was very similar to the motivation behind legalising brothels and liquor and gambling and so forth. The problem was that there was uncontrolled publication.

If your Honour goes to par 7, he talks about a number of major journalistic exposés. There then was Marchetti, Phillip Agee and then the Church Committee came up which discovered a great deal of nasty things had been going on, including a fascination of foreign leaders and so forth. He says in par 11, p 482 -- just excuse me for one moment. Perhaps if your Honour could let me have thesynopsis of these books.

Just reminding your Honour, a cleared book wrote by Ray S. Cline, Secret, Spies and Scholars discusses US and UK cooperation in London when he was the CIA Chief of Station. Peer DeSilva in Sub Rosa 1978, again discusses UK and CIA cooperation, Hong Kong. Kermit Roosevelt's book about Iran, I have mentioned earlier. Eveland's book, Ropes of Sand deals again with British American activities in the middle East. I think they are the main ones. How realistic is it to say there will be any less thought about the British following the publication of a book of this kind. The answer has got to be, with respect, we submit, that as far as detriment is concerned that is just not an issue.

Dealing with detriment in the international context, one of the principles concerns that your Honour has expressed earlier has been the evidence from Mr Codd, the Australian Cabinet Secretary. There are a couple of observations that can be made about that evidence. The first is that it was plain that Mr Codd did not know very much about the topic that he was talking He swore an affidavit which purported to set out a relevant extract from the Hope Report. He admitted that he knew that one of the issues in this case was inequities, crimes, etcetera, committed by MI5. Yet, he left out of that affidavit - or the draftsman did - the very passage from Mr Justice Hope's report, which I think is 452, which states very succinctly the sort of principle we are concerned to enforce in this case. That demonstrated at its highest a lack of candour, an attempt to mislead your Honour .

HIS HONOUR: In fairness to Mr Codd, I don't know that he would have drafted it.

MR TURNBULL: That is what troubles me. Who did draft it? Somebody drafted it. If you were just a good little bureaucrat and you said to yourself, righto, we will put in everything that Hope said about foreign liaison, just put in the whole section. It is 452, your Honour, sorry. Par 449 to 456. But the draftsman left out the three caveats quite deliberately, we would say. Because, as I say, the unimaginative draftsman would just go to the index, see "Foreign Liaison" and say, righto, type that out and that's in the affidavit. That was not done.

The second principle in par 453 is absolutely a point in this case. Certainly Mr Codd was not aware it was there. His Knowledge of the Hope Report I would have thought would have been limited to the fact there had been one. But it does not say very much for the draftsman, and of course the affidavit is only as good as the person who drew it.

Incomplete transcript —

BALANCE TO BE completed

FRIDAY 19 DECEMBER 86.

M. Zarate

Powell J
Equity.

—

Attorney-General of
United Kingdom -v-
Heinemann Publishers.

Balance of transcript
from Thurs. 18/12/86.

Just dealing further with Mr Codd. Could I have the book "Sub Rosa" please. Mr Codd was asked at p 407 about the book, Michael Thwaites "The Truth Will Out" and the book by Mr Matham "Sub Rosa". "Sub Rosa" is a book subtitled "Memoirs of an Australian Intelligence Analyst: R.H. Matham". It was published in 1982 and at p 407 Mr Codd said, referring to it and "The Truth Will Out", in both these cases those books were not regarded as breaching security in terms of their contents.

The sort of information that is contained in this book is a description of Mr Matham's work as head of the Scientific Intelligence Branch of the Joint Intelligence Bureau. In many respects he was the Peter Wright of JIB. He talks about the assessment of Chinese nuclear weapon potential at p 12. He talks about earth orbiting satellites; the use of satellites in intelligence collection - a matter that is not even touched upon by Mr Wright. He talks about his training and when he worked at the British Joint Intelligence Bureau, known as JIB, which was apparently the English equivalent.

He talks about the dragon returnees who are the several hundred German scientists and engineers who participated in rocketry research and development and were relocated from occupied Germany to various locations in the Soviet Union. When they came back they were, of course, all debriefed. That is described in some detail in the book, of course.

If one assumed that that information was part of a book that Mr Codd said was objectionable in the case of Mr Wright, one would not be wrong. In short, this book is worth flicking through your Honour. Frankly it has full and much more up-to-date information than Mr Wright's book and, of course, it is all very Australian. There is a whole chapter on the relationship between America and Australia in intelligence terms and so forth.

The truth of the matter is that if Mr Codd had read that book, which I doubt he had, he would realise that there was no rational difference between it and Mr Wright's, except that that bock has got less, you know, less human interest in it I would think.

The good example of Mr Codd's intimate understanding of the book is at p 408 where he says - he used the same phrase Sir Robert Armstrong did - he said the book was a comprehensive account of the operations and techniques used by an insider in his period of employment with the Secret Service. I asked him this question "The book contains ... I don't recall". YOu do not have to be a spy to know that one of the major forms of collecting intelligence nowadays is the use of satellites, so if you were, in fact, Mr Hawke's principal adviser on security matters, that would be something you would look out for. He does not even remember whether it is in the book or not.

At p 409 I put to him "That the CIA ... no I am not" - notwithstanding that he agreed that America was Australia's largest intelligence partner. Mr Codd, of course, conceded that he had

nine months in the job. At p 412 he placed great store on Mr Justice Hope's report and then went to some degree justifying the fact that the most relevant extracts have been left out. He agreed with Mr Justice Hope's proposition in par 453 of his fourth report at the top of p 416 of this transcript.

He was not even given a copy of the Massiter allegations. I do not know whose fault that was but it hardly shows a deep interest in the case.

At p 416 there is an important statement by Mr Codd. I put to him this question "It is important ... could argue that". I submit that is a positive response, by Mr Codd's standards. Then at p 417 your Honour referred to the matter concerning Chile and your Honour finally said "I can appreciate ... is it not?". No response was the answer. "Q. I gather you would ... on the particular circumstances". So Mr Codd agrees that there is, in fact, a balance to be struck.

At p 418 he agrees with what Mr Justice Hope says about the danger of anti-subversive activities infringing democratic rights. He agrees that the Commonwealth Government is under an obligation, hence ASIO is, to comply with the Vienna convention. He agrees that our intelligence agencies should comply with the law overseas.

He agrees, at p 419, with some passages from Mr Justice Hope's report where he talks about ASIO's past transgressions and, in particular, where Mr Justice Hope says:

> "Of course the past is relevant to show what might happen in the future".

I said to him "Do you agree with that" and he said "Yes".

So Mr Codd is agreeing with the proposition that is very important in our case and particularly in the light of what Mr Whitlam said because part of our case is that once the intelligence material is no longer sensitive it should go into the history books in the history shelves because of the importance of history. Even Mr Codd agrees with that.

He agrees with Mr Justice Hope's observations that ASIO should abide by the law and then there are important questions and answers at p 421, at the top of the page "If the facts ... be aware of it" and then I said "But if the Australian ... to the public". How different is that from the British position?

One of the interesting features of the Hope report, your Honour, and this goes more to public domain and detriment, I took Mr Codd to p 78 of the Hope report where there followed 30-odd pages in quite specific detail of the various forms of intelligence collection uses by ASIO. Your Honour will remember at one point Sir Robert Armstrong was contending that even if Mr Wright said that MI5 used particular means of collecting information and even if he said it in terms as general as: bugging phones; using agents; opening mail; listening to radio transmissions, that would

be enough to help the enemy. Mr Justice Hope has done a great disservice to ASIO people then, by giving reference to that.

He told us that he was against political assassination and against intercepting diplomatic communications. He was against burgling diplomatic premises and breaking international law. I put to him "If Australia was ... it would be". I then asked him whether he was a democrat and he said he was not familiar with those terms. Mr Simos saved him from any more embarrassing questions.

He said, at p 424, that he did not believe that tapping trade union telephones or civil liberterians' telephones was part of ASIO's charter. He agreed with Mr Justice Hope's recommendations on accountability and he agreed with Mr Justice Hope's criticism of accountability through leaks and generally ill-informed sources. The corollary of that, we would say, is that obviously the ideal world is for government to openly, actively and comprehensively publish information, you know, through Senate committees and enquiries. That does not happen enough here and certainly does not happen in England at all.

It is certainly better for someone like Wright to write his memoirs openly and for him to stand behind them rather than to have people being fed information for political purposes in circumstances where the veracity of it can never be assessed by the public.

At p 428 Mr Codd said he was not in a position to judge whether "Ties That Bind" contained a comprehensive account of the secret activities of the countries it discussed, although, of course, he claimed to have been in a position to judge Mr Wright's book. I then asked him why he had not read "Ties That Bind" and he said he had no particular reason to read it. This is a man who is apparently concerned with stopping the leak of information. I am sure your Honour would agree with me that in terms of units of information there is a great deal more in "Ties That Bind" than there is in Mr Wright's book. That is not a criticism of Mr Wright's book. "Ties That Bind" is quite eye-glazing.

He refused to get involved in any question of blue pencilling. He said that was a matter for the British.

We then got to the question of whether this publication would cause the obligations of Australian intelligence officers to be diminished and, I mean, these do not have to be tendered as part of the evidence because they are part of the law that is available to your Honour. But it is plain that s 18 of the ASIO Act and sections 70, 77, 79 of the Commonwealth Crimes Act all contain prohibitions on ASIO officers and ex-ASIO officers from publishing information, which prohibitions are not subject to any public interest defence. So whatever your Honour says viz a viz ASIO will have absolutely no effect on those provisions.

He made the point, however, that those Acts do not apply offshore. Let us analyse that proposition. Let us say an ASIO officer moved to America. I am sure your Honour's judgment in this

case would be accorded great respect in the Courts of New York but I have a funny feeling that Near,Minnesota would carry the day regardless of what your Honour said on prior restraint.

The truth of the matter is that there is no a tipple of evidence to suggest that the publication of this book by Wright will have any adverse effect on ASIO having to get its secrets, either here or abroad. It is covered by statute here and abroad and sadly is not in your Honour's jurisdiction and the principles that your Honour states in other countries depends on the country that this ASIO officer went to.

The logical place, the United States, is a country which has its own different rules on prior restraint. If the ASIO officers have, you know, a vetting agreement, secrecy agreement, then that could be enforced without any doubt. If they do not - they are fools of course. I mean, they would be pretty stupid not to - then they run into Near, Minnesota but that is not down to your Honour. That is the point in any event.

He then said at p 429B that if your Honour allowed the book to be published there would be a perception that under the Australian legal system and through Australian law the protection of sensitive information could be at risk. Firstly, no information in the heads of ASIO officers would be put at risk because they are governed by statute.

The only risk would be: is there a risk that foreign intelligence officers could come here? Well, let us say there was a risk that officers of Turnbull and McWilliam could be beseiged by retired MI5 officers. The first thing is that they would all be turned away after this case. The second thing is this: that that international problem is a typical example of the need for a convention, as Mr Whitlam said.

It is not going to be solved because you have got the same problem in Eire. Let us face it, that is a lot more accessible to Arthur Martin and his friends than Sydney, New South Wales is. So they have already got a problem there; they have got a problem in the United States apparently. The likelihood is that if they want to protect this information they should have a convention, like they do with visiting forces.

The most bizarre of Mr Codd's arguments was that if this book was allowed to be published here that would reduce ASIO's confidence in MI5, notwithstanding the fact that MI5 had done its best to stop the book being published and notwithstanding that the cause of publishing the book is with your Honour who is not, as far as I am aware, a member of the MI5.

HIS HONOUR: I hope I have been taken off the register for Commonwealth Retired Officers because I could well be a Commonwealth Officer for the purposes of the Commonwealth Crimes Act.

MR TURNBULL: That is a fantastic proposition. Firstly, the blame could hardly be MI5's in this case. Secondly, what lack of confidence in MI5 would it do when one considers the vast range of

other books by MI5 officers that have been published and books including publications by MI5 officers.

Of course, Mr Codd's distinct and intense interest in the matter is shown where he says he is not aware, at p 430, of 26 former intelligence officers giving quotes to the authors of "Conspiracy of Silence"; that he did not hear about Kathy Massiter although he did hear about Blunt, Philby, Burgess and McLean. He did hear about Michael Bettaney and Geoffrey Prime. He gets about three out of ten I would say in the intelligence leaking exam. He suggests that there may have been some impact on flow of information because of these leaks of information with Britain but he is not very positive about it.

Over on p 432 I put to him that America was Australia's largest intelligence power and he agreed with that. He agreed he had no knowledge of the CIA manuscript clearance policy. He did understand that there had been some books published by former CIA officers and he said that his concern was only about unauthorised disclosure in the United States. Whereas, of course, the issue is not authorisation or non-authorisation. The question is: what is the content of the information? I mean, if the CIA authorised someone to publish the design for the latest cruise missile, that is going to be a little more damaging, even though it is authorised, than Mr Wright's book being published without authorisation.

He then agreed that if the British Government did authorise Wright's book there would be no call for a submission by the Australian Government and we submit that that is the key to this man's evidence. What he is objecting to is the lack of authority and, in truth, he has got no interest or concern in the contents of the manuscript, notwithstanding that he has indicated he did. We would say that his claim to have an interest in the contents is given the lie to by the fact that he does not seem to have any knowledge of the matters that would enable him to make a rational judgment on the contents.

I asked him, at p 433, whether ASIO had cut down its intelligence sharing with the CIA following the introduction of their manuscript clearance policy and he said he did not know. Here is a man who comes here to tell your Honour about the terrible things that will happen if information is published by one country and the consequences it will have for the other country's confidence in it, yet he knows nothing about the situation in America.

At the bottom of the page I said "Do you believe ... that I have" but the answer is "I don'thave a clue" - and that is the truth of it. I put to him that he was guessing and he said it was a judgment. That is what he presumably calls a guess.

Your Honour is in the position with Mr Codd - and I apologise for taking so long for him but he is the only Australian witness on the other side - Mr Codd's concern truly analysed is simply that Mr Wright's book has been published without authority. There is no realistic prospect of any detriment being caused to ASIO by reason of MI5 losing faith in it or to MI5 by reason of ASIO losing faith in it. He simply is lending his support, as best he can, because Mr Wright is breaking what he perceives are the rules.

We would submit that that has not detriment at all to Australia, no detriment at all. It is not a detriment to Australia that another agency has an officer who does not act in accordance with its directions full stop and that is basically Mr Codd's case.

Your Honour, just quickly, the key points that your Honour, we would submit, should take regard to with Mr Whitlam's evidence are these: firstly, his superior experience to Mr Codd. There is simply no comparison between the two men in any respect. Secondly, he has been charged as being the guardian of the public interest in this country and has been answerable to the people, unlike Mr Codd who is not even prepared to say whether he is a democrat or not.

HIS HONOUR: I think, with great respect to Mr Codd, the simple answer is that he contacted the ASIO fellows and said "What is the party line" and then the Crown Solicitor's office and said "Put it in writing for me".

MR TURNBULL: I think that is probably right your Honour. Whereas, of course, you do with Mr Whitlam. Mr Wright's words were given in affidavit which he read out. With Mr Whitlam his evidence was given in chief. No one is in a position to put words in his mouth.

HIS HONOUR: Nobody would dare. They would be as dross.

MR TURNBULL: One of the things that is most pernicious - and this is an area where your Honour may be adventurous -

HIS HONOUR: It is my turn to be a timorous soul I think.

MR TURNBULL: One of the things that is in this case is that they have replaced Ministers with civil servants as the deponents to affidavits in cases of this kind. They are the best people to speak for the public interests of the politicians because after they have come to Court and told all sorts of waffle and carried on and been caught out telling lies, they have to go back to question time and get a bucketing. That reality of fronting the people in question time discourages them from misleading courts whereas, unfortunately, people like Mr Codd and Sir Robert Armstrong are not answerable to the Parliament and are not answerable to the people. That, of course, is the forum where the public interest is protected.

If you look at cases like Zimora that talk about the Ministerial certificate and, of course, your Honour would have been vastly more impressed, I would submit, if instead of Mr Codd it had been Mr William Hayden, the Foreign Minister.

HIS HONOUR: I would have been vastly more impressed if it had been Mr Harry Barnett's successor.

MR TURNBULL: That is a very significant point because he is not - as I think I have said a number of times before - he is not like his British counterpart, being a sort of mystical figure. Allan Rigby has addressed the Journalists Club. The reason he did not

come here, we would submit, is because if he had been cross-examined in any detail it would have been perfectly apparent that the material in the Court was what we said it was.

One may well ask why it is that both the Australian and the British Governments have sent witnesses to your Honour who have been shown to be profoundly unable to answer the very questions that your Honour is grappling with.

We would submit we have done the best we can with Mr Wright, Mr Schapp and Mr Whitlam but these people, who claim to be fonts of all knowledge, and have got access to much greater resources, have quite deliberately, we would submit, and not just through an error, chosen to send people more for what they do not know than for what they do know.

(FUrther hearing adjourned to 9.30 am on Friday 19 December 1986)
