The Right Honourable Lord Ackner

The Spycatcher: Why Was He Not Caught?

Desmond James Conrad Ackner
(*b.* 18 September 1920)

Lord Ackner read law at Clare College, Cambridge. He was called to the Bar at Middle Temple in 1945. He was in active military service during the Second World War.

Lord Ackner's career at the Bar was indeed distinguished. He was the Head of Chambers at 4 Pump Court from 1965–1971. He became a Queen's Counsel in 1961, and was appointed to the highly respected position of Chairman of the General Council of the Bar from 1968–1970.

Lord Ackner also had an illustrious judicial career. He was Recorder of Swindon (1962–1971), Judge of the Courts of Appeal of Jersey and Guernsey (1967–1971), Judge of the High Court of Justice, Queen's Bench Division (1971–1980) and of the Commercial Court (1973–1980), Lord Justice of Appeal (1980–1986), and Lord of Appeal in Ordinary (1986–1992).

Lord Ackner was a member of the Senate of the Four Inns of Court (1966–1970); and Chairman of the Law Advisory Committee, British Council (1980–1990).

He is currently a member of Lloyd's Arbitration Panel; President of the Arbitration Appeal Tribunal SFA; and Honorary Fellow of the Society of Advanced Legal Studies. He is a Bencher of Middle Temple, of which he was Treasurer in 1984.

Since his retirement from the House of Lords and Privy Council, Lord Ackner has developed a particular interest in Alternative Dispute Resolution. He was a founder member of the City Disputes Panel which was launched in 1994 to offer a speedy, adaptable and economic system of arbitration and dispute resolution. Lord Ackner now frequently sits as an Arbitrator dealing with major commercial disputes, both domestic and international.

Lord Ackner retired as a Law Lord on 30 September 1992.

4 The Spycatcher: Why Was He Not Caught?

Lord Ackner
Lord of Appeal in Ordinary, House of Lords

Text of the Fourth Sultan Azlan Shah Law Lecture delivered on 24 September 1989 in the presence of His Majesty Sultan Azlan Shah.

"Falsehood and delusion are allowed in no case whatsoever; but, as in the exercise of all virtues, there is an economy of truth. It is a sort of temperance, by which a man speaks truth with measure, if he may speak it the longer."

So spoke Edmund Burke.

This was the sense in which Lord Armstrong, the Secretary to the Cabinet used the phrase "economical with the truth" when giving evidence before Powell J in Sydney, Australia.

Three of the six years I spent in the Court of Appeal was under the "headmastership" of Lord Denning MR. It was an enormous privilege and one from which no one could avoid learning a great deal. Lord Denning's judgments had a style of their own, in which the central theme was "simplicity". "Just tell the story", he used to say. So let me come straight away to the simple but depressing facts concerning the book *Spycatcher*[1] and its author, Mr Wright. I shall try to be concise, and I "speak the truth with measure". Scott J in the substantive hearing at first instance in a most impressive judgment deals with the matter in great detail.

Facts of the case

On 1 September 1955, Mr Wright joined the British Security Service. This Service is part of the defence forces of the country. Its task is the

1 Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, 1987.

defence of the realm as a whole, from external and internal dangers, arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or outside the country, which may be judged to be subversive of the State.

Mr Wright joined MI5 as a scientific adviser in its counter-espionage branch. The operations at MI5 are largely confined to operations within the United Kingdom. Mr Wright remained a member of the Service until his resignation on 31 January 1976. He was on the personal staff of the Director General as a consultant on counter-espionage. When he joined the Service in 1955, Mr Wright signed a declaration that he understood the effect of section 2 of the Official Secrets Act 1911 which was set out in the declaration. This rendered liable to prosecution any person in possession of information:

> … which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Her Majesty … and communicates the information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interests of the State his duty to communicate it.

When he left the Service in 1976 he signed a further declaration acknowledging, inter alia, that the provisions of the Official Secrets Acts applied to him after his appointment had ceased, that he was fully aware of the serious consequences which might follow any breach of the provisions of those Acts and that he understood:

> that I am liable to be prosecuted if either in the United Kingdom or abroad I communicate, either orally or in writing, including publication in a speech, lecture, radio or television broadcast, or in the press or in book form or otherwise, to any unauthorised person any information acquired by me as a result of my appointment (save such as has already officially been made public) unless I have previously obtained the official sanction in writing of the department by which I was appointed.

In addition to the obligation of secrecy expressly acknowledged by Mr Wright, he was also under an obligation arising out of his

employment by the Security Service and enforceable in equity not to divulge any information which he obtained in the course of his employment. The obligation arises because of:

> the broad principle of equity that he who has received information in confidence shall not take advantage of it. He must not use it to the prejudice of he who gave it.[2]

In the course of his employment Mr Wright had access to highly classified information.

After his retirement Mr Wright publicly announced that he had submitted a memorandum to the Chairman of a Select Committee of the House of Commons alleging penetrations of the Security Service by foreign agents and calling for an inquiry. Being satisfied that no inquiry was held he decided, so he alleged, to disclose the relevant material in his memoirs, together with allegations of unlawful conduct on the part of members of the Security Service over the years. Throughout the extensive litigation it has been accepted that Mr Wright committed a most serious breach of his duty of confidentiality, described in the number of judgments as *treachery*. It was accordingly at all times conceded that if, instead of emigrating to Australia, he had sought to publish his book in England, both he and his publishers would immediately have been restrained by injunctions. Mr Wright would certainly have committed serious breaches of the Official Secrets Acts and the reasonable assumption was that he would have been prosecuted.

Throughout the extensive litigation it has been accepted that Mr Wright committed a most serious breach of his duty of confidentiality, described in the number of judgments as treachery.

The British courts do not have jurisdiction beyond their shores. Every sovereign nation jealously guards its own jurisdiction. The inability of the English courts to supply a remedy by granting an injunction or other relief against Mr Wright was obviously not a weakness for which the English courts could be blamed. Accordingly,

2
Per Lord Denning MR in *Seager v Copydex* [1967] 1 WLR 923 at 931.

when Mr Wright emigrated to Australia and sought to publish his book, all that the Crown could do was to seek an injunction in the courts of Australia, in particular, in the courts of New South Wales. In 1985, the Attorney General began proceedings in New South Wales against Mr Wright and his Australian publishers, Heinemann Publishers Pty Ltd. At this stage the completed manuscript of the book was in the hands of the publishers but the book had not been published. The Attorney General sought an injunction restraining publication, or alternatively, an account of profits. Pending trial, undertakings restraining publication of the book or disclosure of information obtained by Mr Wright in his capacity as an officer of MI5 were given by Mr Wright, the publishers and the solicitors acting for them. The trial of the New South Wales action commenced on 17 November 1986.

On 22 June 1986, *The Observer,* and on 23 June 1986, *The Guardian* published articles reporting on the forthcoming hearing in Australia. The articles included an outline of some of the allegations contained in the unpublished manuscript. The articles led to two writs being issued on 30 June 1986, one against *The Observer* and the other against *The Guardian.* The actions were later consolidated.

Ex parte interlocutory injunctions against the newspapers were granted on 27 June 1986. On 11 July 1986, Millett J, inter partes granted injunctions, until trial or further order, restraining the publishing or disclosing of any information obtained by Mr Wright in his capacity as a member of MI5 or from attributing any information about MI5 to him. An appeal against this order was dismissed by the Court of Appeal on 25 July 1986.[3]

On 13 March 1987, the Attorney General's action in New South Wales was dismissed by Powell J. The Attorney General appealed to the Court of Appeal of New South Wales and the undertakings which had been given pending trial were continued pending the hearing of the appeal.[4]

3
Attorney General v Observer Ltd (1986) 136 NLJ 799.

See generally, *Attorney General v Guardian Newspapers Ltd and other related appeals (No 1)* [1987] 3 All ER 316, Ch D, CA & HL; and *Attorney General v Guardian Newspapers Ltd and other related appeals (No 2)* [1988] 3 All ER 545, Ch D, CA & HL.

4
(1987) 8 NSWLR 341; (1987) 10 NSWLR 86, CA.

On 14 May 1987, an announcement was made by Viking Penguins Inc, a United States subsidiary of an English publishing house, of its intention to publish the book in the United States. Because of the First Amendment to the United States Constitution and the guarantee of freedom of speech contained therein, it has become settled law in the United States that prior restraint against publications by newspapers cannot be obtained. Accordingly, there was no prospect of the Attorney General obtaining a court order to restrain publication there.

At this stage, *The Sunday Times* came on the scene, negotiating with the Australian publishers for the right to serialise the book. A price of $150,000 was agreed and secrecy was emphasised. The editor of *The Sunday Times* made it clear in his evidence that his intention was to publish his instalments of *Spycatcher* at least a full week before the American publication. This was in the event reduced to only two days because circumstances caused the publication to be brought forward a week. Mr Neal, the editor, knew that undertakings which had been given to the court in Australia and which continued pending the hearing of the appeal, would prevent the Australian publishers from sending him a copy of the manuscript. Mr Neal had to obtain a copy of the manuscript in order to prepare the serialisation but could not obtain one from Australia. His solution was to obtain one from the United States publishers.

The launch of the book in the United States was due to take place on Monday, 13 July. On 7 July 1987, Mr Neal flew to the United States and obtained a copy of the manuscript with the intention that the first extract would appear in *The Sunday Times,* as it did, on Sunday, 12 July 1987. Had the Crown learned of the intended publication in *The Sunday Times* they would certainly have sought and have been entitled to an injunction to restrain it. In the words of Lord Keith of Kinkel, in his judgment in the substantive hearing in the House of Lords, to which I will refer in greater detail later, this newspaper employed "peculiarly sneaky methods to avoid this".[5] The publication of 12 July was accompanied by special measure to throw

5 *Attorney General v Guardian Newspapers Ltd and Others (No 2) and related appeals* [1988] 3 All ER 545 at 644.

the Government off the scent. The first edition of the newspaper, comprising some 76,000 copies, was published without the *Spycatcher* extracts. The extracts were included in the later editions. This was to prevent the Government, on reading the first edition, from obtaining an immediate injunction to restrain the printing of the later editions. By the time the later editions came to the Government's attention, it would be too late for any action to be taken to restrain publication. The plan worked and 1.25 million copies bearing the *Spycatcher* extracts were published.

The British courts do not have jurisdiction beyond their shores. Every sovereign nation jealously guards its own jurisdiction.

On Monday, 13 July 1987, the Attorney General commenced proceedings against *The Sunday Times* for contempt of court and this had had the effect of immediately preventing any further serialisation. On the same day, *Spycatcher* went on sale in bookshops throughout the United States, and this prompted *The Guardian* and *The Observer* to apply for the discharge of the injunctions granted by Millett J. It had been contended that in view of the United States publication, the injunctions could no longer serve a legitimate or useful purpose. *The Sunday Times* joined in this application and the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, acceded to the applications and discharged the injunctions. The Vice-Chancellor reached his decision with regret. He said:

> And let nobody underestimate how important these secrets are. There seems to have been a temptation to treat this case as an unreasonable pursuit by the Government of unreasonable ends. This is not a view I share. The revelation of secrets of a security agent, it seems to me, are highly important and highly undesirable. I, therefore, think it is most regrettable, if it proves to be the case, that there is no way in which the court can preserve that confidentiality.[6]

The basis of his reluctant decision was that there had been a material change in the circumstances since Millet J's order, as a result of the publication in America.

6 *Attorney General v Guardian Newspapers Ltd and Others and related appeals (No 1)* [1987] 3 All ER 316 at 330 – 331.

This decision was, however, reversed by the Court of Appeal[7] on the grounds that the Attorney General had an arguable case that further publication would in various ways damage the British Security Service and thereby national security and that although the original purpose of the Millett injunctions, that was the actual protection of national secrets, could no longer be achieved, the secondary object of the injunctions, namely the avoidance of damage to the Security Service, justified the maintenance of injunctive relief pending trial. The Court of Appeal, however, substituted for the Millett injunctions, a new injunction restraining the newspapers from publishing any extract from *Spycatcher* or any statement about MI5 purporting to emanate from Mr Wright but with the proviso that:

> this Order shall not prevent the publication of a summary in very general terms of the allegations made by Mr Wright.

This was satisfactory to neither party, so both sides appealed to the House of Lords.

This was the first occasion that the litigation had reached the House of Lords[8] and I stress that these were but interlocutory pre-trial proceedings. Following the decision of the House of Lords in *American Cyanamid v Ethicon*[9] in 1975, the essential issue was to decide whether the Attorney General had an arguable case in law. If he had, then the insufficiency of damages as a satisfactory remedy and the balance of convenience in maintaining the status quo, both pointed conclusively to the continuation of the interim injunction. The newspapers were content to accept that the Attorney General did have an arguable case.

What they contended for was that the public interest in the dissemination of the news outweighed all other considerations. Prior restraint was considered as an unacceptable fetter on the freedom of the press and on editorial discretion. By a majority of three to two, the House of Lords held that the Attorney General had an arguable case for a permanent injunction in that the newspapers had been and

7
Ibid, at 333.

8
Ibid, at 342.

9
[1975] 1 All ER 504.

would be in breach of duty in publishing extracts from or commenting on information contained in *Spycatcher,* a work published by an ex-officer of MI5 in flagrant breach of his duty of confidence owed to the Crown. As I ventured to state:

> Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations they would like that to be so, that is, until they require the law's protection.[10]

On 24 September 1987 the New South Wales Court of Appeal[11] dismissed the Attorney General's appeal. It was a majority decision, with Street CJ dissenting. He agreed that ordinarily a foreign government would not be allowed access to the courts of Australia to enforce a public law claim, but regarded the case as justifiable in Australia because the Australian Government supported with evidence the Attorney General's case on the ground that disclosure would harm the *Australian* public interest. The Attorney General obtained leave to appeal to the High Court of Australia but the Court[12] declined to grant temporary injunctions pending the hearing of the application for leave, with the result that since 24 September 1987 there was no impediment obstructing publication of the book or disclosure of its contents in Australia. On 2 June 1988, the High Court[13] dismissed the Attorney General's appeal upon the sole ground that an Australian court should not accept jurisdiction to enforce an obligation of confidence owed to a foreign government so as to protect that government's intelligence secrets and confidential political information. A less extreme view had been taken by the Court of Appeal of New Zealand in a judgment given on 28 April 1988 in the case of *Attorney General for the United Kingdom v Wellington Newspapers Ltd (No 2).*[14] If the New Zealand court had been satisfied that the disclosure of the information would have been detrimental to the public interest in New Zealand, it would have considered granting the relief claimed.

Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations they would like that to be so, that is, until they require the law's protection.

10 [1987] 3 All ER 316 at 363.

11 *Attorney General for the United Kingdom v Heinemann Newspapers Australia Pty Ltd and Another* (1987) 10 NSWLR 86, CA.

12 *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd (No 1)* (1987) 61 ALJR 612.

13 *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 62 ALJR 344.

14 [1988] 1 NZLR 180.

In the meantime, publication and dissemination of *Spycatcher* and its contents had continued worldwide. Extensive publication and distribution had taken place in the United States and Canada. The total number of copies printed by Viking Penguin Inc in the United States by the end of October 1987 was 715,000. In Canada, over 100,000 copies had been printed by October 1987. A large number of copies had found their way into England, the number being estimated to run to several thousands. The Government had taken no steps to prohibit such importation into this country, taking the view that it was impractical to do so. Thus, anyone who wanted a copy was at liberty to order one from one of the United States booksellers.

On 21 December 1987, Scott J on hearing of the substantive action[15] for a permanent injunction concluded that Mr Wright had committed a breach of his duty of confidence in writing *Spycatcher* and having it published. He was thus accountable for any profit thereby made. If sued in this country, permanent injunctions would be granted against him. *The Guardian* and *The Observer* were not in breach of any duty in publishing the articles about the Australian *Spycatcher* case in their respective editions. Those newspapers had acted independently of Mr Wright and had not aided or enriched him in any way. However, *The Sunday Times* was in breach of duty in publishing the edition of 12 July 1987 and the Attorney General's claim for an account of profits thereby made succeeded. An appeal against Scott J's decision was rejected by the Court of Appeal.[16] The Attorney General's appeal to the House of Lords[17] was dismissed on 13 October 1988 and I will spend a little time dealing with the basis of that decision and in particular with that of Lord Keith, who gave the first of the five judgments.

Lord Keith's judgment

Lord Keith pointed out in his speech that the Crown's case upon all the issues which arose invoked the law about confidentiality and he therefore started by considering the nature and scope of the law. In summary, he said this:

15
[1988] 3 All ER 545.

16
[1988] 3 All ER 545 at 594.

17
[1988] 3 All ER 545 at 638.

1. The law has long recognised that an obligation of confidence can arise out of particular relationships, such as doctor and patient, priest and penitent, banker and customer. The obligation may be imposed by an express or implied term of contract but it may exist independently of any contract on the basis of an independent equitable principle of confidence.

2. Financial detriment to the confider of the confidential information is not an essential ingredient of the cause of action. Thus in the case of *Duchess of Argyll v Duke of Argyll*[18] an injunction was granted against the revelation of marital confidences, the breach of confidence involving no more than the invasion of personal privacy.

3. As a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself.

As a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself.

4. The position of the Crown, as representing the continuing government of the country may, however, be regarded as being special. The Crown, as representing the nation as a whole, has no private life or personal feelings capable of being hurt by the disclosure of confidential information. It must be in a position to show that disclosure is likely to damage or has damaged the public interest. He referred to two important cases in which the special position of a government in relation to the preservation of confidence had been considered. The first was *Attorney General v*

18 [1967] Ch 302.

Jonathan Cape Ltd.[19] That was an action for injunctions to restrain publication of the political diaries of the late Richard Crossman, which contained details of Cabinet discussions held some ten years previously and also advice given to Ministers by civil servants. Lord Widgery CJ said:

> The Attorney General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained; and (c) that there are no other facts of the public interest contradictory of or more compelling than that relied upon. Moreover, the court when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need … The court should intervene only in the clearest of cases where the continued confidentiality of the material can be demonstrated.[20]

5. The second case to which Lord Keith referred is *Commonwealth of Australia v John Fairfax & Sons Ltd.*[21] That was a decision of Mason J (now Mason CJ) in the High Court of Australia dealing with an application by the Commonwealth for interlocutory injunction to restrain publication of a book containing the text of Government documents concerned with its relations with other countries, in particular, the Government of Indonesia in connection with the "East Timor Crisis". The documents appear to have been leaked by a civil servant. Restraint of publication was claimed on the ground of breach of confidence and also on the ground of infringement of copyright. Mason J granted an application on the latter ground but not on the former. He then quoted from the judgment of Megarry J in *Coco v AN Clark (Engineers) Ltd* [22] that the plaintiff must show, not only that the information is confidential in quality, that it was imparted so as to import an obligation of confidence, but also that it will be "an unauthorised use of that information to the detriment of the party communicating it". He then asked himself the question—

19
[1976] QB 752.

20
Ibid, at 770 – 771.

21
(1980) 32 ALR 485.

22
[1969] RPC 41 at 47.

when the Executive Government seeks the protection given by equity what detriment does it need to show? He then said:

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

It may be a sufficient detriment to the citizen that disclosure of information in relation to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.

Accordingly, the court would determine the Government's claim of confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest it will not be protected.

The court will not prevent the publication of information which merely throws light on the past workings of Government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of Government will be prejudiced, disclosure will be restrained. There

will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.[23]

6. Lord Keith was in broad agreement with this statement and in particular that a government is not in a position to win the assistance of a court in restraining the publication of information imparted in confidence by it which it possesses unless it can show that publication would be harmful to the public interest. He went on to say this:

> It is common ground that neither the defence of prior publication or the so-called "iniquity" defence would have availed Mr Wright had he sought to publish his book in England. The sporadic and low key prior publication of certain specific allegations of wrongdoing could not conceivably weigh in favour of allowing publication of this whole book of detailed memoirs describing the operations of the Security Service over a lengthy period and naming and describing many members of it not previously known to be such. The damage to the public interest involved in a publication of that character, in which the allegations in question occupy a fairly small space, vastly outweigh all other considerations.[24]

A government is not in a position to win the assistance of a court in restraining the publication of information imparted in confidence by it which it possesses unless it can show that publication would be harmful to the public interest.

However, the worldwide dissemination of the contents of the book which had been brought about by Mr Wright's wrongdoing was such that further publication in England would not bring about any significant detriment to the public interest beyond what had already been done. Lord Keith stressed that he did not base his decision to refuse an injunction against the newspapers upon any balancing of public interest or upon any considerations of freedom of the press, nor upon any possible defences of prior publication or just cause or excuse, but simply upon the view that

23 (1980) 32 ALR 485 at 492 – 493.

24 [1988] 3 All ER 545 at 642.

all possible damage to the interests of the Crown had already been done by the publication of *Spycatcher* abroad and the ready availability to copies in this country. *The Guardian* and *The Observer* were thus at liberty to report and comment upon the substance of the allegations made in *Spycatcher.*

7. In relation to *The Sunday Times,* Lord Keith and indeed all the members of the Committee had no hesitation in holding that this newspaper stood in the shoes of Mr Wright by virtue of the licence it had been granted by the publishers. Its own counsel accepted that neither the defence of prior publication nor the so-called "iniquity" defence would have availed Mr Wright had he sought to publish the text of *Spycatcher* in England. On the principle that no one should be permitted to gain from his own wrongdoing, the Crown was held entitled to an account of profits in respect of the publication on 12 July. *The Sunday Times* was not entitled to deduct in computing any gain, the sums paid to Mr Wright's publishers as consideration for the licence granted by the latter, since neither Mr Wright nor his publishers were or would in future be in a position to maintain an action for recovery of such payments. Nor would the courts of this country enforce a claim by them to the copyright in a work, the publication of which they had brought about contrary to the public interest. Thus Mr Wright is powerless to prevent anyone who chooses to do so from publishing *Spycatcher* in whole or in part in England or to obtain any other remedy against them. Lord Keith observed that a claim by the Crown that it was in equity the owner of the copyright in the book had not yet been advanced but it might well succeed. As regards future serialisation, since the material had now become generally available without *The Sunday Times* being responsible for this having happened, it would not therefore be committing any wrong against the Crown by continuing publication. It would not therefore be liable to account for any resultant profits. *The Sunday Times* was in no different position from anyone else who might choose to publish the book by serialisation or otherwise.

Lessons learned

What has been achieved and learned from this protracted litigation?

(a) It has been authoritatively established that members and former members of the Security Service do have a life-long obligation of confidence owed to the Crown which renders them and anyone publishing on their behalf liable to be restrained by injunction from revealing information which came into their possession in the course of the work. In the words of Lord Keith, "those who breach it, such as Mr Wright, are guilty of treachery just as heinous as that of some other spies he excoriates in his book".

In a very recent decision of the House of Lords in the case of *The Lord Advocate v Scotsman Publication Ltd* [25] which concerned a book of memoirs of a member of MI6, Lord Keith emphasised that such information is by its nature damaging to national security and there is no room for close examination of the precise manner in which its revelation of any particular information would cause damage. The public interest in requiring members of the Security Services not to breach their duty of confidence overrides the public interest in the freedom of speech.

(b) Where the Government seeks to restrain the publication of information imparted in confidence it must as a general rule establish that the publication would be harmful to the public interest.

(c) That even the most sensitive defence secrets cannot expect protection in the courts even of friendly foreign countries unless there is some specific agreement or understanding to this effect.

25 [1989] 2 All ER 852.

(d) Once the information, even if imparted in confidence, has entered the public domain and thus becomes generally accessible, it can no longer be regarded as confidential and therefore ceases to be entitled to any protection.

(e) The law of confidentiality affords no protection at all outside the confines of the domestic jurisdiction. Equally criminal sanction is useless beyond those limits.

(f) There was some doubt as to whether the relationship between Mr Wright and the Crown was contractual. Maybe the Crown would have been in a happier position to preserve its security secrets if it had imposed upon members of the Service an extremely tight contractual obligation, as I believe is the position in the United States, which can thus be enforced speedily not only against the employee but against those wrongfully procuring or abetting a breach of the contract. Contractual obligation in America obliges the agent to submit for vetting what he proposes to publish:

> If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness.[26]

(g) The Attorney General sought but failed to obtain a general injunction against all three newspapers restraining them from publishing any information concerned with the *Spycatcher* allegations obtained by any member or former members of the Security Service which they know or have reasonable grounds for believing to have come from any such member or former member. The reasons for this refusal were, in the words of Lord Keith:

26 *See Snepp v United States* (1980) 444 US 507.

> Injunctions are normally aimed at the prevention of some specific wrong, not at the prevention of wrongdoing in general. It would hardly be appropriate to subject a person to an injunction on the ground that he is the sort of person who is likely to commit some kind of wrong, or that he has an interest in so doing. Then the injunction sought would not leave room for the possibility that a defence might be available in a particular case.[27]

Before concluding my observations I should perhaps refer to two related matters.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

This Convention, to which the United Kingdom Government adheres, provides in Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …

2. The exercise of these freedoms, since it carried with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

In *Sunday Times v UK,* [28] decided in 1978, the European Court of Human Rights decided by a majority of eleven to nine that there had been a violation of the Convention by reason of the judgment

27
[1988] 3 All ER 545 at 646.

28
(1979) 2 EHRR 245, European Court of Human Rights, *The Sunday Times' Case*, decision of 27 October 1978, series A30.

of the House of Lords which restrained *The Sunday Times* from publishing:

> Any article which prejudges the issues of negligence, breach of contract or breach of duty or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers … in respect of the development, distribution or use of the drug Thalidomide.

The European Court pointed out that the House of Lords applying domestic law had balanced the public interest in freedom of expression and the public interest in the due administration of justice. But the European Court:

> … is faced not with the choice between two conflicting principles but with a principle of freedom of expression which is subject to a number of exceptions which must be narrowly interpreted … It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10 which has been invoked; neither is it sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.[29]

Lord Templeman in his speech in *Spycatcher No 1 (interlocutory appeal)*[30] in commenting on the Convention said:

> My Lords, in my opinion a democracy is entitled to take the view that a public servant who is employed in the Security Service must be restrained from making any disclosures concerning the Security Service, and that similar restraints must be imposed on anybody who receives those disclosures knowing that they are confidential.
>
> There are safeguards. No member of the Secret Service is immune from criminal prosecution or civil suit in respect of his actions. Instructions from superior officers are no defence. In addition, anyone,

29
Ibid at 281, paragraph 65.

30
[1987] 3 All ER 316 at 342.

> whether public servant, newspaper editor or journalist who is aware that a crime has been committed or is dissatisfied with the activities of the Secret Service is free to report to the police in relation to crime and in other matters is free to report to the Prime Minister who is charged with the responsibility of the Security Services and to the Security Commission who advises the Prime Minister. The Security Services are not above the law. In the present case there is not the slightest evidence that these safeguards have failed. Furthermore there is nothing to prevent the press investigating all the allegations made by Mr Wright and reporting the results of their investigations to the public. It is only unlawful for the press to publish information unlawfully disclosed by Mr Wright and which may or may not be true.[31]

However, in considering whether an injunction is "necessary" within the meaning attributed to that expression by the European Court of Human Rights, one has to consider whether the restriction on freedom of expression constituted by the injunction is "proportionate to the legitimate aim pursued" as required by the European Court in the *Handyside* case.[32]

The Official Secrets Act 1989

By the date of the recent hearing of the appeal by the House of Lords in the *Scotsman Publications Ltd* case,[33] referred to above, the Official Secrets Act 1989 had been enacted[34] and will be brought into force on such date as the Secretary of State may by order appoint. This Act abolishes section 2 of the Official Secrets Act 1911 which, because it did not define the categories of official information which required the protection of the criminal law, had been the subject-matter of continual criticism. That section applied to all official information whether significant or trivial, damaging or innocent. It left it to the discretion of the prosecuting authorities and the Attorney General to decide whether to institute proceedings in any particular case. The result was that neither the public servants nor the media knew where they stood. The new Act was designed to remedy this situation.

31
Ibid, at 356.

32
Handyside v UK (1976) 1 EHRR 737.

33
The Lord Advocate v Scotsman Publication Ltd [1989] 2 All ER 852.

34
11 May 1989.

Section 1 of the Act deals specifically with security intelligence. Section 1(1), applies to members and former members of Security and Intelligence Services and notified persons whose work is connected with such Services. It prohibits them, without lawful authority, from disclosing the information, document or other article relating to security or intelligence. In section 1(5) there is a very limited defence, ie, that the security employee did not know and had no reasonable cause to believe that the information, etc, related to security or intelligence.

Sections 1(3) and 2–4, create offences which may be committed by Crown servants and Government contractors as defined in the Act if without lawful authority they make a damaging disclosure of any information, etc. relating to security or intelligence. By section 7, a disclosure by a Crown servant is made *with lawful authority* only when it is made in accordance with the official duty and a disclosure by any other person is made *with lawful authority* only if it is made in accordance with an official authorisation duly given by a Crown servant.

Section 5 deals with perhaps what might loosely be called third parties, that is to say, generally speaking, persons who are not and have not been members of the Security or Crown Services. This section makes it an offence to make an unauthorised disclosure of information protected by sections 1–4, where that information has been entrusted to the third party or comes into his possession as a result of an unlawful disclosure by a Crown servant or Government contractor. This section will thus restrict the ability of the media in future to report such revelations as in *Spycatcher.* Where an editor is charged with making an unlawful disclosure under this section, the prosecution will have the burden of proving that he knew or had reasonable cause to believe that the information in question was protected, that, where there is a test of harm,[35] the disclosure was likely to be harmful and that he knew or had reasonable cause to believe that it would be such. The Government, despite much pressure, successfully resisted the inclusion in the Act of a "public interest" defence.

35
See sections 1 to 3.

In the protection of official secrets, this Act will not only have an important part to play in the criminal but also in the civil jurisdiction. In his speech in *The Scotsman Publications* case[36] Lord Templeman had this to say:

> In my opinion the civil jurisdiction of the courts of this country to grant an injunction restraining a breach of confidence at the suit of the Crown should not, in principle, be exercised in a manner different from or more severe than any appropriate restriction which Parliament has imposed in the Act of 1989 and which, if breached, will create a criminal offence as soon as the Act is brought into force.[37]

36
Lord Advocate v Scotsman Publications Ltd [1989] 2 All ER 852, HL.

37
Ibid, at 859.