THE *SPYCATCHER* SAGA: ITS IMPLICATIONS AND EFFECT ON THE LAW OF CONFIDENCE

This article provides a discussion of the *Spycatcher* litigation in England and Australia and also attempts to highlight the grey areas in the law of confidence and to discuss the extent of clarification brought about by the case. Copyright issues are also dealt with.

I. INTRODUCTION

"Freedom of expression, despite its primacy, can never be absolute.... At any time unrestrained expression may conflict with important public or private interests.... Some balancing is inescapable. The ultimate question is always, Where has - and should - the balance be struck?"[1]

THE *A-G* v. *Guardian Newspapers Ltd. & Others (No.1*[2] *& 2*[3]*)* (hereinafter referred to as the *Spycatcher* case) involved litigation proceedings which arose out of the publication of the book entitled *Spycatcher*[4] written by Peter Wright (an ex-officer of the British security service) and published by his Australian publishers, Heinemann Publishers Australia Pty. Ltd. The question whether the British Government could restrain the publication *of Spycatcher* resulted in the Attorney General commencing proceedings for injunctions not only in England but also in Australia, New Zealand and Hong Kong.[5] In England, the case went up to the House of Lords both at the interlocutory injunction stage as well as at trial;

1 See *A-G* v. *Guardian Newspapers (No. 2) [* 1988] 3 All E.R. 545 at p. 623.

2 [1987] 3 All E.R. 316.

3 [1988] 3 All E.R. 545.

4 Peter Wright, *Spycatcher* (Stoddart, 1987).

5 In England:- at the final stage - see *A-G* v. *Guardian Newspapers Ltd. (No.2)* \ 1988] 3 All E.R. 545, at pp. 550 - 594 *(per* Scott J.); at pp. 594 - 638 (Court of Appeal); at pp. 638 - 668 (House of Lords). In Australia:- *A-G (U.K.)* v. *Heinemann Publishers Australia Ptv. Ltd.* (1987) 8 N.S.W.L.R. 341 *(per* Powell J.); (1987) 10 N.S.W.L.R. 86, (1987) 75 A.L.R. 353 (Court of Appeal of New South Wales); (1987) 75 A.L.R. 461 (High Court of Australia - Deane J.); (1988) 78 A.L.R. 449 (High Court of Australia - Full Court). In New Zealand:- *A-G (U.K.)* v. *Wellington Newspapers Ltd.* [1988] I N.Z.L.R. 129, at p. 133 (Davison C.J.); at p. 161 (Court of Appeal, interim judgment - Cooke P.); at p. 166 (Court of Appeal); see also *A-G(U.K.)v.WellingtonNewspapersLtd.(No.2)*[1988] 1 N.Z.L.R. 180(Court of Appeal, application for leave to appeal to the Privy Council - Cooke P.). In Hong Kong:- *Her Majesty's Attorney General In and For the United Kingdom v. South China Morning Post Ltd.* [1988] 1 H.K.L.R. 143 (Court of Appeal); at p. 159 (Court of Appeal, application for leave to appeal to the Privy Council - Kempster, J.A.). See also generally, F. Patfield," Spycatcher Worldwide - an Overview" [1989] 6 E.I.P.R. 201.

whilst in Australia, it went up to the High Court of Australia. The litigation proceedings which took place in these countries were complex raising a multitude of issues from confidence, copyright and fiduciary duties through to matters relating to international law in the case of the Australian litigation.

The issues raised by the English litigation covered many areas of the law ranging from the law of confidence to the law of copyright and official secrets legislation. It also involved issues of freedom of speech and freedom of the press. These multi-faceted issues are separate, and yet in a sense they could be said to be interlocking, for example, the freedom of speech issues raised are in fact useful in structuring the public interest element both in the law of confidence and the law of copyright and thus, interlocks the two.

Although the law of confidence and the law of copyright have been in existence for a long time, there are many grey areas left, especially in the case of an action for breach of confidence. This article will seek to discuss the extent to which the *Spycatcher* case has clarified some of these grey areas and whether it has developed and advanced the law of confidence and the law of copyright, or whether it is just a simple case of the application of the existing law to the facts of the case. It will also deal with the question of when government information can be protected by the law of confidence, when a government employee can reveal confidential government information and when relief can be sought by the Crown against third parties who were not involved in the wrongful publication of the confidential information. The issue of the ownership of the copyright in the book *Spycatcher* will also be discussed.[6] This article will deal only briefly with the Australian proceedings and its main focus will be on the proceedings in England. The article will set out a summary of the main features of the Australian litigation and will then proceed to look at the various decisions of the English courts. It is then proposed to break off from *Spycatcher* to look at some general background issues relating to the law of confidence. Attempts will be made to highlight the grey areas and to discuss the extent of clarification brought about by the *Spycatcher* case.[7] Finally, the article will return to the *Spycatcher* case[8] to assess the decision on the issues raised in the light of the general discussion of the law of confidence. Copyright issues will also be looked at.

The *Spycatcher* case is a decision of the House of Lords in England and is therefore not binding on the Singapore courts. It does, however, carry great persuasive authority in Singapore given the general reception of the English Common Law and the rules of Equity into Singapore. It is trite law that the Second Charter of Justice which was issued on the

[6] Issues relating to the Official Secrets Acts will not be discussed since they were not relied on in the English proceedings. See generally, the Official Secrets Acts 1911 to 1939 (U.K.); see also the Official Secrets Act 1989 (U.K.) which came into force on 1st March 1990.

[7] This article, in its discussion of the *Spycatcher* case, will concentrate on the decisions made by the courts at trial and not the decisions made at the interlocutory stage.

[8] See *supra* note 3.

27th November 1826 imported the English common law, including the law of confidence, into Singapore.[9] Whilst there are no local decisions discussing the general nature of the cause of action, it is submitted that with one exception, it is unlikely that there will be any significant divergence in the development in this area of the law. For this reason, the observations of their Lordships in the *Spycatcher* case on actions for breach of confidence will be of relevance to Singapore and it is on this basis that this article is written.

The exception where there is a possible area of divergence between Singapore and England relates to the court's jurisdiction to grant equitable damages in actions for breach of confidence. If the jurisdictional basis of the law of confidence is equity, then the question will arise in Singapore as to whether the Singapore courts have jurisdiction to grant equitable damages in the absence of a Singapore equivalent to the English Lord Cairns' Act 1858, which gave the English courts jurisdiction to grant damages in lieu of or in addition to an injunction.[10] On the other hand, if the jurisdictional basis of the law of confidence is contractual or tortious then the grant of damages for breach of confidence would pose less of a problem, since the Singapore courts have jurisdiction to award damages at law for breach of contract and for tort.[11]

In the case of copyright, Singapore's copyright laws are currently to be found in the Copyright Act 1987. This Act is based on the Australian Copyright Act 1968. The basic principles of copyright law in Singapore are the same as those found in Australia and England and accordingly, the copyright aspect of the *Spycatcher* litigation will also be of relevance in Singapore.

II. FACTS AND LITIGATION HISTORY[12]

Peter Wright was a senior ex-officer of the British security service, M15, employed by the counter-espionage branch of the security service. He

9 For a more detailed discussion on the applicability of English law in Singapore, see W. Woon, "The Applicability of English Law in Singapore", in W. Woon (Ed.), *The Singapore Legal System* (1989), chapter 4; H. Chan, *An Introduction to The Singapore Legal System* (1986), chapter I; G.W. Bartholomew, "English Law *In Partibus Orientalium"* and Soon Choo Hock and A. Phang, "Reception of English Commercial Law in Singapore - A Century of Uncertainty", chapters 1 and 2 respectively in A.J. Harding (Ed.), *The Common Law in Singapore and Malaysia* (1985).

10 Thean J. in *Shiffon Creations (S'pore) Pte. Ltd. v. Tong Lee Co. Pte. Ltd.* \ 1988] I M.L.J. 363 held that the Singapore courts did not have the equitable jurisdiction conferred by Lord Cairns'Act to award damages in lieu of specific performance. For a discussion on this issue, see K.B. Soh, "Jurisdiction to Award Equitable Damages in Singapore", (1988) 30 Mal. L.R. 79. See, however, *Day* \. *Mead* [1987] 2 N.Z.L.R. 443 at p. 450, where Cooke P. in the New Zealand Court of Appeal stated that:- "In this court it has been accepted that, independently of Lord Cairns' Act, damages or equitable compensation can be awarded for past breaches of a duty deriving historically from equity ...."See *also Aquaculture Corporation v. New Zealand Green Mussel Co. Ltd (No. 2)* (1990) (unreported) (Court of Appeal).

11 See *Shiffon Creations* v. *Tong Lee, supra* note 10.

12 See the judgment of Scott J. in *A-G* v. *Guardian Newspapers* (*No. 2*), *supra* note 3, for a detailed account of the facts.

had access to highly classified and highly sensitive information. Upon his retirement from the security service in 1976 he went to live in Tasmania, Australia. He proposed to publish his memoirs in Australia, in a book entitled *Spycatcher,* describing his experiences in the security service, thus disclosing the secrets of MI5 and its espionage activities. These were information obtained by him in his capacity as an officer of the security service. The Attorney General in right of the Crown, upon learning of the intended publication of *Spycatcher* in Australia, applied for an injunction in New South Wales in 1985 against Peter Wright and his Australian publishers, Heinemann Publishers Australia Pty. Ltd. (hereinafter referred to as Heinemann), to restrain the publication of the book in Australia and/or an account of profits.[13]

On the 22nd and the 23rd June 1986, the Observer and the Guardian newspapers in England respectively, published articles on the forthcoming court hearing in Australia which included an outline of some of the more newsworthy allegations made by Peter Wright in his book *Spycatcher.* On the 11th July 1986, Millett J. granted the Crown an interlocutory injunction, subject to three provisos,[14] restraining the Observer and the Guardian newspapers from publishing or disclosing any information obtained by Peter Wright in his capacity as a member of MI5. On the 25th July 1986, the Court of Appeal dismissed an appeal from the judgment of Millett J. but slightly modified the injunctions.

On the 27th April 1987, 'The Independent' newspaper and two other newspapers, which had not been parties to the 1986 proceedings, also published articles describing some of the more sensational allegations from Peter Wright's memoirs. The Attorney General brought proceedings against these newspapers for contempt of court.[15]

On the 4th June 1987, the Sunday Times newspaper purchased from Heinemann the right to serialise the book *Spycatcher* in their newspaper. On the 12th July 1987, the Sunday Times, having purchased the

[13] See the summary of the Australian proceedings below.

[14] See *supra* note 3 at p. 553.

[15] See *Attorney General* v. *Newspaper Publishing plc. & others* [1987] 3 All E.R. 276 where the Attorney General moved to commit the three defendant newspapers, the Independent, the London Evening Standard and the London Daily News, for contempts of court on the grounds that their actions in publishing the articles were calculated to frustrate the Millett injunctions and render them worthless. Sir Nicolas Browne-Wilkinson V-C on a preliminary issue of law held that the publication in 'The Independent' and the two London evening newspapers were not in contempt of court since there were no injunctions restraining their publication and they were not party nor privy to the injunctions against the Observer and the Guardian newspapers. The Attorney General appealed to the Court of Appeal. The Court of Appeal, upon the preliminary issue, allowed the Attorney General's appeal. The matter was remitted to the High Court where Morritt J. (The Times May 9, 1989; [1989] F.S.R. 457) held that the publishers and the editors of The Independent and the Sunday Times were guilty of contempt of court and were fined. They appealed to the Court of Appeal. The Court of Appeal (The Times February 28, 1990) dismissed their appeal and held that they were in contempt of court. However, due to the exceptional circumstances of the case, no penalty was imposed for the contempt. See also *Attorney General* v. *Observer Ltd. Re an application by Derbyshire County Council* [1988] 1 All E.R. 385 where a county council applied to the court for guidance on the lawfulness of some of its activities, one of which is whether making available to the public in its public libraries copies of the book *Spycatcher* would constitute a lawful activity.

serialisation rights from Heinemann, published, under licence, the first extract of the intended serialisation. On the 13th July 1987, the Attorney General commenced proceedings against the Sunday Times for contempt of court. The Attorney General obtained interlocutory injunction in England restraining Sunday Times from publishing further extracts from the book pending trial.

On or about the 13th July 1987,[16] *Spycatcher* was published in the United States and was on sale in bookshops throughout the United States. In the light of the United States publication and dissemination of *Spycatcher,* the Observer and the Guardian newspapers applied to discharge the Millett injunctions on the grounds that the injunctions could no longer serve "any legitimate or useful purpose and so ought to be discharged."[17] The question of whether the interlocutory injunctions ought to be discharged went up to the House of Lords, where their Lordships, by a majority decision, held that the injunctions should remain pending trial.

In the meantime, the publication and dissemination of *Spycatcher* continued worldwide. The book was published in Australia on the 13th October 1987. It was advertised for sale in various English newspapers and periodicals. A large number of copies of *Spycatcher* had been imported into the United Kingdom. The Attorney General had not taken any steps to prohibit the importation of *Spycatcher* into the United Kingdom because it was felt to be impracticable and undesirable.[18] Anyone who wanted a copy of *Spycatcher* could order one from the United States booksellers. The case finally came to trial and once again found its way up to the House of Lords. Their Lordships dismissed the appeal by the Attorney General and discharged the interlocutory injunctions restraining further publication.

1. *The Flavour of Spycatcher*

The *Spycatcher* purports to be Peter Wright's memoirs of his twenty years of service with MI5, a secret service, whose efficiency depends on its operations, affairs and its personnel being kept secret. In the book, Peter Wright names his colleagues and individuals in the C.I.A. and the F.B.I, whom he had dealings with. He also described the dealings MI5 had with purported defectors from the Soviet security agencies. The book also described the operational techniques used by MI5. Peter Wright also wrote about the alleged "naughty things" which were carried out by the "MI5's dirty tricks department"[19]. These included electronic surveillance, by means of hidden microphones, of foreign embassies in London and the bugging of telephones. Other allegations made in the book included the following:-

16 [1988] 3 All E.R. 545 at p. 555, Scott J. stated that the *Spycatcher* went on sale in bookshops throughout the United States. However, Lord Keith stated, at p. 638, that the *Spycatcher* had been published in the United States of America on the 14th July 1987.

17 *Supra* note 3 at p. 555.

18 See *supra* note 3 at pp. 558 and 638.

19 See *supra* note 3 at p. 607.

(i) that certain members of MI5 plotted an attempt to destabilise the Wilson government;

(ii) that the head of the British Secret Service was a Russian spy, that is, that either Sir Roger Hollis, the ex-director general of MI5 or Graham Mitchell, the ex-deputy director general, was a Soviet agent;[20]

(iii) an alleged plot to assasinate President Nasser of Egypt;[21]

(iv) the allegation that Guy Burgess, a Soviet spy, unsuccessfully attempted to seduce Winston Churchill's daughter on Soviet instruction.[22]

By the time the trial proceedings reached the House of Lords in the middle of 1988, *Spycatcher* had been distributed worldwide and was in circulation throughout the free world.[23] The Danish radio broadcasted, in English, about ten pages of the book on the 14th August 1987 and it could be heard in the United Kingdom. The Swedish radio also broadcasted, in English, extracts from the book. Peter Wright had also granted translation rights in 12 languages.[24] The press round the world had been commenting on the book. Furthermore, the proceedings of the trials in Australia, New Zealand and Hong Kong had been publicised.[25]

2. The Parties

It is worth noting that neither Peter Wright nor Heinemann were parties to the *Spycatcher* litigation in England.[26] The parties to the litigation were the Attorney General and the three newspapers, the Observer, the Guardian

20 *Supra* note 3 at p. 559.
21 See *supra* note 3 at pp. 587 and 635.
22 See *supra* note 3 at pp. 587 and 619.
23 The following is a short summary, taken from the judgment of Scott J. in A-G v. *Guardian Newspapers (No.2)* (see *supra* note 3 at p. 558), of the number of the book *Spycatcher* distributed and disseminated worldwide. Extensive publication and distribution took place in the United States and Canada. In the United States, 715,000 copies were printed by the end of October 1987. Virtually all have been sold. In Canada, 100,000 copies were printed by the 27th October 1987. Heinemann Publishers Australia Pty. Ltd. printed 145,000 copies of the book for sale in Australia. The book went on sale in Australia on the 13th October 1987. Heinemann printed 20,000 copies in Dublin and the book went on sale in Ireland on the 12th October 1987. A further 10,000 copies were printed in Dublin. The *Spycatcher* has also been distributed in Europe as follows:- Holland - 30,000 copies; Germany - 10,000 copies; Malta - 2,000 copies; Cyprus - 1,000 copies; Norway - 500 copies. Some copies of the *Spycatcher* which were printed in Australia were distributed to Asian cities as follow:- Malaysia — 1,000 copies; Hong Kong - 750 copies; Japan - 500 copies; Indonesia - 250 copies; Pakistan - 250 copies. About 1,000 copies of the book were sent to South Africa for distribution.
24 Translation rights had been granted in the following languages:- Japanese, Spanish, Catalan, French, German, Swedish, Italian, Danish, Icelandic, Dutch, Finnish and Portuguese. See *supra* note 3 at p. 558.
25 See *supra* note 3 at p. 631.
26 As Scott J. in *A-G* v. *Guardian Newspapers (No.2), supra* note 3 at p. 552, stated, "... the defendants before me are the newspapers, not Mr. Wright."

and the Sunday Times. However, the position of the three newspapers were not identical. The Sunday Times purchased the United Kingdom serialisation rights from Heinemann for a down payment of twenty five thousand pounds with further payments up to a maximum of one hundred and fifty thousand pounds. The first instalment of the intended serialisation was, therefore, published by the Sunday Times, on the 12th July 1987, under licence from Peter Wright's Australian publishers, Heinemann. The Attorney General's action against the Sunday Times was for contempt of court.

The Observer and the Guardian newspapers, on the other hand, merely reported, on the 22nd and the 23rd June 1986 respectively, on the forthcoming court hearing in Australia and included an outline of some of the allegations made by Peter Wright in the book *Spycatcher.* They did not enter into any licencing agreement with Heinemann or Peter Wright. The action by the Attorney General against these two newspapers was based on the law of confidence and trade secrets.

The Attorney General, therefore, brought actions against the three newspapers seeking permanent injunctions restraining them from publishing further information from Peter Wright. In relation to the Sunday Times an account of profits made by them from the serialisation of the book was also sought. The Attorney General also sought a general injunction restraining future publication of information derived from Peter Wright or other members or ex-members of the security service.

The *Spycatcher* litigation in England involved three main proceedings. They were as follows:-

(i) the interlocutory proceedings, where the courts had to determine how to preserve the status quo pending trial;[27]

(ii) the contempt proceedings against the Independent and two other newspapers which concerned the effect of the injunctive orders on third parties;[28]

(iii) the final stage, which involved the final determination of the legal rights and duties of all the parties.[29]

This article will be dealing primarily with the proceedings in England against the Observer, the Guardian and the Sunday Times newspapers which involved issues relating to confidence and copyright. Elsewhere, in Australia, issues pertaining to international law were also raised. Given

[27] See *A-G* v. *Guardian Newspapers Ltd., supra* note 2. This ended in the House of Lords on the 30th July 1987.
[28] See *A-G* v. *Newspaper Publishing Ltd., supra* note 15. See also *A-G* v. *Observer Ltd. Re an application by Derbyshire County Council, supra* note 15, on the position of public libraries making copies of *Spycatcher* available to the public.
[29] See *A-G* v. *Guardian Newspapers (No.*2), *supra* note 3.

that the *Spycatcher* Saga has its origins in Peter Wright's desire to publish the book in Australia, it may be appropriate to set out a short discussion of the Australian litigation.

III. THE AUSTRALIAN LITIGATION

The litigation proceedings which took place in Australia in *Attorney General (U.K.) v. Heinemann Publishers Pty. Ltd.*[30] went up to the High Court of Australia. The Attorney General (U.K.)'s claim for an injunction and an account of profits in relation to the publication of *Spycatcher* failed in all three Australian courts.[31]

1. *The Facts*

In 1985, the Attorney General (U.K.) commenced proceedings in New South Wales against Peter Wright and his Australian publishers, Heinemann, to restrain publication of the memoirs by injunction and/or an account of profits and other consequential relief. Pending the trial in Australia, an order was made that "neither Mr. Wright nor his publishers, nor any servant or agent of theirs, should make any such disclosure."[32]

2. *The Decisions*

(a) *Supreme Court of New South Wales - Powell J.*

The trial of the New South Wales action commenced on the 17th November 1986. At first instance, the Attorney General (U.K.)'s action in the Supreme Court of New South Wales was dismissed by Powell J."[33] The learned judge refused to grant the Attorney General (U.K.) an injunction to restrain the publication of *Spycatcher* on the grounds that much of the information in the book was already available to the public, that is, it had entered into the public domain, and thus, no longer retained the necessary quality of confidence. The publication *of Spycatcher* would, therefore, not cause any detriment to the British Government or its security service.[34] The Attorney General (U.K.) appealed to the Court of Appeal of New South Wales.

30 (1987) 8 N.S.W.L.R. 341 (Powell J.); (1987) 75 A.L.R. 353, (1987) 10 N.S.W.L.R. 86 (Court of Appeal of New South Wales); (1987) 75 A.L.R. 461 (High Court of Australia- Deane J.); (1988) 78 A.L.R. 449 (High Court of Australia - Full Court).

31 The Attorney General (U.K.)'s claim failed in all three Australian courts, namely, the Supreme Court of New South Wales before Powell J.; the Court of Appeal of New South Wales by majority, Sir Lawrence Street, the Chief Justice of the Court of Appeal of New South Wales gave a powerful dissent and the High Court of Australia (Full Court). See *ibid.*

32 *Supra* note 3 at p. 599.

33 *A-G (U.K.)* v. *Heinemann Publishers Pty. Ltd.* (1987) 8 N.S.W.L.R. 341.

34 See *A-G (U.K.)* v. *Heinemann Publishers Australia Pty. Ltd.* (1988) 78 A.L.R. 449 at p. 450. See generally, M. Blakeney," Protecting the Secrets of a Foreign Government: *Spycatcher* in Australia" (1988) 4 I.P.J. 103.

(b) *Court of Appeal of New South Wales*

On the 24th September 1987, the Supreme Court of the New South Wales Court of Appeal, by a majority decision of two judges to one, dismissed the Attorney General (U.K.)'s appeal.[35] The majority consisted of Kirby P. and McHugh J.A. The Chief Justice of New South Wales, Sir Lawrence Street, gave a forceful dissent.

Kirby P. classified the action by the British Government as a claim by a foreign sovereign power to enforce a penal statute, namely, the Official Secrets Acts of England and as such it was not justiciable in an Australian court. The learned judge therefore, treated the Attorney General (U.K.)'s case as one dealing with the assertion of a public right and not an assertion of a private right. As the learned judge put it:-

> "I have no doubt that the action is one, directly or indirectly, for the enforcement of the public law of secrecy imposed by the statutes, common law and prerogative in the United Kingdom upon officers and former officers of the security services of that country, including MI5."[36]

Kirby P. then went on to say that:-

> "It is not so much a denial of relief in the exercise of the undoubted jurisdiction of the Court for reasons of a higher, competing public policy. Rather, it is the denial of relief because the Court has no jurisdiction (or does not by private international law afford its jurisdiction to a foreign state) to enforce foreign public law in this country."[37]

McHugh J.A. also held that the British Government's action was non-justiciable. However, the learned judge's ruling was on the public policy grounds that the Australian court could not determine the public interest of a foreign country. McHugh J.A. stated that:-

[35] *A-G (U.K.)* v. *Heinemann Publishers Australia Pry. Ltd.* (1987) 10 N.S.W.L.R. 86; (1987) 75 A.L.R. 353. See generally, M. Blakeney, "Attorney-General (U.K.) v. Heinemann Australia & Wright-Smiley Down Under- 'Spycatcher' in Australia" [1988] l E.I.P.R. 21; M. Blakeney. "Protecting the Secrets of a Foreign Government: *Spycatcher* in Australia" (1988)4 I.P.J. 103.

[36] *A-G (U.K.)* v. *Heinemann Publishers Australia Pty. Ltd.* (1987) 10 N.S.W.L.R. 86 at p. 140. The learned judge continued, *ibid.* at p. 143, that:- "... This is a 'public law' of the United Kingdom ... it is a law of the same genus as the penal and revenue Acts which will not be enforced in the courts of a foreign sovereign."

[37] *Ibid.* at p. 144. Kirby P. further stated, *ibid.* at p. 181, that:- "It has long been a rule of private international law that a foreign country cannot use the courts of another independent country to enforce its penal laws. Lately that rule has been broadened to the principle that the courts of one country do not have jurisdiction to enforce the penal or other public laws of another. When the true nature of the claim by the United Kingdom in this case is analysed, it is not that of a private claim by an ordinary foreign litigant to enforce, in Equity, the dictates of conscience upon the conduct of Mr. Wright as a person breaching his duty of secrecy. It is, instead, an impermissible effort by the United Kingdom Government to exert in Australia, ... the sovereign power of the United Kingdom exerted against a former security agent. The courts of England have long held that they will not lend their jurisdiction to this end. So should the courts in this country."

> "… as there was no contract between the parties, the Attorney-General could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom and that the courts of this country will not hear an action which requires them to make such a judgment."[38]

Street C.J., the dissenting judge, sustained the British Government's right to protect its confidential information in Australia. The learned Chief Justice said that:-

> "The public right of the United Kingdom or Australian Government, or of a public organ under the Government, to protect its confidential information is not based on doctrines of contract or of equity. It is a right of a different character, deriving from the entitlement of a state and its organs to protection against harm to the public interest if such information be disclosed."[39]

He agreed that "ordinarily a foreign government [would] not be allowed access to the courts of this country to enforce such a claim."[40] However, the difficulty was overcome in the case at hand by the "key to the door" being provided by the support of the Australian Government. Thus, Street C.J. would have come to the same conclusion as Kirby P. but for the fact that he regarded the claim as justiciable in Australia because the Australian Government supported the Attorney General (U.K.)'s case on the ground that disclosure would harm Australian public interest. The Attorney General (U.K.) then applied for leave to appeal to the High Court of Australia.

On the 29th September 1987, Deane J. in the High Court of Australia declined to grant temporary injunctions pending the hearing of the application for leave.[41] Therefore, since that day there has been no impediment obstructing the publication *of Spycatcher* or the disclosure of its contents in Australia. On the 13th October 1987, the book was published in Australia.

38 *Ibid.* at pp. 184-185. McHugh J.A. continued, *ibid.* at p. 196, that:- "When a foreign government brings an action in the exclusive jurisdiction of Equity to restrain the publication of confidential government information, I think that the court must refuse to entertain the action. The action cannot be resolved without the court determining whether the publication is in the public interest of that foreign country. And I think that it would be against the interests of Australia for one of its courts to determine that issue in a suit brought in Australia by a foreign government. The courts of Australia are part of the machinery of the government of Australia. With the legislature and the executive, they share the burden of exercising the public power of the nation. Decisions by the courts of this country that particular acts or publications are or are not in the public interest of other countries would constitute a fertile source of embarrassment for the relations of Australia with those countries.... But to the question, what does principle and policy require a court to do when a foreign government brings a claim for breach of a purely equitable obligation of confidence, there can, I think, be only one answer. The court will not entertain the claim. It will not make a determination that an act or publication is or is not contrary to the public interest of another country. Of course, a claim such as the present may fail on other grounds. But it cannot succeed without a determination that the publication was detrimental to the public interest of the foreign nation. Consequently, the court will protect the public interest of Australia by refusing to determine the issue."

39 *Ibid.* at p. 92.

40 *Ibid.* at p. 92.

41 *A-G (U.K.)* v. *Heinemann Publishers Australia Pty. Ltd.* (1987) 75 A.L.R. 461.

(c) *The Decision of the High Court of Australia*

On the 2nd June 1988, the High Court of Australia dismissed the Attorney General (U.K.)'s appeal[42] and unanimously refused the Attorney General (U.K.) injunctive relief. Brennan J. agreed with the result of the majority but he adopted a slightly different approach from the other justices. He held that the Australian court should refuse to enforce an obligation of confidence in an action brought for the purpose of protecting the intelligence secrets and confidential political information of a foreign government since it would be contrary to the public policy of the forum State to enforce the obligation.

Mason C.J., Wilson, Deane, Dawson, Toohey and Gaudron JJ. held that the Attorney General (U.K.)'s claim to enforce the governmental interests of a foreign State was unenforceable in Australia. The learned justices stated as follows:-

> "… the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign State. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service as 'part of the defence forces of the country.' The claim for relief … arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of the national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable… In any event the principle of law renders unenforceable actions of a particular kind. Those actions are actions to enforce the governmental interests of a foreign State."[43]

The six justices were of the view that the Attorney General (U.K.)'s claim was a claim to enforce public, as oppose to private, obligations. They held that the action was to be characterised by "reference to the substance of the interest sought to be enforced, rather than the form of the action ... the appellant's central interest in bringing the action ... is to ensure the continued secrecy of the operations of the British Security Service by enjoining disclosure of information relating to those operations and by discouraging revelations by others."[44]

With due respect, it is questionable whether the court was right in treating the Attorney General (U.K.)'s claim as being dependent on an assertion of public right and not an assertion of private right like those which an ordinary employer might have against his employee. The High

[42] *A-G (U.K.)* v. *Heinemann Publishers Australia Pty. Ltd.* (1988) 78 A.L.R. 449.

[43] *Ibid.* at p. 460. See also Dicey and Morris, *The Conflict of Laws* (11th ed., 1987) at p. 100 where the principle was stated in Rule 3 as follows:- " English courts have no jurisdiction to entertain an action ... for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State...." On the 'Exclusion of Foreign Law', see generally, Dicey and Morris, *ibid.* chapter 6 and Chesire and North, *Private International Law* (11th ed., 1987) chapter 8.

[44] *Supra* note 42 at p. 459.

Court appeared to have placed too much significance on the fact that Peter Wright was bound by the Official Secrets Acts. Peter Wright was an ex-employee of the British Security service and as such he would have owed an obligation of confidence to his employers, the British Crown, regardless of the provisions of the Official Secrets Act. The Crown could still have proceeded against Peter Wright under the law of confidence even if there was no official secrets legislation since an obligation of confidence can be imposed on a recipient of confidential information based on broad equitable principles of good faith.

If this approach is correct, then the British Government's claim would not be simply one to enforce governmental interests but would also be analogous to an action to enforce the obligations of confidentiality which an employee owes to his employer. As F.A. Mann puts it, the foreign governmental interest arguments do not apply to the claim against Peter Wright, "since this is based on a servant's undoubted duty of confidentiality; the fact that the employer was the Crown and the employment was in the secret service is in law fortuitous."[45] Cooke P. in *A-G for U.K.* v. *Wellington Newspapers*[46] in the New Zealand Court of Appeal was of the view that "an employer other than the State would presumably not be barred by the rule from enforcing abroad an obligation of confidentiality arising from the employment."[47] Cooke P. treated the law of State secret as part of the private law of confidentiality where the "duty is implicit in the relationship" rather than to treat it as part of the foreign governmental claim. He stated that "the action could not be described as merely an attempt to enforce a United Kingdom criminal or penal law in the shape of the Official Secrets Act ... the duty of confidentiality must subsist apart from the 1911 statute...."[48] However, since the party seeking to enforce the obligation of confidentiality in the present case was a foreign government, that is, the British Crown, Cooke P. adopted an approach similar to that of Street CJ. in the Court of Appeal of New South Wales and held that the support of the New Zealand Government was necessary before the New Zealand courts would entertain the claim. Thus, he appeared to treat a foreign governmental claim as a mixture of a claim under the private law of confidence and a claim in public law.[49]

Apart from the issue of whether a local court would enforce a foreign penal or other public law, the High Court of Australia also dealt with the question of whether the Australian courts could determine what damage had been or would be caused by the disclosure, including any detriment to the public interest. The High Court held that it did not have the power since :-

45 See F.A. Mann, "Spycatcher in the High Court of Australia", (1988) 104 L.Q.R. 497, where the author criticised the approach taken by the High Court of Australia. See also M. Turnbull, *The Spy Catcher Trial* (1988); M. Turnbull, (1989) 105 L.Q.R. 382; F.A. Mann, (1989) 105 L.Q.R. 145.

46 [1988] 1 N.Z.L.R. 129, at pp. 166 - 179 (Court of Appeal).

47 *Ibid.* at p. 174.

48 *Ibid.* at p. 173.

49 See F. Patfield, "Spycatcher Worldwide - an Overview" [1989] 6 E.I.P.R. 201.

> "Such an inquiry might require an Australian court to resolve an issue which it could not appropriately entertain or competently determine, namely, what was, on balance, in the public interest of the foreign State."[50]

The New Zealand courts appeared not to have the same difficulty. In relation to the question of the public interest of the United Kingdom, Cooke P. agreed with McHugh J.A. in the Court of Appeal of New South Wales that it was not possible for the New Zealand courts to determine the public interest of another country. However, he disagreed with McHugh J.A. that the action was therefore non justiciable. Cooke P. held that the British Government, when supported by the New Zealand Government, were entitled to have their claim dealt with on its merits. In relation to a claim by a friendly foreign Government to enforce confidentiality, the New Zealand courts will grant the relief sought if the foreign government can show that the information is *prima facie* confidential and that the New Zealand public interest will not run contrary to it. Thus, in an appropriate case the New Zealand law would protect the secrets of friendly foreign Governments.

The High Court of Australia, however, found it unacceptable that effective access to the courts should depend on a decision of the Executive. The Court was of the view that "so far as friendly States are concerned, the remedy, … is to be found in the introduction of legislation."[51]

The question of whether the book *Spycatcher* had passed into the public domain by reason of the fact that copies of the book was widely available was dealt with by Powell J. in the Supreme Court of New South Wales, but it received only passing attention in the High Court of Australia. The High Court of Australia was more concerned with the question of whether the Australian courts should enforce a claim by a foreign Government in relation to the protection of foreign governmental secrets and treated the Attorney General (U.K.)'s claim as one dealing with the enforcement of public obligations as oppose to the enforcement of the private law of confidence.

Lord Keith of Kinkel in the House of Lords in *A-G* v. *Guardian Newspapers (No. 2)* pointed out that:-

> "The case has also served a useful purpose in bringing to light the problems which arise when the obligation of confidence is breached by publication abroad. The judgment of the High Court of Australia … reveals that even the most sensitive defence secrets of this country may not expect protection in the courts even of friendly foreign countries...."[52]

[50] *Supra* note 42 at p. 458. See, generally, J.G. Starke, "High Court's decision in the 'Spycatcher' Case" (1988) 62 A.L.J. 579.
[51] *Supra* note 42 at p. 461. This view was also criticised by F.A. Mann in his article entitled "*Spycatcher* in the High Court of Australia", *supra* note 45.
[52] See *ante* note 3 at p. 646.

Lord Keith then went on to suggest that:-

> "Consideration should be given to the possibility of some international agreement aimed at reducing the risks to collective security involved in the present state of affairs.... Some degree of comity and reciprocity in this respect would seem desirable in order to promote the common interests of allied nations."[53]

As we turn our attention away from Australia towards England, so too would the flavour of the *Spycatcher* litigation change. The courts in England were not concerned with the conflict of laws issues on the enforcement of a foreign penal or other public law, neither were they concerned with the adjudication of the public interest of another country. They were concerned mainly with the private law of confidence and trade secrets and the determination of the rights and duties of the parties involved under the law of confidence.

IV. THE LITIGATION PROCEEDINGS IN THE ENGLISH COURTS

The litigation proceedings which took place in England will be dealt with in two parts. The first part will discuss the interlocutory proceedings which went up to the House of Lords and the second part will deal with the final determination of the rights and duties of the parties, which also found its way up to the House of Lords.

1. *The Interlocutory Stage*[54]

(a) *The Decisions of the Courts Before the United States Publication of Spycatcher on the 13th July 1987.*

On the 27th June 1986, Macpherson J. granted the Attorney General *ex parte* interlocutory injunctions against the Observer and the Guardian newspapers for the publication of their articles, on the 22nd and the 23rd June 1986 respectively, on the then forthcoming court hearings in Australia, which included some of the allegations made by Peter Wright in his then unpublished manuscript.

On the 11th July 1986, Millett J. *inter panes* granted the injunctions in modified form, subject to three provisos,[55] against the Observer and the Guardian newspapers restraining them from publishing or disclosing information obtained by Peter Wright in his capacity as a member of MI5.

[53] *Ibid.*
[54] See *A-G* v. *Guardian Newspapers Ltd., ante* note 2. For a discussion of the facts of the case, see above under the heading of 'Facts and Litigation History'. The purpose of this part of the article is to provide a summary of the decisions of the various courts at the interlocutory stage. See also R.G. Hammond, "The Wright Case - Wrong Answer?", (1988) 4 I.P.J. 87; D.G.T. Williams, "To Catch A Spy", (1988) 47 C.L.J. 2.
[55] For a discussion of the three provisos, see the judgment of Scott J. in *A-G* v. *Guardian Newspapers, ante* note 3 at p. 553.

On the 25th July 1986, the Court of Appeal dismissed an appeal from the judgment of Millett J. but slightly modified the injunctions. It is worth noting that at this point in time, the *Spycatcher* was still in manuscript form although some of its contents had already been disclosed by the two newspapers in their publications. However, the contents of the book as a whole was not in the public domain.

On the 13th July 1987, the Attorney General commenced contempt proceedings against the Sunday Times newspapers for their publication of the first instalment of the intended serialisation of *Spycatcher* under licence from Peter Wright's Australian publishers, Heinemann. On the same day, *Spycatcher* was published in the United States and was from then on sale in bookshops throughout the United States.

(b) *The Decisions of the Courts made after the United States Publication of Spycatcher.*

On the 15th July 1987, in the contempt proceedings brought by the Attorney General against The Independent, the London Evening Standard and the London Daily News in *Attorney General* v. *Newspaper Publishing*[56], the Court of Appeal, upon the preliminary issue, reversed the decision of Sir Nicolas Browne-Wilkinson V-C and held that the Independent's article of the 27th April 1987 was capable of being in contempt of court. The Court of Appeal judgment, therefore, had the effect of extending the application of the Millett injunction to all newspapers and, thus, bind all media communications. The matter was then remitted to the High Court for the applications to be heard. On the 8th May 1989, Morritt J.[57] held the Independent and the Sunday Times newspapers in contempt of court and imposed fines on them. On the 27th February 1990, the newspapers' appeals to the Court of Appeal were dismissed and they were found guilty of contempt of court but no penalty was imposed for the contempt.[58]

In the light 6f the United States publication and its consequences, the availability of *Spycatcher* in the United Kingdom and the disclosures of some of the allegations contained in the book in other newspapers, the Observer and the Guardian newspapers applied to discharge the Millett injunctions on the ground that there had been a significant change of circumstances. Thus, it was argued that the injunctions which were originally granted to preserve the confidentiality of the information contained in *Spycatcher* could no longer serve any legitimate or useful purpose and therefore, ought to be discharged. The Sunday Times enjoyed a right to be heard in the application for the discharge of the injunctions because they were also effectively bound by those injunctions in the light of the Court of Appeal's decision, upon the preliminary issue, *in Attorney General* v. *Newspaper Publishing.* For convenience, the court blended the actions against the three newspapers together.

[56] *Supra* note 15.
[57] *Ibid.*
[58] *Ibid.*

(i) *The Decision of the Court of First Instance:-* On the 22nd July 1987, Sir Nicholas Browne-Wilkinson V-C discharged the Millett injunctions made against the Observer and the Guardian newspapers and dismissed the application to commit the Sunday Times for contempt of court on the ground that once the information had passed into the public domain and was freely available, the grant of the interlocutory injunction would serve no further useful purpose. The Vice-Chancellor was of the view that:-

> " The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial. Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all. It is an old maxim that equity does not act in vain."[59]

The Attorney General appealed to the Court of Appeal.

(ii) *The Decision of the Court of Appeal:-* On the 24th July 1987, the Court of Appeal unanimously allowed the Attorney General's appeal. The Court however, modified the Millett injunction with a proviso to allow 'the publication of a summary in very general terms of the allegations' made by Peter Wright. The Court was of the view that this would enable the newspapers to report and comment on the contents of *Spycatcher* while preventing them from lining the pockets of Peter Wright by serialising the book.

Sir John Donaldson M.R.[60] was of the view that although the publication of *Spycatcher* itself would have disclosed the information, whether true or false, about the security service such that the original purpose of the Millett injunctions which was the 'actual protection of national secrets' could no longer be served, nevertheless, the Attorney General had an arguable case at the interlocutory stage that further publication would damage the British security service and thus, by maintaining the interlocutory injunctive relief, the secondary object of the injunctions, to prevent further damage to the British security service, could be achieved.

The Observer, the Guardian and the Sunday Times newspapers appealed to the House of Lords and the Attorney General cross-appealed against the variation of the injunctions.

(iii)*The Decision of the House of Lords*:- On the 30th July 1987, the House of Lords, by a majority of three to two, dismissed the appeals by the newspapers and also allowed the cross-appeal by the Attorney General. Their Lordships were of the view that the modified injunction

[59] See *A-G* v. *Guardian Newspapers, ante* note 2 at p. 332.
[60] See *A-G* v. *Guardian Newspapers, ante* note 2 at p. 338.

recommended by the Court of Appeal of allowing 'a summary in very general terms' of the allegations made by Peter Wright was too imprecise and unworkable. The majority of their Lordships also felt that the proviso to the Millett injunction, of allowing the reporting of the open court proceedings in Australia, should be deleted in order to ensure that no further publication of extracts from *Spycatcher* would be carried out. Thus, not only did the majority of their Lordships restore the Millett injunction but they in fact strengthened it by deleting the proviso which was imposed and thus, extended the scope of the interlocutory injunction to cover the open court proceedings in Australia.

The majority of the House of Lords, which comprised Lord Brandon, Lord Templeman and Lord Ackner, were of the view that since they were merely concerned with the grant of an interlocutory injunction, the Court was only concerned with where the balance of convenience lay. They, therefore, took the view that the Attorney General had an arguable case for a permanent injunction, in that the defendant newspapers were in breach of duty when they published extracts from the *Spycatcher,* which was published by Peter Wright in flagrant breach of the duty of confidence which he owed to his former employers, the British Crown.

The minority of their Lordships, which comprised Lord Bridge and Lord Oliver, however, took the view that although the interlocutory injunctions were correctly granted, due to the supervening events of the publication of the *Spycatcher* in the United States and its wide availability to the general public, the injunctions could no longer serve any legitimate purpose.[61]

2. *The Trial — Determination of The Rights of The Parties*[62]

When the case finally came to trial for the final determination of the rights and duties of the parties, there were in fact five main issues raised

[61] See *A-G* v. *Guardian Newspapers (No.2), ante* note 3 at p. 556.

[62] *A-G* v. *Guardian Newspapers (No.* 2), *ante* note 3. It may be useful at this stage to provide a brief summary of the decisions of the various courts at trial. *The Decision of the Court of First Instance* (see *ibid.* at pp. 550-594):- On the 21st December 1987, Scott J. discharged the interlocutory injunctions (also referred to as the 'Millett injunctions') against the Observer and the Guardian newspapers on the grounds that the publication of the *Spycatcher* overseas had already caused the damage which the injunctions sought to prevent. The learned judge also refused the Attorney General an injunction restraining future publication of information derived from Peter Wright or other members of the security service. He further held that the Sunday Times newspapers were liable to account for the profits resulting from the publication of the first extract of its intended serialisation. *The Decision of the Court of Appeal* (see *ibid.* at pp. 594-638):- On the 10th February 1988, the Court of Appeal dismissed the Attorney General's appeal and the Sunday Times newspapers' cross-appeal. *The Decision of the House of Lords* (see *ibid.* at pp. 638-668):- On the 13th October 1988, the House of Lords unanimously discharged the interlocutory injunctions restraining the Observer and the Guardian newspapers from further publication since the information contained in *Spycatcher* had entered into the public domain and thus, was no longer confidential. Therefore, future publication by these two newspapers would not be damaging to the public interest. Their Lordships also refused the Attorney General a general injunction restraining the newspapers from publishing any information derived from Peter Wright or other members or ex-members of the security service. In relation to the order against the Sunday Times newspapers for an account of the profits made on the publication of the first extract of their intended serialisation on the 12th July 1987, their Lordships held that the Attorney General was entitled to the account of profits.

before the Courts.[63] Given the complexity of the issues raised and the multitude of judgments delivered on these issues, this article will set out in some detail, a summary of the decisions of the various courts on each of the five main issues raised. It is worth noting that by the time of the trial the information contained in *Spycatcher* was no longer confidential because of the publication of the book in the United States and elsewhere. As Lord Buckmaster put it in *Mustad* v. *Allcock & Dosen*[64]:- 'The secret, as a secret, had ceased to exist.' This, the Attorney General accepted.[65]

The five issues were as follows:-

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

At the time of the publication of these articles, the book *Spycatcher* had not yet been published anywhere in the world.

(i) *The Decision of Scott J.:-* Scott J. held that they were not in breach of their duty since the articles published represented a legitimate and fair reporting of a matter the newspapers were entitled to put to the public, namely, the open court action in Australia.[66] The learned judge went on to state that:-

> "The public interest in freedom of the press to report the court action outweighs, in my view, the damage, if any, to the national security interests that the articles might, arguably, cause. I can see no 'pressing social need' that is offended by these articles. The claim for an injunction against these two newspapers in June 1986 was not, in my opinion, 'proportionate to the legitimate aim pursued'."[67]

Therefore, no question arose on whether they would have been restrained.

(ii) *The Decision of the Court of Appeal:-* At the Court of Appeal stage, the majority of the judges (Dillon and Bingham L.JJ.; Sir John Donaldson M.R. dissenting) upheld the judgment of Scott J. and held that the publications of the said articles by the two newspapers were not in breach of their duty of confidence.

61 The five main issues raised at trial were summarised in the judgment of Sir John Donaldson M.R. in the Court of Appeal (see *A-G* v. *Guardian Newspapers (No. 2), ante* note 3 at p. 598) and was subsequently taken up by Lord Keith of Kinkel in the House of Lords (see *supra* at p. 639).

64 [1963] R.P.C. 41 at p. 43.

65 *Per* Bingham L.J. in *A-G* v. *Guardian Newspapers (No. 2), ante* note 3 at p. 631. For a summary of the world-wide distribution and dissemination of about one million copies of *Spycatcher,* see *supra* note 23.

66 See *A-G* v. *Guardian Newspapers (No. 2), ante* note 3 at pp. 586-589.

67 *Ibid.* at p. 587.

Dillon L.J. held that the Observer and the Guardian newspapers were merely reporting on the Australian proceedings which was a matter of public interest. He also noted that the articles were short and gave little details of the allegations made in the book. The learned judge then went on to state that he could not "see any detriment to national security or the public interest, to outweigh the benefit of free speech and the advantage in the public interest of restrained and responsible, but adequately detailed, reports of the Australian proceedings."[68]

Sir John Donaldson M.R. (dissenting) disagreed with Scott J. and held that the situation as it existed on the 22nd and 23rd June 1986 was such that the United Kingdom public interest in justice being done between the Crown, Mr. Wright and his publishers required that the orders of the Australian court which required a temporary total ban on the publication of the *Spycatcher* allegations in Australia, be not undermined. Thus, the Master of the Rolls was of the view that the right of the Crown to maintain its confidence was not "eclipsed by an overriding public interest in publication...."[69]

(iii) *The Decision of the House of Lords:-* At the House of Lords, the majority (Lord Keith, Lord Brightman, Lord Goff and Lord Jauncey; Lord Griffiths dissenting) of their Lordships held that the publications by the Observer and the Guardian newspapers were not in breach of their duty of confidence since the articles were not in fact damaging to the public interest.

Lord Griffiths (dissenting) however, was of the view that although the public had a legitimate interest in knowing that the British Government was attempting to prevent the publication of the memoirs of an ex-member of MI5 in Australia, nevertheless, the newspapers could have reported the event without setting out the allegations made in the memoirs.[70]

(b) *Was the Sunday Times in breach of its duty of confidentiality when, on 12th July 1987, it published the first extract of an intended serialisation of Spycatcher?*

On the 12th July 1987, when the Sunday Times newspaper published the first extract of its intended serialisation of *Spycatcher,* the publication of *Spycatcher* in Australia and the United States had not yet taken place.

(i) *The Decision of Scott J.:-* Scott J. held that the Sunday Times was in breach of its obligation of confidence since the publication was 'indiscriminate', in that no attempts were made to concentrate on matters of important public interest and a great deal of the materials published could not be said to raise a public interest in disclosure which could be thought to outweigh the interests of national security in non-disclosure.

68 *Ante* note 3 at p. 620.
69 *Ante* note 3 at p. 602.
70 This article will not discuss this issue in any greater detail since, as described by Lord Keith, it is a point which is "not now of any practical importance", by Lord Goff as being "at most, to be only of marginal relevance" and by Lord Griffiths as "stale".

(ii) *The Decision of the Court of Appeal*:- The Court of Appeal by a majority of two to one (Sir John Donaldson M.R. and Dillon L.J. forming the majority on this issue; Bingham L.J. dissenting) held that the publication was in breach of the Sunday Times' duty of confidentiality.

Sir John Donaldson M.R. criticised the conduct of the editor of the Sunday Times newspaper as being 'disreputable and irresponsible conduct, unworthy of him and of his newspaper'[71] because he resorted to the strategem of keeping the serialisation out of the first few thousand copies and included it in the remainder of the 1,450,000 copies. He then went on to add that "the doctrine of 'publish and be damned' or 'publish and take the consequences' overlooks the fact that in some circumstances it is inevitably the nation rather than the editor which has to take the consequences."[72] The Master of Rolls was of the view that the change of circumstances which occurred the next day, that is, on the 13th July 1987, with the United States publication, did not assist the Sunday Times newspaper since the publication of the first extract of the intended serialisation could not have been excused, if at all, until general publication of *Spycatcher* had taken place on a significant scale.

Dillon L.J. agreed with the conclusion of Scott J. and held that the Sunday Times newspaper was not entitled to publish the first instalment of its intended serialisation under licence from Heinemann, since its publication, "in substance on behalf of Mr. Wright and in furtherance of his exploitation of *Spycatcher,* was a breach of the duty of secrecy which the Sunday Times owed the Crown, since the Sunday Times knew that the information in the instalment was confidential, that Mr. Wright had entered into obligations of secrecy to the Crown and that the publication was without the leave of the Crown and in breach of those obligations."[71]

Bingham L.J. dissented on this point and disagreed with Scott J. and held that the Sunday Times was not in breach of its obligation of confidence. He would therefore, have allowed the Sunday Times' cross-appeal and quashed the order for an account of profits. The learned Lord Justice was of the view that the publication by the Sunday Times was not indiscriminate. He further held that in the light of the virtual certainty that widespread publication of the book in the United States was imminent, there was no pressing social need in the interests of national security to restrain the Sunday Times' freedom to publish. With due respect, on the 12th July 1987, the book *Spycatcher* had not yet been published in the United States and thus, at that date the information contained in the *Spycatcher* was not in the public domain and it still retained the necessary quality of confidence. Therefore, when the Sunday Times newspaper published the extract from the book the interests of national security in maintaining confidence was not outweighed by the public interest to be served by disclosure. Thus, the fact that the United States publication was going to take place the next day was not directly relevant to the

71 See *ante* note 3 at p. 607.
72 *Ibid.*
73 *Ante* note 3 at p. 621.

issue of whether the 12th July 1987 the Sunday Times was in breach of its obligation of confidentiality.

(iii) *The Decision of the House of Lords*:- The House of Lords held that the Sunday Times was in breach of its duty of confidentiality when it published the first extract on the 12th July 1987, since the extract contained information which was prejudicial to national security and had not as a whole been previously published anywhere. The fact that the confidential information was about to be published in the United States the next day in breach of confidence, did not relieve the Sunday Times of their duty of confidentiality in relation to the confidential information contained in the *Spycatcher*. Lord Keith was of the view that the Sunday Times was in breach of its duty of confidence since they knew that the information was confidential in nature and had not as a whole been published elsewhere. Lord Griffiths and Lord Jauncey agreed. Lord Brightman held that the publication of the first extract of the intended serialisation preceded the entry *of Spycatcher* into the public domain and therefore, it amounted to a breach of confidence on the part of the Sunday Times newspaper. Lord Goff was also of the view that on the 12th July 1987, the information in *Spycatcher* was not yet in the public domain since the publication in the United States had not yet taken place and thus, the publication in the Sunday Times was plainly in breach of confidence.

(c) *Is the Attorney General now entitled to such an injunction (a) in relation to the Observer and the Guardian and (b) in relation to the Sunday Times, with special consideration to further serialisation?*

(i) *The Decision of Scott J.*:- Scott J. held that the Attorney General was not entitled to the injunction against the Observer and the Guardian newspapers nor against the Sunday Times newspaper for further serialisation of *Spycatcher*. The learned judge held that as a result of the publication and worldwide dissemination of *Spycatcher* and the information contained therein since July 1987, "there [was] no longer any duty of confidence lying on the newspapers or other third parties in relation to the information contained in the book."[74] The learned judge went on to state that "third parties can publish and distribute *Spycatcher* ... notwithstanding that Mr. Wright and his agents could still be restrained from doing so … The Sunday Times [was] in no worse position than other newspapers on account of its agreement with Mr. Wright to pay him for serialisation rights."[75] Scott J. also held that the damage to the national security had already been inflicted and was not satisfied that further publication of *Spycatcher* and its contents would cause any additional damage to the interest of national security.

(ii) *The Decision of the Court of Appeal*:- In relation to part (a), the Court of Appeal unanimously held that the Attorney General was not

74 *Ante* note 3 at p. 593.
75 *Ibid.*

entitled to an injunction against the Observer and the Guardian newspapers.

Sir John Donaldson M.R. held that the later publications had destroyed all secrecy as to the contents of *Spycatcher* and he would accordingly, rescind the injunctions in relation to the Observer and the Guardian newspapers. Dillon L.J. agreed with Scott J. that the Millett injunctions should not be continued against any of the three newspapers. The learned Lord Justice went on to state that "the fact that *Spycatcher* has been so widely published in the United States and other countries has had the effect that all the contents of *Spycatcher* are now well known to every hostile, or potentially hostile, power which is at all interested in the activities of the British security service."[76] Thus, the "remaining interest of national security does not justify the massive encroachment on freedom of speech which the continuance of the Millett injunctions in present circumstances would necessarily involve."[77] Bingham L.J. also held that the Attorney General was not entitled to the injunction against the Observer and the Guardian newspapers because "the confidentiality the Attorney General [sought] to protect, through no act of the newspapers, no longer [existed]."[78]

In relation to part (b), the majority of the Court of Appeal (Dillon and Bingham L.JJ.; Sir John Donaldson M.R. dissenting) held that the Attorney General was not entitled to an injunction against further serialisation of *Spycatcher* by the Sunday Times.

Dillon L.J. held that "to grant such an injunction would … be futile when the media generally are free to discuss and comment on *Spycatcher* and copies of the book imported from abroad are likely to be available for anyone in the bookshops and public libraries."[79]

Sir John Donaldson M.R. (dissenting on this point) held that the Sunday Times should be restrained from further serialisation because the Sunday Times stood in the shoes of Peter Wright by virtue of the contract and the licence it had been granted by Heineman. The Master of Rolls went on to state that:-

> "In serialising *Spycatcher* the Sunday Times becomes 'Mr. Wright in newsprint' just as a British publisher of *Spycatcher* would stand in his shoes as 'Mr. Wright in hard or (as the case may be) soft covers.'"[80]

(iii) *The Decision of the House of Lords*:- In relation to part (a), the House of Lords unanimously held that the Attorney General was not entitled to such an injunction against the Observer and the Guardian newspapers.

[76] *Ante* note 3 at p. 616.
[77] *Ibid,* at p. 618.
[78] *Ante* note 3 at p. 631.
[79] *Ante* note 3 at p. 621.
[80] *Ante* note 3 at p. 611. For a critique on this part of Sir John Donaldson's judgment, see below.

It is of interest to note that Lord Goff described this issue as 'the most important' and yet the 'most straightforward' issue in the case. It is also the issue on which all the judges in the lower courts and the House of Lords unanimously agreed, namely, that no such injunction should be granted against the Observer and the Guardian newspapers.

Lord Keith was of the opinion that the reports and comments proposed by the two newspapers would not be harmful to the public interest, nor would be the continued serialisation by the Sunday Times newspaper. His Lordship went on to state the ground for his decision as follows:-

> "I would stress that I do not base this on any balancing of public interest nor on any considerations of freedom of the press, nor on any possible defences of prior publication or just cause or excuse, but simply on the view that all possible damage to the interest of the Crown has already been done by the publication of *Spycatcher* abroad and the ready availability of copies in this country."[81]

Lord Griffiths held that further publication of the *Spycatcher* would not cause any further damage to the national security interest of the Crown. His Lordship stated that:-

> "If I had thought that further publication would so damage the morale of the security service that they could not operate efficiently I would have been prepared to grant the injunction in the interests of national security. Of course, I think no such thing."[82]

His Lordship held that the balance came down "firmly in favour of the public interest in freedom of speech and a free press. The interlocutory injunction must be lifted leaving the Observer and the Guardian free to publish and comment on *Spycatcher*."[83]

Lord Goff held that the information contained in the book *Spycatcher* was, at the date of the trial, already in the public domain. Thus, the injunctions against the Observer and the Guardian newspapers should be discharged.[144]

In relation to part (b), Lord Brightman described this aspect of the case as raising 'the most controversial of the questions' before the House of Lords. The majority of their Lordships (Lord Keith, Lord Brightman, Lord Jauncey and Lord Goff; Lord Griffiths dissenting on this point) held that the injunction should not be granted to restrain further serialisation of *Spycatcher*. Lord Keith held that further serialisation of *Spycatcher* would not do any more harm to the public interest than had already been done. Lord Brightman held that:-

[81] *Ante* note 3 at p. 643.
[82] *Ante* note 3 at p. 654.
[83] *Ibid.*
[84] Lord Jauncey and Lord Brightman agreed with their Lordships.

> "if the matter sought to be published is no longer secret, there is unlikely to be any damage to the public interest by reprinting what all the world has already had the opportunity to read. There is no possible damage to the public interest if Tom, Dick or Harry, or the Sunday Times reprints in whole or part what is already printed and available within the covers of *Spycatcher*."[85]

His Lordship went on to state that it would be inappropriate to prevent the Sunday Times from serialising the *Spycatcher* since "every other newspaper proprietor in the land [was] at liberty to serialise or publish"[86] the book, and since the serialisation and publication of *Spycatcher* could be carried out without reference to Peter Wright or Heinemann.

Lord Jauncey found this issue 'a difficult one' and his Lordship would have taken the same view as Lord Griffiths (dissenting on this issue) but for his view that the "future ability of the Sunday Times to serialise *Spycatcher* [did] not derive solely from their licence" granted by Heinemann, to serialise the book. The fact was that the English courts would not afford Peter Wright nor Heinemann any copyright protection in relation to *Spycatcher.* Thus, "anyone [could] copy *Spycatcher* in whole or in part without fear of effective restraint by Peter Wright".[88] That being so, "it follow[ed] that the future ability of the Sunday Times to serialise *Spycatcher* [did] not derive solely from their licence. They [were] free to publish without reference thereto and thus for practical purposes [were] in no better position than any other newspaper."[89]

Lord Goff held that "the public interest [did] not now require that the Sunday Times, despite the fact that its right to publish in the past and today derive[d] from Peter Wright, and despite its previous breach of confidence, should be restrained from serialising further extracts from the book."[90]

Lord Griffiths (dissenting on this issue) held that the Sunday Times should be restrained from further serialisation of *Spycatcher.* Lord Griffiths agreed that further serialisation of *Spycatcher* would not cause any significant damage to national security and that the information contained in *Spycatcher* was now public knowledge. However, his Lordship was of the view that neither Peter Wright nor any agent of his would be permitted to publish *Spycatcher* in England. Thus, if Peter Wright's publisher and agent, Heinemann, was "to be restrained so must anyone in the direct contractual chain with Heinemann."[91] His Lordship went on to state that:-

> "The Sunday Times deliberately placed itself in that contractual chain and in doing so gave encouragement to the publication of *Spycatcher*

85 *Ante* note 3 at p. 648.
86 *Ibid.*
87 *Ante* note 3 at p. 668.
88 *Ibid.*
89 *Ibid.*
90 *Ante* note 3 at p. 667.
91 *Ante* note 3 at p. 656.

> abroad and thereby associated itself with Peter Wright's breach of duty … This is, in my opinion a case in which the Sunday Times is so closely associated with Peter Wright's breach of duty that equity should place the same restraint on the Sunday Times as it does on Peter Wright."[92]

(d) *Is the Attorney General entitled to an account of the profits accruing to the Sunday Times as a result of the serialisation of Spycatcher?*

(i) *The Decision of Scott J.*:- Scott J. held that the Attorney General was entitled to an account of the profits which accrued to the Sunday Times out of the publication of the first extract of the intended serialisation of *Spycatcher.*

(ii) *The Decision of the Court of Appeal*:- The Court of Appeal by a majority of two to one (Sir John Donaldson M.R. and Dillon L.J.; Bingham L.J. dissenting) held that the Attorney General was entitled to an account of the profits since the Sunday Times was in breach of its duty of confidentiality owed to the Crown by publishing the first instalment of the intended serialisation on the 12th July 1987.

Bingham L.J. (dissenting) held that the order for an account of profits should be quashed since the learned Lord Justice was of the view that the Sunday Times was not in breach of its duty of confidentiality in the publication of the first instalment of the intended serialisation.

(iii)*The Decision of the House of Lords*:- The House of Lords unanimously held that the Attorney General was entitled to an account of the profits accruing as a result of the publication by the Sunday Times newspaper of the first instalment of the intended serialisation of *Spycatcher* on the 12th July 1987 on the ground that the Sunday Times should not be allowed to profit from its own wrongdoing.

(e) *Is the Attorney General entitled to some general injunction restraining future publication of the information derived from Mr. Wright or other members or ex-members of the security service?*

This issue concerned the 'fears' which the Attorney General had that Peter Wright "is nursing in his bosom a second volume of his memoirs, a *Spycatcher* 2."[93]

(i) *The Decision of Scott J.*:- Scott J. held that the Attorney General was not entitled to such an injunction since "it [was] an established rule of long-standing that the courts do not answer hypothetical questions and do not grant injunctions on issues that [had] not yet arisen. None of the newspapers [had] threatened to publish *Spycatcher* 2."[94] The learned judge went on to state that there was no evidence that *Spycatcher 2* had been written nor any evidence of its contents, if indeed it had been written.

[92] *Ibid.* For a critique on his Lordship's view, see below.
[93] *Ante* note 3 at p. 593.
[94] *Ibid,* at p. 594.

(ii) *The Decision of the Court of Appeal*:- The Court of Appeal unanimously held that no such injunction should be granted. Dillon and Bingham L.JJ. agreed with Scott J. Sir John Donaldson M.R. was of the view that such an injunctive order would be too uncertain and that the scope of the order would depend on first determining issues of fact or law. As the Master of Rolls observed, "… a person who is subject to an injunction must know precisely where he stands."[95]

(iii)*The Decision of the House of Lords*:- The House of Lords also unanimously held that no such injunction should be granted. Their Lordships were of the view that the most appropriate way to prevent the publication of these types of materials was in the observance by members of the security service of 'their lifelong obligation of confidence owed to the Crown.' As Lord Griffiths put it :-

> "Ultimately, if we are to have an efficient security service we have to trust its members and if we are to have a free press we have to trust the editors."[96]

Furthermore, their Lordships were of the view that injunctions should not be granted to prevent wrongdoing in general but rather to prevent some specific wrong since there might be a valid defence in any particular case.

3. *Summary of The Parties' Case In The English Courts*

It is worth stressing again at this stage that the parties to the *Spycatcher* litigation in England was not Peter Wright nor his Australian publisher, Heinemann. The parties to the litigation were the third party newspapers, the Observer, the Guardian and the Sunday Times.

(a) *The Newspapers' Case*

The key points raised by the newspapers were as follows:-

(i) The information contained in the book *Spycatcher* was in the public domain by the time of the trial and had, thus, become 'public property and public knowledge'[97] due to the publication of the book in the United States on the 13th July 1987 and the subsequent distribution, dissemination and publication of the contents of the book on a worldwide scale. The information contained in *Spycatcher* had thus lost its confidential character, that is, the necessary quality of confidence, and was therefore outside the realm of protection of the law of confidence. The duty of confidence owed by the newspapers, therefore, no longer existed.

[95] *Ante* note 3 at p. 612.
[96] *Ante* note 3 at p. 658.
[97] Lord Greene M.R. in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C 203 at p. 215, cited in *A-G* v. *Guardian Newspapers, ante* note 2 at p. 337.

(ii) Some of the allegations made by Peter Wright in the book *Spycatcher,* if true, revealed that members of MI5 had committed serious breaches of the law in their operations. Thus, the public interest or iniquity defence in the exposure of these unlawful activities and serious breaches of the law would override the public interest in preserving confidentiality.

(iii) Freedom of speech and freedom of the press arguments were also raised by the newspapers as counterbalancing public interest points against the arguments in favour of national security and confidentiality.[98]

(b) *The Attorney General's Case*

(i) In framing the Crown's case the Attorney General relied on eight propositions.[99] In support of the Crown's claim for permanent injunction against the newspapers, the Attorney General argued that notwithstanding the publication, distribution and dissemination of the contents of *Spycatcher* on a worldwide scale outside the United Kingdom, the newspapers knowing that those actions constituted Peter Wright's breach of his duty of confidence to the Crown, could not treat the information as having lost the necessary quality of confidence by reason of Peter Wright's breach of his duty of confidence. Thus, the newspapers would themselves remain under a duty not to disclose the information further.

(ii) The Attorney General also raised the arguments based on the national security of the United Kingdom. Initially, the national security arguments were that the injunctions ought to be granted based on the fact that 'MI5 secrets should be kept secret'[100] since the efficiency of MI5, a secret service essential to the national security of the United Kingdom, required that its operations, affairs and personnel be kept a secret. If the contents of *Spycatcher* were revealed, there would be damage to the national security of the United Kingdom. However, because of the publication of *Spycatcher* in the United States and its subsequent dissemination on a worldwide scale, the contents of *Spycatcher* were no longer a secret and thus, this argument would no longer apply.

The Attorney General later argued based on quite different national security arguments that permanent injunctions ought to be granted to restrain further disclosure of information that is no longer secret based on the fact that the information still had some residual confidence in that the disclosure of the information would cause public harm or damage. The Attorney General framed his arguments on the basis that the national security of the country required an efficient MI5 and that if the injunctions were not granted then MI5 and its efficiency would be damaged[101] and

98 See *A-G* v. *Guardian Newspapers (No.2)*, *ante* note 3 at p. 569.

99 The eight propositions were summarised in the judgment of Scott J. in *A-G* v. *Guardian Newspapers (No.2), ante* note 3 at p. 566.

100 *Ibid,* at p. 568.

101 The arguments of the Attorney General on the ways in which M15 and its efficiency would be damaged were summarised in the judgment of Scott J. in *A-G* v. *Guardian Newspapers (No.2), ante* note 3 at p. 568 as follows:- "... the morale of loyal members of the service will suffer; other members of the service may be tempted to breach their duty by publishing memoirs; publishers of illegal memoirs will be encouraged; media pressure on other members of the service to reply to allegations in *Spycatcher* will mount; security services in other countries will lose confidence in MI5; and potential informers will lose confidence in MI5."

therefore, the grant of the permanent injunctions were necessary in order to promote the efficiency and reputation of MI5.

It would appear that the task for the courts at the end of the day would be to find the balance between two competing public interests, namely, (i) the public interest in freedom of speech and freedom of the press and the public interest in the exposure of possible iniquity in the security service on the one hand, as against (ii) the public interest in national security and the right of the government to protect its organisation on the other. On the facts of the *Spycatcher* case, the widespread publication and dissemination of the book internationally resulted in primacy being accorded to the arguments in favour of freedom of speech and of the press.

V. General Discussion on the Law of Confidence[102]

A useful starting point on the principles of the law of confidence will be the decision of Megarry J. in the leading case of *Coco* v. *Clark*.[103] Megarry J. held that:-

> "In my judgment three elements are normally required if, apart from contract a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it.'[104] Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."[105]

[102] Although this article is centred primarily on the *Spycatcher* decision and its impact on the law of confidence, it would be useful at this stage to give a brief general discussion on the law of confidence. Some parts of the discussion will be covered in greater detail where they are of particular relevance to the *Spycatcher* decision. See generally, Law Commission (U.K.), *Breach of Confidence,* (Law Com. No. 110), Cmnd. 8388, H.M.S.O., London (1981); Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2nd ed., 1989), chapter 8; *Gurry, Breach of Confidence* (Oxford, 1984); Ricketson, *The Law of Intellectual Property* (1984), chapters 42-45; Goff & Jones, *The Law of Restitution* (3rd ed., 1986), pp. 650-653 & chapters 35, 36 & 37; Dean, *The Law of Trade Secrets* (1990). This article will not discuss the position of government secrets under official secrets legislation.

[103] [1969] R.P.C. 41 .

[104] *Per* Lord Greene, M.R. in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203 at p. 215.

[105] *Supra* note 103 at p. 47. It is worth noting that Megarry J. expressed his doubt on the requirement of detriment and questioned whether there is a need for the plaintiff to prove detriment in all cases in order to succeed in an action for breach of confidence, but the learned judge left the question open on this point. See the reservations expressed by Megarry J. in *Coco* v. *Clark, ibid* at p. 48. See also Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2nd ed., 1989) pp. 235-236.

1. *Quality of Confidence*

The law of confidence protects a wide range of confidential information[106] ranging from commercial[107] and technical trade/industrial secrets to personal[108], artistic, literary[109] and governmental secrets.[110] However, in order for the information to be protected by the law of confidence it must be confidential in the sense that it must "have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge."[111] It must not be common knowledge,[112] that is, the information must not be in the public domain. Once the information is common knowledge or information in the public domain then the information would lose its confidentiality and will no longer be protected under the law of confidence. Whether or not information is in the public domain will depend to a certain extent on its degree of exposure and accessibility. It is difficult to provide an absolute guide as to the extent of publication required before the information is in the public domain and thus loses its confidentiality. However, it is clear that the question does not depend solely on the number of persons who have knowledge of the confidential information. If the information has been published to a limited number of persons, then the information has probably

106 See generally, Ricketson, *The Law of Intellectual Property* (1984), pp. 816-818; Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2nd ed., 1989), p. 220: Gurry, *Breach of Confidence* (Oxford, 1984), pp. 89-108.

107 See for example, *Faccenda Chicken* v *Fowler* [1986] I All E.R. 617 where the plaintiff wanted to restrain his ex-employee from using sales information; *Thomas Marshall Ltd.* v. *Guinle* [1978] 3 All E.R. 193, [1978] 3 W.L.R. 116 where the plaintiff was seeking an injunction to prevent the defendant from using confidential information about the plaintiff's business; *Seager* v. *Copydex* [1967] 2 All E.R. 415 a case where the confidential information relating to the design of a carpet grip was disclosed to the defendant in the course of negotiations; *Coco* v. *Clark* [1969] R.P.C. 41 where the subject matter in the litigation was an engine for a moped. See generally. Gurry, *Breach of Confidence* (Oxford, 1984), pp. 90-97.

108 See *Argyll* v. *Argyll* [1967] Ch. 302, relating to the secrets of the Duchess of Argyll's private life which she told to her husband, the Duke of Argyll; *Stephen* v. *Avery* [1988] 2 All E.R. 477 a case concerning the lesbian relationship of a woman who was killed by her husband; *Woodward* v. *Hutchin* [1977] 1 W.L.R. 760, [1977] 2 All E.R. 751 a case about the behaviour and private lives of the famous pop stars, Tom Jones, Engelbert Humperdink and Gilbert O' Sullivan; *Lennon* v. *News Group Newspapers Ltd.* (1978| F.S.R. 573 where John Lennon (former member of the Beatles pop group) was trying to restrain the publication about his matrimonial relationships with his wife. See also Gurry, *Breach of Confidence* (Oxford, 1984), pp. 97-101.

109 See *Talbot* v. *General Television Corporation Pty. Ltd.* [1981] R.P.C. 1 (a decision of the Supreme Court of Victoria) a case involving an idea of making a programme about millionaires with an unusual twist of including interviews with real life millionaires; *Fraser* v. *Thames Television* [1983] 2 All E.R. 101 where the plaintiffs (members of a female rock band) had an idea of making a television series based partly on their lives and partly on fiction.

110 *See Attorney-General* v. *Jonathan Cape* [1976] 1 Q.B. 752 which concerned the application for injunctions to prevent the publication of the information on Cabinet discussions recorded in the diaries of the former minister, Richard Grossman; *Commonwealth of Australia* v. *John Fairfax & Sons Ltd.* (1980)32 A.L.R. 485 which was an application for an injunction to restrain the publication of government documents disclosing its relations with the government of Indonesia over the 'East Timor crisis'. See generally, Gurry, *supra* note 106, at pp. 103-108.

111 See Lord Greene MR in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203 at p. 215.

112 Where Megarry J. stated in *Coco* v. *Clark* [1969] R.P.C. 41 at p. 47 that "... However, confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge."

not entered into the public domain and the confidential nature of the information is preserved. On the other hand, if the information is generally known to the public at large, then it would be in the public domain and the confidentiality of the information would be destroyed.[113] Even the fact that the information has been published to a large number of persons does not mean that the information has necessarily entered into the public domain; a factor to be considered in this type of situation would be whether these persons who have knowledge of the confidential information were under any bars of confidentiality not to make unauthorised use or disclosure of the information. If they were, then the information would probably not be in the public domain. Conversely, the fact that very few people have knowledge of the information does not mean that it is conclusive that the information is not in the public domain; the public availability of the information would be a relevant factor to be considered. Thus, if the information has been made available to the public but very few people have read it, then the information may be considered in the public domain notwithstanding the fact that only very few people have read it. The issue at the end of the day is a question of fact and degree depending on the circumstances in each case.

Francis Gurry, in his leading monograph, was of the view that the accessibility of the information was important in determining whether the information was confidential. In order for the information to be confidential it must have the basic attribute of inaccessibility. He stated that "as a general rule, confidentiality is established by showing that the information is inaccessible to the public....[114] It is also clear that just because the

[113] See *Mustad* v. *Dosen* [1963] R.P.C. 41, where the House of Lords refused the plaintiffs protection since the plaintiffs' secret invention (information regarding the making of fish-hooks) had been completely disclosed to the world by the publication of the patent specification. Thus, the information was in the public domain and had lost its confidentiality. However, the House of Lords intimated that where the disclosure to the public was partial, then the parts of the information which had not been disclosed to the public would still remain confidential. In *Franchi* v. *Franchi* [1967] R.P.C. 149, Cross J. indicated that there could be 'relative secrecy' in cases where the information was known to some persons but not to others. However, although the plaintiff is generally not permitted to restrain the defendant from using information that is common knowledge or information which is in the public domain, this rule is not absolute. See *Schering Chemicals Ltd.* v. *Falkman Ltd* [1981] 2 All E.R. 321 where tricky arguments on whether information which was at one time in the public domain could reacquire an aura of confidentiality through lapse of time. Shaw L.J., *ibid,* at p. 338, stated that:- "In any case, though facts may be widely known, they are not ever present in the minds of the public. To extend the knowledge or to revive the recollection of matters which may be detrimental or prejudicial to the interests of some person or organisation is not to be condoned because the facts are already known to some and linger in the memories of others." See also J. Philips, *Introduction to Intellectual Property* (1986), at p. 210, para. 20.3. It should however be borne in mind that Shaw L.J. did not elucidate on how the information is to regain confidentiality when it is still publicly available. The courts have after all observed that "justifiable fury" is *per se* no cause of action - see *Harrison and Starkey* v. *Polydor Ltd.* [1977] F.S.R. 1.

[114] See the monograph by Gurry, *Breach of Confidence* (Oxford, 1984), at p. 4. The author further stated at p. 70 that the "basic attribute which information must possess before it can be considered confidential is inaccessibility.... This attribute is fundamental to the action for breach of confidence for it is only through the communication of inaccessible information that a confidence is reposed by the confider in the confidant." Herein lay a problem for the Crown in *Spycatcher.* The book may not have been published in the United Kingdom but it was clearly easily accessible to the United Kingdom public. Accessibility, as opposed to publication, placed its contents into the United Kingdom public domain.

isolated constituent parts of the confidential information consists of information in the public domain, that this does not necessarily mean that the information as a whole can never be regarded as confidential information for the purposes of protection by the law of confidence. The final end product as a whole can still be protected by the law of confidence if it is the product of human mind which is sufficient to confer confidentiality. As Lord Greene, M.R. stated in *Saltman Engineering Co. Ltd* v. *Campbell Engineering Co. Ltd.*:-

> "… it is perfectly possible to have a confidential document, … which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.[115]

Finally, although the simplicity of the information is no bar to protection under the law of confidence,[116] Megarry J. in *Coco* v. *Clark* expressed reservations against the protection of mere 'trivial tittle-tattle'[117]. However, the learned judge did not define 'trivial tittle-tattle' and the exact meaning of that phrase is still uncertain.[118] The mere fact that the secret is of a personal nature does not necessarily mean that it is trivia. In *X* v. Y[119] Rose J. was of the view that information about doctors who

[115] (1948) 65 R.P.C. 203 at p. 215. See also *Coco* v. *Clark [* 1969] R.P.C. 41 at p. 47, where Megarry J. expressed a similar view that:- "Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain.... I think there must be some product of the human brain which suffices to confer a confidential nature upon the information...."

[116] See *Cranleigh Precision Engineering Ltd.* v. *Bryant* (1965] I W.L.R. 1293; [1966] R.P.C. 81 where the decision of the court was endorsed by Megarry J. in *Coco* v. *Clark* [1969] R.P.C. 41 at p. 47 as follows:- "… the mere simplicity of an idea does not prevent it being confidential … Indeed, the simpler an idea, the more likely it is to need protection."

[117] [1969] R.P.C. 41 at p. 48, where Megarry J. stated that "equity ought not to be invoked to protect trivial tittle-tattle, however confidential." This statement raises interesting questions as to whether Megarry J. was of the view that once the information was found to be trivia it is outside the protection of the law of confidence, in the sense that it is not the proper subject matter that the law of confidence is concerned with, or whether the learned judge was of the view that even though the information is trivia it can still be protected by the law of confidence but that equity will not grant any relief to the person aggrieved. Sir Nicolas Browne-Wilkinson V-C in *Stephen* v. *Avery* [1988] 2 All E.R. 477 at p. 481, was of the view that although the statement made by Megarry J. on trivia "occurs in that part of the judgment which deals with the nature of information which can be protected, it is to be noted that the judge appeared to be considering when equity would give a remedy, not dealing with the fundamental nature of the legal right. If, as I think he was, Megarry J. was saying that the discretion to grant an injunction or to award damages would not be exercised in a case which was merely trivial, I agree." The Vice-Chancellor noted, *ibid,* at p. 481, that Megarry J.'s observations on trivia were *dicta.* He went on to hold that the sexual conduct, including the lesbian relationship of a woman who was killed by her husband was not 'trivial tittle-tattle'. Neither was it a matter which has a 'grossly immoral tendency' (see *ibid,* at p. 480) such as to be disentitled to protection. Whilst the observation was *obiter* it has been picked up by the Courts in the *Spycatcher* case. See Scott J. *ante* note 3 at p. 574 and p. 585 and Lord Goff *ibid,* at p. 659 and pp. 660-661. Note that Lord Griffiths *ibid,* at p. 650 doubted whether the trivia exception should apply to state secrets.

[118] However, "trivia" which has economic value are protected: see *Argyll* v. *Argyll, supra* note 108.

[119] [1988] 2 All E.R. 648.

had contracted the disease AIDS and who were still in general practice (practising non-invasive medicine) were entitled to protection under the law of confidence. This information was not regarded by the court as trivia. Rose J. held that: "[t]here must (as is common ground) be a substantial, not trivial, violation of the plaintiffs' rights to justify equitable relief."[120] The learned judge concluded that:-

> "The public in general and patients in particular are entitled to expect hospital records to be confidential and it is not for any individual to take it on himself or herself to breach that confidence...."[121]

Thus, the duty of confidence extends to a wide range of confidential information provided it is not useless or trivia, it is not information in the public domain and it is not required to be disclosed in the public interest.

2. *Relationship!Obligation of Confidence*

It is necessary to establish that the confidential information was imparted in circumstances importing an obligation of confidence between the confider and the confidant. This is tested objectively from the stand-point of a reasonable man, a concept borrowed from the common law. Megarry J. in *Coco* v. *Clark* puts it as follows:-

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."[122]

3. *Unauthorised Use*

Unauthorised use may consist 'in any disclosure or use which contravenes the limited purpose for which the information was revealed.'[123] The plaintiff in an action for breach of confidence would have to show that the defendant had made use of the plaintiff's confidential information, in that the information used or disclosed must come from the plaintiff and not from some other independent source or by reverse engineering, and also that the use of

[120] *Ibid,* at p. 657.
[121] *Ibid,* at p. 665.
[122] [1969] R.P.C. 41 at p. 48. The obligation is not necessarily dependent upon the existence of a contractual term, nor even on the existence of a contractual relationship. The prevalent view is that the duty of confidentiality can arise out of equity. See *A-G* v. *Guardian Newspapers (No. 2)* [1988] 3 All E.R. 545 at p. 573 (Scott J.); p. 595 (Sir John Donaldson M.R.); pp. 624-625 (Bingham L.J.); p. 639 (Lord Keith) and p. 648 (Lord Griffiths); Lord Goff left this issue open (p. 659). Clearly Peter Wright owed an obligation of confidence to the Crown. Nothing turned on the question whether the obligation was derived from a contractual term or from equity, since the equitable duty would have been co-extensive with any implied term of confidentiality.
[123] See Cornish, *supra* note 102, at p. 234.

that confidential information was without the express or implied consent of the plaintiff.

4. *Detriment*

It is unclear whether the plaintiff in every action for breach of confidence has to establish that he has suffered detriment before he can succeed. Megarry J. in *Coco* v. *Clark* left the question open and queried whether there was such a need to prove detriment in every case. Megarry J. expressed his view as follows:-

> "Some of the statements of principle in the cases omit any mention of detriment; others include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him.... I wish to keep open the possibility of the true proposition being that in the wider form."[124]

Thus, in order to succeed in an action for breach of confidence the elements laid down in *Coco* v. *Clark* must be satisfied subject to the following provisos:-

(a) the information must not be in the public domain;[125]
(b) the information must not be mere 'trivial tittle-tattle';
(c) the disclosure must not be justified in the public interest.[126]

VI. Some Problem Areas in the Law of Confidence

There are some areas in the law of confidence which require a more detailed discussion due to the uncertainty in the law and also due to their particular relevance to the *Spycatcher* decision.

1. *Jurisdictional Basis of An Action for Breach of Confidence*[121]

The Jurisdictional basis of an action for breach of confidence is still an uncertain and controversial area in the law of confidence. It is important to determine the Jurisdictional basis since it affects the type of remedies which would be available to the plaintiff.[128] If the action for breach of confidence is an equitable right, then all the usual remedies in equity

[124] [1969] R.P.C. 41 at p. 48. For a further discussion on the issue of detriment, see below.
[125] See above for a general discussion on the scope of the public domain.
[126] For a more detailed discussion of the public interest defence, see below.
[127] See generally, Ricketson, *The Law of Intellectual Property* (1984), chapter 45, pp. 849-857; Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2nd ed., 1989), chapter 8, pp. 215-241; Gurry, *Breach of Confidence* (1984), chapter II, pp. 25-61.
[128] See Law Commission (U.K.) (Law Com. No. 110), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), para. 3.1 where the Commission stated that there has been some "uncertainty as to the nature and scope of the remedies owing to its somewhat obscure legal basis."

will be available. Further, the courts in England will have power under Lord Cairns' Act[129] to grant damages in lieu of or in addition to injunctive relief. The position in Singapore is somewhat more complex. It has been noted already that there is no Singapore legislation equivalent to Lord Cairns' Act.[130] In its absence, difficulties are bound to arise over the power of the court to award damages for a purely equitable wrong. Short of a legislative key, the courts may have to fall back on the pre-1858 rules of equity and to try to develop a power to award damages. This could prove a somewhat daunting task. If the jurisdictional basis for an action for breach of confidence is based on contract or tort, then the Singapore courts would not have problems granting damages in actions for breach of confidence since the courts have jurisdiction to award damages at law. A further distinction would arise if the action for breach of confidence is a legal property right, that is, a right in *rem.* Such a right would be enforceable against the world except the owner of the legal title. On the other hand, if it is an equitable property right, that is, a right in *personam,* then, arguably, it would only be good against persons who have notice of the breach of confidence. Such a right might therefore be defeated by a *bona fide* purchaser for value without notice. Thus, although the "question of the basis of the jurisdiction is not any longer a matter of particular importance in establishing the existence of the jurisdiction; the cases themselves provide ample authority … it remains a vital question in forecasting the future development of the law. No one can say with any assurance how a particular issue will be decided in the future if it is not certain, for instance, whether the courts will apply equitable or tort principles."[131]

There are five possible jurisdictional basis for an action for breach of confidence.[132] Some of these are based on principles of equity while others are based on common law. These will be discussed briefly below.

(a) *Contract*

One possible jurisdictional basis is that of contract. Contract has been used to explain the liability imposed in actions for breach of confidence on the basis that in many cases of liability for breach of confidence,

[129] Originally of 1858. The power to award equitable damages is now set out in section 50 Supreme Court Act 1981 (U.K.). See generally, A.S. Burrows, *Remedies for Torts and Breach of Contract* (1987) at pp. 211-217.

[130] See *ante* note 10.

[131] See Law Commission (U.K.), *Working Paper No. 58 - "Breach of Confidence",* (1974) para. 40. However, as pointed out by Gurry, *supra* note 102 at p. 27, "the significance of the jurisdictional basis used by the court should not be over-emphasised."

[132] The following is a collection of some of the materials on this area: See Turner, *The Law of Trade Secrets (*1962): Gurry, *Breach of Confidence (*1984), pp. 25 - 61; Ricketson. *The Law of Intellectual Property* (1984), pp. 849-857; North, P.M. "Breach of Confidence: Is There a New Tort?", (1971) 12 J.S.P.T.L. 149; Libling, "The Concept of Property: Property in Intangibles", (1978) 94 L.Q.R. 103; Jones, G. "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463; Ricketson, S. "Confidential Information - A New Proprietary Interest? Part I", (1977) 11 M.U.L.R. 225, "Part II", (1978) 11 M.U.L.R.289; Stuckey, J.E. "Equitable Action for Breach of Confidence: Is Information Property?", (1981) 9 Syd. L. Rev. 402.

a contractual nexus can be found between the parties, generating express or implied duties of confidentiality. Under this view, the law of confidence would be part of the law of contract and thus, part of common law. However, this jurisdictional basis is not entirely satisfactory since it presupposes that there is the existence of a contract in every situation where an action for breach of confidence arises. There are a significant number of situations in which the confider and the confidant are not in a contractual relationship[133] and yet an action for breach of confidence may succeed, or situations in which an obligation of confidence has been imposed between the confider and a third party who was not privy to the disclosure between the confider and the original confidant. In situations where there is an express contract between the parties and there are express terms of confidentiality the courts will enforce these terms. Where there is an express contract between the parties but with no express terms of confidentiality, the courts might be able to imply an obligation of confidence under the *Moorcock* doctrine.[134] The difficulty will arise in a situation where there is no express contract between the parties, in this case the courts will have to first imply a contract between the parties and then imply an obligation of confidentiality between them. Finally, even where there is a contractual obligation of confidentiality, it must not be assumed that any extra-contractual source of the obligation of confidence is thereby negated. An obligation of confidence in equity can exist side by side with an express contractual obligation. Indeed, this might have been the position of Peter Wright himself in the *Spycatcher* case.[135] Further, even where there is an express contractual obligation of confidence, the courts have in the past demonstrated a willingness to allow the confider to fall back on the general equitable duty of confidentiality so as to overcome shortcomings in the express contractual obligation.[136] Accordingly, whilst contract may be a useful peg on which to hang liability for breach of confidence, it falls far short of providing a general theory of liability in this area of the law.

(b) *Tort/Property*[137]

This approach can be explained on the basis that the law of confidence protects against "trespass" to confidential information. First, it treats confidential information as a type of property right. It focuses on confidential information as a type of legal property. Once this is accepted, then any misuse of the confidential information or any breach of confidence could be regarded as tortious, in the sense that it could then amount to "trespass" to that legal property (namely, trespass to the confidential information). This approach is, therefore, analogous to the tort of trespass

[133] There may be relationships which would give rise to an obligation of confidence even where there is strictly no contractual obligation between the parties, for example, the relationship between a wife and her husband, or between a priest and the confessor.
[134] *The Moorcock* (1889) 14 P.D. 64. See also *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206.
[135] See *A-G* v. *Guardian Newspapers (No. 2)* [1988] 3 All E.R. 545 at pp. 573-574 (Scott J.).
[136] *Marshall (Thomas)* v. *Guinle* [1979] Ch. 227.
[137] For a critique of the Tort/Property School, see Ricketson, *The Law of Intellectual Pmperty* (1984), at pp. 843-844 and p. 849.

to property and the tort of conversion. If one were to be a supporter of this view, the requirement of detriment in an action for breach of confidence would be less important, since the analogous torts of trespass to land, goods and the person are generally actionable *per se.* The law of confidence would become part of the law of tort and the common law. Whilst in theory, attractive analogies may be drawn between the tort of trespass and the law of confidence, it is unlikely that this approach will find judicial favour. Liability for breach of confidence has never depended solely on the existence of confidential information. In addition, a relationship of confidence has to be established. In many cases the existence of the relationship will depend on the degree of knowledge of the recipient, either as to the confidential nature of the communication (as in the case of direct recipients) or the fact that the information is being given to him in breach of confidence (as in the case of remoter recipients). The pre-occupation with the relationship of confidentiality and knowledge tends to suggest that broader principles of trust and good faith are in operation. Indeed, this is the next, and probably the most widely accepted theory.

(c) *Equity - Principle of Good Faith*

Thus far, the jurisdictional basis for an action for breach of confidence has been explained as part of the common law. However, traditionally the jurisdiction in cases of breach of confidence has its roots in equity[138] and the courts will protect confidential information and restrain breaches of confidence under the equitable principle of good faith. This approach focuses on the relationship of good faith or trust between the plaintiff and the defendant. It is due to this relationship of good faith between the parties that equity will intervene. Thus, where the confidential information is received in confidence equity imposes an equitable obligation of good faith on the confidant not to use the confidential information or to disclose or reveal it to any third parties. This approach has received some considerable judicial support. Lord Denning M.R. said in *Fraser* v. *Evans* that "the jurisdiction is based not so much on property or on contract as on the duty to be of good faith."[139] His Lordship further stated in *Seager* v. *Copydex Ltd.* that:-

> "The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He

[138] Megarry J. in *Coco* v. *Clark* [1969] R.P.C 41 at p. 46 stated that:- "The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust … and a couplet, attributed to Sir Thomas More; Lord Chancellor avers that "Three things are to be helpt in Conscience; Fraud, Accident and things of Confidence."

[139] [1969] 1 Q.B. 349 at p. 361.

> must not make use of it to the prejudice of him who gave it without obtaining his consent."[140]

More recently, Sir Nicholas Browne-Wilkinson V-C in *Stephens* v. Avery stated that:-

> "The basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information.... It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information."[141]

Under this approach, the elements of liability identified by Megarry J. in *Coco* v. *Clark* [142]can be explained. Good faith will demand liability only where there is an unauthorised use of confidential information that has been imparted in circumstances imposing an obligation of confidence. Such an obligation will arise when a reasonable man standing in the shoes of the recipient would realise that the information was being given in confidence. Only then will his conscience be tainted. Likewise, remoter recipients will only be under a duty of confidentiality upon acquisition of knowledge (actual/constructive) of the plaintiff's rights in the information.[143] Such an approach may also tend to place emphasis on the requirement of detriment, since as a general rule 'equity does not act in vain'.[144]

(d) *Equitable Property*

This approach treats confidential information as a type of property interest, not as a legal proprietary interest but rather as a proprietary

[140] [1967] 2 All E.R. 415 at p. 417, *per* Lord Denning M.R. See also *Moorgate Tobacco Co. Ltd.* v. *Philip Morris Ltd.* (1984) 56 A.L.R. 193 at p. 208, *dicta* by Deane J. in the High Court of Australia on the jurisdiction to grant relief against abuse of confidential information - "Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained." Megarry J. in *Coco* v. *Clark* [1969] R.P.C. 41 is also a supporter of this approach. See also Jones, G. "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463 at p. 466, where it was argued that "... It is the purpose of this article to suggest that the basis of the restitutionary claim is no longer implied contract or property but a broad equitable principle of good faith, namely, that he 'who has received the information in confidence shall not take unfair advantage of it'; and that this principle is wide enough to protect the plaintiff who imparts, in confidence, any confidential information whatever its substance."

[141] [1988] 2 All E.R. 477 at p. 482. See also *A-G* v. *Guardian Newspapers (No.2)* [1988] 3 All E.R. 545. Whilst no definite conclusion was reached on the jurisdictional basis, it would be fair to say that most of the judges accepted that the general obligation of confidence arises out of equity. Some of the judges were prepared to source the intervention of equity to notions of good faith. See, for example. Sir John Donaldson M.R. at p. 596 and Bingham L.J. at pp. 624-625.

[142] [1969] R.P.C. 41.

[143] For a discussion of the level of knowledge necessary to bind the conscience of remoter recipients, see below.

[144] Note the possibility of injunctive relief on a *quia timer* basis. Query whether liability for subconscious unauthorised user is consistent with good faith principles. See *Seager* v. *Copydex (No.1)* [1967] R.P.C. 349.

interest recognised and enforced in equity. Ricketson argues that they "approximate that class of equitable interest described as 'undefined equities'."[145] If confidential information is equitable property then it should be a right in *personam* which can be defeated by a *bona fide* purchaser for value without notice. A property interest recognised at law, on the other hand, is a right in *rem* good against all the world except the owner of the legal title. Difficult issues arise with this approach. It is by no means clear as to what is meant by equitable property in the context of confidential information. It appears to be a lesser property interest and will lose priority to a *bona fide* purchaser of a legal estate who was without notice. However, if confidential information is treated as a mere equity, there will be no legal estate to purchase. It will be a type of equitable proprietary interest that is unrelated to any property interest in law. Further, as the case law currently stands, there is some doubt as to whether *bona fide* purchase without notice is a valid defence to a claim in respects of breach of confidence. In the main Australian case[146] where the matter was directly in issue, the court held that a purchaser of confidential information will be bound from the time of receipt of the requisite notice, notwithstanding his *bona fides* at the time of purchase.

(e) *Sui Generis*

So far we have seen the difficulties involved in trying to determine the jurisdictional basis of an action for breach of confidence. In view of the uncertainty and the confusion which has resulted it may be that the approach to take in determining the jurisdictional basis is to treat the action for breach of confidence as "truly *sui generis* and represent[ing] a peculiar and unique outgrowth of equitable jurisdiction."[147] Under this approach no single branch of the law could claim to form the jurisdictional basis of the action but rather the action is based on a combination of the various branches of the law of contract, equity, tort and property to form a 'composite jurisdictional basis'[148]. Under this approach, it would appear that what is important is not so much which branch of the law forms the basis for the action (since it is a mixture of the various branches of the law) but rather the fact that a jurisdiction does exist to enforce

[145] Ricketson, *The Law of Intellectual Property* (1984), p. 852, para. 45.11. See D. Jackson, *Principles of Property Law* (1967), at p. 69 on 'undefined equity' which was quoted by Ricketson, *ibid.,* at p. 854, para. 45.16 as follows: '… a term which one writer has used to describe those situations where the courts: ....have acted to create a proprietary interest, but which has not as yet reached the stage when it can be said to a plaintiff, "Bring yourself within that category and you will be protected". Instead all that can be said is that "the remedies are available for protection. Prove that yours is a situation where they should be employed". But this does not mean that the "interest", once recognised as an equity, is any less a proprietary interest of a sort.' Other examples of 'undefined equities' are the equity of acquiescence and the now-defunct deserted wife's equity.

[146] See *Wheatley* v. *Bell* [1984] F.S.R. 16. The status of a *bona fide* purchaser is considered in more detail below. In the *Spycatcher* case, the tenor of the decision was to base the action on broad equitable principles of good faith. Only Lord Goff expressly left the matter open as to whether the true basis was property or conscience, see *A-G* v. *Guardian Newspaper (No.2), supra* note 3, at p. 659.

[147] Ricketson, *The Law of Intellectual Property* (1984), p. 856 at para. 45.23.

[148] Gurry, *Breach of Confidence* (1984), at p. 58.

an obligation of confidence. Thus, although it is difficult to determine clearly which principles of the various branches of the law are to apply the courts have always been reasonably clear about what would constitute the basic elements for a successful action for breach of confidence. Thus, once the courts acknowledge that a jurisdiction does exist in such an action, they will then adopt a flexible approach in any given case in determining the cause of action. The difficulties inherent in pinning down the parentage of the cause of action has not escaped judicial and academic notice. Slade L.J. in *Union Carbide Corp.* v. *Naturin Ltd.* commented that:-

> "Neither of the two leading counsel appearing before us, both very experienced in this field, were even willing to make any firm submission as to whether the cause of action is based on tort or simply on principles of equity."[149]

Professor G. Jones in a leading article stated that:-

> "A cursory study of the cases, where the plaintiff's confidence has been breached, reveals great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention. Indeed some judges have indiscriminately intermingled all these concepts. The result is that the answer to many fundamental questions remains speculative."[150]

From the discussion above it can be seen that the question of what is the jurisdictional basis for an action for breach of confidence is still unclear despite the *Spycatcher* decision. The courts have been seen to borrow from equity, contract, tort and property. This can be seen, for example, in the elaboration of when an obligation of confidence arises. In *Coco* v. *Clark*,[151] Megarry J. whilst not hesitating in grounding the cause of action on broad equitable principles of good faith, had little trouble in borrowing the 'hard-worked creature', the common law reasonable man to test when the equitable obligation of confidence would arise.[152] He also encountered little problems in borrowing the 'officious bystander' from contract law as an alternative basis to test the crystallisation of a relationship of confidence.[153] Even where there is a contract between the parties with express or implied obligations of confidentiality, broader equitable principles might still operate. In such cases, there will usually be no difference in content between the equitable obligation of confidence and the implied term.[154] Sometimes, however, the equitable obligation of confidentiality might help to fill in gaps in express terms.[155] Given

[149] [1987] F.S.R. 538 at p. 545.
[150] Jones, G. "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 L.Q.R. 463.
[151] [19691 R.P.C. 41.
[152] *Ibid,* at p. 48.
[153] *Ibid,* at p. 51.
[154] See *A-G* v. *Guardian Newspapers (No.2), supra* note 3, at p. 573.
[155] See *Marshall (Thomas)* v. *Guinle* (1979) Ch. 227.

all of the uncertainties and the mixture of principles, it would appear that there is some force in this approach of treating the jurisdictional basis as *sui generis*.[156] This approach does have its weaknesses too (if it could be considered a weakness) in that it would leave the future development of the law in this area open, uncertain and unsettled, since it prays in aid of so many branches of the law that the precise development of the law in this area will not be clear as it would be uncertain as to whether the principles of equity or that of common law would apply in any given situation. Despite this fact, this approach may ultimately prove to be conceptually more honest, even if it is somewhat amorphous in nature. However, it is this writer's view that on balance liability based on broad equitable principle of good faith is preferable and the weight of current authorities tend to support this approach. To conclude this section it should be noted that the British Law Commission in its report considered that the intervention of the legislature was required in this area and stated that:-

> "the present law on breach of confidence, whether it be based on principles of equity or of common law, should be abolished and replaced with a new statutory action for breach of confidence."[157]

2. *Detriment*[158]

On the question of whether the plaintiff in a breach of confidence action needs to prove detriment, the House of Lords in the *Spycatcher* decision drew a distinction between private litigants in a private action for breach of confidence and a governmental action for breach of confidence.

In the case of a private action, Lord Keith took the view that it was not necessary for the plaintiff to prove detriment in the sense of financial or material loss, specific detriment or harm in any positive way. In fact his Lordship stated that:-

> "... 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.... So I would think it was a sufficient detriment

[156] See Gurry, *supra* note 102, at pp. 58-61 for a discussion on this jurisdictional basis for an action for breach of confidence.

[157] See Law Commission (U.K.), *Breach of Confidence,* (Law Com. No. 110), Cmnd. 8388, H.M.S.O., London (1981) at p. 101. The Law Commission further stated their recommendation on the basic policy as follows (at p. 103, para. 6.5): "We recommend that the present action for breach of confidence should be abolished and replaced by a new statutory tort of breach of confidence, the incidents of which would be those attaching to any case of breach of a duty in tort except to the extent that they are specifically provided for in the ensuing recommendations." See also Ricketson, *The Law of Intellectual Property* (1984), p. 856, para. 45.24; Gurry, *Breach of Confidence* (Oxford, 1984), at p. 57 and Appendix II at p. 474; Denning, *What Next In The Law* (1982), pp. 266-268.

[158] See above for a general discussion on this issue.

> to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."[159]

Thus, Lord Keith appeared to be of the view that specific detriment was not an essential element in an action for breach of confidence, in the sense that it does not have to be proven in every action before the plaintiff can succeed. Furthermore, his Lordship appeared to adopt the view that even where detriment was necessary, the proof of it in the very broad sense of 'unwanted disclosure' would suffice. Lord Jauncey agreed with Lord Keith. Lord Goff left this question open and said, "I would also, like Megarry J. in *Coco* v. *Clark* ... wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment or potential detriment to the plaintiff will nearly always form part of his case; but this may not always be necessary."[160]

Lord Griffiths was of the view that detriment or potential detriment was an essential element which a private litigant in a breach of confidence action had to prove before he was entitled to the remedy. His Lordship expressed his views as follows:-

> "I am of the opinion that detriment or potential detriment to the confider, is an element that must be established before a private individual is entitled to the remedy. The remedy has been fashioned to protect the confider not to punish the confidant, and there seems little point in extending it to a confider who has no need of the protection."[161]

However, his Lordship interpreted detriment broadly (for example, a breach of confidence resulting in the loss of a friend was sufficient detriment) and thus, appeared to take a view similar to that of Lord Keith's in adopting a wide interpretation of detriment. The remarks in the *Spycatcher* case on the detriment requirement in private actions for breach of confidence are by way of *dicta.* Nevertheless, given the importance of the issue, it may be convenient to briefly discuss the point in more detail. There are arguments for and against having detriment as an essential prerequisite in an action for breach of confidence. First, the main argument in favour of having detriment as an element of the action is that it acts as a control factor to limit liability. However, in order to act as an effective control factor, the term detriment would have to have a clear and definable meaning. The word detriment in the law of confidence has acquired different meanings in relation to different types of confidential informa-

[159] *Ante* note 3 at p. 640. His Lordship, *ibid.,* gave an example as follows:- "Information about a person's private and personal affairs may be of a nature which shows him up in a favourable light and would by no means expose him to criticism. The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation."

[160] See *ante* note 3 at p. 659c-d.

[161] *Ante* note 3 at p. 650.

tion. In the case of commercial secrets, detriment commonly refers to financial detriment or financial loss or damage. However, in the case of personal secrets, detriment has a broader meaning than financial loss, since the law would be protecting a different type of confidential information. Thus, in relation to personal secrets, hurt feelings or exposure of ones affairs to 'public discussion or criticism' may constitute sufficient detriment, yet the same cannot be said to constitute sufficient detriment in relation to governmental secrets.[162] Therefore, since the term detriment has such a varied meaning, it is questionable whether it forms an effective control factor in the law of confidence. Further, the word detriment has been so broadly defined by some of their Lordships in the *Spycatcher* decision that in a private action for breach of confidence, detriment, if it is at all an essential requirement, is at most a requirement which has been so "diluted to the point of elimination"[163] that it cannot form a separate and independent element in a private action for breach of confidence. This is especially so, if the interpretation of detriment given by Lord Keith of 'unwanted disclosure' is accepted. The inclusion of detriment as an element of an action for breach of confidence would serve no useful purpose since such a broad concept of detriment would be present in most cases of breach of confidence. The interpretation of detriment given by Lord Keith as including disclosure "to persons whom he would prefer not to know of it" or "unwanted disclosure" could be said to be inherent in an action for breach of confidence. In a private action for breach of confidence, a plaintiff would normally be complaining that there has been a breach of confidence 'to persons whom he would prefer not to know of it'. Thus, once the plaintiff has proved that the information has the necessary quality of confidence, that there is a relationship of confidence and that there has been an unauthorised use of the confidential information, that should suffice. However, one could argue that since detriment in the sense of 'unwanted disclosure', that is, disclosure to persons whom the confider would prefer not to know of it, is different from 'unauthorised user', namely, disclosure or user without the confider's express or implied consent; the fact that the disclosure or user might be unauthorised will not necessarily mean that it is 'unwanted' and thus, having the element of detriment might still serve a purpose. However, it is submitted that if the disclosure is not 'unwanted' then it could be argued that it was impliedly authorised and thus, the element of unauthorised user would not be satisfied and the confider would not succeed in the action for breach of confidence. For example, one might conceive of a situation where without the requirement of detriment (as defined above) the plaintiff might try to sue the confidant for breach of confidence in a situation where there has been unauthorised user of the confidential information in the sense of use or disclosure without the confider's consent, and yet the disclosure could be to persons whom the plaintiff or confider might have no objections to them knowing. In a situation like this, one might

[162] See discussion on *Commonwealth of Australia* v. *John Fairfax & Sons Ltd.* below. Query whether or not damages can be awarded for mental distress in actions for breach of confidence. *Dicta in W* v. *Egdell* [1989] 1 All E.R. 1089 at pp. 1108-1109 is against its recovery. See also A.M. Tettenborn, "Damages For Breach of Confidence: An English Perspective", (1987) 3 I.P.J. 183.

[163] See P. Birks, "A Lifelong Obligation of Confidence" (1989) 105 L.Q.R. 501 at p. 506.

argue that without the requirement of detriment there would be injustice to the confidant if sued. It is submitted that the injustice would not arise in the situation given above since it could be argued that although the disclosure was not expressly authorised by the confider it may be possible to read in an implied licence. If one looks at the remedies provided for in an action for breach of confidence these are not merely compensatory but may be restitutionary and prohibitory in nature.[164] Thus, once it is proven that the wrong or the breach of confidence has occurred it is difficult to see why the confider should have to further establish detriment before he can succeed in his action for breach of confidence. In a situation where an injunction is sought by the plaintiff, especially in cases involving the breach of a personal confidence, it is difficult to see why the claim for an injunction should be dependent on proof of specific tangible detriment. Surely in this case, the grant of the injunction should be dependent on the proof of the breach of confidence and should not be dependent upon the proof of detriment. However, in a situation where the relief sought by the confider was damages, then the extent of the detriment suffered would be important in the award of damages since damages are compensatory in nature. Thus, if the plaintiff has suffered little or no specific tangible detriment then the damages would be nominal. Support for this view that detriment in the sense of a specific tangible loss is more relevant to the question of remedies, than breach, can be found in the decision of Rose J. in *X* v. *Y* who stated that:-

> "In my judgment detriment *in the use of* the information is not a necessary precondition to injunctive relief.... I do not understand any member of the court to have been saying that detrimental use is always necessary. I respectfully agree with Megarry V-C that an injunction may be appropriate for breach of confidence where the plaintiff may not suffer from the use of the information and that is borne out by more recent observations in the Court of Appeal and House of Lords ... which contain no reference to the necessity for detriment in use and, indeed, point away from any such principle."[165]

It would therefore seem that the courts in England have not yet come to any firm conclusion on whether detriment is an essential element in an action for breach of confidence. However, the meaning which has been attributed to the term by some of their Lordships in the *Spycatcher* decision has been so broad as to render it unnecessary to have a separate and independent requirement of detriment in a breach of confidence action between private litigants.

[164] See generally, P. Birks, "A Lifelong Obligation of Confidence", (1989) 105 L.Q.R. 501.
[165] [1988] 2 All E.R. 648 at p. 657. See also Francis Gurry, in his monograph on *Breath of Confidence,* (Oxford, 1984) at p. 407 where he argued against detriment being an element in an action for breach of confidence and stated that: "the existence of detriment should be relevant to the determination of the appropriate remedy rather than the existence of a breach of confidence. A confidence may be broken whether the confider suffers material detriment or not, particularly where personal confidential information is involved...." See also P. Birks, "A Lifelong Obligation of Confidence" (1989) 105 L.Q.R. 501 at p. 506 where the author was of the view that "it is right that this requirement [of detriment] should be eliminated or diluted to the point of elimination."

The position in relation to governmental actions for breach of confidence is different. All of their Lordships in the *Spycatcher* case were of the view that public detriment, in the sense of damage to the public interest, was an essential requirement.[166] Clearly the competing public interests in a public law action for breach of confidence will be different from a private law action between citizen and citizen.[167] In the context of governmental action, broad concerns of freedom of speech and of the press come strongly into play. There are two leading cases in this area,[168] dealing with the special position of the government in a breach of confidence action, which have been cited by their Lordships in the *Spycatcher* case. They are *A-G* v. *Jonathan Cape Ltd.* and *Commonwealth of Australia* v. *John Fairfax & Sons Ltd.*

In *A-G* v. *Jonathan Cape Ltd.*[169] Lord Widgery C.J. said that:-

> "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[170] of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.... The court should intervene only in the clearest of cases where the continuing confidentiality of the material can be demon-

166 See *A-G* v. *Guardian Newspapers (No.2), ante* note 3, where their Lordships seemed of the view that detriment in the sense of damage to the public interest was essential in a governmental action for breach of confidence. Lord Keith stated at p. 642 that:- "... a government is not in a position to win the assistance of the court in restraining the publication of information imparted in confidence by it or its predecessors unless it can show that publication would be harmful to the public interest." Lord Jauncey agreed. Lord Griffiths took a similar view and stated at p. 651 that:-"... a government that wishes to enforce silence through an action for breach of confidence must establish that it is in the public interest to do so. This is but another way of saying that the government must establish, as an essential element of the right to the remedy, that the public interest will suffer detriment if an injunction is not granted." Lord Goff also expressed a similar view at p. 659 that:- "... it is established that in cases of government secrets the Crown has to establish not only that the information is confidential, but also to its 'detriment' in the sense that the public interest requires that it should not be published."

167 *Ante* note 3 at p. 629, *per* Bingham L.J.

168 Both these cases will be quoted in quite great detail since they are the leading cases in this area and they have been cited with approval by the judges in the *Spycatcher case* and quoted in great detail in the judgment of Lord Keith.

169 [1975] 3 All E.R. 484. This was a case in which the Attorney General applied for an injunction to restrain the publication of the Grossman diaries in which Richard Grossman discussed confidential cabinet meetings. The injunction was refused by Lord Widgery C.J. The learned Chief Justice applied the relevant legal principles (which have been quoted below) and held that in the appropriate case the court would restrain the publication of government secrets where it is necessary in the public interest. However, on the facts of the case since it was concerned with disclosure of information which occurred some ten years ago his Lordship was not satisfied that the publication of the diaries would be harmful to the public interest and thus, the court declined to intervene.

170 In the Law Commission Report (U.K.) (Law Com. No. 110), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), para. 4.42, the Law Commission was of the view that although 'the term "facts" appears in the Law Reports, but from the context this would appear to be an error. The report at [1975] 3 All E.R. 484, at p. 495 has "facets".' Thus, the Law Commission has stated (c) as follows: "(c) that there are no facets of the public interest...."

strated. In less clear cases ... reliance must be placed on the good sense and good taste of the Minister or ex-Minister concerned."[171]

In *Commonwealth ofAustralia* v. *John Fairfax & Sons Ltd.*[172] (a decision of the High Court of Australia) Mason J. said:-

"The question then, when the executive government seeks the protection given by equity, is:- What detriment does it need to show?

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

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

Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.... If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."[173]

171 *Ibid,* at pp. 770-771. This principle laid down by Lord Widgery C.J. has been approved by Mason J. in *Commonwealth ofAustralia* v. *John Fairfax & Sons Ltd., infra,* and was also cited with approval by the judges in the *Spycatcher* decision, see *ante* note 3:- Scott J. at p. 575; Dillon L.J. at p. 615; Bingham L.J. at p. 627; Lord Keith at p. 640-641; Lord Griffiths at p. 651; Lord Goff at p. 660. See also M.W. Bryan, "The Grossman Diaries - Developments in the Law of Breach of Confidence", (1976) 92 L.Q.R. 180, where this statement has been criticised as unduly restricting the government's right to restrain disclosure of confidential information. See also the Law Commission Report, *supra* note 102, at paras. 4.41-4.44 for a discussion of the case.

172 (1980) 32 A.L.R. 485; (1980) 147 C.L.R. 39. A case in which the Commonwealth of Australia applied for an injunction to restrain the publication of the book *Documents on Australian Defence and Foreign Policy 1968-1975* which contained documents concerning the relationship of Australia with other countries particularly its relations with the Indonesian government in relation to the 'East Timor Crisis'. The injunction was granted by Mason J. on the grounds of copyright infringement but failed on the ground of breach of confidence.

173 *Ibid,* at pp. 492-493; pp. 51-52. Approved in the *Spycatcher* decision, *ante* note 3, by Scott J. at p. 576; Bingham L.J. at p. 629; Lord Keith at pp. 641-642; Lord Griffiths at p. 651; Lord Goff at p. 660.

These cases appear to have established an important principle of law that in the case of a government which is seeking to restrain the disclosure of confidential government information under the law of confidence, it is not sufficient merely for the Crown to show that the information has the necessary quality of confidence (namely, that it is not public property or public knowledge) but the Crown must also prove that the disclosure of the confidential information would be harmful to the public interest. It would appear that this principle of law is confined to actions by the government for the protection of confidential information and is not applicable in the case of an action between private litigants.[174] Thus, detriment in the sense of harm or likely harm to the public interest becomes one of the essential requirements which the Crown has to prove in order for its action for breach of confidence to succeed. Accordingly, in the case of government secrets, "it is for the party seeking to restrain publication to show cause why restraint is necessary."[175] Therefore, it is for the Crown to show that the restraint was necessary in the public interest in order for the court to grant protection.[176]

However, the definition of detriment in the case of government secrets is not financial detriment, as is common in commercial secrets, nor hurt feelings or exposure to public discussion or criticism as in the case of personal secrets,[177] but detriment in the sense of damage to the public interest or injury to the public good. The reason why detriment has been defined as such in relation to governmental secrets is because the Crown as the 'embodiment of the nation as a whole'[178], the government as 'the guardian of the public interest in national security'[179] are in a special position 'representing the nation as a whole'[180] such that any detriment to the Crown or the government must necessarily be in the terms of damage to the public interest. Lord Keith succinctly stated that:-

> "The Crown ... has no private life or personal feelings capable of being hurt by the disclosure of confidential information ... it must necessarily ... be in a position to show that the disclosure is likely

174 The Law Commission Report, *supra* note 102, at para. 4.44, stated that whether this principle "applies to the action for breach of confidence in other contexts, and if so to what extent, is as yet uncertain."

175 *Ante* note 3 at p. 628, *per* Bingham L.J.

176 See *ante* note 3 at p. 660, where Lord Goff stated the position in relation to government secrets as follows:- "... it is incumbent on the Crown, in order to restrain disclosure of government secrets, not only to show that the information is confidential, but also to show that it is in the public interest that it should not be published." The Law Commission on *Breach of Confidence, supra* note 102, at para. 4.42 stated that in the view of Lord Widgery in *Attorney-General* v. *Jonathan Cape Ltd.,* "... it is a positive requirement of the action for breach of confidence that on balancing the public interest in the protection of the information given in confidence against public interest in its disclosure the scales are tipped in favour of the protection of the information."

177 See *Commonwealth of Australia* v.*John Fairfax & Sons Ltd., supra* note 172, where exposure to public discussion and criticism was not sufficient detriment in the case of governmental secrets.

178 *Ante* note 3 at p. 595.

179 *Ante* note 3 at p. 581.

180 *Ante* note 3 at p. 640.

> to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstances of each case. In a question with a Crown servant himself, or others acting as his agents, the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice. But, where the publication is proposed to be made by third parties unconnected with the particular confidant, the position may be different.... The general rule is that anyone is entitled to communicate anything he pleases to anyone else, by speech or in writing or in any other way. That rule is limited by the law of defamation and other restrictions....[181]

Therefore, in cases on breach of confidence concerned with governmental secrets it is important for the Crown to show not just that the information has the necessary quality of confidence but also that it is "in the public interest that it should not be published."[182]

The question which then surfaces is the significance of the first element in an action for breach of confidence, namely, the quality of confidence. It is important in any action for breach of confidence that the plaintiff shows that the information for which he is seeking protection has the necessary confidentiality and the same is true in the case of government secrets since the need to show that there is confidential information worthy of protection in a court of law is an important aspect of an action for breach of confidence. However, in the case of State secrets the House of Lords in the *Spycatcher* case has confirmed the additional requirement of showing that it is in the public interest to prevent disclosure of the confidential information. With respect, this is correct since the mere fact that the information has the necessary quality of confidence (and in the case of State secrets, most, if not all, State secrets would be regarded as confidential) and the fact that the other requirements for a successful action for breach of confidence are also satisfied (namely, relationship of confidence and unauthorised user of the information) should not be sufficient to allow the Crown a successful action for breach of confidence in a democratic society because of the special position of the Crown. Otherwise the actions of the government would not be open to public discussion and criticism by the electorate and as Lord Goff aptly puts it:-

> "... although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutinity and criticism."[183]

[181] *Ante* note 3 at p. 640. See also *Lard Advocate* v. *Scotsman Publications Ltd.* \ I989\ 2 All E.R. 852.
[182] *Per* Lord Goff, *ante* note 3, at p. 660.
[183] *Ibid.*

Therefore, it seems clear that in the case of the Crown seeking protection of government secrets, confidentiality *per se* is insufficient. An interesting question has, thus, arisen in the *Spycatcher* case on the relationship between quality of confidence and detriment (in the sense of damage to the public interest). Did the House of Lords in the *Spycatcher* case decide the case more on the grounds of quality of confidence or on detriment? To put it another way, was the decision to refuse the Attorney General an injunction against the Observer and the Guardian newspapers reached on the grounds that the information was in the public domain, by virtue of the United States publication of the book *Spycatcher* and its subsequent worldwide dissemination, such that the information had lost its confidentiality and would therefore no longer be protected by the law of confidence, or did their Lordships refuse the Crown protection on the ground that they had failed to prove detriment in the sense of harm to the public interest? This is a difficult question. Their Lordships' judgments were not very clear on the actual basis of their decisions on this issue.

Lord Keith was of the view that:-

> "A communication about some aspect of government activity which does no harm to the interests of the nation cannot, even where the original disclosure has been made in breach of confidence, be restrained on the ground of a nebulous equitable duty of conscience serving no useful practical purpose."[184]

His Lordship then went on to stress that the ground of his decision for refusing the Attorney General relief against the newspapers was based:-

> "... simply on the view that all possible damage to the interest of the Crown has already been done by the publication of *Spycatcher* abroad and the ready availability of copies in this country ... it cannot reasonably be held in the present case that publication in England now of the contents of *Spycatcher* would do any more harm to the public interest than has already been done."[185]

Thus, Lord Keith appeared to place a great deal of emphasis on the detriment or damage to the public interest point. Lord Jauncey concurred with Lord Keith.

Lord Brightman adopted a similar view point that:-

> "The Crown is only entitled to restrain the publication of intelligence information if such publication would be against the public interest ... But if the matter sought to be published is no longer secret, there is unlikely to be any damage to the public interest."[186]

184 *Ante* note 3 at p. 640.
185 *Ibid.*
186 *Ante* note 3 at p. 648.

Lord Griffiths expressed similar views. However, Lord Goff adopted a slightly different approach and discussed the quality of confidence point as follows:-

> "In my opinion, however, these matters are all in any event irrelevant, having regard to the fact that the information is now in the public domain and therefore no longer confidential."[187]

It would appear that the majority of their Lordships seemed to have based their decisions on the fact that due to the United States publication of the book *Spycatcher* on the 13th July 1987 and its subsequent dissemination thereof, no further detriment or damage to the public interest could result, and therefore the Crown would no longer be able to prove detriment in the sense of damage to the public interest from the further publications of the newspapers. Since detriment has become an additional element in an action for breach of confidence in the case of governmental secrets, the Crown, in failing to prove this additional requirement of detriment, lost its action. Thus, the emphasis of the majority of their Lordships in refusing the Attorney General relief, appeared to be more on the fact that there was no further detriment or damage to the public interest which could result from further publications by the newspapers, rather than on the fact that due to the publications which had occurred the information was in the public domain and had thus lost its quality of confidence. In the context of the facts in the *Spycatcher* case, it may be that little turns on this point, as it was precisely because the information was in the public domain that detriment was hard to establish.

Their Lordships broadly in agreement with Scott J. were not persuaded by the national security arguments put forward by Sir Robert Armstrong on behalf of the Crown that greater damage would result from further publications in England.[188] Following from that, an interesting point has arisen as to the link between the element of 'quality of con--fidence of the information' and 'detriment in the sense of damage to the public interest'. Supposing the Court had accepted Sir Robert Armstrong's evidence, that despite the worldwide release of the book *Spycatcher* there were still valid national security reasons for granting the Crown protection because the secret service would be hurt, for example, because their sources may dry up and people would refuse to give information to them due to the loss of confidence of the informers in having their identity kept a secret. In other words, if their Lordships had been prepared to accept that there would be further detriment in the sense of further damage to the public interest due to matters of national security, would they have granted the Attorney General protection despite the fact that the information was already in the public domain and had thus lost its confidentiality. This is a tricky issue. The general principle in the law of confidence

187 *Ante* note 3 at p. 666.

188 For a detailed discussion on the national security factors raised by Sir Robert Armstrong on behalf of the Crown, see the judgment of Scott J., *ante* note 3, at pp. 590-592, which has been quoted in the judgment of Lord Griffiths at pp. 653-654.

is the protection of confidential information. Once the information has lost the necessary quality of confidence and is no longer confidential the basis for protection under the law of confidence will no longer exist. Thus, by the strong emphasis which their Lordships appeared to place on the damage to the public interest issue, are they suggesting that notwithstanding the fact that the information is no longer confidential they would have been prepared to grant the Attorney General relief had they been satisfied that further damage would have resulted. There appears to be a subtle hint of this in the judgment of Lord Keith[189] and to a lesser unclear extent in the judgment of Lord Goff.[190] Lord Griffiths was however, more vocal on this point and stated that:-

> "If I had thought that further publication would so damage the morale of the security service that they could not operate efficiently I would have been prepared to grant the injunction in the interests of national security. Of course, I think no such thing."[191]

Thus, Lord Griffiths would appear to be prepared to grant the Crown relief, notwithstanding the fact that the information was no longer confidential, provided that further damage to the public interest could be proved. If this view is accepted then it would seem that in the case of government secrets, proof of detriment in the sense of damage to the public interest alone, might be sufficient for the grant of relief under the law of confidence. Should detriment alone be enough in the case of State secrets? In the case of private secrets, detriment alone is not sufficient.[192] The information must also have the necessary quality of confidence. If detriment alone is sufficient in the case of State secrets, it would appear that the law is eroding away the requirement of quality of confidence in the case of governmental actions for breach of confidence. The element of quality of confidence is difficult to define because of the amorphous nature of the concept of public domain and the concept of accessibility and relative secrecy.[193] However, it would appear doubtful if the courts are in fact suggesting a move away from the need for quality of confidence. This is so even in relation to governmental secrets. The basic principle behind the law of confidence is the protection of confidential matters

189 *Ante* note 3 at p. 643.

190 *Ante* note 3 at p. 666, although Lord Goff did not really consider this question and considered it irrelevant under the circumstances.

191 *Ante* note 3 at p. 654.

192 See *Lennon* v. *News Group Newspapers Ltd., ante* note 108; *Woodward* v. *Hutchin, ante* note 108.

193 In *Schering Chemicals Ltd.* v. *Falkman Ltd., ante* note 113, Shaw L.J. commented on the tricky question of whether information which had lost its confidentiality could reacquire its aura of confidence through lapse of time. It would be a long shot to extend that to information seeking to reacquire its confidence which it recently lost and which is still fresh in the minds of many.

and once these matters are no longer confidential it is difficult to see how the law of confidence could grant further relief. The same must hold true in relation to State secrets too, for it is difficult to see why the Crown should be accorded such a special privilege of needing only to prove detriment in order to succeed in an action for breach of confidence.[194] Confidentiality and detriment to the public interest, whilst related are not merely the different sides of the same coin. They are conceptually distinct. Proof of confidentiality does not prove detriment, and proof of detriment will not necessarily prove confidentiality. At most, all that can really be said is that where the information is in the public domain, it will be exceedingly difficult for the Crown to prove detriment. This does not mean that the Crown should be able to succeed on proof of harm alone. Such a right, if it is to exist, must be based on legislation.

3. *Background Policy Arguments - Public Interest*[195]

Once the plaintiff has established the elements for an action for breach of confidence the courts can still refuse the plaintiff relief if the defendant can show that the publication or disclosure was in the public interest. This is known as the public interest defence.[196] Historically, the defence was confined to iniquities in the sense of wrongdoings like serious misconduct or crimes and was known as the iniquity defence.[197] However, the position today, in the light of subsequent cases, appears to be that the iniquity

[194] Query also whether this will mean that "small" discussions (for example, discussions between individuals) of the matter will be permitted since there may be no detriment to the public interest, whereas, the same cannot be said of "big" discussions (for example, discussions in the newspapers) which may lead to detriment to the public interest due to the width of their circulation. If this is the case, then it may lead to the anomalous result that the newspapers, whose duty it is to report the news and keep the public informed of matters of public interest, cannot do what the individuals can.

[195] See Law Commision Report, *ante* note 102, paras. 4.36-4.53 and para. 5.14; Cornish, *Intellectual Property: Patents, Copyright. Trade Marks and Allied Rights* (2nd ed., 1989), pp. 223-225; Gurry, *Breach of Confidence* (Oxford, 1984), chapter XV; Ricketson, *The Law of Intellectual Property* (1984), pp. 834-838, paras. 44.4-44.10. Goff & Jones, *The Law of Restitution* (3rd ed., 1986), pp. 675-683. See generally, R.G. Hammond, "Copyright, Confidence and the Public Interest Defence: "Mole's Charter" or Necessary Safeguard?", (1985) 3 I.P.J. 293.

[196] See Ricketson, *supra* note 102, at p. 834, para. 44.4, where the author was of the view that "to call it a "defence" may be a misnomer as sometimes it does not operate as a complete answer to an action for breach of confidence but only as a bar to injunctive relief and not to the award of damages under *Lord Cairns' Act.*" see also P. Birks, "A Lifelong Obligation of Confidence", (1989) 105 L.Q.R. 501 at p. 504.

[197] See *Cartside* v. *Outram* (1856) 26 L.J. Ch. 113 at p. 114, where Wood, V.C. stated that "....there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist."

rule is but one facet of a broader public interest defence which is not confined to disclosures of iniquities.[198] In *Lion Laboratories Ltd.* v. *Evans*[199] the Court of Appeal laid down guidelines on the application of the public

[198] In *Beloff* v. *Pressdram Ltd.* [1973] 1 All E.R. 241 at p. 260, Ungoed-Thomas J. stated that the defence of public interest clearly covers and ... does not extend beyond disclosure ... of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity ... Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country." Thus, the learned judge appeared to have adopted a narrow interpretation of the defence and confined it to 'misdeeds of a serious nature and importance to the country.' However, in other cases the judges appeared to have adopted a broader approach and given a wider meaning to the public interest defence. See *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396 at p. 405, *per* Lord Denning M.R.:- "... this exception ... extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others.... The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest." In *Fraser* v. *Evans* [1969] I Q.B. 349 at p. 362, Lord Denning M.R. further stated that:- "I do not look upon the word "iniquity" as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret." In *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, the public interest defence succeeded since the disclosure related to dangerous material on medical quackeries. See also *Woodward* v. *Hutchin* [1977] 2 All E.R. 751, for a broad application of the public interest defence where pop stars who promote their virtues run the risk of having their vices disclosed even if it amounts to a breach of confidence. See also *Lion Laboratories Ltd.* v. *Evans* [1985] 1 Q.B. 526; [1984] 2 All E.R. 417 where the court adopted a wide interpretation of the public interest defence.

[199] [1985] 1 Q.B. 526; [1984] 2 All E.R. 417.

[200] *Ibid,* at p. 537; p. 423 where Stephenson L.J. in his judgment discussed the four factors which the courts may take into account in determining the public interest defence. First, one has to distinguish between information which the public would find interesting from information which the public would have a right to know. The public interest defence is not a 'gossip charter' and extends only to the latter. As Stephenson L.J. puts it:- "The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know." Second, a distinction should be drawn between the private interest of the media in increasing "their circulation or the numbers of their viewers or listeners" and the public interest. Thus, one must not confuse the private profit motives of the newspapers in the disclosure with those of the public interest. In *Francome* v. *Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892 at p. 898 , Sir John Donaldson M.R. had this to say about the media:- "The 'media', to use a term which comprises not only the newspapers, but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always." Third, even if the disclosure was made on the public interest it is important to determine the scope of the intended disclosure. Thus, the extent and degree of disclosure should be only such as to protect the public interest. As the learned Lord Justice stated:- "... there are cases in which the public interest is best served by an informer giving the confidential information not to the press but to the police or some other responsible body." Fourth, Stephenson L.J. rejected the 'no iniquity, no public interest' rule and adopted the wider interpretation of the defence which was stated by Lord Denning M.R. in *Fraser* v. *Evans, supra* note 198, that "some things are required to be disclosed in the public interest, in which case no confidence can be prayed in aid to keep them secret, and '[iniquity]' is merely an instance of a just cause and excuse for breaking confidence." Thus, the public interest defence is not restricted to disclosures of iniquity. Rose J. in *X* v. *Y, ante* note 119, at p. 658, stated that Stephenson L.J.'s fourth consideration was that "it is not necessary to show misconduct by the plaintiffs in order to justify publication." It is also worth noting that further in his judgment, Stephenson L.J. also briefly dealt with the issue of motive by quoting from Lord Fraser in *British Steel Corp.* v. *Granada Television Ltd.* [1981] 1 All E.R. 417 at p. 480; [1981] A.C. 1096 at p. 1202 where his Lordship stated that:-"... The informer's motives are, in my opinion, irrelevant. It is said ... that in this case the informant neither asked for nor received any money, or other reward, but that he acted out of a keen sense of indignation...." Thus, once it is determined that the disclosure is justifiable in the public interest as oppose to the informer's own private interest, motive becomes irrelevant.

interest defence.[200] Once it has been established that the disclosure would be in the public interest, it is worth noting that there are different levels of public interest. Not every case of breach of confidence action will justify disclosure to the press. Lord Denning M.R. in *Initial Services Ltd.* v. *Putterill* said that:-

> "The disclosure must... be to one who has a proper interest to receive the information. Thus, it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."[201]

Thus, in order for a defendant in a private action for breach of confidence to avail himself of the public interest defence, he has to prove not only that the matters disclosed are matters of public interest but also that the disclosures are made to persons who have the proper interest to receive them, in other words, that the public interest justifies the extent and degree of disclosure which has occurred. This was applied in *Francome* v. *Mirror Group Newspapers Ltd.*[202] where the Court of Appeal, at the interlocutory application, held that the public interest only justified limited disclosures to the police and the Jockey Club but not to the public at large. In *Lion Laboratories Ltd.* v. *Evans*[203], due to the seriousness of the case the court held that the public interest justified disclosure to the public at large.

The House of Lords and the lower courts in the *Spycatcher* case[204] appear to have confirmed the existence of the public interest defence. The question of whether the public interest defence is restricted only to the revelation of iniquities appears to have been answered in the negative. Their Lordships adopted the wider interpretation of the public interest defence and did not confine it to iniquities. Lord Griffiths acknowledged that the public interest defence has been developed to include "cases in which it is in the public interest that the confidential information should be disclosed."[205] Lord Goff expressed similar views that "it is now clear that the principle extends to matters of which disclosure is required in

201 *Supra* note 198 at pp. 405-406. See also *Re a Company* (1989) 139 N.L.J. 542; The Times Law Report, 13 February 1989.

202 [1984] 1 W.L.R. 892; a case concerned with the confidential information obtained from the illegal tapping of the telephone of the home of the plaintiff, a famous jockey, by unidentified persons. Sir John Donaldson M.R. at p. 898 stated that:- "... it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the 'Daily Mirror'."

203 *Supra* note 199. A case concerned with confidential information relating to the alleged inaccuracy of the breathalyser, Lion Intoximeter 3000, which is a device for testing the breath of motorists to determine the alcohol concentration in these drivers.

204 *Ante* note 3, see the judgment of Scott J. at pp. 582-584 for a discussion of the 'iniquity defence'; Dillon L.J. at pp. 614, 619 and 622; Bingham L.J. at pp. 629-630. See also the judgment of Sir John Donaldson M.R. at p. 596 and pp. 602-604, where the Master of Rolls discussed the levels of public interest in relation to the facts of the case. At the House of Lords stage, see Lord Griffiths at pp. 649 and 657; Lord Goff at pp. 659-660.

205 *Ante* note 3 at p. 649.

206 *Ante* note 3 at p. 659.

the public interest."[206] Both their Lordships accepted that there were different levels of public interest and that some cases may justify disclosure to the public at large while others may justify a more limited disclosure.[207] Their Lordships considered the possibility of the public interest defence applying to certain parts of the publication of the book *Spycatcher* but not to the whole book. Lord Griffiths noted that in relation to Peter Wright "it is very difficult to envisage the circumstances in which the facts would justify ... [the public interest] defence."[208] In the Court of Appeal, Sir John Donaldson M.R. was of the view that the right to have confidentiality maintained would be lost or will not be upheld by the courts "if there is just cause or excuse" for the disclosure, although "the nature and degree of the communication must be proportionate to the cause or excuse."[209] On the question of the determination of the public interest, the Master of Rolls made a plea to the media to "never forget how easy it is to confuse the word 'self' with that of 'public' when attached to the word 'interest'."[210] Thus, confirming the second factor laid down by Stephenson L.J. in the *Lion Laboratories* decision.[211] The Law Commission made an important preliminary point in relation to the meaning of 'public interest' by pointing out that "only the question whether it is *'in* the public interest' to disclose certain information is in point, not the quite distinct question whether that information is *'of* public interest'."[212] Described in this way, the ultimate parameters of the defence in any given case will be hard to predict and define.[213] As Ricketson aptly puts it, "It is much easier to be certain about the existence of this defence to an action for breach of confidence, although it is less easy to describe its limits."[214] The Law Commission was of the view that "the disclosure or use of the information may be justified when the public interest in the protection of the confidence is outweighed by the public interest in such disclosure or use."[215] They also recommended the creation of a new statutory tort of breach of confidence and made certain recommendations in that context in relation to disclosures in the public interest. These are broadly in line with the general principles of law stated above, namely, that the disclosure must be in the public interest, that there are levels of public interest and that

207 Scott J., *ante* note 3 at p. 589, was of the view that "the importance to the public of this country of the allegation that members of MI5 endeavoured to undermine and destroy public confidence in a democratically elected government makes the public the proper recipient of the information."

208 *Ante* note 3 at p. 650. It would appear that only in exceptional circumstances where there was evidence of some "iniquitous course of action... being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any member of the establishment, or the police, to do anything about it" that a member of the security service could rely on the public interest defence. There were none in the *Spycatcher* case. *Per* Lord Griffiths, *ibid,* at p. 650.

209 *Ante* note 3 at p. 596.

210 *Ibid,* at p. 613.

211 See *supra* note 200.

212 Law Commission (U.K.) (Law Com. No. 110), *Breach of Confidence.* Cmnd. 8388, H.M.S.O., London (1981), para. 4.37. This view conforms with the first factor laid down by Stephenson L.J. in *Lion Laboratories Ltd.* v. *Evans, supra* note 200.

213 Goff & Jones, *The Law of Restitution* (3rd ed., 1986) at p. 682 stated that:- "The scope of the defence of disclosure in the public interest is still most uncertain."

214 Ricketson, *The Law of Intellectual Property* (1984), p. 834, para. 44.4.

215 See Law Commission Report, *supra* note 212, at para. 4.53.

in determining the public interest the courts have to perform the balancing act.[216] This balancing act may require the court to make hard decisions on finely balanced competing arguments. As Stephenson L.J. in *Lion Laboratories Ltd.* v. *Evans* said:-

> "The problem before the judge and before this court is how best to resolve ... a conflict of two competing public interests. The first public interest is the preservation of the right of organisations, as of individuals, to keep secret confidential information. The courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer.... The duty of confidence, the public interest in maintaining it, is a restriction on the freedom of the press ... the duty to publish, the countervailing interest of the public in being kept informed of matters which are of real public concern, is an inroad on the privacy of confidential matters."[217]

In a case like *Spycatcher* where the parties to the litigation involve the newspapers instead of the 'real wrong-doers' Peter Wright and his publishers, Heinemann, the courts have the difficulty not only of balancing the conflicting rights of freedom of speech and information which

[216] See generally, the Law Commission's recommendations, *ibid.,* paras. 6.77-6.84 and pp. 208-209. The following is a summary of some of the recommendations. The Law Commission recommended that:- (a) "information should only enjoy the protection of the action for breach of confidence if, after balancing the respective public interests in confidentiality on the one hand and in disclosure or use of the information on the other, the information is found to merit such protection." (para. 6.84) In assessing the public interest the court should take into account all the relevant factors, "including the manner in which the information was acquired", "the extent and character of the disclosure or use" and "the time that has lapsed since the information originally became subject to an obligation of confidence". The Commission came to the general conclusion that "the courts should have a broad power to decide ... whether in the particular case the public interest in protecting the confidentiality of the information outweighs the public interest in its disclosure or use." (para. 6.77); (b) The public interest defence was not confined to iniquities or "misconducts" and that "in weighing the conflicting interests in the balance, the court will have regard to the circumstances of the particular case. (para. 6.78); (c) They also recommended that there should be levels of public interest and that "the question will arise as to whether the actual disclosure or use is, having regard to its extent and character, on balance justifiable in the public interest." (para. 6.80); (d) "It should be for the defendant to satisfy the court that there was a public interest involved in the relevant disclosure or use of the information in question. If the defendant discharges this burden, it should be for the plaintiff to establish that this interest is outweighed by the public interest in the protection of the confidentiality of the information." (para. 6.84). It is worth noting that the authors of Goff & Jones, *supra* note 213 at p. 683, were not persuaded by the Law Commission's recommendations and felt that if the "proposals were to be implemented, paradoxically, greater secrecy and greater inefficiency would ensue from the expense incurred to protect secrets; and multi-nationals might well base their research and development elsewhere than in the United Kingdom." They were of the view that this branch of the law should develop on a case by case basis and not "be the subject of legislation."

[217] *Supra* note 199 at pp. 536-537; pp. 422-423. Quoted by Scott J. in the *Spycatcher* case, *ante* note 3 at p. 581.

is fundamental to any society against the right of the individual to be left alone and the right of organisations[218] as of individuals to keep secret confidential information, but also the added task of considering the right of the press and the media to disseminate news[219] and the right of the public to receive such matters which are in the public interest.

At the end of the day the judges in the *Spycatcher* case had to perform the 'balancing exercise' and to strike the balance between the various competing interests taking into account the relative weight of those interests.[220] Based on the facts of the case, Scott J., the majority in the Court of Appeal and the majority of their Lordships in the House of Lords held that the Attorney General was not entitled to the final injunction against the Observer, the Guardian and the Sunday Times newspapers. Thus, the

218 Sir Robert Armstrong in the *Spycatcher* case advanced this latter right on behalf of the Crown that "the effective functioning of the British Security Service requires that its affairs be kept secret." See the judgment of Scott J. in the case, *ante* note 3 at p. 585, where part of Sir Robert Armstrong's affidavit was quoted. Thus, the Attorney General, suing on behalf of the Crown, asserted "the public interest in a leak-proof, reliable and efficient security service ..." *(per* Bingham L.J. in the *Spycatcher* case at p. 623) and concentrated on the "damage to the efficiency of MI5" *(per* Scott J. at p. 569) if the injunctions were not granted. See also *British Steel Corp.* v. *Granada Television Ltd.* [1981] 1 All E.R. 417 at p. 480; 11981] A.C. 1096 at p. 1202; where similar remarks were made by Lord Fraser on the confidentiality interests of private organisations.

219 It is worth noting what Sir John Donaldson M.R. in the *Spycatcher* case, *ante* note 3 at p. 600, said about the position of the newspapers. The learned Master of the Rolls rejected the idea that the newspapers enjoyed a "special status and special rights in relation to the disclosure of confidential information which is not enjoyed by the public as a whole." However, he was of the view that the press occupied an important position in a democratic society and the reason for that is "not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees. If the public interest in the safety of the realm, or other public interest, requires that there be no general dissemination of particular information, the media will be under a duty not to publish. This duty is owed to the public as much as to the confider. If the public interest forbids indiscriminate publication, but permits or requires that disclosure be to a limited category of persons, for example, the police, the government, the opposition, or members of Parliament, the media will have a correspondingly limited right and duty." Bingham L.J. at p. 614 noted that:- "... The media have greater powers of disseminating information widely than other people have, but ... they have the same rights of free speech as anyone else, subject to the same constraints." Bingham L.J. then continued at p. 627 that "... where the defendant is a newspaper. It is elementary that our constitution provides no entrenched guarantee of freedom of speech or of the press, and neither the press nor any other medium of public communication enjoys ... any special position or privileges. The rule is that anyone and any newspapers and any other medium of public communication may say and write anything they like unless there is some legal reason why they should not." Scott J. at p. 588 was of the view that "... The press has a legitimate role in disclosing scandals in government. An open democratic society requires that that be so."

220 See *ante* note 3 at p. 580, where Scott J. also made a useful point, that in the *Spycatcher* case the parties were the newspapers and not the 'wrong-doer' Peter Wright and that the balance "to be struck as between the government and an ex-officer of MI5 is not.... an identical balance to that which has to be struck between the government and the press ... I do not accept that the newspaper's duty will necessarily be coterminous with the duty on its informant, the confidant." The judges of the *Spycatcher* case expressed views on the balancing exercise which the courts may be required to perform - see Sir John Donaldson M.R. at p. 611; Dillon L.J. at p. 622; Bingham L.J. at pp. 626-627; Lord Griffiths at p. 654; Lord Goff at p. 659.

balance came down in favour of freedom of speech and freedom of the press. This was an understandable conclusion given the fact that by the time of the trial the book *Spycatcher* had already been disseminated on a worldwide basis and therefore it would have been objectionable that information which was available to "citizens of virtually every other country in the world ... could not be placed before the citizens of [the United Kingdom]."[221]

To summarise, in the case of the protection of governmental secrets the Attorney General acting on behalf of the government must show:-

(a) that the publication or disclosure would be a breach of confidence;

(b) that the public interest requires the restraint of the publication or disclosure in the sense that the disclosure would injure the public interest, in other words, the public interest issue becomes an element of liability and the Crown would have to show public detriment or potential public detriment in the sense of injury to the public interest; and

(c) that there are no other considerations of public interest "contradictory of and more compelling than those relied upon" by the Attorney General.[222]

Thus, it would appear that in the case of government secrets the public interest element would be considered twice. First, it would be considered as an element of liability which the Crown would have to prove [see (b) above]. Second, it would be considered at the stage of the public interest defence [see (c) above]. Therefore, in order to reconcile (b) and (c) it would appear that the courts would have to perform the 'balancing exercise' discussed above.[223] Even if the Crown could show that there would be injury to the public interest by the publication, the courts will not necessarily grant the Crown relief. If it can be shown that there are overwhelming or more compelling public interest factors in favour of disclosure, for example, freedom of speech or of the press, the Crown would fail in its action since the law of confidence will not protect in

[221] *Ante* note 3 at p. 592, *per* Scott J.

[222] See Law Commission (U.K.) (Law Com. No. 110), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), para. 4.42 quoting from the judgment of Lord Widgery in *A-G* v. *Jonathan Cape Ltd.* [1976] Q.B. 752 at p. 770.

[223] See P. Birks, "A Lifelong Obligation of Confidence", (1989) 105 L.Q.R. 501 at p. 506, where the author stated that "a more elegant explanation would be to unite the inquiry after public detriment and the balancing exercise required by the proposition that confidence cannot subsist in information the disclosure of which, all things considered, is in the public interest." Thus, the author is putting forward the "unified approach through the definition of confidential information." Although this would be one way of looking at the situation, I would prefer the view that even if the disclosure is in the public interest the information could still be confidential in the sense that it is not public knowledge or information in the public domain, but that the obligation not to disclose the information is being restricted to the extent to which disclosure is justifiable in the public interest.

confidence, material the disclosure of which is in the public interest. It has been suggested that in private actions for breach of confidence the public interest in the preservation of confidentiality is rarely outweighed by other public interests except in the case of iniquity. But that in governmental actions there is "a more subtle and difficult balance between confidentiality ... and freedom of speech."[224]

4. *The Duration of The Obligation of Confidence: The Position of Peter Wright and His Publishers, Heinemann*

All the judges in the *Spycatcher* case were unanimous in condemning the actions of Peter Wright and his publishers, Heinemann, in the publication and subsequent dissemination of the book *Spycatcher.*

Scott J. at the court of first instance stated that:-

> "Mr. Wright, in writing his memoirs and submitting them for publication was, in my judgment, in clear and flagrant breach of the duty of confidence he owed to the Crown. I am easily persuaded that the nature of employment in the security services justifies the conclusion that its members on entering the service come under a duty of confidence ... prima facie, members and ex-members of the security services must carry their secrets with them to the grave."[225]

The learned judge continued as follows:-

> "If the writing and publication of the book represented a breach of duty owed by Mr. Wright to the Crown, he cannot, ... by his own wrongdoing, have relieved himself of his duty and provided for himself a freedom to publish that he did not previously enjoy.... He cannot be allowed to benefit from his own wrong ... if sued in this country, be accountable to the Crown for any profit he made out of his own breach of duty.... For those reasons, the Attorney-General remains

[224] *Ibid.*
[225] *Ante* note 3 at p. 585.

> ... entitled to an injunction against Mr. Wright, or any agent of his, to restrain publication of *Spycatcher* in this country."[226]

It should be noted that the issue of the liability of Peter Wright in the publication of *Spycatcher* was not directly in issue in the *Spycatcher* case. As Sir John Donaldson M.R. puts it:-

> "Fortunately or unfortunately, Mr. Wright is not a party to the proceedings. The reason is that, in view of the Crown, there were insuperable procedural difficulties in the way of joining him as a party, when not only was he resident outside the jurisdiction but also the Crown had already begun proceedings against him in New South Wales."[227]

Nevertheless, this issue is still of interest in relation to the liability of a confidant who himself destroys the confidentiality of the information by putting it into the public domain.[228] From the *dicta* of the various judges, it would appear that most of the judges would agree to the following:-

[226] *Ibid,* at p. 586. See p. 593 for a summary of Scott J.'s conclusion. See also the view of Sir John Donaldson M.R., at p. 598, that Peter Wright was not justified in publishing *Spycatcher as* a whole. Dillon L.J. also expressed his views, at p. 613, that Peter Wright "owed a duty of secrecy to the British government ... the publication of the book as a whole was a flagrant breach on his part of his duty of secrecy. The subsequent widespread distribution of the book ... did not ... absolve Mr. Wright from his duty of secrecy or from the consequences of his breaches of that duty... He could not automatically release himself from his duty by breaking it." Bingham L.J. agreed, at p. 633, that "Mr. Wright's conduct deserves the severe condemnation it has consistently received." Lord Keith opined, at p. 642, that had Peter Wright sought to first publish his book in England:- "... the Crown would have been entitled to an injunction restraining him. The work of a member of MI5 and the information which he acquire in the course of that work must necessarily be secret and confidential and be kept secret and confidential by him.... It is common ground that neither the defence of prior publication nor the so-called 'iniquity' defence would have availed Mr. Wright had he sought to publish his book in England.... In the result, the case for an injunction now against publication by or on behalf of Mr. Wright would ... rest on the principle that he should not be permitted to take advantage of his own wrongdoing." His Lordship concluded, at p. 646, that:- "... members and former members of the security service do have a lifelong obligation of confidence owed to the Crown. Those who breach it, such as Mr. Wright, are guilty of treachery just as heinous as that of some of the spies he excoriates in his book." Lord Brightman *(ibid,* at p. 647) and Lord Griffiths *(ibid.* at p. 650) expressed similar views. Lord Griffiths was also of the view that if Peter Wright wanted to publish *Spycatcher* in England today he would be prepared to grant the government an injunction to prevent him from doing so. His Lordship further stated, at p. 651, that:-"... whatever publication may have been achieved abroad, Peter Wright remains bound by his duty of secrecy and confidence and will not be allowed to publish *Spvcatcher* in any form in this country." Lord Goff also agreed, at p. 660, that:- "Peter Wright, as a member of the security service, owed to the Crown a lifelong duty not to disclose confidential information which came into his possession in the course of his period of service with the security service ... by publishing the book as a whole he committed a clear and flagrant breach of his duty." Lord Jauncey stated, at p. 668, that:- "In the absence of full argument 1 find it very difficult to accept the proposition that Peter Wright can, by his own breach of duty, discharge himself from any further restraint on publication of the information confided to him during and in the course of his service.... The publication of *Spvcatcher* was against the public interest and was in breach of the duty of confidence which Peter Wright owed to the Crown. His action reeked of turpitude."

[227] *Ante* note 3 at p. 598.

[228] See generally, F. Patfield, "*Attorney-General* v. *The Observer Limited: Attorney-General* v. *The Times Newspapers Limited* - The Decision of the House of Lords in the *Spycatcher* Litigation" [1989] 1 E.I.P.R. 27.

(a) that Peter Wright owed a 'lifelong obligation of confidence' to the Crown and that by the publication of the book *Spycatcher* he had breached that lifelong obligation which was imposed on him;

(b) that had Peter Wright attempted to publish his memoirs as a whole in the book *Spycatcher* in England the courts would have granted an injunction to restrain the publication, subject to the public interest defence;

(c) that Peter Wright could not relieve himself of his obligation of confidence or from the consequences of his breach by relying on his own wrongdoing and alleging that the information was now in the public domain and thereby provide himself with the right to publish the information;

(d) that the Crown was entitled to an account of profits made by Peter Wright out of his breach of duty if sued in England.

In relation to (a), all the judges agreed that a member of the security service owed a lifelong obligation of confidence to the Crown and that Peter Wright as a former member of the security service was also similarly under the lifelong obligation of confidence.[229] The publication *of Spycatcher* which contained confidential matters about the security service was held to be a breach of that obligation of confidence.

In relation to (b), had Peter Wright attempted the first publication of *Spycatcher* in England, an injunction would quite clearly have been granted to restrain publication since at that time the information was still confidential and would have been protected under the law of confidence subject to any disclosures which were in the public interest.

In relation to (c), this issue is the most difficult and controversial. As Lord Griffiths stated of the Attorney General's third argument:-

> "The third argument is that even if publication of *Spycatcher* in this country would cause no further harm to the security service, Mr. Wright nevertheless remains bound by his duty of confidence because he cannot free himself from this duty by breaking it, or to put the matter in more colourful language, he cannot be permitted to profit from his own wrongdoing. All the judges who have so far considered this case have accepted this argument."[230]

Lord Goff stated as follows:-

> "... it has been held by the judge, and by all members of the Court of Appeal in the present case, that Peter Wright cannot be released

[229] See *Lord Advocate* v. *Scotsman Publications Ltd.* [1989] 2 All E.R. 852; J. McDermott, "Secrets and the Public Interest" (1988) N.L.J. (October, 21) 762 at p. 763; where the lifelong obligation of confidence was stated by the author to be limited where: (a) the information has become generally available to the public through no fault of the confidant and (b) where it is in the public interest that the information should be disclosed.

[230] *Ante* note 3 at p. 651.

> from his duty of confidence by his own publication of the confidential information, apparently on the basis that he cannot be allowed to profit from his own wrong."[231]

Scott J. and the Lord Justices in the Court of Appeal were in agreement that Peter Wright's duty of confidence remained notwithstanding the publication and the worldwide dissemination of *Spycatcher.* They seemed to be of the view that a confidant, like Peter Wright, could not rely on his own breach or wrongdoing to terminate his own obligation of confidence. In the House of Lords, all their Lordships except Lord Goff, were in favour of granting the Attorney General the injunction against Peter Wright should he want to publish *Spycatcher* in England today, notwithstanding the fact that the information is already in the public domain. However, the reasons given by their Lordships for this decision were not the same.

Lord Keith was in favour of the grant of the injunction on the principle that Peter Wright should not be permitted to take advantage of his own wrongdoing. However, it is unclear as to whether his Lordship was saying that the injunction would be granted because Peter Wright was still under an obligation of confidence or whether the injunction was granted under some limited equitable doctrine analogous to the springboard principle.[232] It is worth noting that his Lordship felt that no greater damage would be caused by the publication[233] and yet his Lordship was prepared to grant the injunction.

Lord Brightman would have granted the injunction on quite different grounds. His Lordship was of the view that the publication and worldwide dissemination of *Spycatcher* by Peter Wright had totally destroyed the "initial confidential quality of the contents of the book." His Lordship stated that:-

> "The reason why the duty of confidence is extinguished is that the matter is no longer secret and there is therefore no secrecy in relation to such matter remaining to be preserved by the duty of confidence. It is meaningless to talk of a continuing duty of confidence in relation to matters disclosed worldwide. It is meaningful only to discuss the remedies available to deprive the delinquent confidant or his successor-in-title of benefits flowing from the breach, or in an appropriate case to compensate the confider."[234]

Thus, Lord Brightman would have been prepared to grant the Attorney General the injunction not on the ground that Peter Wright owed a continu-

231 *Ante* note 3 at p. 662.

232 See *infra* note 258 for a discussion of the springboard principle.

233 As discussed above, in the case of the protection of government secret, detriment is an essential element of liability.

234 *Ante* note 3 at p. 647. His Lordship further stated, *ibid.,* that:- "In my opinion the reason why the court would, or might, grant an injunction against Wright if he now brought himself within the jurisdiction and sought to publish *Spycatcher* here, is not that such an order would recognise a subsisting duty of confidence, but that it would impede the unjust enrichment of Wright, or preclude him from benefitting, tangibly or intangibly, from his own wrongdoing...."

ing duty of confidence to the Crown (his Lordship was clearly of the view that Peter Wright's duty of confidence was terminated when the information lost its necessary quality of confidence by its worldwide publication) but in order to impede or prevent Peter Wright from benefitting from his own breach or wrongdoing.

Lord Griffiths expressed strong views that:-

> "It would make a mockery of the duty of confidence owed by members of the security and intelligence services if they could discharge it by breaching it. I would therefore hold that whatever publication may have been achieved abroad, Peter Wright remains bound by his duty of secrecy and confidence and will not be allowed to publish *Spycatcher* in any form in this country."[235]

Thus, Lord Griffiths appeared to be a strong supporter of the "continuing duty" issue.

Lord Goff dealt with this issue at great length and came to the view that:-

> "... it is difficult to see how a confidant who publishes the relevant confidential information to the whole world can be under any further obligation not to disclose the information, simply because it was he who wrongfully destroyed its confidentiality. The information has, after all, already been so fully disclosed that it is in the public domain.... For his wrongful act, he may be held liable in damages, or may be required to make restitution; but ... the confidential information, as confidential information, has ceased to exist, and with it should go, as a matter of principle, the obligation of confidence.... The subject matter is gone; the obligation is therefore also gone; all that is left is the remedy or remedies for breach of the obligation."[236]

Lord Goff was against artificially prolonging the continuing duty of confidence once the information was no longer confidential and was in the public domain. However, his Lordship was not entirely convinced that the whole obligation of confidence had been terminated, for he expressed his doubts as follows:-

> "At all events, since the point was not argued before us, I wish to reserve the question whether, in a case such as the present, some limited obligation (analogous to the springboard doctrine) may continue to rest on a confidant who, in breach of confidence, destroys the confidential nature of the information entrusted to him."[237]

Lord Goff further concluded that even if his provisional view on this point was wrong and Peter Wright remained under a continuing duty of

235 *Ante* note 3 at p. 651.
236 *Ante* note 3 at pp. 662-663.
237 *Ibid,* at p. 664.

confidence, his Lordship was nevertheless of the view that it was not in the public interest to prevent publication of the book in England.[238]

The arguments expressed by Lord Goff on this issue are indeed tempting. However, it is prudent to note that even Lord Goff expressed reservations on lifting the entire obligation of confidence from a confidant who himself destroyed the confidentiality in the information by putting it into the public domain. On basic principles, the entry of the confidential information into the public domain is bound to cause problems in relation to arguments over the continuance of the obligation of confidentiality, since the information no longer possesses the necessary quality of confidence. These problems are aggravated by the fact that there are three main situations in which confidential information may lose its confidentiality.

(a) *Where the confidential information was published by the confider himself or with his consent.*[239]

In *Mustad* v. *Allcock & Dosen,*[240] the House of Lords refused the plaintiffs protection on the grounds that the plaintiffs' confidential information had been completely disclosed to the world by the publication of its patent specification. As Lord Buckmaster puts it:- "The secret, as a secret, had ceased to exist."[241] The case was one in which the confidential information was disclosed by the confiders themselves. Thus, where the confidential information was published or put into the public domain by the confider himself or by the owner of the confidential information or with his consent, the confidant is no longer bound by any obligation of confidence.

(b) *Where the confidential information was published by a third party.*

Cranleigh Precision Engineering Ltd. v. *Bryant*[242] is a controversial case in this area. In that case the defendant, Bryant, who was the plaintiffs' managing director invented an above ground swimming pool. As managing director of the plaintiff company he received information from the plaintiffs' agent about the existence of a published Swiss patent with respect to a swimming pool similar to that of the plaintiffs. The defendant did not disclose this information to the plaintiffs and kept it a secret. He subsequently bought over the rights to the Swiss patent and since leaving the plaintiffs' service he sought to exploit the information to his

238 See *ibid.* at p. 665, where Lord Goff stated that:- "In my opinion, artificially to restrict the readership of a widely accessible book in this way is unacceptable: if the information in the book is in the public domain and many people in this country are already able to read it, I do not see why anybody else in this country who wants to read it should be prevented from doing so."

239 In the following discussion we shall assume that the confider is the "owner" of the confidential information or the person to whom the obligation of confidence is owed; the confidant is the person on whom the obligation of confidence has been imposed.

240 [1963] R.P.C. 41.

241 *Ibid,* at p. 43.

242 [1964] 3 All E.R. 289; see also Law Commission (U.K.) (Law Com. No. 110), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), paras. 4.27-4.30. See also Dean, *The Law of Trade Secrets* (1990) at pp. 131-133.

own advantage and that of the defendant company. Roskill J. granted an injunction against the defendant preventing him from using the information. Different views have been expressed on the implications of the decision of Roskill J. Fox L.J. in *Speed Seal Products* v. *Paddington* took the view that:-

> "It appears, therefore, that the fact that a third party has published the information does not necessarily release B (the person who owed the duty of confidence) from his obligations. The court will prevent B from abusing his position of confidence."[243]

Lord Goff in the *Spycatcher* case was, however, of the view that the decision in *Cranleigh* v. *Bryant* should be regarded as:-

> "... no more than an extension of the springboard doctrine, and I do not consider that it can support any general principle that, if it is a third party who puts the confidential information into the public domain, as opposed to the confider, the confidant will not be released from his duty of confidence."[244]

There were several basis for Roskill J.'s decision in the *Cranleigh* case. First, the decision could have been made on the basis that confidentiality existed notwithstanding the publication of the Swiss patent since the confidentiality which the court was seeking to protect was not the information in the Swiss patent but the knowledge of the effect of the Swiss patent on the plaintiffs' business.[245] Second, the decision could have been decided on the basis that the defendant as managing director of the plaintiff company was in a position of a fiduciary and there was a breach of his fiduciary duty when he used the information for his own benefit instead of using it in the interest of the plaintiff company[246]. Third, Roskill J. distinguished *Mustad* v. *Dosen* on the basis that in that case the confidential information was published by the confider himself and stated that "... if the master had published his secret to the whole world ... the servant is no longer bound by his promise to the master not to publish that same secret...."[247] but that in the present case the publication was by a third party. Accordingly, he was not bound by the decision and granted the injunction against the defendant. It is submitted that the decision can be best explained on either or both of the first two grounds. The third ground is, with respect, somewhat difficult to support as the distinction drawn on the facts does little to change the fact that the

243 [1986] 1 All E.R. 91 at p. 95.
244 *Ante* note 3 at p. 662.
245 *Supra* note 242 at pp. 297-298, where Roskill J. stated that:- "I can perhaps best state the plaintiffs' argument in this way. It was not what appeared in the Bischoff specification itself which was confidential. It was the knowledge of the possible effect to and on the plaintiffs of the existence and publication of this specification which was confidential in the hands of the one person who was in a position to assess its true significance because of the knowledge which he, as the plaintiffs' managing director, possessed of all the facts of the plaintiffs' swimming pool and of their business connected therewith." See also Gurry, *Breach of Confidence* (Oxford, 1984), at pp. 78-79.
246 See Gurry, *supra* note 245, at pp. 183-184, 192-193 and 196.
247 *Supra* note 242 at p. 300.

information in the published patent specifications had entered into the public domain.[248]

(c) *Where the confidential information was published by the confidant or with his consent.*

In *Speed Seal Products* v. *Paddington,*[249] Fox L.J. held that in this situation the confidant, the person who owed the obligation of confidence, "cannot be in a better position than he would be if the publication had been made" by a third party or a stranger. Fox L.J. came to this conclusion based on his wide interpretation of the *Cranleigh* case.[250] This would mean that "if the confidant is not released when the publication is by a third party, then he cannot be released when it is he himself who has published the information."[251] This view has been criticised.[252] The Law Commission[253] came to the conclusion that once the information is in the public domain, the obligation of confidence should be terminated and this should be the case even if the confidant was the person who put the information into the public domain.

The position in relation to Peter Wright would fall to be considered under this section since in the *Spycatcher* case the information was put in the public domain by the confidant, Peter Wright. It is clear that once the information has entered into the public domain no fresh or new obligation of confidence can arise since there is no longer any confidential information capable of creating a new obligation of confidence. Once we transgress that clear line we are emerging into an area of great uncertainty and doubt. On the issue of whether a continuing duty of confidence remained in Peter Wright notwithstanding the fact that the contents of

248 See Gurry, *supra* note 245, at pp. 246-247 tor a discussion of Roskill J.'s attempt at reconciling the springboard doctrine with *Mustad* v. *Dosen* and the criticism of his reasoning.
249 [1986] 1 All E.R. 91 at p. 95.
250 See *supra* note 242.
251 *Ante* note 3 at p. 661.
252 See the criticism by Lord Goff in the *Spycatcher* case, *ante* note 3 at pp. 661 -662, where Lord Goff stated that:- ".... so far as concerns publication by the confidant himself, the reasoning in the *Speed Seal* case (founded as it is on the *Cranleigh* case) cannot, in my mind, be supported.... For my part, I cannot see how the secret can continue to exist when the publication has been made not by the confider but by a third party." See also Gurry, *Breach of Confidence* (Oxford, 1984) at pp. 246-247 where the author stated that:- "Once information has lost its confidential character and passed into the public domain, the foundation of any action aimed at preserving the secrecy of the information would seem to be undermined. The agency through which the information becomes common knowledge seems irrelevant." The author then continued at footnote 29 on p. 247, that if it was the confidant who published the information then he would be liable for breach of confidence. The author then expressed the view that whether the injunction be an appropriate remedy may depend on the publication. See also Dean, *The Law of Trade Secrets* (1990) at p. 162, where the author expressed the view that:- "... it cannot be a hard and fast rule that whatever the level of culpability, where the confidee is responsible for the publication of information received in confidence, the confidee will remain permanently enjoined from its use." The author appeared to be of the view that in general, once the information had entered into the public domain the confider would be restricted to damages but left the question open in relation to cases where obvious dishonesty on the part of the confidant occurred.
253 See Law Commission (U.K.) (Law Com. No. 110), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), paras. 4.30 and 6.70.

Spycatcher had entered into the public domain, the views of Lord Brightman and Lord Goff are, with respect preferable.[254] Once the subject matter of the confidence no longer exists the obligation of confidence should also be terminated. However, just because the confidant is no longer under a continuing obligation of confidence does not mean that he is released from all equitable obligations. Where the confidant by his own breach places the information into the public domain, thereby destroying the original obligation of confidence, a limited residual equitable obligation might survive so as to impose a "special handicap" on him. It is difficult to define precisely the nature and the legal basis of this limited residual equitable obligation. One possible approach might be to construct a fiduciary relationship between the parties. The reason for this is that the obligations of the fiduciary are more onerous and includes a positive obligation to act in the best interest of the beneficiary by virtue of the position of trust.[255] This can be compared to the less onerous and more negative obligation imposed by the law of confidence, namely, that the confidant is not to make unauthorised use or disclosure of the confidential information. Thus, if a fiduciary relationship could be imposed on the confidant who in breach of confidence causes the information to enter into the public domain, then the fact that confidentiality has been destroyed will not affect the positive duty imposed on the fiduciary to act in the best interest of the confider or not to act against the interest of the confider. This would therefore mean that the courts could grant an injunction to prevent the confidant from making further use of the information as part of a fiduciary's duty to act in the best interest of the confider and not to breach his fiduciary duty. The length or duration of the injunction would depend on the nature of the fiduciary obligation. *The Cranleigh Precision Engineering* decision could also have been explained on the basis that the defendant managing director was in a position of a fiduciary to the plaintiff company and had thus, breached his fiduciary duty. Similarly, in *Schering Chemicals Ltd.* v. *Falkman Ltd.*[256] the defendants were held by Shaw L.J. to be fiduciaries. Thus, in the case of *Spycatcher* one could argue that Peter Wright as a high ranking officer of MI5 would owe a fiduciary duty to the Crown. If one were to draw an analogy between MI5 and a private company then the position of Peter Wright as a senior officer of MI5 would probably be analogous to that of a director in a private company, although not necessarily that of a managing director as in *Cranleigh's* case. The relationship of a director to the company generates clear fiduciary obligations. Thus, it would not be a radical extension of the law to hold that Peter Wright could be placed in a position of fiduciary to the Crown.[257] If this is so, then it would be right to say that injunctive

254 Their Lordships were of the view that once the information has entered into the public domain, it is difficult to see how the obligation of confidence can continue to exist.

255 See Cornish, *ante* note 102 at p. 228, where the author stated that:- "... the fiduciary may be wider in scope than a simple obligation to observe confidence: the fiduciary may, for example, be expected to continue using information for his beneficiary's advantage only, even after it has become public." The author then cites *Cranleigh's* case in support of the proposition.

256 [1981] 2 W.L.R. 848. See a discussion of the case in the Law Commission Report No. 110, *supra* note 253 at paras. 4.21-4.23.

relief could be granted against Peter Wright and the basis for the grant of the injunction would be to prevent Peter Wright from breaching and continuing to breach the fiduciary duty imposed on him. The length of the injunction to be granted would depend on the nature of his fiduciary obligation. The judges in the *Spycatcher* case were in agreement that Peter Wright owed the Crown a lifelong obligation of confidence. Thus, the length of the injunctive relief against Peter Wright would be for ever, a lifetime ban, since the nature of the obligation he owed to the Crown was a lifelong obligation. This would therefore be analogous to the springboard doctrine.[258] It should however be borne in mind that the maxim that "equity does not act in vain"[259] might be relevant to the question of the relief to be granted. It could be argued that the grant of the injunction against Peter Wright when the information is already in the public domain would be futile. With due respect, it is submitted that the grant of the injunction against Peter Wright would not be futile since the purpose of the grant is not to protect the confidentiality of the information which has already been lost but to enforce the residual fiduciary duty to act affirmatively in the interests of the Crown. In the context of the broader obligations of a fiduciary, equity would not be acting in vain in granting injunctive

257 See Goff & Jones, *The Law of Restitution* (3rd ed., 1986), chapter 34, pp. 632-658. The learned authors stated that:- "English judges have wisely never attempted to formulate a comprehensive definition of who is a fiduciary." Thus, there is no definitive definition of who a fiduciary is. However, it has been said that "the class of fiduciary relationships is never closed." Thus, it is not inconceivable that the relationship of Peter Wright to the Crown could be regarded as a fiduciary relationship.

258 The springboard doctrine was laid down by Roxburgh J. in *Terrapin Ltd.* v. *Builders' Supply Co. (Hayes) Ltd.* [1967J R.P.C. 375 at pp. 391-392 as follows:- "... that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.... Therefore, the possessor of the confidential information still has a long start over any member of the public.... It is, in my view, inherent in the principle upon which the *Saltman* case rests that the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start...." See also *Seager* v. *Copydex (No. 1)* [1967] 2 All E.R. 415; *Aqiiacultiire Corporation* v. *New Zealand Green Mussel Co. Ltd.* (1985) 5 I.P.R. 353, where Prichard J. in the High Court of New Zealand applied the "springboard doctrine". In *Potters-Ballotini* v. *Weston-Baker* [1977] R.P.C. 202 at p. 206, Lord Denning stated that:- "Although a man must not use such information as a springboard to get a start over others, nevertheless that springboard does not last for ever." For a more detailed discussion on this area:- see Gurry, *Breach of Confidence (Oxford,* 1984) pp. 245-252; Cornish, *ante* note 102, pp. 222-223, Ricketson, *ante* note 102 paras. 43.10-43.12; Law Commission Report No.1 10, *supra* note 253 at paras. 4.24-4.26 and para. 6.70. It is worth noting that in most of these cases where the courts have applied the "springboard doctrine" the secrets of the inventions or the actual confidential information has not completely entered into the public domain yet and that some work or "reverse engineering" is required on the part of the members of the public before the confidential information can be extracted. This is therefore, unlike the *Spycatcher* case where the confidential information itself has already entered into the public domain. Thus, as submitted, the courts in a situation like *Spycatcher* would probably have to apply either an "extended springboard doctrine" or a doctrine analogous to the "springboard doctrine".

259 See also Bingham L.J. in the *Spycatcher* case, *ante* note 3 at p. 630. where he quotes Sir Nicolas Browne-Wilkinson V-C in the same case as stating that:- "It is an old maxim that equity does not act in vain. To my mind that is good law and the court should not make orders which would be ineffective to achieve what they set out to do."

relief against Peter Wright.[260]

However, using fiduciary relationships as the basis for imposing the limited residual equitable obligation on the confidant in these types of cases is not a panacea to all the problems in this area since not all confidants are fiduciaries. The problem arises in relation to a confidant who deliberately and flagrantly breaches confidence but who is not technically a fiduciary. Could this more onerous fiduciary duty be imposed on such a confidant who deliberately and flagrantly breaches confidence? Could this "special disability" be imposed on him? Could it be said of such a person that although initially he was not a fiduciary, that a fiduciary type of obligation would be imposed on him by virtue of the flagrancy of the breach of confidence? In general, a fiduciary obligation is imposed due to the nature of the relationship. It is difficult to see how an individual by breaching a lesser duty of confidence, namely, by placing information into the public domain, thereby has imposed on him the more onerous duty to act affirmatively in the interests of the confider in respects of that information, for example, by not placing himself into a position where his interests clash with those of the original confider. The controversy accordingly continues.

5. *The Problem of Indirect Recipients*[261]

So far we have dealt with the obligation owed by the confidant in cases of direct disclosure of the confidential information by the confider. In this section the problem in relation to the obligation of a third party who has obtained the confidential information through an indirect disclosure will be examined. The most common scenario which falls under this category would be where A (the confider) discloses the confidential information to B (the confidant) through direct disclosure. B then in breach of confidence discloses the confidential information to C (the indirect recipient). The action by A against B for breach of confidence has already been discussed above. The problem that has arisen is in relation to the obligation owed by C to A, if any. The obligation of confidence owed by C to A (the "owner" of the confidential information) would on "good faith" principles,

[260] See also Fox L.J. in *Speed Seal Products* v. *Paddington, supra* note 249, who held that the grant of the injunction against the defendant who had placed a commercial secret in the public domain could be supported where the only traders operating in that field are the plaintiff and the defendant. An injunction in such a case would go a long way to restoring the parties to their original position. Query however the position where the breach has produced a field of multiple competitors. The grant of an injunction in the former situation would not be punitive of the defendant. Further, in the *Spycatcher* case, given the life long duty of confidence owed by Peter Wright, it would hardly be possible for it to be argued that he was being punished. In cases of commercial secrets, it may be that any residual equitable obligations will be limited to the duration of time that it would have taken for the information to become public knowledge without the defendant's breach.

[261] See Gurry, *Breach of Confidence* (Oxford, 1984), at pp. 269-283; Cornish, *Intellectual Property: Patents, Copyright. Trade Marks and Allied Rights* (2nd ed., 1989), pp. 231-232; Ricketson, *The Law of Intellectual Property* (1984), para. 43.19; Dean, *The Law of Trade Secrets* (1990), chapter 5, pp. 255-272; Law Commission (U.K.) (Law Com. No. 110), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), paras. 4.11 -4.12 and paras. 6.52-6.55.

depend on when C gained knowledge of the breach of confidence by B. There are three main scenarios which need to be considered in this context.

(a) *The position of third parties who receive the confidential information knowing that the confidential information was disclosed to them in breach of confidence.*

In this type of situation the third party who at the time of receipt of the information has actual knowledge that the information has been disclosed to him in breach of confidence will be imposed with an obligation of confidence to A (the "owner" of the confidential information) due to the bad faith at the time of receipt of the confidential information.[262]

(b) *The position of third parties who receive the confidential information in circumstances in which they ought to have known that the confidential information was disclosed to them in breach of confidence.*

In this situation the third party who received the confidential information in circumstances in which he ought to have known that the information was imparted to him in breach of confidence will also be bound by an obligation of confidence to A (the "owner" of the confidential information) due to the "constructive bad faith" which he acquired at the time of receipt of the confidential information.[263]

(c) *The position of third parties who at the time of receipt of the confidential information were receiving it innocently and without notice that the information was disclosed to them in breach of confidence.*

In this situation the principle generally is that the innocent third party, C, would be under an obligation of confidence to A (the "owner" of the confidential information) from the moment C acquired the necessary knowledge that the information was imparted to him in breach of confidence, even though he was completely innocent at the time of receipt of the information.[264] Thus, the obligation of confidence is not imposed at the moment

[262] See *Prince Albert* v. *Strange* (1849) *2* De Gex & Sm. 652, 64 E.R. 293; (on appeal) (1849) 1 Mac. & G. 25, 41 E.R. 1171. See Gurry, *Breach of Confidence* (Oxford, 1984) at pp. 271-272 for a more detailed discussion on this area.

[263] Difficulties have arisen in relation to the level of knowledge required. For a more detailed discussion on this, see below.

[264] See *Fraser* v. *Evans* [1969) 1 Q.B. 349 at p. 361, where Lord Denning M.R. said that:- "No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence." See Gurry, *supra* note 261, at p. 275 for a more detailed discussion. See also Law Commission (U.K.) (Law Com. No. 1 10), *Breach of Confidence,* Cmnd. 8388, H.M.S.O., London (1981), para. 4.12 where the Commission stated that:- "A person is not liable for breach of confidence in disclosing or using information which is in fact subject to an obligation of confidence as long as he has no actual or constructive knowledge of its confidential character, but once he acquires such knowledge he becomes liable from that time onwards for any subsequent disclosure or use." The Commission also took the view, *ibid,* at para. 6.53, that:- "Liability should, however, only attach as from such time as the third party has both acquired the information and has the requisite knowledge of the obligation of confidence...." See below on the knowledge requirement.

of receipt of the confidential information since C was innocent at the time of receipt of the information. The obligation of confidence is imposed from the moment C gains the necessary knowledge of the breach of confidence. In *Talbot* v. *General Television Corporation Pty. Ltd.,*[265] Harris J. accepted that an obligation of confidence would be imposed on the defendant once he was put on notice that the information was disclosed to him in breach of confidence. The learned judge then went on to state that:-

> "In my opinion, at least by the time the writ was issued it was unconscionable for the defendant to use the plaintiff's information, and therefore the plaintiff is entitled to an injunction against it to restrain any further use of that information...."[266]

Thus, the obligation of confidence owed by C (the innocent indirect recipient) to A (the "owner" of the confidential information) crystallised at the time C acquired the necessary knowledge of the breach of confidence. According to Harris J. in the *Talbot* case, the latest point in time in which C ought to have known of the breach of confidence is at the time the writ was issued. In *Talbot's* case, the defendant was a volunteer and traditionally, equity does not assist a volunteer. However, the same principle was adopted even in relation to a *bona fide* purchaser for value without notice in the case of *Wheatley* v. *Bell*.[267]

In the *Spycatcher* case, the Court of Appeal and the House of Lords accepted the basic propositions discussed above that the third party will be bound by an obligation of confidence to the "owner" of the confidential information once the third party acquires the necessary knowledge that the information was imparted to him in breach of confidence.[268]

265 [1981] R.P.C. 1.

266 *Ibid,* at p. 18.

267 [1984] F.S.R. 16. Helsham C.J. in the Supreme Court of New South Wales rejected the defence of *bona fide* purchaser for value in this type of case and was of the view that the defence was directed towards the resolution of priorities in relation to property rights which cases on breach of confidence are not concerned with. The learned Chief Justice appeared to support the *Talbot* decision and quoted from Pettit on *Equity and the Law of Trusts* (3rd ed., 1974) at p. 422 that:- "... even, if a man obtains the confidential information innocently, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence." See also the suggestions made by Professor Gareth Jones on the "Defence of Change of Position" in his article Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463 at pp. 477-481, where the learned author suggested that where the *bona fide* purchaser for value without notice has "irrevocably changed his position to his detriment" that he should be accorded a defence against liability. See *Morison* v. *Moat* (1851) 9 Hare 241 for *dicta* on the *bona fide* purchaser for value without notice defence. If such a defendant has not made an irrevocable change of position to his detriment then the *bonafide* purchaser for value without notice defence may act only as a partial defence against the grant of an injunction and not as a complete defence to liability. See also Goff & Jones, *The Law of Restitution* (3rd ed., 1986) chapter 39, pp. 691-699. See also Law Commission Report No. 110, *supra* note 261, at paras. 6.53-6.54 where the Commission stated that:- "... a third party should be liable as soon as he knew or ought to have known of the obligation of confidence affecting the information ... even if he gave value for the information.... However the fact that a third party has given value for information and was at the time of its acquisition without actual or constructive knowledge of any obligation affecting it is of considerable significance and is, in our view, one of the matters of which the court should be able to take account in determining the appropriate remedies against the third party."

What remains unclear is whether *honafide* purchaser for value without notice is a defence to an action for breach of confidence. In the *Spycatcher* case Sir John Donaldson MR. intimated that it might be. He said:-

> "Since the right to have confidentiality maintained is an equitable right, it will ... 'bind the conscience' of third parties, unless they are *bona fide* purchasers for value without notice...."[269]

Unfortunately, no reasons were given in support of this proposition and given that the point was not directly in issue, it was not surprising that the matter was left untouched in the House of Lords. If liability for breach of confidence is based on broad equitable notions of good faith and good conscience, then the fact of *bona fide* purchase will not necessarily operate to prevent the acquisition of knowledge such as to taint in equity the conscience of the third party. This should not however, prevent the court from having regard to the fact of *bona fide* purchase in tailoring injunctive relief, given the discretionary nature of equitable remedies. Detrimental change of position on the part of the defendant in the context of a reliance on a representation from the plaintiff, might generate a defence based on estoppel principles. In the absence of estoppel, it is unclear as to whether detrimental change of position coupled with a *bona fide* purchase operates as a defence to liability.[270]

A subsidiary issue that has arisen in the context of the position of third party indirect recipients of confidential information, is whether the scope of the obligation of confidence imposed on them is the same as that owed by the direct recipient (namely, the original confidant). In the *Spycatcher* case, Sir John Donaldson M.R. said:-

> "In an earlier passage in his judgment Scott J. had considered whether the duty to maintain confidentiality was in all circumstances the same in relation to third parties who became possessed of confidential information as it was in relation to the primary confidant.... His

[268] See the *Spycatcher* case, *ante* note 3, at p. 614 where Dillon L.J. stated that:- "... anyone who receives information from a person bound by an obligation of secrecy or confidence, and who knows that the information has been passed to him by his informant in breach of that obligation, becomes automatically *prima facie* himself bound by a like obligation of secrecy or confidence which will prevent his disseminating the information any further, or making any use of it without the consent of the person to whom the obligation of secrecy or confidence was owed by the informant." See also Bingham L.J. at p. 625, where the learned Lord Justice said:-"... A third party coming into possession of confidential information is accordingly liable to be restrained from publishing it if he knows the information to be confidential and the circumstances are such as to impose on him an obligation in good conscience not to publish...." See *per* Lord Keith at p. 644 that:- "... The third party to whom the information has been wrongfully revealed himself comes under a duty of confidence to the original confider." *Per* Lord Griffiths at p. 652 that:- "... a third party who knowingly receives the confidential information directly from the confidant... is tainted and identified with the confidant's breach of duty and will be restrained from making use of the information." See also Lord Goff at p. 658.

[269] See *ante* note 3 at p. 596.

[270] See *Rover International Ltd.* v. *Cannon Film Sales Ltd. (No. 3)* [1989] 3 All E.R. 423, a case on mistake of fact and *restitutio in integrum,* for the defence of change of position and estoppel. Tricky problems could arise on the relationship between change of position, *bona fide* purchaser for value without notice and estoppel.

> conclusion was that it was not necessarily the same. I agree. The reason is that the third party recipient may be subject to some additional and conflicting duty which does not affect the primary confidant or may not be subject to some special duty which does affect the confidant. In such situations the equation is not the same in the case of the confidant and that of the third party and accordingly the result may be different."[271]

Thus, although the nature of the obligation of confidence owed by the primary confidant and the third party indirect recipient to the "owner" of the confidential information would appear to be the same, the application of that obligation may produce different results in the case of an indirect recipient, given differences in his position.

The Level of Knowledge Required by The Third Party

The question of the level of knowledge which a third party indirect recipient is required to possess before an obligation of confidence can be imposed on him has yet to be resolved. Thus, when one states that the "third party will be bound by an obligation of confidence if at the time of receipt of the confidential information he ought to have known that the information was imparted to him in breach of confidence"[272] or that "the innocent third party without knowledge of the breach of confidence at the time of receipt of the confidential information would be bound by an obligation of confidence once he has the necessary knowledge"[273], what level of knowledge on the part of the third party are we looking for? In general, the law has identified five different possible levels of knowledge. In *Lipkin Gorman* v. *Karpnale Ltd.,*[274] Alliott J. adopting the *"Baden categorisation"* set out the five categories as follows:-

> "(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry."[275]

These five categories of knowledge cited above were developed in relation to constructive trust cases.[276] Do they apply to the law of con-

271 See *ante* note 3 at p. 600. This passage was cited by Scott J. in *W* v. *Egdell* (1989) 1 All E.R. 1089.
272 See category (b) above.
273 See category (c) above.
274 [1986]F.L.R.271.
275 *Ibid,* at p. 283 where Alliott J. cited the categorisation of the types of knowledge referred to in the judgment of PeterGibson J. in *Baden* v. *Societe Gen. du Commerce S.A.* [1983] B.C.L.C. 325 at p. 407. This was also cited by May L.J. in the Court of Appeal in the *Lipkin Gorman* case, [1989J F.L.R. 137 at p. 145.
276 Categories (i) and (ii) would be what the constructive trust lawyers would appear to refer to as "actual knowledge". Categories (iv) and (v) would appear to be known as "constructive notice" or "constructive knowledge". It is unclear whether category (iii) refers to "actual knowledge" or "constructive notice". For the purposes of this article the same categorisation will be adopted.

fidence? In the case of an action for breach of confidence which categories of knowledge are we looking for in relation to the imposition of obligations of confidence on indirect recipients.

Francis Gurry was of the view that:-

> "In the case of breach of confidence ... the courts should ... affix the third party with knowledge, and thus liability from the date of such knowledge, not only where a third party wilfully refrains from making inquiry, but also where he ought to have known that the information was being given in breach of confidence."[277]

The author continued that:-

> "... the third party should be affixed with liability from the time of acquiring information if, at that time, he knew or ought to have known that he was acquiring the information in breach of an obligation. But the third party should be affixed with constructive notice on the basis of an objective test - that is, if the circumstances were such that a reasonable person in his position would have made inquiries about the origin of confidential information at the time of the acquisition."[278]

Thus, Francis Gurry appeared to be of the view that constructive notice on the part of the third party would be sufficient to impose an obligation of confidence on him and that it is not necessary for the plaintiff to prove actual knowledge.[279] In *Coco* v. *Clark,* Megarry J. was also of the view that constructive notice of the breach of confidence would be sufficient to impose an obligation of confidence on the third party and adopted the objective reasonable man test.[280] The Law Commission also adopted the constructive notice approach and would impose an obligation of confidence on a third party who knows or ought to know that the information was imparted to him in breach of confidence.[281]

277 See Gurry, *Breach of Confidence* (Oxford, 1984), at p. 273.
278 *Ibid,* at p. 274.
279 Gurry, *ibid,* at p. 273, expressed the view that:- "The wilful abstention from making inquiry in circumstances in which it would be embarrassing to do so is also the basis on which the courts will, in the context of constructive trustees, affix liability to a stranger to the trust." The author then continued on p. 274 that:- "The more rigorous standards which seem to be gaining ground in the area of constructive trusts would be, it is submitted, inapposite." Thus, Francis Gurry is of the view that, in the case of the law of confidence the courts should impose the third party with an obligation of confidence if the third party has constructive notice that the confidential information was imparted to him in breach of confidence.
280 [1969] R.P.C. 41 at p. 48 where Megarry J. stated that:- "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence." On the actual facts, Megarry J. was not dealing with the position of indirect recipients. The defendant in that case was a direct recipient. Should that make any difference?
281 See Law Commission Report, *supra* note 261, at para. 6.55 where the Law Commission recommended that:- "... a person who acquires information already impressed with an obligation of confidence, however created, should become subject to that obligation as soon as he has both acquired the information and knows or ought to know that the information is so impressed."

Goff and Jones, however, appeared to adopt a higher level of knowledge requirement, namely, knowledge in the sense of reckless disregard to the truth or recklessly closing ones eyes to the truth, before an obligation of confidence would be imposed on a third party who received information in breach of confidence.[282]

Thus, the preponderence of the views discussed so far appear to adopt the approach that actual or constructive notice on the part of the third party that the information was imparted to him in breach of confidence would be sufficient to impose an obligation of confidence on him to the "owner" of the confidential information.

In *Union Carbide Corp.* v. *Naturin Ltd.,* Slade L.J. discussed in *dicta* the degree of knowledge required in order to render the third party recipient of the confidential information liable. Slade L.J. stated as follows:-

> "I am not yet persuaded that any of the authorities relating to constructive trusts necessarily provide the test of the degree of notice which is required on facts such as the present. Nor am I persuaded that actual knowledge of the full factual and legal position would necessarily be required before an obligation would attach ... on the ground that, to use the words of Harris J., it would be unconscionable to do so ... The degree of notice which is required to render liable a defendant ... is, in my opinion, a difficult question to which the answer is far from clear on the existing authorities."[283]

Slade L.J. acknowledged the difficulty involved in determining the degree of notice required in order to impose the third party recipient of the confidential information with an obligation of confidence. The learned Lord Justice left the question open and considered it "inappropriate for this court to attempt to answer it on this striking out application"[284] but expressed the view that he was not persuaded that actual knowledge of the full facts and legal position was required.

In the *Spycatcher* case, only Lord Goff in the House of Lords appeared to have made any mention of the knowledge requirement. His Lordship stated as follows:-

[282] See Goff & Jones, *The Law of Restitution* (3rd ed., 1986), at p. 666 where the learned authors stated that:- "... In our view he should only be liable (subject to any defences) from the time when he becomes aware of the breach of confidence or recklessly closes his eyes to that possibility; from that time, but not before, he will be jointly and severally liable with the confidant to the confider."

[283] [1987] F.S.R. 538 at p. 549. In that case counsel for the plaintiff argued for a lower degree of knowledge requirement, *ibid.* at p. 548 that "it would not be necessary to prove actual knowledge" on the part of the defendant before an obligation of confidence can be imposed on it. Counsel argued that:- "All that is needed ... is sufficient notice to put the defendant on inquiry." Counsel for the defendant, on the other hand, argued for a higher level of knowledge requirement. He submitted, *ibid.* at p. 547 that "... the mere knowledge of the existence of a claim by the plaintiffs would not suffice. Sufficient notice ... would involve the knowledge at the material time both that the relevant confidential information had been stolen and that the goods had been made with the use of that information."

[284] *Ibid,* at p. 549.

> "I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word 'notice' advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary, though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious."[285]

Thus, Lord Goff did not come to any firm conclusion on the level of knowledge which was required. However, it would appear that his Lordship was implying that the level of knowledge required would be rather high before an obligation of confidence would be imposed on the recipient of the confidential information, since his Lordship mentioned the "extent to which actual knowledge" is required and also included situations in which the confidant "deliberately closed his eyes to the obvious."[286] However, no mention was made as to whether the lower level of knowledge, namely, that of constructive notice would be sufficient to impose an obligation of confidence on the third party recipient of the confidential information.

From the various views discussed above, it would appear that the question of the degree of knowledge required by a third party recipient before an obligation of confidence would be imposed on him is a difficult one. The answer, at the end of the day, would appear to depend on the degree of notice or the level of knowledge required such that it would be unconscionable for the recipient of the confidential information to make use of the confidential information. It is submitted that once the recipient of the confidential information has actual or constructive knowledge[287] that the information was imparted to him in breach of confidence, an obligation of confidence may be imposed on him. It would not be necessary to restrict liability only to situations where the recipient of the confidential information has actual knowledge of the breach of confidence. Liability on the basis of constructive knowledge would, it is submitted, be more

285 See *ante* note 3 at p. 658.

286 This would appear to refer to category (ii) in the *"Baden* categorisation" of the five categories of knowledge. Thus, it would appear that Lord Goff may be taken to be implying that actual knowledge is required before an obligation of confidence can be imposed on the recipient of the confidential information. However, his Lordship felt it unnecessary to decide on which level of actual knowledge was required. But his Lordship did state that knowledge under category (ii) would be covered.

287 A further issue could arise here in relation to the notice requirement. Even if one were to have decided on the degree of notice required, the next question would appear to be "Notice of what?" When we say that the third party recipient has to have the necessary knowledge or notice, are we referring to notice of the actual breach of confidence or notice of a claim made by the plaintiff of a breach of confidence or notice of the factual basis of the claim for breach of confidence? Note also that difficult issues may arise on whether the imposition of the obligation of confidence based on constructive knowledge is consistent with the level of knowledge required such that it would be unconscionable for the recipient of the confidential information to make use of it, for example, in relation to persons who are slow-witted.

consistent with the general basis of liability in this area of the law. It has generally been accepted that in the case of direct recipients, an obligation of confidence can arise in equity based on the fact that a reasonable man would have known that the information was imparted in confidence. This would approximate to level (iv) knowledge in the *Baden* categorisation. If such a level of knowledge is sufficient to taint the conscience of the direct recipient, it may be difficult to see why it should not also suffice in the case of third party indirect recipients. Whilst constructive notice of circumstances which would put an honest and reasonable man on enquiry [level (v) knowledge] may be insufficient, it is submitted that constructive notice of the facts [level (iv) knowledge] ought to suffice to justify the intervention of equity.

VII. *SPYCATCHER* REVISITED: A FINAL APPRAISAL OF THE ISSUES IN THE LIGHT OF THE DISCUSSION ON THE LAW OF CONFIDENCE[288]

1. *Were the Observer and the Guardian Newspapers in breach of their duty of confidentiality when, on 22nd and 23rd June 1986, they respectively published articles on the forthcoming hearing in Australia? If so, would they have been restrained from publishing if the Attorney General had been able to seek the assistance of the court?*

Since at the time of publication of the articles, the book *Spycatcher* had not yet been published anywhere in the world, the confidentiality in the information which the Attorney General was seeking to protect would still have existed. The newspapers, as third party recipients of the confidential information would be bound by an obligation of confidence once they had acquired the necessary knowledge that the information was imparted to them in breach of confidence.[289] Thus, any use of the information without the consent of the owner of the information (that is, the Crown) would amount to a breach of confidence, subject to any defences available. Thus, the courts would preserve confidentiality in the information unless the disclosure was justified in the public interest.[290] The judges in the *Spycatcher* case appeared to have confirmed these principles but some of the judges appeared to have differed in the application of the public interest defence to the facts of the case on this issue.[291]

2. Was the Sunday Times in breach of its duty of confidentiality when, on 12th July 1987, it published the first extract of an intended serialisation of Spycatcher?

On the 12th July 1987, the book *Spycatcher* had not yet been published and thus, the information contained in the book was still confi-

[288] Some of these issues have already been discussed above and thus, only a brief discussion will be provided on them.
[289] See above for a discussion on the liability of third parties who receive information which was subject to an obligation of confidence.
[290] See above for a discussion of the public interest defence.
[291] See above for a discussion of the decisions of the various judges.

dential. Therefore, when the Sunday Times newspaper published the first instalment of the intended serialisation of *Spycatcher* they were in fact publishing information which was still confidential. Thus, the Sunday Times newspaper when they received the information relating to *Spycatcher* would probably have actual or constructive knowledge that the information was disclosed by Peter Wright in breach of confidence. If that were the case, then they would also be bound by an obligation of confidence not to disclose the information once they had acquired the necessary knowledge of the breach of confidence.[292] The publication of the first extract of the intended serialisation *of Spycatcher* would, therefore, amount to a breach of that obligation of confidence imposed on them. The decision of the judges in the *Spycatcher* case confirmed this fact.[293] The defence of *bonafide* purchaser for value without notice, if such a defence exists,[294] would not be available to the Sunday Times newspapers. It would also appear that the public interest defence would not apply to the publication by the Sunday Times newspapers since their publication of the first extract of the intended serialisation of *Spycatcher* was 'indiscriminate' and the public interest in national security and in the preservation of the confidential information would outweigh the public interest in disclosure, namely, freedom of speech.[295]

3. *Is the Attorney General now entitled to such an injunction (a) in relation to the Observer and the Guardian and (b) in relation to the Sunday Times, with special consideration to further serialisation?*

In considering this issue it is important to distinguish the factual background under issue 3 from those under issues 1 and 2. In considering issues 1 and 2 the courts in the *Spycatcher* case were concerned with the position of the newspapers before the publication and the worldwide dissemination of the book *Spycatcher,* that is, when the information in the book *Spycatcher* was still confidential and had the necessary quality of confidence. Whereas, in considering issue 3 the courts were concerned with the position of the newspapers after the publication and worldwide dissemination of *Spycatcher,* that is, when the information in the book *Spycatcher* had already entered into the public domain. Thus, the factual background upon which the courts were considering issues 1 and 2 were different from those for issue 3.

[292] See above on the liability of third parties who receive information already subject to an obligation of confidence.
[293] See above for a discussion of the decisions of the various courts. See above for a critique of the view expressed by Bingham L.J. on this issue.
[294] See above for a discussion of this defence. This defence even if it existed in actions for breach of confidence would not be available to the Sunday Times newspapers due to the fact that they were not *honafide* purchasers for value without notice. The conduct of the editor of the Sunday Times newspapers in the publication of the first instalment of the intended serialisation of *Spycatcher* has been severely criticised by Sir John Donaldson MR. in the *Spycatcher* case, see *ante* note 3 at p. 607.
[295] See *supra* note 290.

(a) *The position in relation to the Observer and the Guardian newspapers.*

All the judges in the lower courts and the House of Lords in the *Spycatcher* case were unanimously of the view that the Attorney General was not entitled to an injunction against the Observer and the Guardian newspapers.[296] The decision of the judges and their Lordships, with respect, appear to be consistent with the general law of confidence. As discussed above,[297] a third party recipient of confidential information would be bound by an obligation of confidence to the "owner" of the confidential information once he has acquired the necessary knowledge of the breach of confidence such that it would be unconscionable for him to use the information. However, the position of the Observer and the Guardian newspapers with regards to any future publication of *Spycatcher* would be different from those of the third party recipient of confidential information discussed above. In the case of the Observer and the Guardian newspapers, the information contained in the book *Spycatcher* had already lost its confidentiality and entered into the public domain through no act of the Observer or the Guardian newspapers.[298] Thus, any information acquired by the two newspapers on *Spycatcher* could no longer be regarded as confidential information since it had become public knowledge or public property and had lost the necessary quality of confidence needed for protection under the law of confidence. This would, therefore, mean that any member of the public could go to a public source to acquire a copy of *Spycatcher* and to comment on it free from any obligations of confidence owed to the Crown. Thus, the Observer and the Guardian newspapers, like any member of the public, could similarly acquire a copy of *Spycatcher* from a public source and should be able to comment on it free from any obligations of confidence to the Crown.

Bingham L.J. stated that:-

> "A third party coming into possession of confidential information is accordingly liable to be restrained from publishing it if he knows the information to be confidential and the circumstances are such as to impose on him an obligation in good conscience not to publish. No such obligation would in my view ordinarily arise where the third party comes into possession of information which, although once confidential, has ceased to be so otherwise than through the agency of the third party."[299]

296 See above for a discussion of the decisions of the various courts.

297 See *supra* note 292.

298 Thus, the position of the Observer and the Guardian newspapers were different from those of Peter Wright and his publishers, Heinemann, who were responsible for putting the contents *of Spycatcher* into the public domain. See above for a discussion of the position of Peter Wright and his publishers, Heinemann. See also *Lord Advocate* v. *Scotsman Publications Ltd.*[1989] 2 All E.R. 852.

299 See *ante* note 3 at p. 625. See also *ibid,* at p. 626 where Bingham L.J. stated that:- "... as Sir Nicolas Browne-Wilkinson V-C held in this case ... 'As between the confider and the confidant there may be a duty, either under contract or in some other way, which remains enforceable by injunction notwithstanding that the information in relation to which it arose has since come into the public domain, as in *Schering Chemicals Ltd.* v. *Falkman Ltd.* and *Speed Seal Products Ltd.* v. *Paddington.*' But the survival of such a duty, where the information is no longer confidential, will not necessarily affect the conscience of a third party."

The learned Lord Justice continued as follows:-

"Of course there will be those in this country who are still unaware of the contents of *Spycatcher.* Some people are impermeable to information or wholly out of touch with the topical subjects of the day. But anyone with the slightest interest in the subject matter of *Spycatcher* is likely either to have read the book or to be aware of its contents. It is in my view a conclusive answer to this claim that the confidentiality the Attorney General seeks to protect, through no act of the newspapers, no longer exists. I do not accept that an action for breach of confidence against third parties can succeed in those circumstances, whatever the position as between confider and confidant. The same conclusion can be put another way. I do not think that the editors of these newspapers can be said to be subject to a duty in conscience not to publish material which is freely available in the marketplace and publishable by other newspapers editors the world over."[300]

Lord Griffiths also expressed a similar view that:-

"The Attorney General therefore submits that despite the fact that *Spycatcher* has received worldwide publication and is in fact available in this country for anyone who wants to read it, the law forbids the press, the media and indeed anyone else from publishing or commenting on any part of it, saving only that which has already been referred to in judgments of the courts. If such was the law then the law would indeed be an ass, for it would seek to deny to our own citizens the right to be informed of matters which are freely available throughout the rest of the world and would in fact be seeking in vain because anyone who really wishes to read *Spycatcher* can lay his hands on a copy in this country."[301]

His Lordship then continued that:-

"The position of a third party who receives information that has been published in breach of confidence will vary widely according to the circumstances of the case.... If, however, before the confider can act, his confidential information has spread far and wide and is read in, say, some trade magazine by a rival manufacturer, that manufacturer is in no way tainted or associated with the original breach of confidence and he will not be restrained from making use of information that is now public knowledge even though he may realise that the information must have been leaked in breach of confidence. The courts have to evolve practical rules and once the confidential information has escaped into the public domain it is not practical to attempt to restrain everyone with access to the knowledge from making use of it. That is not, however, to say that the original confidant may not be restrained or even a third party in the direct chain from

[300] See *ante* note 3 at p. 631.
[301] See *ante* note 3 at p. 652.

> the confidant. Each case will depend on its own facts ... whether the conscience of the third party is affected by the confidant's breach of duty. There is certainly no absolute rule even in the case of a breach of a private confidence that a third party who receives the confidential information will be restrained from using it."[302]

(b) *The position in relation to the Sunday Times newspaper with special consideration to further serialisation.*

On this issue there appeared to be a difference of opinion between (i) the judgments of Sir John Donaldson M.R. in the Court of Appeal and Lord Griffiths in the House of Lords on the one hand (hereinafter referred to as the dissenting view) and (ii) the judgments of the other judges in the lower courts and the House of Lords on the other (hereinafter referred to as the majority view).[303]

The majority view was that the Attorney General was not entitled to an injunction against further serialisation of the book *Spycatcher* by the Sunday Times newspaper.

The dissenting view that the Sunday Times was tainted with the iniquity and wrongdoing of Peter Wright, with great respect, cannot be supported for the following reasons. Both Lord Griffiths and Sir John Donaldson M.R. took the approach that the Sunday Times stood in the shoes of Peter Wright by virtue of the contractual links (namely, the

[302] *Ibid,* at p. 652. See also the judgment of Lord Oliver in the House of Lords at the interlocutory stage of the *Spycatcher* proceedings [1987] 3 All E.R. 316 at pp. 375-376 which was quoted by Scott J., *ante* note 3 at pp. 592-593, at trial. Lord Oliver said at p. 376 that:- "... as Blackstone observed, the liberty of the press is essential to the nature of a free state. The price that we pay is that that liberty may be and sometimes is harnessed to the carriage of liars or charlatans, but that cannot be avoided if the liberty is to be preserved. No one contends that the liberty is absolute.... The argument is not perhaps much assisted by homely metaphors about empty stables or escaping cats, but I cannot help but feel that your Lordships are being asked in the light of what has now occurred to beat the air and to interfere with an essential freedom for the preservation of a confidentiality that has already been lost beyond recall.... Once information has travelled into the public domain by whatever means and is the subject matter of public discussion in the press and other public media abroad, I emphasise again without fault on the part of the appellants, I find it unacceptable that publication and discussion in the press in this country should be further restrained. In practical terms 1 cannot see how the appellants can, at trial, properly be restrained by permanent injunction for making use of information of which every other newspaper and the news media generally throughout the western hemisphere are free to make use. Ideas, however unpopular or unpalatable, once released and however released into the open air of free discussion and circulation, cannot for ever be effectively proscribed as if they were a virulent disease. *Facilis est descensus Averno* and to attempt... to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only ... certain to be ineffective but involves taking the first steps on a very perilous path."

[303] See above for a discussion of the decisions of the judges of the various courts. A distinction may be made between the position of the Sunday Times on the one hand and that of the Observer and the Guardian newspapers on the other, since in the words of Scott J., *ante* note 3 at p. 567, "... the Sunday Times has acquired a licence to serialise the book. The Guardian and the Observer have no such licence." Thus, the fact that the Sunday Times had a contractual link to Peter Wright through the licence agreement appeared to have formed the basis for the dissenting view.

contract and the licence granted to them in relation to the serialisation of the book) between Peter Wright's Australian publishers, Heinemann, and the Sunday Times.[304] There are two main difficulties in this approach. First, the iniquity of Peter Wright lay in the writing and the publication of the book. The publication of *Spycatcher* and its worldwide dissemination were carried out by Heinemann and Viking Penguin amongst others. The Sunday Times was in no way responsible for either the initial writing or the publication of *Spycatcher* in book form. For example, it would be difficult to conceive how the Sunday Times would be liable on the basis of "joint tortfeasorship"[305] principles for the writing and the publication of the book. The Sunday Times merely had a limited licence to serialise the book and were not agents for general publication. At the time of the publication of the first extract of the intended serialisation the information contained in *Spycatcher* may still have been confidential. No doubt the Sunday Times are liable for the publication of this first extract.[306] However, the issue now at hand concerns the future serialisation of the book from information now available in the public domain. As Scott J. pointed out it would be possible to set "... aside as de minimis the effect of the Sunday Times edition of 12 July 1987 in disseminating the contents of *Spycatcher* "[307] It would, therefore, be difficult to see how the Sunday Times could in any way be responsible for the entry of the book *Spycatcher* into the public domain. The second and related point is that the ability of the Sunday Times to serialise in the future would not depend on the contractual licence since the copyright in the hands of Peter Wright or his agents would probably be sterile because of the maxim *ex turpi causa non oritur actio.*[308]

On this Bingham L.J. said:-

> "It is, I agree, to some extent anomalous that the Sunday Times should be free to do what Mr. Wright and his Australian publishers could not. But it would also be anomalous if a citizen of this country could read reports and reviews of the book and comments on it in the newspapers, and could buy it in a bookshop or borrow it from a public library, but could not read a serialised extract of the book in a newspaper. And the Sunday Times is, like the Observer and the Guardian, entitled to say that it has played no part in the worldwide publication of the book which would (but for its initial instalment) have occurred even if it had played no part at all."[309]

[304] See above.

[305] An action for breach of confidence may not necessarily be in tort (see discussion on the jurisdictional basis of the law of confidence above).

[306] See above.

[307] See *ante* note 3 at p. 590.

[308] See below. Further, as Lord Jauncey pointed out, ante note 3 at p. 668:- "That being so anyone can copy *Spycatcher* in whole or in part without fear of effective restraint by Peter Wright or those claiming to derive title from him. It follows that the future ability of the Sunday Times to serialise *Spycatcher does* not derive solely from their licence. They are free to publish without reference thereto and are thus for practical purposes in no better position than any other newspaper."

[309] *Ante* note 3 at p. 633.

Hence, the Sunday Times, like anyone else, should be allowed to comment and publish extracts of *Spycatcher* from the public domain.

4. *Is the Attorney General entitled to an account of the profits accruing to the Sunday Times as a result of the serialisation of Spycatcher?*

All the judges in the lower courts and in the House of Lords (except Bingham L.J.) were of the view that the Attorney General was entitled to an account of profits accruing from the publication of the first extract of the intended serialisation by the Sunday Times.[310] In the light of the discussion in relation to issue 2 above, that the Sunday Times was in breach of its duty of confidence in the publication of the first extract of the intended serialisation, the decision of the majority would, with respect, appear to be correct.

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

All the judges in the lower courts and in the House of Lords unanimously held that the Attorney General was not entitled to such an injunction.[311] The grant of such an injunction would appear to be too uncertain and hypothetical in nature since there would appear to be insufficient evidence of such future publications.

VIII. THE COPYRIGHT ISSUE

Apart from throwing up issues on the law of confidence, the *Spycatcher* decision also raised some matters relating to the copyright status of the book, *Spycatcher.* The Attorney General in the *Spycatcher* case did not make a claim on copyright and "expressly disavowed any claim by the Crown to be entitled in equity to the copyright in the book"[312] but instead based his action on the law of confidence. Notwithstanding this, the judges in the *Spycatcher* case took the opportunity to express some tentative views on the Crown's right to claim the copyright as their own.

Scott J. was of the view that since Peter Wright wrote the book so he would be the "original proprietor of the copyright". However, the learned judge further stated that there were strong arguments for regarding the Crown as the owner of the copyright in equity since Peter Wright in producing the book was acting in breach of his duty of confidence and fidelity to the Crown. The Sunday Times being unable to claim that it was a *bona fide* purchaser without notice of the Crown's equity would be "accountable to the Crown for any profit it made in serialising *Spy-*

310 See above for a discussion of the decisions of the various courts.

311 See above for a discussion of the decisions of the various courts on this issue.

312 See the judgment of Scott J., *ante* note 3 at p. 567. The reasons for this was stated by Sir John Donaldson M.R. at pp. 608-609 as follows:- "The reason was simple. The vice of *Spycatcher* is, in the view of the Attorney General, that it purports to tear away the veil of secrecy from what the Crown was entitled in the public interest to have kept secret. A remedy based on copyright would not meet this evil. It would limit the extent to which others could quote from the text *of Spycatcher,* but because of the statutory right of 'fair dealing.... it would leave the media free to reveal and comment on much of its contents." See *Ibid* at p. 609 for further reasons on why the Crown did not wish to base its claim on Crown copyright.

catcher" and could have been restrained from further serialisation since the Crown would also be entitled to "prevent further publication of the book by anyone who could be shown to be on notice of the Crown's equity."[313] Sir John Donaldson M.R. interpreted Scott J.'s judgment "to say that, if it had been based on copyright, he would have granted an injunction."[314]

Dillon L.J. also expressed a similar view that there were strong arguments for saying that"... as Mr. Wright wrote and published *Spycatcher* in breach of his duty of secrecy to the Crown and was only able to do so by the misuse of secret information which has come to him in the course of his employment as an officer in the security service of the Crown, the copyright in *Spycatcher* belongs in equity to the Crown and is held on a constructive trust for the Crown."[315]

Therefore, Scott J. and Dillon L.J. appeared to be of the view that the Crown may have been entitled in equity to the copyright in the book *Spycatcher.* The House of Lords expressed similar views on this issue.[316] Their Lordships also opined that in any event, the copyright in the book would be sterile and unenforceable in the hands of Peter Wright or his agents.[317]

The question of whether copyright subsists in a work is separate and distinct from the question of whether or not the courts will enforce that

313 *Ante* note 3 at p. 567.
314 *Ante* note 3 at p. 608.
315 *Ante* note 3 at p. 621.
316 Lord Goff, *ante* note 3 at p. 664, expressed similar views to those of Dillon L.J. that the copyright in the book was held by Peter Wright on "constructive trust for the confider...." Lord Keith and Lord Griffiths, like Scott J. and Dillon L.J., also expressed views that the Crown may be entitled to claim the copyright in the book in equity. Lord Keith said, at p. 645. that:- "There remains ... the question whether the Crown might successfully maintain a claim that it is in equity the owner of the copyright in the book. Such a claim has not yet been advanced, but might well succeed if it were to be." Lord Griffiths expressed his view, at p. 654, that "... I doubt if Peter Wright owns the copyright because as at present advised I accept the view of Scott J. and Dillon L.J. that the copyright in *Spycatcher* is probably vested in the Crown." Lord Brightman also hinted, at p. 647, "... perhaps that the copyright of the work would in equity be vested in the Crown...."
317 Lord Keith, *ante* note 3 at p. 645, expressed the view that:- "... the Sunday Times, in the taking of the account, is not entitled to deduct in computing any gain the sums paid to Mr. Wright's publishers as consideration for the licence granted by the latter, since neither Mr. Wright nor his publishers were or would in the future be in a position to maintain an action in England for recovery of such payments. Nor would the courts of [England] enforce a claim ... to the copyright in a work the publication of which [had been) brought about contrary to the public interest...." Lord Brightman, at p. 648, expressed a similar view that"... it is certain that neither of the latter [Wright or Heinemann] has any copyright in *Spycatcher* which would be recognised by the courts of this country." Lord Griffiths stated, at p. 654, that:- "Neither Peter Wright nor any agent of his will be permitted to publish *Spycatcher* in this country. If Peter Wright owns the copyright in *Spycatcher,* which I doubt, it seems to me extremely unlikely that any court in this country would uphold his claim to copyright if any newspaper or other third party chose to publish *Spycatcher* and keep such profits as they might make to themselves. I would expect ajudge to say that the disgraceful circumstances in which he wrote and published *Spycatcher* disentitled him to seek the assistance of the court to obtain any redress...." Lord Jauncey said, *ibid* at p. 668, expressed a similar view. See generally F. Patfield, *"Attorney-General* v. *The Observer Limited; Attorney-General* v. *The Times Newspapers Limited-* The Decision of the House of Lords in the Spycatcher Litigation" [1989] 1 E.I.P.R. 27 at pp. 30-31.

copyright. It is generally accepted that copyright will subsist in a work where the author or originator of the work has expended "time, skill and labour on the material" and that copyright protects the form of expression of the information and not the idea or the substance contained in the information.[318] No doubt Peter Wright had expended time, skill and labour in the writing of the book *Spycatcher* and therefore, *prima facie* he would acquire copyright in the book as its author.[319] The House of Lords in the *Spycatcher* case were not saying that there was no copyright in the work, as indeed there would appear to be, but that the copyright was unenforceable in the hands of Peter Wright and his publishers. The reason for this was because the writing and the publication of the book was done in breach of the duty of confidence which Peter Wright owed to the Crown. Therefore, the maxim *ex turpi causa non oritur actio* would apply to prevent Peter Wright from seeking assistance from the court.[320] This approach would appear to be correct in that the "illegality" in the writing and the publication of the book would appear not to impugne on the existence of the copyright in *Spycatcher* but on the enforcement of it. Thus, there would probably be copyright in *Spycatcher* as an original literary work but it would be unenforceable in the hands of Peter Wright and those deriving title from him.[321] Interesting and tricky issues could arise on the ownership of the copyright in *Spycatcher* had the Crown sought to claim the copyright. Some of the *dicta* in the *Spycatcher* case

318 See generally Copinger and Skone James, *Copyright* (12th ed., 1980) ; Laddie, Prescott, Vitoria, *The Modern Law of Copyright* (1980); Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2nd ed., 1989) chapters 9-13; Ricketson, *The Law of Intellectual Property* (1984) chapters 3-15; Wei, *The Law of Copyright in Singapore* (1989). See also *Fraser* v. *Evans* [1969] 1 Q.B. 349 at p. 362, per Lord Denning M.R.:- "... copyright does not subsist in the information contained in the report. It exists only in the literary form in which the information is dressed."

319 See section 30(2) of the Copyright Act 1987.

320 Further, Peter Wright and his agents did not come to court with "clean hands".

321 This approach is analogous to libellous, obscene and immoral works where a claim of copyright in such works would also not be enforced. In *Stephens* v. *Avery* [1988] 2 All E.R. 477 at p. 480, Sir Nicolas Browne-Wilkinson V-C stated that:- "... the principle being that a court of equity will not enforce copyright, and presumably also will not enforce a duty of confidence, relating to matters which have a grossly immoral tendency." See Copinger, *supra* note 318 at para. 182, where the authors said that:- "It is probably more accurate to say that the ground for refusal by the courts to intervene is that it is against public policy to protect rights of publication and sale of works, where publication and sale would be against the public interest; not that there is no copyright in the work, but the courts will not enforce such copyright." See also *ibid*, at paras. 183-187 and paras. 138-142; Laddie, Prescott, Vitoria, *supra* note 318 at paras. 2.101 -2.106; Ricketson, *The Law of Intellectual Property* (1984) paras. 5.100-5.108; Wei *supra* note 318 at p. 19, footnote 1. In *Glyn* v. *Weston Feature Film Company* [1916] 1 Ch. 261 at p. 269, Younger J. said, "Now it is clear law that copyright cannot exist in a work of a tendency so grossly immoral as this, a work which apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome." See also *Television Broadcasts Ltd.* v. *Mandarin Video Holdings Sdn. Bhd.* [1983] 2 M.L.J. 346 where the illegality did not taint the existence of the copyright but may affect the enforcement of it. *Per* Chan J. *ibid* at p. 363:- "If Golden Star have infringed the Films (Censorship) Act 1952, as they must have, then they could be prosecuted and they would have to pay the penalty. But their rights under the Copyright Act 1969 remain and can be enforced." See also *Asia Television Ltd.* v. *Viwa Video Sdn. Bhd.* [1984] 2 M.L.J. 304 at p. 307 where Abdoolcader F.J. expressed similar views that:- "... non-compliance with the provisions of the Films (Censorship) Act does not affect the acquisition of copyright under the Copyright Act." These local cases can also be used to support the proposition that illegality does not affect the existence of the copyright but may affect its enforcement.

would appear to point towards the direction that Peter Wright and his publishers may be held to be constructive trustees of the copyright in the book for the confider (namely, the Crown) and that the Crown may be the owner of the copyright in equity. If the copyright could be claimed by the Crown, then in the hands of the Crown it would be enforceable since the maxim *ex turpi causa non oritur actio* would not apply to the Crown (that is, the victim of the illegality). If that were the case, then the Crown would probably be able to restrain the Sunday Times from further serialisation of the book on the grounds of breach of copyright. However, the Crown would not be able to stop comments on the book if the comments fell within the 'fair dealing' defence[322] or the public interest defence.[323]

It might be suggested that this view that the Crown is the equitable owner of the copyright tends to blur the distinction drawn by copyright law between the protected form of expression and the unprotected (for purposes of copyright law) idea or information contained in the work.[324] An individual whose sole contribution to a literary work is to provide the information for it, will not in general be entitled to share in the copyright. To claim as author of the work, the claimant must show that he participated in the process of giving the work its form of expression. The Crown clearly could not claim the copyright as author. Its right in confidence in the informational content of the book would not be sufficient to enable the Crown to be the author in equity of the copyright. With respect, this would not, however, be the proper basis on which the Crown's case would be formulated. The Crown's rights would flow not from the concept of authorship of the form of expression but from the breach of confidence of Peter Wright. Peter Wright, it is submitted, owed both confidentiality and fiduciary obligations to the Crown. The Crown would be entitled at the very least to an account of profits made by Peter Wright and his agents. They would hold such profits on constructive trust[325] for the Crown by virtue of the breach of confidence and fiduciary obligations.[326] The Crown should be entitled to claim as equitable owner

[322] See section 6 Copyright Act 1956 (U.K.); sections 29-31 Copyright, Designs and Patents Act 1988 (U.K.); sections 35-38 of the Copyright Act 1987. See also Wei, *supra* note 318, chapter 7; Dworkin & Taylor, *Copyright. Designs & Patents Act 1988,* chapter 6.

[323] The public interest defence applies to actions for breach of copyright as well as to actions for breach of confidence - see *Lion Laboratories* v. *Evans* [1984] 2 All E.R. 417; *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241; Wei, *The Law of Copyright in Singapore* (1989), pp. 170-172; Y. Cripps, "Breaches of Copyright and Confidence: The Spycatcher Effect", [1989] Public Law 13. See above for a discussion on the public interest defence.

[324] See *Corelli v. Gray* (1913) 29 T.L.R. 570 where a blurring of the idea-expression dichotomy in the case of copyright infringement appeared to exist.

[325] See *Boardman* v. *Phipps* [1967] 2 A.C. 46 and *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378.

[326] See *Snepp* v. *United States* (1980) 444 U.S. 507, where a constructive trust was imposed on profits derived by a former C.I.A. agent from the publication of a book about the C.I.A., and P. Birks, "Restitutionary damages for breach of contract; *Snepp* and the fusion of law and equity", [1987] L.M.C.L.Q. 421. See also *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14, where the majority of the Supreme Court of Canada held that the imposition of a constructive trust was the appropriate remedy for the breach of confidence, and P.D. Maddaugh, "Confidence Abused; LAC Minerals Ltd. v. International Corona Resources Ltd.", (1990) 16 Can.Bus.L.J. 198. See generally, R.G. Hammond, "The Wright Case - Wrong Answer?", (1988) 4 I.P.J. 87 at pp. 99-101; Y. Cripps, "Breaches of Copyright and Confidence: The Spycatcher Effect", [1989] Public Law 13; J. Michael, "Wrongs, rights and remedies", (1988) N.L.J., (October 21) at pp. 764-766.

of the copyright so as to prevent Peter Wright and his agents from profiting from the clear breaches that had been established.[327] The Crown's claim in equity to the copyright would be seen from the point of view of remedial action for breach of confidence and not from any other stand point.

IX. CONCLUSION

The *Spycatcher* decision covered a wide spectrum of issues in the law of confidence; ranging from the concept of public domain, the comparative positions of an original direct confidant and third party indirect recipients, the requirement of detriment through to broad issues of public policy and public interest. Many issues remain unresolved, for example, the fundamental basis of the cause of action is still somewhat unclear, although the majority of the judgments do tend to gravitate towards liability based on equitable notions of good faith. Similarly, there are still doubts over the position of *bona fide* purchasers of confidential information. Moving further afield, there are also other issues in the law of confidence which have not been dealt with by the decision, such as, the problems relating to surreptitious taking of confidential information and the receipt of unsolicited information.[328] Further problems are also likely to arise in connection with the concept of privacy. This is particularly so given the increasing use of computerised data bases. In this age of scientific, technological and industrial advancement, the issue has arisen on whether the law should recognise a right of privacy,[329] as distinct from rights of confidence. In the context of data bases, arguments could be raised in support of the introduction of data protection legislation along the lines of the Data Protection Act 1984 (United Kingdom).[330]

Further problems can still arise in the area of the protection of State secrets. It can be seen from the *Spycatcher* case that difficulties can arise, particularly, in relation to the protection of State secrets accorded by friendly foreign countries. As Lord Keith reflected in his judgment:-

> "... even the most sensitive defence secrets of this country may not expect protection in the courts even of friendly foreign countries ... Consideration should be given to the possibility of some international agreement aimed at reducing the risks to collective security involved in the present state of affairs ... Some degree of comity and reciprocity

[327] Query whether or not the Crown has a sufficient interest to compel Peter Wright to assign his copyright to the Crown. See *British Syphon Co. Ltd.* v. *Homewood* [1956] 1 W.L.R. 1190 where the court compelled the defendant employee to assign the patent rights over to his employer which he held in equity on behalf of his employer. See also *Fine Industrial Commodities Ltd.* v. *Powling* (1954) 71 R.P.C. 253 and *Cranleigh Precision Engineering Ltd.* v. *Bryant* [1964] 3 All E.R. 289.

[328] See for example, *Malone* v. *Commissioner of Police* [*1979*] *2* All E.R. 620 and *Francome* v. *Mirror Group* [1984] 2 All E.R. 408. See also Law Commission Report, *ante* note 261, paras. 6.6-6.17, paras. 6.28-6.46 and para. 7.2.

[329] See Denning, *What Next In The Law* (1982) at pp. 223-224. See also the Court of Appeal's decision in *Kaye* v. *Robertson* (The Times March 21, 1990).

[330] See Savage & Edwards, *A Guide to The Data Protection Act* (2nd ed., 1984).

> in this respect would seem desirable in order to promote the common interests of allied nations."[331]

Thus, friendly countries may consider the possibility of setting up of an international convention for the protection of their respective State secrets and thereby, supplement the protection given by the law of confidence and by statute.

At the end of the day, the *Spycatcher* case has demonstrated the difficulties involved in balancing the various competing public interests of freedom of speech and of the press and the right of individuals and organisations to protect their secrets. The balance achieved on the facts of the *Spycatcher* case in favour of freedom of speech and of the press, it is submitted, with respect, was correct. As Scott J. succinctly puts it:-

> "Society must pay a price both for freedom of the press and for national security. The price to be paid for an efficient and secure security service will be some loss in the freedom of the press to publish what it chooses. The price to be paid for free speech and a free press in a democratic society will be the loss of some degree of secrecy about the affairs of government, including the security service. A balance must be struck between the two competing public interests.... And so it is for the courts to strike the balance.... I repeat that, in my judgment, there is a balance to be struck and the courts must strike it."[332]

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[331] See *ante* note 3 at p. 646.
[332] *Ante* note 3 at p. 570.

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