This seems to me wholly a matter of academic judgment in which this court should not interfere.

LORD DONALDSON OF LYMINGTON MR. I agree with both judgments.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Davis Walker & Co*, Chalfont St Peter (for the applicant); *Treasury Solicitor*; *Clifford Chance* (for the university).

Frances Rustin Barrister.

Lord Advocate v Scotsman Publications Ltd and others

HOUSE OF LORDS
LORD KEITH OF KINKEL, LORD TEMPLEMAN, LORD GRIFFTHS, LORD GOFF OF CHIEVELEY AND LORD JAUNCEY OF TULLICHETTLE
15, 16, 17 MAY, 6 JULY 1989

Confidential information – Injunction against disclosure of information – Information relating to security service – Public interest in preventing disclosure – Book written by former member of security services – Book not containing material prejudicial to public interest – Limited publication of book – Newspaper publishing article about book – Crown seeking interim interdict to prevent further publication of contents of book – Whether in public interest that further publication of contents of book should be restrained.

In 1987 C, a member of the British security service (MI6) from 1948 to 1953 who had remained on close terms with members of the security service, in particular the head of the service from 1973 to 1977, sought authorisation from the Crown to publish a book of memoirs about his service with MI6 and to publish in it material disclosed to him by other members of the service. When authorisation to publish the book was refused C published 500 copies of the book privately and distributed 279 copies to various private individuals in December 1987. Following representations made to him on behalf of the Crown C gave an undertaking on 30 December 1987 not to distribute any more copies of the book without first giving 14 days' notice of his intention to do so. However, a copy of the book came into the possession of the Sunday Times newspaper, which published an article about it on 27 December 1987. On 2 January 1988 the Attorney General obtained an injunction in England restraining that newspaper from publishing any further information from the book concerning the British intelligence and security services. A copy of the book was also handed over to the Scotsman newspaper by one of the original recipients and on 5 January 1988 the Scotsman published an article about the book. The Lord Advocate requested the publishers of the Scotsman to give an undertaking not to publish any material which if published in England would be in breach of the injunction against the Sunday Times but they refused to give such an undertaking. The Lord Advocate thereupon presented a petition against the publishers and editor of the Scotsman (the first and second respondents) for an interim interdict restraining them and any person having notice of the interdict from disclosing or publishing any information obtained by C in the course of his employment with the British security and intelligence services. The first and second respondents, together with the third and fourth respondents, who were interested in publishing material from the book, opposed the petition. The Lord Ordinary refused the Lord Advocate's application

and on appeal his interlocutor was affirmed by the Second Division of the Court of Session. The Lord Advocate appealed to the House of Lords. The Lord Advocate conceded that the book did not contain any information the disclosure of which was capable of damaging national security but contended that C as a former member of the security intelligence service remained under a lifelong obligation of confidentiality owed to the Crown as regards information which came into his possession, and that as regards information communicated to him by other members of the service after his retirement he was under the same obligation of confidentiality as affected those other members.

Held – A third party who came into possession of security information which was originally confidential but which had been revealed by a Crown servant in breach of his duty of confidence would not be restrained from publishing that information if it was not damaging to national security and the third party was not involved in the Crown servant's breach of his duty of confidentiality, since the public interest would not require that publication be restrained in such circumstances. Accordingly, although C as a former member of the British security and intelligence services owed a lifelong duty of confidentiality to the Crown which rendered him liable to be restrained by injunction or interdict from revealing information which came into his possession in the course of his work and although a publisher or other person acting on his behalf was under a similar restraint, the Crown was not entitled to an injunction or interdict restraining publication by a third party, such as the Scotsman, of such information unless such restraint was required in the public interest. Furthermore (per Lord Templeman and Lord Jauncey), that reasoning accorded with the Official Secrets Act 1989, which when it came into force would make it an offence for any employee or former employee of the security services to disclose any information about the security services whereas a third party would be guilty of an offence only if he disclosed information about the security services which was damaging. Since the Crown had conceded that the book did not include material damaging to national security and since publication had already taken place the Lord Advocate had not established a good arguable prima facie case that further publication by the respondents would be prejudicial to the public interest. The Lord Ordinary and the Second Division had therefore been right to refuse interim interdict and the appeal would be dismissed (see p 858 *g h j* to p 859 *b g h*, p 861 *d f* to *j*, p 862 *j* and p 863 *a* to *d j* to p 864 *b e f*, post).

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 applied.

Notes

For injunctions restraining disclosure of confidential information, see 24 Halsbury's Laws (4th edn) para 1014, and for cases on the subject, see 28(2) Digest (Reissue) 1081–1090, 868–917.

For proceedings to protect a public right, see 24 Halsbury's Laws (4th edn) paras 1030–1031.

Cases referred to in opinions

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1988] 3 WLR 776, HL; *affg* [1988] 3 All ER 545, [1988] 2 WLR 805, CA; *affg* [1988] 3 All ER 545, [1988] 2 WLR 805.

A-G v Jonathan Cape Ltd [1975] 3 All ER 484, [1976] QB 752, [1975] 3 WLR 606.

Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39, Aust HC.

Handyside v UK (1976) 1 EHRR 737, E Ct HR.

Sunday Times v UK (1979) 2 EHRR 245, E Ct HR.

Appeal

The Lord Advocate appealed with leave of the Second Division of the Inner House of the Court of Session in Scotland against an interlocutor of the Second Division (the Lord Justice Clerk (Ross), Lord Dunpark and Lord McDonald) (1988 SLT 490) dated 8 April

1988 refusing a reclaiming motion by the Lord Advocate against an interlocutor dated 23 February 1988 pronounced by the Lord Ordinary (Coulsfield) refusing the Lord Advocate's application for interim interdict to restrain the first and second respondents, Scotsman Publications Ltd and Magnus Linklater, the proprietor and the editor respectively of the Scotsman newspaper, and any person having notice of the interdict, from disclosing and publishing certain information obtained by Anthony Cavendish in the course of his employment with the British security and intelligence services which he had published in the book *Inside Intelligence*. The third respondent, Scottish Television plc, and the fourth respondent, George Outram & Co Ltd, publishers of the Glasgow Herald, appeared as persons having notice of the interdict. The facts are set out in the opinion of Lord Keith.

J A Cameron QC (Vice-Dean of Faculty) and *N F Davidson* (both of the Scottish Bar) for the Lord Advocate.

W A Nimmo Smith QC and *J A Peoples* (both of the Scottish Bar) for the first and second respondents.

R N M MacLean QC (of the Scottish Bar) and *Desmond Browne* for the third and fourth respondents.

Their Lordships took time for consideration.

6 July. The following opinions were delivered.

LORD KEITH OF KINKEL. My Lords, Mr Anthony Cavendish was employed by the British secret intelligence service (MI6) from 1948 to 1953. After leaving the service he remained on close terms with some continuing members of it, in particular Sir Maurice Oldfield, who was head of MI6 from 1973 to 1977. In 1987 Cavendish sought authorisation from the government for publication of a book of memoirs which included some information about his period of service with MI6 and his association with Sir Maurice Oldfield. The book was called *Inside Intelligence*. Authorisation to publish it was refused. Mr Cavendish then had 500 copies of the book printed at his own expense, and at Christmas 1987 distributed 279 copies of it to various private individuals. Following representations made to him on behalf of the Crown, Mr Cavendish on 30 December 1987 gave an undertaking not to distribute any more copies of the book without first giving 14 days' notice.

Apparently a copy of the book came into the hands of the Sunday Times newspaper, which published an article about it on 27 December 1987. On 2 January 1988 the Attorney General was granted by the High Court of Justice an injunction against Times Newspapers Ltd (the publishers of the Sunday Times) restraining them from publishing any information obtained by Mr Cavendish concerning the British security and intelligence services. The injunction also bore to restrain similarly 'any person having notice of this order'. On 15 January 1988, following a hearing inter partes, the injunction was modified to the effect, inter alia, of permitting the publication of parts of *Inside Intelligence* which remained undeleted in an expurgated copy placed before the court, amounting to about two-thirds of the book.

A copy of *Inside Intelligence* also came into the possession of the Scotsman newspaper, having apparently been handed over to it by the one of the original recipients. On 5 January 1988 the Scotsman published an article which included some of the material contained in the book. The first respondents, the publishers of the Scotsman, were requested on behalf of the Lord Advocate to give an undertaking that they would not publish any material which if published in England would be in breach of the injunction granted against Times Newspapers Ltd. They refused to give such an undertaking, and thereupon the Lord Advocate launched the present petition against the publishers and the editor of the Scotsman in the Court of Session, by the amended prayer of which he asked the court—

'to interdict the respondents or either of them or their agents, servants or anyone acting on their behalf or any person having notice of said interlocuter from disclosing or publishing or causing or permitting to be disclosed or published to any person all or any material or information obtained by Anthony Cavendish in the course of his employment with the British Security and Intelligence Services or obtained by other officers of those services in the course of their employment with them and given by such officers to Anthony Cavendish being information concerning the British Security and Intelligence Services or their activities or any other British Security organisation or its activities provided that there shall not be prohibited publication of the following (a) information contained in articles previously published by the Sunday Times; (b) information contained in the document entitled "Inside Intelligence", No 27 of process, but only insofar as such information is not obscured to any extent by being lined through in the text; (c) information comprised in (i) fair and accurate reporting of proceedings in Open Court in the United Kingdom; (ii) fair and accurate reporting of proceedings in either House of Parliament whose publication is not prohibited by that House; and for interdict *ad interim* . . .'

After sundry procedure which included the lodging of answers to the petition not only by the publishers and editor of the Scotsman but also by Scottish Television plc and George Outram & Co Ltd, the publishers of the Glasgow Herald, who objected to the proposal that any interdict granted should bind any person having notice of it, the Lord Ordinary on 23 February 1988, following a lengthy hearing, refused the Lord Advocate's application for interim interdict. His interlocuter was affirmed by the Second Division (the Lord Justice Clerk (Ross), Lord Dunpark and Lord McDonald) (1988 SLT 490) on 8 April 1988. The Lord Advocate now appeals, with leave of the Second Division, to your Lordships' House.

The grant or refusal of interim interdict is a discretionary matter, so that in order to succeed the Lord Advocate must demonstrate that the courts below in some way misdirected themselves in law or that their discretion was exercised unreasonably. The ground on which the Lord Advocate seeks interdict is that of confidentiality. It is averred that Mr Cavendish as a former member of the secret intelligence service remains under a lifelong obligation of confidentiality owed to the Crown as regards information which came into his possession as such a member, and further, that as regards information communicated to him after his retirement by other members of the service he is under the same obligation of confidentiality as affected those other members. The Scotsman's article of 5 January 1988 is said to contain material revealed by Mr Cavendish in breach of his obligation. The Lord Advocate goes on to aver, in statement 7 of his petition:

'That the petitioner is reasonably apprehensive that it is likely that the respondents will publish further information obtained by Anthony Cavendish concerning the British Security and Intelligence Services or their activities or any other British Security organisation or its activities or other security service or its activities. Further the petitioner is apprehensive that standing the nature of the material and information that others will seek to disclose or publish said material to the prejudice of the administration of justice. Disclosure or publication of said material and information is prejudicial to the interests of the Crown. It is prejudicial to national security. It is prejudicial to said interests in the following respects:—(a) the intelligence and security services of friendly foreign countries with which the British Security and Intelligence Services are in liaison would be likely to lose confidence in their ability to protect classified information; (b) the British Security and Intelligence Services depend upon the confidence and co-operation of other organisations and persons which confidence would be likely to suffer serious damage should Mr Cavendish reveal information of the nature described above; (c) there would be a risk that other persons who are or have been employed in the British Security and Intelligence Services who have had access to similar information might

seek to publish it; (d) there would be likely to be a serious adverse effect in the future on the morale and discipline of members of the British Security and Intelligence Services if the disclosure of said information were allowed in breach of said duty of confidentiality; (e) in the absence of interdict pressure would be likely to be exerted by the media on other members or ex-members of the British Security and Intelligence Services to give their views on matters referred to by Mr Cavendish; (f) detriment will be likely to flow from the publication of information about the methodology and personnel and organisation of the British Security and Intelligence Services.'

It is the Lord Advocate's case that the duty of confidence which was incumbent on Mr Cavendish in relation to relevant information contained in his book is incumbent also on the respondents, who received that information knowing that it had been revealed by Mr Cavendish in breach of his own obligation.

In the course of the argument for the Lord Advocate before the Second Division it became clear, as apparently it had not been before the Lord Ordinary, that the Crown did not maintain that *Inside Intelligence* contained any information disclosure of which was capable of damaging national security. From that point of view the whole contents of the book were entirely innocuous. So the grounds on which the Second Division refused interim interdict were different from those relied on by the Lord Ordinary, which in the circumstances need not be examined. The judges of the Second Division, having considered such authorities on the law of confidentiality as existed in the Scottish corpus juris, came to the conclusion that Scots law in this field was the same as that of England, in particular as respects the circumstances under which a person coming into possession of confidential information knowing it to be such, but not having received it directly from the original confider, himself comes under an obligation of confidence. That conclusion was, in my opinion, undoubtedly correct. While the juridical basis may differ to some extent in the two jurisdictions, the substance of the law in both of them is the same. If it had not been for the acceptance by counsel for the Lord Advocate that further publication of the information contained in the book would not be prejudicial to national security, the Second Division would have been disposed to grant interim interdict. They would not, at the interlocutory state, have been prepared to hold that such limited publication as had already taken place had placed the contents of the book in the public domain to such an extent that a restriction on further publication would serve no useful purpose. But in the face of the concession about absence of prejudice to national security the Second Division were unable to find that a prima facie case for permanent interdict had been pleaded. The Lord Justice Clerk said, under reference to statement 7 of the petition (1988 SLR 490 at 505):

'Bearing in mind that this is avowedly a non-contents case, I am of opinion that the Lord Advocate has failed to make out a prima facie case. Heads (a) to (f) might have been relevant if this had been a contents case. This is because heads (a) to (f) are all expressed as being referable to information, i.e. the contents of the book. But since this is a non-contents case, they are irrelevant. This can be seen clearly if each of the heads is examined separately. So far as (a) is concerned, it could not be contended that foreign security services would be likely to lose confidence in the ability of the British security and intelligence services to protect classified information unless it were being asserted that the book contained classified information. It is nowhere averred that there is classified information in the book, and in the context of a non-contents case this could not arise. So far as (b) is concerned the same comment can be made. The same is true of (c) since "similar information" must be a reference back to classified information. The same is true of (d). So far as (e) is concerned what is said to be apprehended is that the media would exert pressure upon members or ex-members of the British security and intelligence services to give their views "on matters referred to by Mr Cavendish". This must be a reference to what is in the book, and cannot be material to a non-contents case. What appears to lie behind (a) to (e) is that if Mr Cavendish is allowed to publish his memoirs there will be a loss of confidence in the British security and intelligence service and a risk of further disclosures. One can readily understand that once it is known that there has been disclosure by Mr Cavendish, these results will ensue. The trouble is that it is now known widely that Mr Cavendish has made these disclosures and accordingly the anticipated results must have occurred. That being so, there is no way in which the loss of confidence referred to and the reduction in morale can be averted by an order of the court. I would stress that in this context it is not the degree of publication which is important but the fact that there has been publication at all. As junior counsel for the first respondents put it: "Once the leak occurs, the damage is done". As soon as it becomes known that there has been disclosure or publication on the part of Mr Cavendish, the damaging consequences referred to in paras. (a) to (e) are inevitable. Paragraphs (a) to (e) might well have been convincing considerations if an interdict were being sought before any publication or disclosure by Mr Cavendish had taken place. However, since such publication and disclosure have taken place, granting interdict now would indeed be closing the proverbial stable door after the horse had bolted. I would only add, under reference to (c) and (d), that I doubt in any event whether the court would be justified in granting interdict if the purpose of the interdict was not to stop a wrong but was to deter others and to maintain morale. On this aspect I respectfully agree with what Lord Oliver said in *Att. Gen.* v. *Guardian Newspapers Ltd.* ([1987] 3 All ER 316 at 373–374, [1987] 1 WLR 1248 at 1318). So far as (f) is concerned it appears to me that this head would only be relevant in the context of a contents case. It clearly envisages publication of the contents of the book which might then enable the reader to learn something about the methodology, personnel and organisation of the British security and intelligence services. But we know nothing about the contents of the book, and there is no suggestion that it contains information on these matters. In the context of a non-contents detriment case, I am of opinion that head (f) can have no proper relevance, and counsel for the petitioner appeared ultimately to recognise this.'

Similar views were expressed by Lord Dunpark and Lord McDonald.

At the time of the decision by the Second Division the *Spycatcher* case had passed through the stages of trial before Scott J and appeal to the Court of Appeal: see *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1988] 2 WLR 805. The decision on appeal to your Lordships' House, which affirmed the Court of Appeal, was given on 13 October 1988 (see [1988] 3 All ER 545, [1988] 3 WLR 776). That decision authoritatively established that a member or former member of the British security or intelligence services owes a lifelong duty of confidentiality to the Crown which renders him liable to be restrained by injunction or interdict from revealing information which came into his possession in the course of his work. Disclosure of such information is by its nature damaging to national security and there is no room for close examination of the precise manner in which revelation of any particular information would cause damage. A publisher or other person acting on behalf of the member or former member of the service was held to be subject to similar restraint. It was the prospect of damage to the public interest which necessistated the fetter on freedom of speech, and the House accepted the principle that in general the Crown was not in a position to insist on confidentiality as regards governmental matters unless it could demonstrate the likelihood of such damage being caused by disclosure. I said ([1988] 3 All ER 545 at 640, [1988] 3 WLR 776 at 782–783):

'In so far as the Crown acts to prevent such disclosure or to seek redress for it on confidentiality grounds, it must necessarily, in my opinion, be in a position to show

that the disclosure is likely to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstance 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 Crown's argument in the present case would go the length that in all circumstances where the original disclosure has been made by a Crown servant in breach of his obligation of confidence, any person to whose knowledge the information comes and who is aware of the breach comes under an equitable duty binding his conscience not to communicate the information to anyone else irrespective of the circumstances under which he acquired the knowledge. In my opinion that general proposition is untenable and impracticable, in addition to being unsupported by any authority. 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 similar to those mentioned in art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). All those restrictions are imposed in the light of considerations of public interest such as to countervail the public interest in freedom of expression. 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.'

This passage recognises that there may be some circumstances under which a third party may come into possession of information, originally confidential, which has been revealed by a Crown servant in breach of his own duty of confidence, and yet may not be liable to be restrained from passing it on to others. In *Spycatcher* itself the circumstances which resulted in the defendant newspapers not being restrained from publishing and commenting on material contained in the book were that it had been disseminated worldwide to the extent of over one million copies and that it was freely available in this country. In that situation it was impossible for the Crown to demonstrate that further publication by the defendants would add to any extent to the damage to the public interest which had already been brought about.

One particular circumstance of the present case, which gives it a peculiar and perhaps unique character, is the abandonment by the Lord Advocate of any contention that the contents of *Inside Intelligence* include any material damage to national security. The other most relevant circumstance is that the book has been distributed by Mr Cavendish to 279 recipients. These two circumstances in combination must lead inevitably to the conclusion that the Lord Advocate has not pleaded a good arguable prima facie case that further publication by the respondents would do any material damage to the public interest. If a proof were allowed, any opinion evidence on the lines of statement 7 of the petition, such as was given by Sir Robert Armstrong in the *Spycatcher* case, would be given on the basis that the contents of the book were innocuous. The court would not be proceeding on the normal prima facie footing that any book about his work by a former member of the security or intelligence services was directly prejudicial to national security. Further, as the Lord Justice Clerk pointed out, the sort of indirect prejudice which is described in paras (a) to (e) of statement 7 is brought about by the known fact of publication by a former member of the service, not by its extent.

It was argued for the Lord Advocate that dismissal of this appeal would have the effect that any newspaper which received an unsolicited book of memoirs by a present or former member of the security or intelligence services would be free to publish it. That is not so. If there had been no previous publication at all and no concession that the contents of the book were innocuous the newspaper would undoubtedly itself come under an obligation of confidence and be subject to restraint. If there had been a minor degree of prior publication, and no such concession it would be a matter for investigation whether further publication would be prejudicial to the public interest, and interim interdict would normally be appropriate.

My Lords, I can find no material misdirection in law in the opinions of the judges of the Second Division, nor anything unreasonable in the manner of exercise of their discretion. I would accordingly dismiss the appeal and find it unnecessary to deal with the argument of the third and fourth respondents regarding the form of the interim interdict asked for.

LORD TEMPLEMAN. My Lords, in this appeal the Lord Advocate, acting on behalf of the Crown, claims to restrain the respondent newspapers and television companies from disclosing certain information contained in a book written by one Cavendish, that information having been obtained by him in the course of his employment with the British security and intelligence services.

Any such restraint is an interference with the right of expression safeguarded by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) to which the United Kingdom government adheres. Article 10 of the convention is in these terms:

> '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

The question therefore is whether the restraint sought to be imposed on the respondents is 'necessary in a democratic society in the interests of national security'. Similar questions were considered in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 345, [1988] 3 WLR 776 (the *Spycatcher* case) but at that time Parliament had not provided any answer to the questions posed by the conflict between the freedom of expression and the requirement of national security.

In my opinion it is for Parliament to determine the restraints on freedom of expression which are necessary in a democratic society. The courts of this country should follow any guidance contained in a statute. If that guidance is inconsistent with the requirements of the convention then that will be a matter for the convention authorities and for the United Kingdom government. It will not be a matter for the courts.

The guidance of Parliament has now been provided in the Official Secrets Act 1989, which was enacted on 11 May 1989 and will be brought into force on such date as the Secretary of State may by order appoint. By the 1989 Act certain categories of persons will be guilty of a criminal offence if they disclose information relating to security or intelligence in the circumstances specified in the Act but not otherwise. In my opinion the civil jurisdiction of the courts of this country to grant an injunction restraining a breach of confidence at the suit of the Crown should not, in principle, be exercised in a manner different from or more severe than any appropriate restriction which Parliament has imposed in the 1989 Act and which, if breached, will create a criminal offence as soon as the Act is brought into force.

Section 1 deals with a person who is or has been a member of any of the security and

intelligence services. Such a person, who may, for want of a better expression, be described as a security employee, is by s 1(1)—

> 'guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services . . .'

By s 7 a disclosure by a Crown servant is made with lawful authority if, and only if, it is made in accordance with his official duty and a disclosure by any other person is made with lawful authority if, and only if, it is made in accordance with an official authorisation duly given by a Crown servant. Cavendish is not now a Crown servant and he has failed to obtain official authorisation for some parts of his book. Cavendish has made disclosures which would infringe s 1 if the 1989 Act were in force.

Section 5 deals with third parties, that is to say, generally speaking persons who are not and have not been members of the security and intelligence services. Section 5(1) applies where—

> '(a) any information, document or other article protected against disclosure by the foregoing provisions of this Act has come into a person's possession as a result of having been—(i) disclosed (whether to him or another), by a Crown servant . . . without lawful authority . . .'

In my opinion the respondents fall into the category described by s 5 notwithstanding that Cavendish had retired from his employment and was not a Crown servant at the date when information protected against disclosure was disclosed by Cavendish and came into the possession of the respondents. The restrictions imposed by the 1989 Act on third parties are less onerous than the restrictions placed on Cavendish and other security employees. By s 5(2), subject to s 5(3), a third party into whose possession confidential information has come—

> 'is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above.'

In the present case the respondents are well aware that the information derived from Cavendish is protected against disclosure and came into their possession as a result of a disclosure by Cavendish. But by s 5(3):

> 'In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless—(a) the disclosure by him is damaging; and (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging . . .'

By s 1(4) the disclosure by the respondents of the protected information derived from Cavendish will be damaging if—

> '(a) it causes damage to the work of, or of any part of, the security and intelligence services; or (b) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect.'

The information derived from Cavendish which the respondents may wish to publish and disclose is information embedded in a book of memoirs by Cavendish. Part of that book relates to the period between 1948 and 1953 when Cavendish was a security employee and is protected against disclosure by s 1 of the 1989 Act. The Crown concede, however, that publication of that information by the respondents will not cause or be likely to cause damage to the work of the security or intelligence services, presumably because the information is inaccurate or unenlightening or insignificant. The information itself does not fall within a class or description of information the unauthorised disclosure of which would be likely to be damaging. Nevertheless, the Crown contend that it is entitled to restrain the respondents from publishing this harmless information because the information is contained in the memoirs of a security employee. It is said that the publication of harmless information derived from a former security employee and protected by s 1 against disclosure by him, though not damaging in itself, would cause harm by encouraging other security employees to make disclosures in breach of s 1 of the 1989 Act and by raising doubts as to the reliability of the security service.

My Lords, it is well known, at home and abroad, that every security service suffers from time to time from an employee who is disloyal for idealogical or other reasons which may derive from the desire for profit or notoriety. The motives of Cavendish are irrelevant if he is in breach of the duty of lifelong confidence of security employees accepted in the *Spycatcher* case and imposed by s 1 of the 1989 Act. If the 1989 Act had been in force when Cavendish circulated his book to a chosen band of readers, he would have committed an offence under s 1 of the Act notwithstanding that the information disclosed in his book is harmless. But it does not follow that third parties commit an offence if they disclose harmless information. Were it otherwise, the distinction between an offence by a security employee and an offence by a third party which appears from the 1989 Act would be eradicated. A security employee can commit an offence if he discloses any information. A third party is only guilty of an offence if the information is damaging in the sense defined by the Act.

If the Crown had asserted that future publication by the Scotsman would be likely to damage the work of the security services, then difficult questions might have arisen as to the nature of the damage feared, whether an injunction was necessary within the meaning attributed to that expression by the European Court of Human Rights and whether the restriction on freedom of expression constituted by the injunction sought was 'proportionate to the legitimate aim pursued' as required by the European Court of Human Rights in *Handyside v UK* (1976) 1 EHRR 737 and *Sunday Times v UK* (1979) 2 EHRR 245. These difficult questions do not, however, arise since the Crown conceded that future publication would not be likely to cause damage other than the indirect damage which I have already rejected.

In the present case the respondents did not instigate or encourage or facilitate any breach by Cavendish of his obligations. They did not solicit a copy of the Cavendish book or any information from him or derived from him. They did not commit an offence at common law in connection with an offence or attempted offence by Cavendish. It may be that there are circumstances in which a third party might be liable to be restrained from publishing protected information even though the publication by the third party might itself be harmless. It is unnecessary, however, to consider this possibility in the present instance.

I would affirm the decision of the Court of Session and dismiss the appeal of the Crown.

LORD GRIFFITHS. My Lords, I have had the advantage of reading the speech of my noble and learned friend Lord Keith, and for the reasons he gives I would dismiss this appeal.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading the speech of my noble and learned friend Lord Keith, and for the reasons he gives I would dismiss this appeal.

LORD JAUNCEY OF TULLICHETTLE. My Lords, Anthony Cavendish, a former member of the security services from 1948 to 1953, wrote a book of his memoirs entitled *Inside Intelligence* and sought leave of the Crown to publish it. Leave was refused.

Thereafter Cavendish had 500 copies printed, and in December 1987 distributed some 279 as 'Christmas cards'. One of these 'Christmas cards' was sent to a Scottish member of Parliament who passed it to the editor of the Scotsman. Proceedings were initiated in England by the Attorney General against the Observer and the Sunday Times newspapers and interim injunctions were granted by Kennedy J on 1 and 2 January 1988 against their publishing information supplied directly or indirectly by Cavendish in breach of his duty of confidence owed to the Crown. The terms of these injunctions were subsequently modified when the Crown restricted its initial refusal of leave to publish to certain parts (the blue-pencilled parts) of the book. The Lord Advocate, on behalf of the Crown, also presented a petition for suspension and interdict in the Court of Session against the Scotsman and its editor, and interim interdict against publication was granted by Lord Coulsfield on 5 January 1988, but after sundry procedure, involving a recall of the interdict of consent, interim interdict was refused by him on 23 February 1988 (see 1988 SLT 490). The Lord Advocate proceeded against the Scotsman after the editor had refused to give an undertaking not to publish any material which could, if published in England, be in breach of Kennedy J's injunction. The Lord Advocate reclaimed the Lord Ordinary's interlocuter but the Second Division on 8 April 1988 adhered thereto (see 1988 SLT 490). It is to be noted that the hearing before the Second Division took place some time before the hearing of *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1988] 3 WLR 776 (the *Spycatcher* case) in your Lordship's House.

The Lord Advocate concedes that there is nothing in the blue-pencilled parts of the book which would endanger national security if published. Furthermore, he does not aver that the Scotsman or its editor had any responsibility for Cavendish's publication of the book or for their receipt of it. He takes his stand on the proposition that since there is a lifelong duty of non-disclosure on anyone who has been a member of the security services, any unauthorised disclosure of information, however innocuous, deriving from such a member by a person who is aware that the disclosure is unauthorised is against the public interest and should be restrained. This must, at any rate, be the position at an interlocutory stage and was the basis on which Millett J granted an interim injunction in the *Spycatcher* case. The Lord Advocate is thus relying on the act of publication by the respondents and not on the character of the information which they propose to publish. The respondents, while accepting that Cavendish is subject to such a lifelong duty, maintain that the public interest does not require that anyone fortuitously acquiring confidential information derived from him which does not endanger national security should be restrained from publishing.

My Lords, the Lord Advocate's contention was decisively rejected in this House in the *Spycatcher* case and it is sufficient to refer to the speech of Lord Keith ([1988] 3 All ER 545 at 640, [1988] 3 WLR 776 at 782–785). Counsel for the Lord Advocate sought to get round this difficulty by submitting that the present case was different from the *Spycatcher* case in that there had been no worldwide publication of the material. I agree with the Lord Justice Clerk that 'There is all the difference in the world between a case such as *Spycatcher* where about 1,000,000 copies of the book had been published and distributed and the present case where such publication as there had been was clearly limited' (see 1988 SLT 490 at 504). However, the fact that this book is not generally available to the public does not necessarily render inapplicable the principles enunciated in the *Spycatcher* case.

It is now beyond doubt that the Crown can only restrain the publication of confidential information if the public interest requires such restraint. This principle was enunciated in *A-G v Jonathan Cape Ltd* [1975] 3 All ER 484 at 495, [1976] QB 752 at 770–771 by Lord Widgery CJ and in *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51–52 by Mason J and was expressly approved in this House in the *Spycatcher* case. It is also clear from that case that any attempt by a member, past or present, of the security services to publish without authority information which he acquired in the course of his work will be restrained regardless of the character of the information. The

public interest requires that members should not breach their duty of confidence. This is what Lord Griffiths described as the 'brightline rule' in the *Spycatcher* case [1988] 3 All ER 545 at 650, [1988] 3 WLR 776 at 795. In the present case the respondents accepted that this rule would apply in any proceedings against Cavendish in the United Kingdom.

To what extent a third party receiving information which he knows to be disclosed in breach of confidence will be restrained from publication thereof must depend on the circumstances. If the information is likely to be damaging to national security he will almost certainly be restrained. So far as confidential information which is not so damaging is concerned, it would be inappropriate in this appeal to attempt an exhaustive definition. Suffice it to say that an agent publishing on behalf of the confidant would probably be restrained (see the *Spycatcher* case [1988] 3 All ER 545 at 642–643, [1988] 3 WLR 776 at 786 per Lord Keith) as would anyone in the 'direct chain from the confidant' (see [1988] 3 All ER 545 at 652, [1988] 3 WLR 776 at 797 per Lord Griffiths). I would consider that anyone who was directly involved in the disclosure by the confidant of the information sought to be published should be restrained and there might be circumstances in which a person deriving a right to publish from such a person should similarly be restrained. In such cases the public interest in requiring members of the security services not to breach their duty of confidence overrides the public interest in the freedom of speech. However, Cavendish's unauthorised disclosure and hence his breach of duty occurred when he posted his book to the member of Parliament. When the book reached the respondents there had already occurred a breach of duty in which they had been in no way involved.

To quote the words of Lord Keith in the *Spycatcher* case [1988] 3 All ER 545 at 640, [1988] 3 WLR 776 at 783:

> '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 similar to these mentioned an art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). All those restrictions are imposed in the light of considerations of public interest such as to countervail the public interest in freedom of expression.'

Article 10 identifies 'the interests of national security' and 'preventing the disclosure of information received in confidence' as grounds on which restraint may be imposed on freedom of expression. The Crown accepts that the interests of national security do not require that publication of this book be restrained but maintain that the matters set out in statement 7 of the petition and which are fully set out in the speech of my noble and learned friend Lord Keith constitute sufficient detriment to the public interest to outweigh the interest in preserving freedom of expression. In my view, this proposition is unsound. The six matters relied on in statement 7 are almost identical to matters relied on as national security factors by Sir Robert Armstrong in the *Spycatcher* case: see the judgment of Scott J ([1988] 3 All ER 545 at 590–592, [1988] 2 WLR 805 at 860–862). Scott J concluded that having regard to the worldwide publication of *Spycatcher* further damage to national security on any of the grounds advanced by Sir Robert Armstrong would not take place and he therefore refused to grant a permanent injunction. In this House Lord Griffiths expressed his broad agreement with Scott J's assessment of Sir Robert Armstrong's grounds (see [1988] 3 All ER 545 at 654, [1988] 3 WLR 776 at 800). If the Lord Advocate's argument in this appeal is correct, it would appear to follow that Scott J in the *Spycatcher* case should have granted a permanent injunction on the basis that for the reasons given by Sir Robert Armstrong the public interest required restraint of publication notwithstanding the fact no further damage to national security would have resulted therefrom, and that the majority of the Court of Appeal and your Lordships should have come to a similar conclusion. This is not a realistic approach. National security is not in issue, the respondents were not involved in Cavendish's breach of duty.

and it therefore follows that the public interest in freedom of expression outweighs any public interest there may be in restraining the mere act of publication by the respondents. To put the matter another way, the Lord Advocate has made no relevant averments of such detriment to the public interest as would entitle him to an inquiry and ad interim to an interdict restricting the right of freedom of expression. The Second Division's approach to and refusal of the reclaiming motion was correct and I would therefore dismiss the appeal.

My Lords, during the course of argument reference was made to the Official Secrets Act 1989 which has not yet come into force. It is interesting to give a brief summary of certain of its provisions which relate specifically to members of the security services. Section 1(1) makes it an offence for a past or present member of the security services to disclose confidential information without lawful authority. Section 5(2) makes it an offence for a person into whose possession information has come in the manner indicated in s 5(1) to disclose without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure by, inter alia, s 1(1). Section 5(3) provides that an offence under s 5(2) is not committed unless the disclosure is damaging and the offender makes it knowing or having reasonable cause to believe that it would be damaging. Section 5(1) provides that s 5(2) applies where, inter alia, any information has come into a person's possession as a result of having been disclosed by a Crown servant without lawful authority. Section 5(1) does not refer to past Crown servants, as does s 1(1) and (3), but s 5(3) applies to information 'protected against disclosure by sections 1 to 3'. On the assumption that s 5 was intended to apply to confidential information deriving from past as well as present members of the security services, an assumption which may well be unjustified having regard to the obscurity of the language, the pattern of the Act appears to be that disclosure of any such information by such a person is a statutory offence but that disclosure by third parties is only such an offence if the disclosure is damaging. Thus, just as the first and second respondents cannot be interdicted from publishing at common law so they could not have been prosecuted under the 1989 Act had it been in force in respect of such publication.

My Lords, an argument was advanced by the third and fourth respondents in relation to the inclusion in any interdict which might be pronounced of the words 'or any person having notice of said interlocuter'. In view of the way in which I propose that this appeal should be disposed of, I do not find it necessary to deal with this matter.

Appeal dismissed.

Solicitors: *Treasury Solicitor*, agent for *Solicitor to the Secretary of State for Scotland*, Edinburgh (for the appellant); *Allen & Overy*, agents for *Dundas & Wilson CS*, Edinburgh (for the first and second respondents); *Lovell White Durrant*, agents for *John G Gray & Co*, Edinburgh, agents for *Levy & McRae*, Glasgow (for the third respondents) and for *Haig-Scott & Co WS*, Edinburgh, agents for *Bannatyne Kirkwood France & Co*, Glasgow (for the fourth respondents).

Mary Rose Plummer Barrister.

R v Watson

COURT OF APPEAL, CRIMINAL DIVISION
LORD LANE CJ, FARQUHARSON AND POTTS JJ
23, 26 MAY 1989

Criminal law – Manslaughter – Causing death by unlawful act – Unlawful act – Death occurring after burglary – Defendant entering victim's flat at night with intent to steal – Victim an elderly man with heart trouble living alone – Victim woken up and verbally abused by defendant – Police and council workmen arriving shortly after burglary – Victim dying hour and a half after burglary – Jury directed that defendant responsible for victim's death even if heart attack brought on by arrival of police or council workmen – Whether knowledge of victim to be attributed to defendant confined to knowledge which defendant acquired when first entering house – Whether knowledge of victim to be attributed to defendant including knowledge gained during whole of his stay in house – Whether defendant guilty of manslaughter.

The appellant and another man entered the home of an 87-year-old man late at night by breaking a window with intent to commit burglary. The occupant, who lived alone and suffered from a serious heart condition, was woken up by the appellant and his accomplice and verbally abused but the appellant and his accomplice made off without stealing anything. Shortly after the burglary the police arrived to investigate and council workmen came to board up the broken window and then, an hour and a half after the burglary, the occupant had a heart attack and died. The appellant was later arrested and charged with burglary and manslaughter of the occupant of the house and was convicted. He appealed against his conviction for manslaughter.

Held – Where a defendant had entered a house as a burglar and confronted an elderly occupant who had a heart attack some time after discovering the defendant, the knowledge of his victim to be attributed to the defendant for the purposes of a charge of manslaughter was not confined to the knowledge which the defendant acquired when he first entered the house but included knowledge gained during the whole of his stay in the house since his unlawful act comprised the whole of his burglarious intrusion. Accordingly, since the appellant must have become aware of the occupant's frailty and old age in the course of his intrusion he ought to have realised that his unlawful act would subject the occupant to a risk of harm. However, since the appellant's counsel had not been given the opportunity to make submissions before the judge directed the jury to the effect that if the arrival of the police or the council workmen had caused the occupant's heart attack the burglary was still responsible for the occupant's death regardless of which of those events actually precipitated the attack, the conviction for manslaughter would be quashed (see p 867 *e* and 868 *c d*, post).

Notes

For manslaughter and killing by an unlawful act, see 11 Halsbury's Laws (4th edn) paras 1161, 1169, and for cases on the subject, see 15 Digest (Reissue) 1136–1140, 9609–9656.

Cases cited

R v Dawson (1985) 81 Cr App R 150, CA.
R v Roberts (1971) 56 Cr App R 95, CA.

Appeal against conviction

Clarence Archibald Watson appealed with the leave of the single judge against his conviction on 24 February 1988 in the Central Criminal Court before his Honour Judge