PUBLIC INTEREST AND BREACH OF CONFIDENCE

BY SAM RICKETSON*

[*In an article published in the last volume of this Review ((1977) 11* M.U.L.R. *223; (1978) 11* M.U.L.R. *289) the author dealt at length with the correct basis and scope of the rapidly growing action for breach of confidence. In the course of this, passing reference was made to the development of a 'defence' or 'exception' to such actions whereby relief could be refused in respect of unauthorized disclosures of confidential information on the basis that they had been made 'in the public interest'. As this was not crucial to the argument presented in that piece, little more was said about it. Nevertheless, there can be little doubt of its importance, and the purpose of the present article is to examine its nature and scope in more detail.*]

The wide-ranging implications of a successful action for breach of confidence are readily apparent. To restrain others from using or broadcasting one's secrets restricts the free flow of information, if not freedom of speech itself, and the same is almost as true of the situation where damages in lieu of an injunction are awarded. It will be argued below that such restraints can be quite properly justified in view of the interests protected by the action for breach of confidence. Nevertheless, it will be clear that there are some circumstances in which such rights should not be enforced. An extreme example is where the confidence relates to some crime or illegality committed by its communicator. It would be strange in such a case if the latter had the right to bind his listener's tongue forever. Nevertheless, there are many other situations which do not involve illegality *per se* but still raise some question of wrongdoing or impropriety. In such borderline cases an individual's private rights in his information can come into sharp conflict with a broader public interest in 'full disclosure'. What, for instance, is to be made of the case where the former employee of a nuclear engineering company takes with him (at the end of his employment) a copy of a confidential company report on the health hazards to workers in nuclear power plants and then seeks to publish it? While there may be no doubt that this information was only acquired by him in confidence, can it be argued that its publication is justified in the public interest? Does it make a difference if it can be shown that the former employee was paid a large sum for it by a newspaper? Or perhaps that he only wishes to publish it out of spite because he was passed over for promotion or was dismissed? And can it be argued that he should first

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have made a more limited disclosure, say to a government nuclear regulatory agency, before going 'completely public'?[1]

It is clear that there is a need for guidelines to help determine the situations in which confidences should be upheld or disclosures allowed. So far, the response of the courts to this problem has been uneven and there is no Australian authority which deals with the point. All that can be firmly stated at the present is that there is a judicially recognized exception to breach of confidence actions where the breach may be justified or excused on the basis that it is in the public interest that such disclosures be made or, more generally, that there is a 'just cause or excuse' for them. Nevertheless, the authorities are far from satisfactory and the parameters of the doctrine are uncertain.

Before discussing the cases in detail, it is useful to consider the conceptual basis for the exception or defence just described. It has been argued by this author that the action for breach of confidence is essentially founded upon an equitable proprietary interest.[2] While the proprietary nature of the right may be disputed,[3] there is a general acceptance among both courts and commentators that the origins and present scope of the action are to be found in equity rather than at law.[4] This carries with it a number of consequences, the most important being that when courts grant relief for breach of confidence, whether by way of an injunction, damages, an account of profits or an order for delivery up and/or destruction, they do so on a discretionary basis. This does not mean that the award of relief is dependent upon the individual judge's caprice, but rather that there is no automatic right to it once the applicant has established his case.[5] In granting relief, the court may have regard to a range of factors which will guide its ultimate exercise of discretion, for instance, laches or acquiescence on the part of the applicant,[6] or undue hardship to the defendant.[7] Another important consideration affecting the grant of

[1] All these factors are well illustrated in the recent furore concerning the Rt. Hon. Ian Sinclair, former Minister for Primary Industry, and his father's financial affairs. In an interview on the A.B.C. radio programme 'A.M.' on 8 June 1979 the editor of the *Age* newspaper admitted that the *Age* had paid $600 for certain confidential documents dealing with the Sinclair finances. He justified this as being 'in the public interest', although he made some critical comments about 'cheque-book journalism' where the information purchased concerned matters of a purely salacious or sensational kind. In this case it is interesting that just before the *Age* published the information (on 7 June 1979), Mr Sinclair made a pre-empting statement to Parliament. As a consequence there could be no complaint from him that the *Age* published the information in breach of confidence.

[2] Ricketson S., 'Confidential Information — A New Proprietary Interest?' (1977) 11 *M.U.L.R.* 223; (1978) 11 *M.U.L.R.* 289, 305-15.

[3] See *e.g.* Jones G., 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 *Law Quarterly Review* 463; Finn P., *Fiduciary Obligations* (1977) Chapter 19; Meagher R. P., Gummow W. M. C. and Lehane J. R. F., *Equity: Doctrines and Remedies* (1975) Chapter 41.

[4] *Supra* n. 2; see also *Deta Nominees Pty Ltd v. Viscount Plastic Products Pty Ltd* [1979] V.R. 167.

[5] See generally Spry I. C. F., *Equitable Remedies* (1971) 354 ff.

[6] *Ibid.* 391, 399. Meagher, Gummow and Lehane, *op. cit.* Chapter 36.

[7] Spry, *op. cit.* 361.

relief stems from equity's central concern with questions of conscience: has the applicant come to court with 'clean hands'?[8] In other words, while the applicant may otherwise have a sustainable claim, his conduct may have disentitled him from gaining an equitable remedy or may be such that he can only obtain it subject to certain conditions. As Isaacs J. once put it, protection will be denied to the applicant

> [w]here the right relied on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff, so that protection for what he claims involves protection for his own wrong. No court of equity will aid a man to derive advantage from his own wrong and this is really the meaning of the maxim.[9]

In the event that relief is denied, the plaintiff is left to pursue any remedy which he may have at common law. Nevertheless, the doctrine does not impeach all unconscionable or improper conduct. It seems that something fairly serious is required to make an applicant 'unclean', and a court will refuse to grant relief only if the conduct in question is shown to have had 'an immediate and necessary relation' to the relief sought.[10] Furthermore, by 'improper' is meant legal, not merely moral, impropriety.[11] In the context of breach of confidence, the above propositions are well illustrated by the decision in *Argyll v. Argyll*.[12] In this case the third Duchess of Argyll's adultery did not bar her from seeking to restrain the Duke's intended newspaper revelations of intimate details of their former life together, although it appeared that her adultery had brought about the collapse of their marriage.[13] On the other hand, the type of impropriety which suffices for 'unclean hands' should not be confused with the defence of illegality. In equity, just as at law, no suit will generally lie in respect of an illegal transaction, but this is on the ground of its illegality rather than because of the demerits of the applicant.[14]

In view of the above it seems sensible to begin our analysis of the concept of 'public interest' in the context of the 'clean hands' doctrine. For a start, it may be said that the very words 'public interest' sound out of place in any discussion of equitable rights, which are usually concerned with parties' private interests. Nonetheless, since a number of recent cases have clearly established it as a distinct factor in the award of relief in breach of confidence actions,[15] it is necessary to consider how it fits into

[8] *Cory v. Gertcken* (1816) 2 Madd. 40; 56 E.R. 250 (Ch.); *Overton v. Banister* (1844) 3 Hare 503; 67 E.R. 479 (Ch.). More recent Australian cases include *Kettles and Gas Appliances Ltd v. Anthony Hordern & Sons Ltd* (1934) 35 S.R. (N.S.W.) 108 and *Harrigan v. Brown* [1967] 1 N.S.W.R. 342. See generally Meagher, Gummow and Lehane, *op. cit.* paras. 318-22; Spry, *op. cit.* 370-4.

[9] *Meyers v. Casey* (1913) 17 C.L.R. 90, 124.

[10] *Moody v. Cox* [1917] 2 Ch. 71, 88 (C.A.); *Meyers v. Casey* (1913) 17 C.L.R. 90.

[11] Meagher, Gummow and Lehane, *op. cit.* para. 318.

[12] [1967] Ch. 302.

[13] *Ibid.* 331 f.

[14] See 16 *Halsbury's Laws of England* (4th ed. 1976) 876 n. 10.

[15] *E.g. Initial Services Ltd v. Putterill* [1968] 1 Q.B. 396 (C.A.); *Fraser v. Evans* [1969] 1 Q.B. 349 (C.A.) and other cases discussed in the body of this article.

the overall theoretical framework of the action. From the cases, two possible alternatives suggest themselves. Firstly, although 'public interest' is not a term commonly used in an equitable context, it can be argued that in situations where courts refuse relief because an alleged breach of confidence is 'in the public interest' they are in reality giving effect to the older 'clean hands' doctrine. On the other hand, a number of recent cases appear to have treated 'public interest' as a separate equitable bar quite distinct from that of 'unclean hands'. This second approach has some conceptual advantages. Whilst traditionally the 'clean hands' doctrine was directed at applicants whose conduct was tainted by some fraud or impropriety, it did not necessarily refer to any wider public interest which might be served by denying them the relief sought or granting it subject to conditions.[16] In other words, the court's refusal or imposition of conditions came primarily from its reluctance to promote unconscionable behaviour, rather than because the refusal was in the general public interest. Of course in many cases the two might overlap, but by and large 'public interest' appears to be a wider and more amorphous exception than that of 'unclean hands'. In the context of breach of confidence it is easy to envisage cases where there might be a very strong 'public interest' in the disclosure of certain information, but no fraud or impropriety on the part of the person(s) seeking to keep it confidential.

There is a further question which arises if it is accepted that 'public interest' represents a new type of bar to equitable relief, at least in relation to breach of confidence actions. Does it operate in the same way as the other recognized bars, such as laches or acquiescence, or does it have a more fundamental effect? In relation to the second alternative, some cases[17] suggest that it is more than just a discretionary defence and operates to remove the confidential obligation altogether. If this is so then it may seriously limit the court's ability to take account of other factors that might incline it in the applicant's favour or cause it to grant lesser relief, say in damages. Once it is said that the obligation of confidence no longer exists then it will be impossible for a court to arrive at any intermediate solution that will more evenly balance the interest of the applicant in his confidential information and the broader public interest in disclosure.

Problems also arise in determining the bounds of what is 'in the public interest'. As already stated, the concept is foreign to equitable jurisdiction, although quite common in other areas of law, particularly in the context of the statutory industrial property regimes.[18] Nevertheless, in these cases

[16] Deception of the public was however clearly a relevant factor in *Kettles and Gas Appliances Ltd v. Anthony Hordern & Sons Ltd* (1934) 35 S.R. (N.S.W.) 108.

[17] *Gartside v. Outram* (1857) 26 L.J. Ch. 113; *Fraser v. Evans* [1969] 1 Q.B. 349 (C.A.).

[18] *E.g.* Patents Act 1952 (Cth), s. 93(a) (extension of term); Trade Marks Act 1955 (Cth), s. 74(3) (registered user).

its scope is usually limited to certain well-defined situations[19] and its meaning narrowly interpreted by the courts.[20] In relation to breach of confidence, however, its potential scope is much wider, since it can determine the whole success or failure of an action. Accordingly, differing views as to its width are to be found in the cases. In some it has been held that only crimes and 'misdeeds of a serious nature' can be disclosed 'in the public interest'.[21] In others however it has been more liberally interpreted, and two recent English cases have come close to holding that disclosure of matters which are 'of public interest' in the sense that people are willing to read about them can also be justified as being 'in the public interest'.[22] This second formulation allows courts a much wider latitude to make their own subjective judgments, whereas the first approach provides some objective criteria to assist in this process.

By now it will be obvious that considerable conceptual confusion exists as to the scope and effect of the 'public interest' defence in breach of confidence actions. The purpose of this article is to examine in detail the different English decisions in which the question has been discussed and to advance some suggestions as to the most appropriate approach for an Australian court to take when faced with the issue. Before proceeding further, however, it is necessary to refer to several areas of law which are closely related to the present topic but which will not be discussed in this article. The first relates to the protection of personal privacy, a subject which has become of considerable importance in recent years. As will be seen below, where confidential information of a personal type is concerned a successful defence of disclosure in the public interest may allow considerable intrusions into the private areas of peoples' lives. Nevertheless, breach of confidence and privacy are concerned with quite distinct interests however much they may overlap: the first deals with the rights of persons in 'secrets' which they have communicated in confidence to other persons, while the second is concerned with the broader issue of what has been called 'the right to be let alone'.[23]

[19] *E.g.* Trade Marks Act 1955 (Cth), s. 74(3), which deals with the registration of registered users, requires that the registration be not contrary to the public interest.

[20] *E.g. Pioneer Kabushiki Kaisha v. Registrar of Trade Marks* (1977) 137 C.L.R. 670, 690, *per* Aickin J.

[21] *E.g. Beloff v. Pressdram* [1973] 1 All E.R. 241, 260 f., where this is discussed at length by Ungoed-Thomas J.

[22] *Woodward v. Hutchins* [1977] 1 W.L.R. 760 (C.A.); *Lennon v. News Group Newspapers Ltd* [1978] F.S.R. 573 (C.A.).

[23] Prosser W. L., 'Privacy' (1960) 48 *California Law Review* 383. The literature on privacy is quite extensive, but the following provide a good general survey of the issues involved: Warren S. and Brandeis L., 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193; Pratt W., 'The Warren and Brandeis Argument for a Right of Privacy' [1973] *Public Law* 161; Gerety T., 'Redefining Privacy' (1978) 12 *Harvard Civil Rights — Civil Liberties Law Review* 233; Wacks R., 'Breach of Confidence and the Protection of Privacy' [1977] *New Law Journal* 328; Swanton J., 'Protection of Privacy' (1974) 48 *Australian Law Journal* 91; Storey H., 'Infringement of Privacy and its Remedies' (1973) 47 *Australian Law Journal* 498. For two government reports on the subject, see the *Younger Committee Report on Privacy* (Cmnd 5012) (1972) and Australian Law Reform Commission, *Defamation and Publication Privacy — A Draft Uniform Bill; Discussion Paper No. 3* (1977).

Secondly, the question of public interest has recently been widely canvassed by English and Australian courts in relation to the discovery of documents and other information in the course of litigation where it is claimed that the documents and information are privileged because they were received in confidence. This has led to a major reconsideration of the doctrine of privilege and of the types of situation where obligations of confidence should be overridden by the public interest in the full discovery of evidence in judicial proceedings.[24] While this is a topic of great importance and closely related to our present inquiry it has been discussed in detail elsewhere and will not be treated further here.[25] The sole concern of this article will be with those situations where recipients of confidential information seek to justify their use or disclosure of the information on the basis of public interest.

Origins of the defence of public interest

It has always been clear in relation to breach of confidence actions that a confidence will not generally[26] be protected where it relates to a crime or possible crime committed by the applicant for relief. Whether this is best seen as an application of the 'clean hands' doctrine or the defence of illegality is difficult to say, since it is not specified by any of the courts in the cases discussed below.

An early example is provided by *Southey v. Sherwood*[27] in 1817. Here, the author Robert Southey had left the manuscript of a poem called 'Wat Tyler' with a publisher some 23 years earlier. While Southey's original intention had been to publish the poem, he apparently changed his mind, but omitted to demand the manuscript back from the publisher although he had not assigned any of his rights therein to anyone. Subsequently, the

[24] *Alfred Crompton Amusement Machines Ltd v. Commissioner for Customs and Excise* [1972] 2 Q.B. 102 (C.A.); [1974] A.C. 405 (H.L. (E.)); *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* [1974] A.C. 133 (C.A.; H.L. (E.)); *D. v. N.S.P.C.C.* [1978] A.C. 171 (C.A.; H.L. (E.)); *Sankey v. Whitlam* (1978) 53 A.L.J.R. 11.

[25] *E.g.* Heydon J. D., 'Legal Professional Privilege and Third Parties' (1974) 37 *Modern Law Review* 601; Tapper C., 'Privilege and Confidence' (1972) 35 *Modern Law Review* 83; Tapper C., 'Privilege and Policy' (1974) 37 *Modern Law Review* 92; Elias P., 'Withholding Information and the Public Interest' [1977] *Cambridge Law Journal* 209; Pearce D., 'The Courts and Government Information' (1976) 50 *Australian Law Journal* 513; Campbell S., Note (1979) 53 *Australian Law Journal* 212.

[26] The word 'generally' is used here because, as will be seen below, there are some confidential relationships where the confidence relates to crimes committed by the communicant but which a court will still protect, *e.g.* solicitor and client or barrister and client: *Weld-Blundell v. Stephens* [1919] 1 K.B. 520 (C.A.); *R. v. Cox and Railton* (1884) 14 Q.B.D. 153 (C.C.R.).

[27] (1817) 2 Mer. 435; 35 E.R. 1006 (Ch.).

[28] See generally Ricketson, *op. cit.* 233 ff. Typical cases involving 'common law rights of property in unpublished works' include *Pope v. Curl* (1741) 2 Ack. 342; 26 E.R. 608 (Ch.) (letters); *Gee v. Pritchard* (1818) 2 Swans. 402; 36 E.R. 670 (Ch.) (letters); *Prince Albert v. Strange* (1849) 1 H. and Tw. 1; 47 E.R. 1302 (Ch.) (engravings); *Macklin v. Richardson* (1770) Amb. 694; 27 E.R. 451 (Ch.) (plays).

manuscript passed into the hands of the defendant publisher, who published it for the first time. Thereupon Southey's interest suddenly revived, particularly as he by this time disavowed the sentiments expressed in the poem. He therefore sought an injunction restraining the publication. While this action was based on the old common law notion of an author's right of property in his unpublished works, it was very similar in nature to a modern action for breach of confidence.[28] Lord Eldon L.C. refused an injunction, giving as one of his reasons the fact that the work was *possibly* criminal in nature,[29] although several comments by his Lordship indicated a more general ground, namely that a court of equity would not intervene to restrain publication of a work which was 'mischievous'.[30] In addition, the plaintiff's abandonment of the manuscript and his subsequent delay in claiming it were clearly relevant considerations in the refusal of relief.[31] Apart from these factors the authorities on the rights of authors in their unpublished works would have indicated a contrary result.

The main line of authority, however, really begins in 1857 with *Gartside v. Outram*.[32] Without referring specifically to either 'clean hands' or 'illegality', Wood V.-C. held that confidences should not be protected if they involved 'iniquities'. He also appeared to ascribe more fundamental consequences to them than had Lord Eldon L.C. in *Southey v. Sherwood*. In answer to a bill for an injunction to restrain a former clerk of the plaintiffs from disclosing any of their dealings and transactions the defendant stated that the plaintiffs, who were wool-brokers, conducted their business in a fraudulent way. After stating the principle of equity on which a court normally acted in such cases, Wood V.-C. said:

> But there are exceptions to this confidence, or perhaps, rather only nominally, and not really exceptions. The true doctrine is, 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.[33]

Certainly a court would not be willing to listen to any general accusation of fraud or wrongdoing by a former employee, but here the allegation was quite specific and 'not a general, wide and roving case'.[34] Wood V.-C. then went on to say that the presence of fraud destroyed any property rights subsisting in the information:

> The real ground of the jurisdiction, as it is properly put, is founded first upon property, because the Court attempts not to interfere with morals, except in

[29] (1817) 2 Mer. 435, 438; 35 E.R. 1006, 1007. The crime being criminal libel.
[30] (1817) 2 Mer. 435, 439; 35 E.R. 1006, 1008. There are also a number of cases dealing with published works where courts have refused to grant relief by way of injunction or damages because of the obscene or immoral nature of the work. See generally: *Slingsby v. Bradford Patent Truck and Trolley Co.* [1906] W.N. 51 (C.A.) (false trade circular); *Lawrence v. Smith* (1822) Jacob 470; 37 E.R. 928 (Ch.) (blasphemous work); *Glynn v. Weston Feature Film Co.* [1916] 1 Ch. 261 (burlesque).
[31] (1817) 2 Mer. 435, 438 ff.; 35 E.R. 1006, 1007 f.
[32] (1857) 26 L.J. Ch. 113.
[33] *Ibid.* 114.
[34] *Ibid.*

> administering civil rights connected with rights of property. There is the property of the employer in those secrets of his business which he is obliged to communicate to others, and which are not to be trifled with. It is a sacred and solemn deposit, but there is no property in these transactions with this gentleman which were of the character I have been describing, and in his answer he has made no disclosures except as to these fraudulent transactions.[35]

He therefore held that if the defendant could make out his case this would be a good defence to the injunction sought by the plaintiff.[36]

From the later case of *Weld-Blundell v. Stephens*[37] it appeared that the doctrine in *Gartside v. Outram* did not extend to civil wrongs, although this was only by way of *obiter*.[38] The plaintiff[39] here had lent money to a certain company. After being asked for a further advance, he employed the defendant (a chartered accountant) to look into the affairs of the company. In a letter of instructions to the defendant he made certain libellous statements about the previous manager of the company, describing him as 'an ingenious thief' and the other officers of the company as the 'rest of the gang'.[40] He also expressed the opinion that the then manager of the company might prove to be no better than his predecessor and requested the defendant to make confidential inquiries about the company's affairs to see if there was either 'sense or safety in lending any more money or throwing good money after bad'.[41] The defendant handed the letter of instructions to his partner, who carelessly left it at the company's offices when he was making his investigations. It was found by the company's manager, who communicated its contents to the persons concerned. They sued the plaintiff for libel and recovered considerable damages against him, the jury finding that in each case he was actuated by malice. The plaintiff then sued the defendant for breach of an implied duty to keep the letter of instructions secret, claiming as damages the amounts which he had paid in damages in the two libel suits, as well as his own costs. In essence his case was founded upon the negligence of the defendant's partner in not taking care of the letter, as a consequence of which its contents had become known to the persons who ultimately brought the libel suits against the plaintiff. In reply, the defendant argued that he was not under any duty to the plaintiff 'not to disclose the contents of the letter because any contract not to do so would be either an illegal contract, or against public policy'.[42]

Despite the earlier contrary findings of a special jury[43] Darling J. had

[35] *Ibid.*
[36] *Ibid.* 116.
[37] [1919] 1 K.B. 520 (C.A.).
[38] *Ibid.* 527, *per* Bankes L.J.
[39] The plaintiff was described by Scrutton L.J. *ibid.* 537 as follows:
> Mr Weld-Blundell is an elderly gentleman who has never appreciated that 'the tongue is an unruly member' and has not been taught by verdicts in libel actions to restrain his tongue.

[40] *Ibid.* 525, *per* Bankes L.J.
[41] *Ibid.* 524.
[42] *Ibid.* 526, *per* Bankes L.J.
[43] [1918] 2 K.B. 742.

dismissed the action, holding that no such condition as alleged by the plaintiff could be implied in the circumstances and that accordingly there was no breach of duty by the defendant. The Court of Appeal however held that the action should succeed. Strictly of course it could not be argued that the doctrine in *Gartside v. Outram* applied, because in the instant case the plaintiff was only seeking damages at law for breach of contract and not an equitable remedy, while in the earlier case the court was simply refusing to exercise its discretion to grant an injunction, thereby leaving the plaintiff to his remedy at law. But even if the decision in *Gartside v. Outram* was of wider application, it could not apply to the present facts as no crime or fraud was involved. It could not be argued that Weld-Blundell's letter contained a criminal libel, for this point had not been tested in court. Thus, it could only be regarded as a civil wrong, albeit one actuated by malice, and a distinction was to be made between seeking to restrain disclosure of a criminal or illegal intention and seeking to restrain disclosure of a civil or private wrong.[44] Warrington L.J. said of *Gartside v. Outram*:

> The fraud there alleged was a systematic fraud pursued by the plaintiffs in the course of their business, and the disclosure of the evidence in the defendant's possession would tend to prevent such frauds in the future. I doubt whether the Vice-Chancellor would have come to the same conclusion where, as in the present case, the question relates to a single document, the writing and publication of which is no doubt a cause of action, but the disclosure of which serves no useful purpose, except to enable the person libelled to recover damages for a libel, the existence of which, but for the defendant's neglect, might never have been known to anyone.[45]

His Lordship went on to say:

> No other authority in point has been cited to us, but there are expressions in the judgment of Lindley L.J. in *Saunders v. Seyd and Kelly's Credit Index Co.*[46] which show that it did not occur to him that there was any objection in law to an obligation not to disclose a libellous document. Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed I can see no distinction in this respect between cases of contract and cases of tort. Unless there be such a distinction, the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal.[47]

Bankes and Scrutton L.JJ. agreed with this conclusion, both pointing out that in certain situations the courts would even protect confidential communications concerning criminal deeds where a special relationship such as solicitor-client or counsel-client was on foot and the information was communicated for the purpose of preparing and conducting a defence.[48]

[44] [1919] 1 K.B. 520, 527 f., *per* Bankes L.J.; 533 f., *per* Warrington L.J.; 539-48, *per* Scrutton L.J.
[45] *Ibid.* 534.
[46] (1896) 75 L.T. 193 (C.A.).
[47] [1919] 1 K.B. 520, 534 f.
[48] *Ibid.* 527 f., *per* Bankes L.J.; 544 f., *per* Scrutton L.J. See also *R. v. Cox and Railton* (1884) 14 Q.B.D. 153 (C.C.R.).

In Scrutton L.J.'s view such agreements were protected for reasons of public policy that did not arise in a case like *Gartside v. Outram*. Public policy could not be invoked to justify disclosure of information relating to the commission of civil wrongs, particularly where, as in the present case, if the obligation of confidence had been observed by the defendant no civil wrong would have been committed, inasmuch as no publication of the libel would have occurred.[49] One possible qualification to all this was made by Bankes L.J., who pointed out that even the protection given to professional advisers such as lawyers would not avail where the confidential communication related to a crime which was proposed rather than committed. He also suggested that the same could be said of the proposed commission of a civil wrong upon an individual, and that such an obligation might well be considered illegal as one where

> the duty to the public to disclose the criminal or illegal intention may properly be held to override the private duty to respect and protect the client's confidence.[50]

Nevertheless, it is clear overall that the Court of Appeal took a narrow view of the circumstances under which unauthorized disclosures of confidential information would be permitted. Although some references are made to 'public policy' and 'duty to the public', these are only made within the limited context of crimes, frauds and contemplated torts and there is no recognition given to any wider kind of public interest which might be served by allowing disclosures of other categories of information. Therefore, while Mr Weld-Blundell was obviously a man of great indiscretion, he was still entitled to insist upon his agents observing their obligations of confidence towards him and to hold them liable for disclosing information which he had given them in confidence, even where such disclosure was done negligently. On the other hand, there is no reason to suppose that the decision in this case was simply confined to the relationship of principal and agent, for it had been clearly established in previous cases that liability for breach of confidence arose in the context of a wide range of contractual and fiduciary relationships.[51] Finally, of course, it should be noted that it is not strictly an authority on the limits

[49] [1919] 1 K.B. 520, 547. It should be noted that while Bankes and Warrington L.JJ. held that the plaintiff could only recover nominal damages in respect of disclosure of his own wilful wrong because to grant more would have been in the nature of an indemnity, Scrutton L.J. was prepared to grant damages in the sum of £650.

[50] *Ibid.* 527.

[51] *Abernethy v. Hutchinson* (1824) 1 H. & Tw. 28; 47 E.R. 1313 (Ch.); *Yovatt v. Winyard* (1820) 1 Jac. & W. 394; 37 E.R. 425 (Ch.); *Prince Albert v. Strange* (1849) 1 H. & Tw. 1; 47 E.R. 1302 (Ch.); *Morison v. Moat* (1851) 9 Hare 241; 68 E.R. 492 (Ch.); *Alperton Rubber Co. v. Manning* (1917) 86 L.J. Ch. 377; *Robb v. Green* [1895] 2 Q.B. 315 (C.A.); *Merryweather v. Moore* [1892] 2 Ch. 518; *Lamb v. Evans* [1893] 1 Ch. 218 (C.A.). Note, however, that it was not until 1948 that it was authoritatively stated that liability arose independently of contract or fiduciary relationship: see *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) [1963] 3 All E.R. 413 n. (C.A.); *Argyll v. Argyll* [1967] Ch. 303; *Seager v. Copydex (No. 1)* [1967] 1 W.L.R. 923 (C.A.); *Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41.

of the defence applied in *Gartside v. Outram*, because the plaintiff was not seeking equitable relief but only damages for breach of an implied contractual obligation of confidence. In reality the Court was only concerned with the limited question of whether the implied contractual obligation was illegal or against public policy in the sense in which these concepts are applied in the law of contract. Nevertheless, their comments on the limits of the equitable doctrine applied in *Gartside v. Outram* must be given some weight, coming as they did from a strongly constituted Court of Appeal.

The modern cases: Initial Services v. Putterill *to* Distillers v. Times Newspapers

More recent cases have extended the circumstances under which equitable relief for unauthorized disclosures of confidential information may be refused. It is here that for the first time reference to a wider concept, namely public interest, is to be found. Thus, in *Initial Services v. Putterill*[52] the court was concerned with the proposed disclosure of information relating to an alleged breach of statutory duty. The first defendant, a former employee of the plaintiff launderers, took with him a number of the plaintiff's documents when he left its employment. He handed them to reporters on the *Daily Mail* (the second defendant) and based on these documents that newspaper published two articles detailing an alleged liaison system between different laundries to keep up their prices. These articles also claimed that the plaintiff had issued a misleading circular concerning the reasons for its price increases. As soon as the articles appeared, the plaintiff issued a writ against both defendants seeking an injunction and damages for breach of confidence as well as delivery up of the confidential documents. In defence, the first defendant argued that the agreement which the plaintiff had entered was contrary to section 6 of the Restrictive Trade Practices Act 1956 (U.K.). It therefore should have been registered pursuant to that Act, which it had not, and also referred to the Monopolies Commission.[53] In relation to the circular he maintained that it was misleading to the public, in that the plaintiff stated therein that it had increased its prices because of selective employment tax when this was not the case at all, since it had made considerable profits in the relevant period.[54]

The plaintiff sought to strike out these parts of Putterill's defence on the basis that the matters raised in them did not provide an exception to the obligation of confidence imposed upon a servant. Both master and judge refused to allow this.[55] On appeal, the Court of Appeal rejected the plaintiff's argument, refusing to limit the exception to cases where the

[52] [1968] 1 Q.B. 396 (C.A.).
[53] *Ibid.* 404.
[54] *Ibid.* 404 f.
[55] *Ibid.* 399.

master was 'guilty of a crime or fraud'. As to this, Lord Denning M.R. said:

> I do not think that it is so limited. It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. As Wood V.-C. [in *Gartside v. Outram*] put it in a vivid phrase: 'There is no confidence as to the disclosure of iniquity'.[56]

His Lordship went on to say of *Weld-Blundell v. Stephens*:

> In *Weld-Blundell v. Stephens*, Bankes L.J. rather suggested that the exception is limited to the proposed or contemplated commission of a crime of a civil wrong. But I should have thought that was too limited. 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. The reason is because 'no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare': see *Annesley v. Anglesea (Earl).*[57]

Salmon L.J., with whom Winn L.J. agreed, came to the same conclusion on the facts, although his comments were more specific, holding that a court would not enforce an agreement to keep secret a breach of statutory duty such as was alleged here:

> I am by no means convinced that any court would do other than regard such an agreement as illegal on the ground that it was clearly contrary to the public interest. I do not think that the law would lend assistance to anyone who is proposing to commit and to continue to commit a clear breach of a statutory duty imposed upon him in the public interest. If such agreements between masters and servants were to be enforced by the courts, it would be of great assistance to those who proposed ignoring their statutory duties. I do not believe that the courts should or would render them any assistance.[58]

What can be seen in this case, therefore, is a wider approach to the question of refusing to enforce confidential obligations, at least those arising out of the master and servant relationship. All the judges extended the scope of permissible disclosure by reference to the concept of 'public interest'. In the present case their conclusion was that the alleged failure to register the agreement pursuant to the Restrictive Practices Act came within the scope of what could be justifiably disclosed, and while the question as to reference to the Monopolies Commission was held to be more tenuous it was not so completely unfounded 'as to require it to be struck out'.[59] Similarly, with the allegedly misleading circular, none of the members of the Court felt that confidentiality should be enforced in relation to this. In so holding, Salmon L.J. referred to the dictum in

[56] *Ibid.* 405.

[57] *Ibid.* The reference to *Annesley v. Anglesea (Earl)* is to be found in (1743) L.R. 5 Q.B. 317 n. This celebrated case lasted for 15 days before the Court of Exchequer in Ireland, in the course of which an attorney was asked as to certain communications between himself and the defendant with reference to an alleged conspiracy on the part of the defendant to prosecute a party and obtain his conviction and execution if possible. The quotation which appears in Lord Denning M.R.'s judgment is taken from the argument of Mr Serjeant Tisdall, which was approved of by the court: see also *Gartside v. Outram* (1856) 26 L.J. Ch. 113, 115 f., *per* Wood V.-C.

[58] *Ibid.* 410.

[59] *Ibid.* 406, *per* Lord Denning M.R.

Gartside v. Outram that there was no confidence as to the disclosure of iniquity and said:

> The iniquity referred to in that case was quite dramatic, but what is the sort of iniquity that comes within that doctrine is certainly not easy to define. What was iniquity in 1856 may be too narrow or perhaps too wide for 1967. If, however, traders issue false circulars to their customers such as it is alleged that these traders have done, I am certainly not prepared to hold that it is unarguable that such a trade practice is iniquitous.[60]

One possible limitation was however proposed by Lord Denning M.R. This was based upon an argument advanced by the plaintiff that even if the disclosures had been justified they should have been made to 'one who has a proper interest to receive the information'.[61] It would thus be proper to disclose a crime to the police or a breach of the Restrictive Practices Act to the Registrar appointed under that Act, and there might even 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.[62]

This suggestion, however, was not taken up by the other members of the Court and on the facts of this case Lord Denning M.R. felt that the fact that the disclosures had been made to the press was insufficient to strike out the defence of public interest raised by the defendants.[63] In other words, while the facts of the case may not have 'demanded' publication to the press, such publication was at least 'excusable'. On the merits of the case this may have been a justifiable conclusion, but it does appear to make Lord Denning M.R.'s suggested qualification devoid of any real content. In a subsequent case, discussed below,[64] one court at least was prepared to restrain the further disclosure of confidential information once it had been disclosed to the proper authority, although logically this is a distinct situation from that where the initial disclosure is to the wrong person. Otherwise, however, the suggestion has not been acted upon in later cases.

A further qualification to the defence was also tentatively adverted to by Lord Denning M.R. at the end of his judgment:

> I say nothing as to what the position would be if he disclosed it out of malice or spite or sold it to a newspaper for money or for reward. That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward.[65]

This again seems a reasonable reservation to make, particularly as an argument that disclosure is in the public interest surely carries with it the implied requirement that the disclosure be done in a disinterested way. Nevertheless, as will be seen below, it has not been seen as a relevant

[60] *Ibid.* 410.
[61] *Ibid.* 405.
[62] *Ibid.* 406.
[63] *Ibid.* 406, *per* Lord Denning M.R.; 409, *per* Salmon L.J.; 411 f., *per* Winn L.J. (by implication).
[64] *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd* [1975] Q.B. 613.
[65] [1968] 1 Q.B. 396, 406.

factor by courts in subsequent cases where confidential information has been sold for valuable consideration.

Initial Services v. Putterill therefore represents a broadening of the defence or exception discussed in the earlier cases, particularly after the limitations proposed in *Weld-Blundell v. Stephens.* It is arguable perhaps that a similar result might have occurred had the 'clean hands' doctrine been applied. But the reference to a requirement of 'public interest' adds a new element to that more traditional doctrine with its emphasis on the applicant's behaviour. It would seem, at least from Lord Denning M.R.'s judgment, that more than the simple commission of a 'crime, fraud or misdeed' needs to be shown: it must be demonstrated that it is in the public interest to disclose this. Presumably it would almost always be in the public interest to reveal details of crimes or frauds disclosed to one in confidence. The categories of 'misdeeds' and 'iniquities' (the expression adopted by Salmon L.J. from *Gartside v. Outram*) are more open-ended, and here the element of public interest would be of more importance in determining whether or not relief should be granted. In any event it is clear that all members of the Court were agreed that it was in the public interest for a former servant to disclose that his master was acting in contravention of a statutory obligation.

However, it is unclear what the Court thought was the effect of the public interest defence which they were enunciating. Did it operate to remove the defendant's obligations of confidence altogether, as suggested in *Gartside v. Outram*? Or was it simply a discretionary bar to the grant of the equitable relief sought? While all their Lordships referred to *Gartside*, on balance it seems that they preferred the second view. This can be particularly seen in Lord Denning M.R.'s judgment in his references to factors which might influence the exercise of discretion in the opposite way, such as the need for disclosure to be to a 'proper person' and the motives of the person breaching confidence.

It also seems clear from their Lordships' judgments that it is only where fairly serious matters are involved that disclosure in the public interest will become justified. This is a reasonable conclusion to draw from the use of words like 'misdeeds' and 'iniquities', both of which must surely exclude matters of a trivial, sensational or purely salacious nature. A similar conclusion is also to be found in *Fraser v. Evans*,[66] which was decided shortly afterwards, although this case contains a wider formulation of the scope of public interest. The plaintiff's sole 'misdeed' or 'iniquity' here was that he had prepared a consultancy report on public relations for the Greek Junta government and had communicated this in confidence to the latter. A copy of it was somehow 'leaked' to the *Sunday Times*, which proposed to print extracts and a commentary thereon (including

[66] [1969] 1 Q.B. 349 (C.A.).

answers given by Mr Fraser to a *Sunday Times* interviewer) in a forthcoming article. Presumably the disclosure of the contents of the report and Fraser's links with an unpopular and undemocratic regime would have been embarrassing to him. Nevertheless, there was nothing illegal in what he had done, and any moral taint involved depended entirely upon one's attitude to the then Greek government. His application for an injunction to restrain publication of the article was refused, but not on the ground that disclosure was justified in the public interest: the decision of the Court of Appeal was that the only party with any standing to bring an action for breach of confidence was the Greek government itself, for when Fraser had sent it the report he had parted with all rights in respect of it and could no longer claim any confidentiality for himself.[67] Nevertheless, Lord Denning M.R. made some comments in passing about the argument advanced by the defendants that had there been a breach of confidence in relation to Fraser they would still have been entitled to publish the article in the public interest. His Lordship here appeared to express a broader formulation of the situations in which breaches of confidence might be permissible by saying that confidences were to be protected unless there was 'just cause or excuse' for disclosing them.[68] He then referred to Wood V.-C.'s dictum concerning the 'disclosure of iniquity' and went on to say:

> 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.[69]

This certainly appears to be much wider than the formulation which his Lordship had made shortly before in *Putterill*. The reason for this is perhaps to be found at the end of his judgment, where he stressed the importance of the interest of free speech which is involved in such cases:

> It all comes back to this. There are some things which are of such public concern that the newspapers, the press, and, indeed, everyone is entitled to know the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away.[70]

But what things are of 'such public concern' that they provide 'just cause or excuse' for disclosure of confidences? Despite the apparent broad sweep of his new principle, Lord Denning M.R.'s application of it would have been conservative in the instant case: on the facts before him he doubted that the *Sunday Times* could have made out the defence. A number of other comments also need to be made here.

Firstly, while no one would argue with his Lordship's assertion about the general public interest which exists in free speech, it is nonetheless clear that in certain circumstances the law recognizes that free speech

[67] *Ibid.*
[68] *Ibid.* 361 f.
[69] *Ibid.* 362.
[70] *Ibid.* 363.

may quite properly be abridged. The doctrine of breach of confidence is only one instance; the laws of defamation, copyright and state secrets are others. Secondly, what does 'just cause or excuse' mean? The phrase is extremely wide and invites courts to enter into a highly speculative and subjective area of inquiry. If such a test is to be used, it is submitted that it should not be left at large but should only be applied in accordance with some sort of objectively ascertainable criteria.[71] Thirdly, Lord Denning M.R. seems to ascribe a more fundamental effect to his suggested defence than he did in *Initial Services v. Putterill*: if 'just cause or excuse' can be shown, then the confidence does not exist. Finally, it should be noted that in view of the outcome of the case all his comments were *obiter*.

In later cases, however, the permissible scope of the defence has arisen directly for consideration. In two of them, where it succeeded, the subject matter — the secrets of the Church of Scientology — had perhaps the unfavourable odour of wrongdoing that was lacking in *Fraser v. Evans*, although there was no evidence of any definite illegality. The first case concerned the attempt of Mr Vosper, a former member and pupil of the Church, to publish a book exposing the beliefs and practices of Scientology.[72] In doing so he used extracts from the Church's literature as well as his knowledge of the more intimate details of its practices and doctrines which he had learnt in secret courses in relation to which he had signed an undertaking of confidence. Mr Hubbard, the American founder of the sect, thereupon brought an action against Vosper, alleging infringement of copyright and breach of confidence and seeking an injunction restraining publication. Although this was granted at first instance, the Court of Appeal upheld an appeal and discharged the interlocutory injunction. This was firstly because the defendant had shown that in relation to the alleged copyright infringement he might have a good defence on 'fair dealing' under section 6(2) of the Copyright Act 1956 (U.K.)[73] and secondly because, as Lord Denning M.R. put it, after a consideration of the plaintiff's literature, in relation to the alleged breach of confidence:

> even on what we have learnt so far, there is good ground for thinking these courses contain such dangerous material that it is in the public interest that it should be made public.[74]

In this respect the plaintiff's case was certainly not helped by its own admission that some of the courses could be 'dangerous if practised behind

[71] 'More recently Lord Denning M.R. has sought to elevate this unexceptionable application of settled principle [*i.e.* the clean hands doctrine] to a new proposition that the defendant cannot be prevented from breaking confidence where there is just (in the very special and indefinable sense that word has for Lord Denning) excuse or it is in the public interest to do so': Meagher, Gummow and Lehane, *op. cit.* para. 4109. It is hard to disagree with them: while the phrase 'just cause and excuse' has a fine equitable ring about it, its meaning is as variable as the Chancellor's foot.

[72] *Hubbard v. Vosper* [1972] 2 Q.B. 84 (C.A.).

[73] *Ibid.* 94 f., *per* Lord Denning M.R.; 98 f., *per* Megaw L.J.

[74] *Ibid.* 96.

closed doors'.[75] Megaw L.J. came to a similar conclusion after a detailed examination of the plaintiff's literature, although he expressed his reasons for refusal of interlocutory relief in the traditional language of equity, namely that the plaintiff did not come to court with 'clean hands', as he and his followers had used 'deplorable means' to protect their secrets.[76] Stephenson L.J. also agreed, adding that damages would be an adequate remedy for any breach of copyright or confidence proved at the trial.[77]

A similar conclusion was reached in the second *Scientology* case, *Church of Scientology of California v. Kaufman*,[78] the facts of which were very similar to those in *Hubbard v. Vosper*. Again the defendant relied upon the public interest as justifying his proposed publication of a book containing considerable extracts from confidential documents of the Church. To counter this the plaintiffs submitted that the decision in *Hubbard v. Vosper* not to grant an interlocutory injunction was distinguishable or incorrect, particularly in view of the earlier Court of Appeal decision in *Weld-Blundell v. Stephens*, which they argued was inconsistent with it. This was on the basis that the latter case had not adopted the wider defence of public interest enunciated by Lord Denning M.R. in *Hubbard v. Vosper*. Clearly *Weld-Blundell v. Stephens* was in the plaintiffs' favour, but the argument took no account of the developments that had occurred in the succeeding 50 years in such cases as *Initial Services v. Putterill* and *Fraser v. Evans*. Goff J. met this contention by saying that the issue of public interest had not arisen in the earlier case and therefore *Hubbard v. Vosper* was binding upon him.[79] Accordingly, he exercised his discretion in the same way as the Court of Appeal had done in that case and refused an interlocutory injunction. When the matter came to trial before him, he examined the evidence concerning the activities and teachings of Scientology more closely. In concluding that disclosures of such material were justifiable he discussed a number of tests, finding that, under each, disclosure in this case would be permissible. For instance, on his view of the evidence, he could readily conclude as had Lord Denning M.R. in *Hubbard v. Vosper* that the teachings and practices were so dangerous that it was in the public interest that they be made public.[80] He also held that this would be so under Lord Denning's dictum in *Fraser v. Evans* concerning 'just cause or excuse', which he felt to be a wider test than that of 'danger', although he recognized the need for limits to such a formulation.[81] On the more traditional equitable ground of 'unclean hands' he also felt that the plaintiffs should not

[75] *Ibid.* 96.
[76] *Ibid.* 99-101.
[77] *Ibid.* 101.
[78] [1973] R.P.C. 627 (interlocutory proceedings); 635 (trial).
[79] *Ibid.* 629.
[80] *Ibid.* 649-59, 653.
[81] *Ibid.* 653.

succeed[82] and that in any case damages would be an adequate remedy, although any injury appeared to be 'problematic and speculative in the extreme'.[83]

While there may be little argument with the particular conclusions reached in these two cases, it is unclear how much further they extend the defence of public interest. Goff J.'s judgment, which is a final and not simply an interlocutory determination, is not of much assistance here, since he found the disclosures justified under a number of tests both narrow and wide, including the 'clean hands' doctrine. Perhaps all that can be said is that the two cases more clearly demonstrate the 'public interest' aspect of the defence: disclosure in the public interest may be justified where the subject matter of the confidence concerns something which is potentially dangerous to public health or safety. Under this sort of formulation — which is not so narrow as Goff J. supposed — a number of different situations where disclosure would be justified can be imagined, particularly in relation to confidential information of the commercial and industrial sort. For instance, it might be possible to argue that the disclosure of the inadequacy of safety precautions taken in a large industrial plant would be justified, as would publication of a confidential company report showing that the health hazards of a particular activity engaged in by the company or the constituents of a particular product made by it were greater than was publicly known. Of course, in many of these cases there might be some accompanying illegality such as breach of an industrial safety or consumer protection statute or some tortious liability (although that would be much more problematic), but the element of danger to public health or safety would in itself provide a strong enough reason for permitting disclosure. However, a qualification needs at once to be made here. The *Scientology* cases had bizarre facts, and the courts concerned were in no doubt that the element of danger was clearly present. On the other hand, where the evidence as to its existence is more evenly balanced, it is submitted that a court should not treat that as a sufficient reason to deny a plaintiff relief. Such, for instance, might be the case where publication is threatened of confidential details of an individual's or institution's involvement in a uranium-mining or tobacco company or a brewery. If the argument is advanced that it is in the public interest that the public should know such details on the basis that these companies are engaged in 'dangerous' pursuits, it is submitted that such a defence should not succeed unless the defendant can adduce clear evidence supporting his claim that such enterprises are indeed dangerous to public health.

In addition it should be noted that in both *Scientology* cases the courts clearly differentiated between 'clean hands' and 'public interest'. It is true that Megaw L.J. in *Hubbard v. Vosper* expressly based his decision on the

[82] *Ibid.* 654 f.
[83] *Ibid.* 658.

former, but Lord Denning M.R. did not refer to it, and in *Kaufman* Goff J. treated them as separate bars to relief. On the facts of both cases, of course, 'clean hands' may have been sufficient to dispose of the issue before the court. But it is easy to envisage instances where the person seeking to enforce an obligation of confidence cannot be said to have disentitled himself to relief through his personal conduct yet the information contains material which is so dangerous that it should be disclosed in the public interest. Obvious examples include the pure research scientist who is conducting research into matters which may be of great ultimate benefit to mankind but which may also be of immense danger if they are misused. The *bona fides* of such scientists may be beyond question: nevertheless, the research may be of such potential harm that it should be made known.[84] The public interest formulation therefore provides an appropriate way for a court to consider whether or not such information should be protected, without doing violence to the long established 'clean hands' doctrine.

Several subsequent cases have attempted to 'codify' the guidelines for allowing disclosure in the public interest in breach of confidence cases. The most comprehensive of these attempts is to be found in the judgment of Ungoed-Thomas J. in *Beloff v. Pressdram*,[85] although unfortunately it is only *obiter*. In this case the plaintiff was a senior lobby correspondent for the *Observer* newspaper, which position gave her special access to the House of Commons and its members. She was concerned about a campaign of vilification being conducted by the satirical magazine *Private Eye* against the then Home Secretary, Reginald Maudling, in relation to the latter's previous connections with a certain businessman, now in prison (one Hoffman), and certain companies which had been run by the latter. After a conversation with a senior government Minister (William Whitelaw), in which he told her that Maudling would be the obvious choice for the premiership if the present Prime Minister (Mr Heath) 'ran under a bus' and that this was also the view of another senior minister (Robert Carr), she wrote a memorandum for the *Observer's* editorial staff setting out these opinions and suggesting that she use them as a basis for writing some articles on Maudling's past career and associates and assessing his future political prospects, particularly in the light of the present allegations. In substance the articles were probably intended as a considered rebuttal of the *Private Eye* campaign. By some means however a copy of the memorandum was 'leaked' from the *Observer* office and given to *Private Eye*, where it was subsequently reproduced in full as the 'Ballsoff Memorandum'. The plaintiff thereupon took action against *Private Eye*, claiming damages for infringement of her copyright. Her obvious concern was that the defendant's publication of her memorandum

[84] Recent controversies over 'genetic engineering' and nuclear safety standards amply illustrate this point.
[85] [1973] 1 All E.R. 241.

had revealed to the public the names of her sources (Whitelaw and Carr) and had attributed to them views which had only been communicated to her in confidence. Her claim was in substance one for breach of confidence, but she framed it in copyright, apparently to obtain the benefit of the additional damages available under section 17(3) of the Copyright Act 1956 (U.K.) for the flagrancy of the infringement. Her action failed for various reasons not relevant here,[86] but in the course of a careful judgment Ungoed-Thomas J. dealt with the defence of publication in the public interest which had been advanced by the defendants and which he held applied to copyright cases as much as to breach of confidence actions, because it was based upon a general principle of common law.[87] After reviewing the authorities dealt with above, he gave the following formulation of the limits of the defence:

> The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning M.R. emphasized must be disclosure justified in the public interest, 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. Public interest, as a defence in law, operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect. Such public interest, as now recognized by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view, clearly recognizable as such.[88]

On the facts of this case, he held that the defence would have failed, since the 'Ballsoff Memorandum' did not disclose any 'iniquity or misdeed' and he was unimpressed by the defendant's argument that it was in the public interest for people to know what senior Ministers were thinking.[89] While only *obiter*, his treatment of the authorities is thorough and it is submitted that his interpretation of them is sensible, particularly in relation to journalists, who usually claim a wide ranging 'right' to publish information obtained in breach of confidence in the public interest.[90] Even the plaintiff in this case, Nora Beloff, found herself in a cleft stick as a journalist. On the one hand, she wanted to protect her own confidential sources of information. On the other hand she wanted freedom, on occasion, to publish items that were 'leaked' to her by persons in breach of their own obligations of confidence. Ungoed-Thomas J. however refused to accept that some 'leaks' might be proper and others might not

[86] Chief among these was that she did not own the copyright in the memorandum because she was employed under a contract of service and there had not been a valid assignment of it to her by the editor of the *Observer: ibid.* 245-57.

[87] *Ibid.* 259.

[88] *Ibid.* 260.

[89] *Ibid.* 261.

[90] There is little doubt that journalists ideally would like a complete right to publish any information obtained in confidence where they feel there is a legitimate public interest. This is not to say that such a right would be irresponsibly exercised if it was accepted by the law. However, for reasons which are given in the concluding part of this article, if such a right were recognized it would cut right across the basis of the action for breach of confidence. See also Australian Law Reform Commission, *op. cit.*

(as in the case of *Private Eye* obtaining a copy of her memorandum).[91] In his view, there was no general journalistic right or privilege to disclose confidential information simply because it was in the public interest to do so: such a defence did not extend beyond the factors listed above, namely 'misdeeds of a serious nature and importance to the country and . . . clearly recognizable as such'.[92]

It needs to be stressed of course that Ungoed-Thomas J.'s comments were only *obiter*, not even directed at a claim for equitable relief but at one for damages under the Copyright Act 1956 (U.K.). The implication to be drawn from this is that while public interest may operate as a bar or discretionary defence to equitable relief, it can also operate as a general defence to legal claims, such as one for infringement of copyright. This raises fascinating possibilities: would a defence of public interest apply in respect of other industrial property rights as well as copyright? Could it also apply to other legal claims such as the torts of trespass or conversion? 'Public interest' type defences exist in the action of defamation and similar overtones are to be found in the law of contract with its doctrines of illegality and public policy. Does this mean, then, that there is a general principle running through the common law whereby public interest may be pleaded as a justification for what would otherwise be an actionable wrong? These speculations go far beyond the scope of the present article, but would certainly repay closer investigation. For present purposes all that needs to be said is that Ungoed-Thomas J.'s comments in *Beloff* provide a useful set of guidelines for the application of the discretionary defence of public interest in breach of confidence actions. They also provide some authority for arguing that a more general defence at law operates, at least in respect of copyright claims.

A similar conclusion as to the scope of the defence was reached by Talbot J. in *Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd*,[93] a case which arose out of the protracted litigation over the drug thalidomide. In the course of one of the many actions against Distillers a large number of their confidential documents were disclosed to the claimants under an order for discovery and were given to one of their expert advisers, Dr Phillips. The action was ultimately settled in early 1968, and around the same time Dr Phillips entered into an agreement with Times Newspapers Ltd to sell the documents which he had in his possession for a

[91] [1973] 1 All E.R. 241, 261, 264. There is a curious paradox here, because it is clear that journalists would also like to claim a legal privilege to protect their 'sources' from revelation even in judicial proceedings. On occasions this has led reporters to martyrdom both in Australia and the U.K. where courts or judicial bodies of inquiry have sought the disclosure of names and other information: *O'Brennan v. Tully* (1935) 69 Ir.L.T. 115; *McGuiness v. Attorney-General of Victoria* (1940) 63 C.L.R. 73; *Attorney-General v. Mulholland; Attorney-General v. Foster* [1963] 2 Q.B. 477 (C.A.).

[92] [1973] 1 All E.R. 241, 260.

[93] [1975] Q.B. 613.

considerable sum of money.[94] It seems that he handed over the documents he had, although the *Times* did not immediately use them. Later in 1968 Distillers' solicitors, realizing that Dr Phillips had copies of these documents, asked him for an undertaking not to use or disclose them. The latter gave this undertaking, but without disclosing the agreement which he had earlier made with the *Times*. When that newspaper in 1972 published a series of articles on the thalidomide actions one particular article was apparently closely based on the documents obtained from Dr Phillips. A copy of the article was sent to the Attorney-General, who moved for and ultimately obtained an injunction preventing the defendant publishing the article on the ground that it constituted a contempt of court.[95] A copy was also supplied to Distillers and in this way it became aware of the fact that the *Times* was in possession of a number of its confidential documents. After a series of negotiations between the parties the plaintiff brought an action against the defendant alleging both infringement of copyright and breach of confidence in respect of the proposed article and seeking injunctions to prevent the *Times* using these documents or any information contained in them.[96]

Talbot J. granted an interlocutory injunction, holding that the documents had only been disclosed to Dr Phillips for a limited purpose to do with the particular litigation for which they had been produced on discovery and that it was a breach of confidence for him to have sold them to the *Times*, which was also similarly liable.[97] In relation to an argument that disclosure and use of the documents in this way was justified in the public interest, he carefully reviewed the authorities from *Gartside v. Outram*[98] to *Beloff v. Pressdram*[99] and concluded that there was 'no crime or fraud of misdeed' on the part of the plaintiffs here to come within the scope of the defence. He furthermore commented that in his view

> negligence, even if it could be proved, could not be within the same class so as to constitute an exception to the need to protect confidentiality.[1]

Furthermore, while the *Scientology* cases, with their broader approach, might appear to favour the plaintiff's case, he viewed them as 'rather a special case as the material was even on first view so dangerous that it was in the public interest that it should be made known'.[2] He therefore

[94] The sum agreed was £5,000, but only £1,000 appears to have been paid: *ibid.* 616.
[95] [1973] Q.B. 710 (D.C.; C.A.); [1974] A.C. 273 (H.L. (E.)). On 26 April 1979 the European Court of Human Rights decided by a majority of eleven to nine that the suppression of the *Sunday Times* article was in breach of the European Convention on Human Rights: *The Age* (Melbourne) 27 April 1979, 7. See generally *supra* 1-18 and Starke J. G., Note (1979) 53 *Australian Law Journal* 793.
[96] [1975] Q.B. 613, 617 f.
[97] *Ibid.* 621.
[98] (1857) 26 L.J. Ch. 113.
[99] [1973] 1 All E.R. 241.
[1] [1975] Q.B. 613, 622.
[2] *Ibid.* 623.

concluded that there was insufficient public interest in the present case to override the plaintiff's claim of confidence:[3]

> Whilst, as I have said, the public have a great interest in the thalidomide story (and it is a matter of public interest), and any light which can be thrown on to this matter to obviate any such thing happening again is welcome, nevertheless the defendants have not persuaded me that such use as they proposed to make of the documents which they possess is of greater advantage to the public than the public's interest in the need for the proper administration of justice, to protect the confidentiality of discovery of documents. I would go further and say that I doubt very much a public interest which overcomes the plaintiffs' private right to the confidentiality of their documents. In any event I consider that the plaintiffs have established their right (this is not really disputed) and have an arguable case for its protection by an injunction.

If our discussion of the defence of public interest were to stop at this point it would be possible to conclude that the scope given to it by the English courts was reasonably limited, leaving aside Lord Denning M.R.'s suggested test of 'just cause or excuse' in *Fraser v. Evans.* However, before discussing what approach Australian courts should take in this matter, it is first necessary to examine the most recent cases in the United Kingdom, where startling extensions to the defence appear to have been made.

The most recent cases

There are three cases to be considered. The first two of these are Court of Appeal decisions dealing with applications for interlocutory injunctions to restrain breaches of confidence. The first, *Woodward v. Hutchins,*[4] involved action by four pop stars known as 'The Family' — Tom Jones, Gilbert O'Sullivan, Englebert Humperdinck and Gordon Mills — to prevent their former press agent, Chris Hutchins, from divulging any details acquired during the course of his employment with them relating to their private lives, personal affairs and private conduct. He was first employed by them in 1970, one of his chief functions being 'to see that they had publicity and that their activities were made more interesting to the public at large'.[5] At an early stage he was asked to sign an undertaking not to disclose information about the group to outsiders either during his employment or at any time afterwards. Subsequently however he was released from the undertaking and nothing in the case turned on this particular point.[6] In time his contract of employment came to an amicable end and soon afterwards he sold to the *Daily Mirror* stories which were said to contain secret details of the lives of 'The Family'. After considerable publicity and the appearance of two articles (with such salacious titles as 'Why Mrs Tom Jones threw her jewellery from a car

[3] *Ibid.* 625.
[4] [1977] 1 W.L.R. 760. See also the comments on this case by Hammond R. G., 'Superstuds and Confidence' [1977] N.Z.L.J. 464 and Luck J., 'Current Developments in the Protection of Confidential Information' in Monash University Faculty of Law and Licensing Executives Society of Australia, *Intellectual Property and Industrial Property Lectures* (1977) 7 ff.
[5] [1977] 1 W.L.R. 760.
[6] *Ibid.* 761 f.

window . . . and Tom got high in a Jumbo Jet'),[7] 'The Family' applied for an injunction against publication of further articles, alleging libel, breach of contract and breach of confidence. An interim injunction was not available on the first two grounds because the defendants indicated that they intended to justify what they had said on the basis of truth and there was clear evidence that the contractual obligation was to be treated as rescinded.[8] However, the judge in chambers granted it on the ground of breach of confidence. There was an immediate appeal on the same day and the Court of Appeal discharged the injunction.[9] Their reasons for doing so are germane to the present discussion.

Lord Denning M.R. delivered the most lengthy judgment, saying:

> No doubt in some employments there is an obligation of confidence. In a proper case the court will be prepared to restrain a servant from disclosing confidential information which he has received in the course of his employment. But this case is quite out of the ordinary. There is no doubt whatever that this pop group sought publicity. They wanted to have themselves presented to the public in a favourable light so that audiences would come to hear them and support them. Mr Hutchins was engaged so as to produce, or help to produce, this favourable image, not only of their public lives but of their private lives also. If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth. That appears from *Initial Services Ltd v. Putterill*;[10] *Fraser v. Evans*[11] and *D. v. National Society for the Prevention of Cruelty to Children*.[12] In this case the balance comes down in favour of the truth being told, even if it should involve some breach of confidential information. As there should be 'truth in advertising', so there should be truth in publicity. The public should not be misled. So it seems to me that the breach of confidential information is not a ground for granting an injunction.[13]

Lawton and Bridge L.JJ., in brief judgments, agreed with Lord Denning M.R., although Lawton L.J.'s reasons were narrower than those of his brethren since he found it difficult to extricate the libel aspects of the case from the issue of confidentiality.[14] Nevertheless, a number of disturbing implications arise from the Master of the Rolls' judgment (with which Bridge L.J. at least must be taken as agreeing). For a start, it might well be possible to argue that the logical conclusion of his argument just

[7] This was the heading of the first article, published on 16 April 1977, which described, as Lord Denning M.R. said, a 'very unsavoury incident in a Jumbo Jet': *ibid.* The second article, published on 18 April, was headed:

Tom Jones and Marji — the truth! Starts today: The most explosive show business story of the decade. The Family by Chris Hutchins. The man on the inside. 'I lived it. I'm telling it.'

The heading of the third article — in respect of which the interlocutory injunction was sought — was even more colourful: 'Tom Jones's Superstud. More Startling Secrets of The Family by Chris Hutchins.'

[8] *Ibid.* 763.

[9] Glynn J. heard the application from 2.15 p.m. to 4.20 p.m. on 19 April and the appeal was heard immediately afterwards from 4.30 p.m. to 6.30 p.m.: *ibid.* 761.

[10] [1968] 1 Q.B. 396 (C.A.).

[11] [1969] 1 Q.B. 349 (C.A.).

[12] [1978] A.C. 171 (C.A.; H.L. (E.)).

[13] [1977] 1 W.L.R. 760, 763 f.

[14] *Ibid.* 764 f.

quoted is that no person in a public position can claim the right to restrain publication of information which he has communicated in confidence to another. If such information went to 'flesh out' that person's public image or to give the 'other side', then it could be said that this would justify publication. Of course, Lord Denning M.R. may have been particularly influenced by the fact that the plaintiffs as pop stars deliberately sought publicity in order to promote themselves, but this can be said with nearly the same degree of truth of other persons in the public eye such as politicians, actors, sportsmen and entertainers. Do such people cease to have any rights in relation to their private secrets? Lord Denning M.R.'s judgment would appear to say so, at least where disclosure would correct a 'misleading' public impression which had been created. In relation to defamation actions the American courts make a distinction between private individuals and 'public figures', defamation of the latter not being actionable unless known to be false or made with reckless indifference as to truth or falsity.[15] Whilst this has not yet been authoritatively determined, it appears likely that a similar distinction will be applied in actions for invasion of privacy.[16] Lord Denning M.R.'s judgment reflects a like approach in respect of actions for breach of confidence, although the subject matter of this action is quite different from defamation and protection of privacy. Furthermore, how does one demarcate 'publicity seekers' from private individuals, given that persons who are in the public eye seek publicity in differing degrees or have no say as to publicity being thrust upon them, as for instance with a person who creates a spectacular new invention or a doctor who carries out an epoch-making operation?[17] Carried to its logical conclusion, Lord Denning M.R.'s judgment might render many of these persons ineligible to seek redress through the action of breach of confidence in respect of unauthorized disclosures by their confidential employees or professional advisers. Such 'secrets' might be infinitely variable, but it appears to the author that if they are not in the public domain, have been communicated to the employee in confidence and do not involve any 'misdeeds' or danger to the public, then the public

[15] *New York Times Co. v. Sullivan* (1964) 376 U.S. 254; 11 L.Ed. 2d 686.

[16] *Time Inc. v. Hill* (1967) 385 U.S. 374; 17 L.Ed. 2d 456; *Cox Broadcasting Corporation v. Cohn* (1974) 420 U.S. 469; 43 L.Ed. 2d 328; *Gertz v. Robert Welch Inc.* (1974) 418 U.S. 323; 41 L.Ed. 2d 789. In respect of defamation, the United States Supreme Court in *Gertz* suggested the following test for determining whether an individual is a public figure ((1974) 418 U.S. 323, 352; 41 L.Ed. 2d 789, 812):

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

The application of these defamation cases to the protection of privacy where 'public figures' are concerned is well discussed by Dana J. T., 'Copyright and Privacy Protection of Unpublished Works — The Author's Dilemma' (1977) 13 *Columbia Journal of Law and Social Problems* 351.

[17] See, for instance, the narrow test preferred by the United States Supreme Court in *Gertz* (1974) 418 U.S. 323, 352; 41 L.Ed. 2d 789, 812 f.

interest in knowing the truth and correcting a misleading public image should not be allowed to override the private interest of the public personality in his or her secrets. For example, as the former wife of a well-known — if not notorious — peer of the realm, the third Duchess of Argyll may have been considered a public figure herself, particularly as there was evidence that she had at one time sought publicity by publishing some newspaper articles about her married life with the Duke.[18] Yet this did not stop Ungoed-Thomas J. from restraining the Duke from disclosing to the public the intimate secrets which the two had communicated to each other during the course of their marriage. In such a case the difference between the Argylls and 'The Family' is only one of degree and there does not seem to be any logical ground for distinguishing between the secrets of either.

Lord Denning M.R.'s judgment, therefore, leaves the scope of 'public interest' far more open-ended than in the earlier decisions discussed above. It comes close to saying that it is justifiable in the public interest to disclose confidential information which is 'of public interest' in that there is a public willing to read about it. Indeed Bridge L.J. in his brief judgment does in effect say this. His Lordship quoted the following claim made by Hutchins in one of the articles:

> This accurate record of an amazing decade will put straight the fallacies and half-truths of the lives and careers of four of the most interesting men British show business has ever produced.[19]

He went on to say that if the defendants could substantiate this claim, then the plaintiffs would recover no damages in libel and only nominal damages for breach of confidence.[20] In other words, their breach of confidence would in effect be justified by showing that their disclosures were 'the truth', despite the fact that breach of confidence, unlike defamation, is essentially concerned with information which is true but which is protected because it has been imparted in confidence.

Nevertheless, it is possible to limit the effect of the judgments in *Woodward's* case, for there clearly were other good reasons for the refusal of an interlocutory injunction. For instance, as Lord Denning M.R. makes clear in a later part of his judgment, the injunction sought was vaguely worded and did not distinguish between information which Hutchins might have received in confidence from his employers and information which was arguably in the public domain, for example where various incidents involving members of 'The Family' had occurred in public.[21] Again, as Lawton L.J. pointed out, the libel and breach of confidence aspects of the case were closely related and difficult to untangle.[22] Accordingly, an

[18] *Argyll v. Argyll* [1967] Ch. 302, 331 ff.
[19] [1977] 1 W.L.R. 760, 765.
[20] *Ibid.*
[21] *Ibid.* 764.
[22] *Ibid.*

interlocutory injunction could have been easily refused without resort to the wide propositions enunciated by Lord Denning M.R. and Bridge L.J.

A holding similar, though not identical, to *Woodward v. Hutchins* is to be found in the recent attempt by ex-Beatle John Lennon to restrain newspaper publication of details of his former married life which had been communicated to the newspaper by his ex-wife Cynthia.[23] Lennon's claim was in respect of both libel and breach of confidence based upon *Argyll v. Argyll.* Bristow J. refused an interlocutory injunction in respect of both matters and the plaintiff, on the same day, appealed to the Court of Appeal. Because the defendant put forward a defence of truth in respect of the alleged libel an interlocutory injunction was refused, as was the application based on breach of confidence. The reason given for this latter holding by Lord Denning M.R. (with whom Browne L.J., the only other member of the Court, agreed) was that the relationship of the two parties had ceased to be their own private affair and had become part of the 'public domain'.[24] There are two ways in which this holding can be interpreted. The first is that the parties were unable to claim confidence for details of their married life which either or both of them had previously published — and there was ample evidence, apparently, of both of them having done this upon a number of occasions. If this interpretation is right, then the decision of the Court is in line with other authorities on breach of confidence which have denied protection where the information has ceased to be confidential.[25]

The second interpretation however is much broader, reflecting the approach taken in the *Woodward* case. This is that the parties had ceased to have any private rights in the confidential details of their married life because they had both sought publicity by talking and writing in the press about their relationship. Accordingly, this had put the relationship itself into the public domain and meant that a court would not now restrain as a breach of confidence publication of previously unpublished and confidential facts about it. If this second view of the case is correct, then this is a second authority in favour of extending the scope of public interest in the open-ended way suggested in the *Woodward* case.

In the third and most recent of the English cases referred to above, the balance has shifted back to some extent. In *Malone v. Metropolitan Police Commissioner*,[26] Megarry V.-C. was concerned with an application for a series of declarations that alleged police telephone tappings infringed the plaintiff's rights in respect of, *inter alia*, the European Convention on

[23] *Lennon v. News Group Newspapers Ltd* [1978] F.S.R. 573 (C.A.).
[24] *Ibid.* 574.
[25] *O. Mustad & Son v. S. Allcock & Co. Ltd* (1928) [1963] 3 All E.R. 416 (H.L. (E.)).
[26] [1979] 2 W.L.R. 700.

Human Rights, copyright, privacy and confidentiality.[27] In relation to the last of these, his Lordship was not convinced that a telephone conversation could be treated as a confidential communication, at least so far as third parties were concerned. This was because he could not see how an obligation of confidence could be imposed upon someone who accidentally or even deliberately overheard such a conversation, for instance, from a crossed line.[28] While this conclusion may be challenged,[29] Megarry V.-C. also went on to consider the position if there had in fact been a breach of confidence. He referred here to Lord Denning's formulation of the defence of 'just cause or excuse' in *Fraser v. Evans* and of 'public interest' in *Putterill.* He preferred the former for the following reasons:

> There may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them.[30]

Nevertheless, his Lordship made no reference to any of the cases decided subsequent to *Putterill.* It is also clear that the facts of the instant case came squarely within the defence of public interest however formulated, because the alleged phone tappings related to possible crimes committed by the plaintiff. Accordingly, his Lordship did not explore the application of the doctrine in non-criminal areas. However, he did discuss the problems inherent in phone tapping where many of the conversations recorded might be wholly innocent. Was the overall tapping justified by a mere suspicion of iniquity or was something more required before it would be excused? He pointed here to the impossibility of knowing which conversations would be criminal and which would not. He also referred to the great public interest in the detection, prosecution and prevention of crime.[31] The question therefore to be asked was

> not whether there is a certainty that the conversation tapped will be iniquitous, but whether there is just cause or excuse for the tapping and the use made of the material obtained by the tapping.[32]

Accordingly, if certain requirements were satisfied, there would be 'just cause or excuse' for such police activities (which, incidentally, were not unlawful *per se* in the United Kingdom).[33] These were

[27] *Ibid.* 705 f.
[28] *Ibid.* 729.
[29] Gareth Jones in his seminal article on breach of confidence suggested that the action should be extended to cover information obtained by 'reprehensible means'. In doing so he distinguished persons who accidentally overheard conversations from those who set out to do so by 'reprehensible means', giving as a specific example of the latter the bugging of a telephone. Nevertheless, apart from Megarry V.-C.'s comments to the contrary in the instant case the point is entirely without authority: Jones, *op. cit.* 482 f.
[30] [1979] 2 W.L.R. 700, 716.
[31] *Ibid.* 730.
[32] *Ibid.*
[33] In Victoria and Australia such activities are unlawful unless authorized by proper authority: Listening Devices Act 1969 (Vic.), s. 4(1) (recording private

> first, that there should be grounds for suspecting that the tapping of the particular telephone will be of material assistance in detecting or preventing crime, or discovering the criminals, or otherwise assisting in the discharge of the functions of the police in relation to crime. Second, no use should be made of any material obtained except for these purposes. Third, any knowledge of information [*sic*] which is not relevant to those purposes should be confined to the minimum number of persons reasonably required to carry out the process of tapping. If those requirements are satisfied, then it seems to me that there will be just cause or excuse for carrying out the tapping, and using information obtained for those limited purposes.[34]

These were not given as an exhaustive statement of requirements and his Lordship emphasized that he was only speaking of what was before him in the instant case, namely tapping for police purposes in relation to crime.[35] It cannot therefore be said that his comments (which are clearly *obiter* provide unqualified support for the wider approach adopted in the more recent English cases. On the contrary, his list of requirements for the existence of a 'just cause or excuse' indicate that he took a more restricted view of the operation of the defence. Thus, the way in which the breach of confidence was effected, the persons to whom the information was given and the purpose for which this was done were all highly relevant factors in determining whether or not to grant relief. This would seem more consistent with viewing the defence as a discretionary bar rather than an absolute defence removing the confidential obligation altogether. Therefore, while Megarry V.-C. uses the wide language of Lord Denning M.R. in *Fraser v. Evans*, it is submitted that his approach is more akin to that of Ungoed-Thomas J. in *Beloff* and Talbot J. in *Distillers.*

Conclusions: a desirable Australian approach

At this point it is possible to assess the different authorities on the scope and effect of the public interest defence. As far as Australian courts are concerned, no precedent binds them and they are free to choose what approach to take. How should they do this?

In the author's view, the best starting point is to look carefully at the interests protected by a successful action for breach of confidence. Essentially these are of a proprietary nature.[36] For example, it is clear that the owner of confidential information has a remedy against a recipient who uses it unconsciously[37] or a third party who is unaware of

conversations in general); Telephonic Communications (Interception) Act 1960 (Cth), s. 5(1) (intercepting telephonic communications); s. 5(3) (divulging information so obtained). See also *Miller v. Miller* (1978) 53 A.L.J.R. 59, noted *infra* 297.

[34] [1979] 2 W.L.R. 700, 730.
[35] *Ibid.*
[36] Ricketson, *op. cit.* 305-15.
[37] *Seager v. Copydex (No. 1)* [1967] 1 W.L.R. 923 (C.A.); *Talbot v. General Television Pty Ltd* (Unreported, Supreme Court of Victoria, 13 May 1977 (Harris J.); 10 April 1978 (F.C.)).

the fact that it derives from a breach of confidence.[88] As a general proposition therefore, the invasion of such proprietary rights by unauthorized user or disclosure should only be permitted in circumstances which are reasonably clearly specified.

Against this background, the notion of 'public interest' is best viewed as one of the discretionary bars to be considered by a court in determining whether or not to grant equitable relief for an alleged breach of confidence. As such, it overlaps considerably with the more traditional bar of 'clean hands'. Nevertheless, its scope is wider: it is not so much concerned with the behaviour of the applicant as with the broader question of whether the particular disclosure of information is justified 'in the public interest'. While the latter requirement should be flexibly interpreted, there is nevertheless a need for guidelines to assist in this process. These might be similar to those suggested by Ungoed-Thomas J. in *Beloff v. Pressdram*. Certainly where confidences involve illegality, wrongdoing or danger to public health it will almost always be in the public interest that such matters be revealed. Nonetheless, it may not be advisable to seek to establish an exhaustive list of categories: sharp-edged as they may first appear, they can become blurred at their boundaries. In the author's opinion the most crucial point for a court to bear in mind is that there must be some serious substance in a public interest claim before a plaintiff's proprietary rights in his information can be overridden. In other words, continued protection of the information must carry with it some harmful effect to the public. On this approach, many private wrongs such as the libel in *Weld-Blundell v. Stephens* would probably still receive protection. On the other hand, in cases where there has been no misconduct or unconscionable behaviour by the applicant the information may still relate to matters of such a harmful nature that disclosure should not be restrained. It is perhaps worth reiterating that the phrase 'in the public interest' should not mean the same as the phrase 'of public interest'. If courts confuse the two, much of the substance of the action for breach of confidence will be dissipated. People will always be interested in the private secrets of public figures; in the same way, competitors will always be interested to know the trade secrets of their opponents. In neither case, however, should disclosure of these matters be permitted in the absence of some additional element of public harm. For the reasons given in the previous section it is submitted that Lord Denning's most recent forays into this area in *Woodward* and *Lennon* should not be followed. For an Australian court faced with this question the best guidance is to be derived from the judgments of Ungoed-Thomas J. in *Beloff* and Talbot J. in *Distillers*.

[88] *Prince Albert v. Strange* (1849) 1 H. & Tw. 1; 47 E.R. 1302 (Ch.); *Printers & Finishers Ltd v. Holloway* [1965] 1 W.L.R. 1; *Nicrotherm Electrical Co. Pty Ltd v. Percy* [1956] R.P.C. 272.

It will also be obvious by now that the effect of the public interest defence argued for here is not the same as that suggested by Wood V.-C. in *Gartside v. Outram* and implicit in Lord Denning's 'just cause or excuse' test in *Fraser v. Evans*. In the other cases discussed above, this question was not referred to directly. Nevertheless, it does seem that in all of them the courts viewed the public interest defence as only one of the discretionary factors to be taken into account in deciding whether or not relief should be granted or if so upon what terms. This balancing process is well illustrated by Lord Denning M.R.'s judgments in *Initial Services v. Putterill* and *Hubbard v. Vosper* and that of Megarry V.-C. in *Malone v. Metropolitan Police Commissioner*. Such an approach accords perfectly with the equitable nature of the right protected by the action. It also allows for flexibility, for there might be other factors apart from public interest which support the applicant's case, particularly in a borderline situation. On the other hand, if the more fundamental view of Wood V.-C. is adopted, then logically nothing else will be relevant to the grant of relief, because once the defence is made out the confidential obligation is treated as though it never existed.

Are there any other factors which could be relevant in determining whether or not to apply the public interest defence? Several emerge from the cases considered above and can be listed briefly here. First of all, there is the suggestion of Lord Denning M.R. in *Putterill* that the disclosure should be made to one who has a proper interest in receiving the information.[38a] Although this apparently was not a sufficient reason to deny Putterill a defence in that case, it is submitted that it should be a relevant consideration in any action where a public interest defence is advanced. Secondly, it may be relevant to look at the stage at which the confidence is broken or publication is made. In this regard the United Kingdom Law Commission in its working paper on breach of confidence has suggested that even if it is in the public interest to reveal that a course of conduct has been or is about to be adopted, the parties to it should at least be able to discuss in confidence whether or not they will adopt such a course.[39] Leaving aside questions of possible criminal liability for conspiracy, this seems a sensible proposal. Thirdly, there is the possibility of a 'half-way house', namely the imposition of conditions or the award of damages in lieu of an injunction under Lord Cairns' Act. This gives the court the option of tailoring or modifying its relief where the information or secrets are clearly dubious, but not so dubious as to be denied protection altogether.[40] Fourthly, in some cases where the 'misdeed' or 'iniquity' which is the subject of the confidence is of the borderline

[38a] This also seems implicit in the judgment of Megarry V.-C. in *Malone v. Metropolitan Police Commissioner*.

[39] United Kingdom Law Commission, *Working Paper No. 58 on Breach of Confidence* (1974) para. 93.

[40] See here *Hubbard v. Vosper* [1972] 2 Q.B. 84, 101, *per* Stephenson L.J., and generally Ricketson, *op. cit.* 293 ff.

variety it may be appropriate for the court to ask whether the disclosure has been made, or is threatened to be made, for material reward or from motives of spite or malice. This possible limitation was suggested by Lord Denning M.R. in *Initial Services v. Putterill*[41] and it is submitted that it should play a more important role in determining whether or not to permit disclosure where public interest is advanced as a defence. In more serious cases of course it will not be of any great weight, but in general courts should be slow to give their approval to breaches of confidence where the motive is vengeance or gain. In fact, this would involve nothing more than an application of the 'clean hands' doctrine in reverse and would therefore be completely consistent with the balancing process involved in the granting of equitable remedies.

A final point relates to the award of interlocutory relief. In every case where public interest is raised, this question will not be finally determined until the time of trial. A problem therefore arises in relation to interlocutory relief. If an injunction is granted but disclosure is ultimately allowed at the trial, this will mean that the information remains unpublished for a considerable period of time. In defamation actions, for instance, there is a general rule in the United Kingdom that a court will not restrain the publication of a work even if it is defamatory where the defendant says that he intends to justify it or that it is a fair comment on a matter of public interest.[42] One reason for this is that the issue should be left for the jury to decide rather than the judge, but more fundamental appears to be the interest of free speech which is involved if the court prejudges the issue against the defendant:

> The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done.[43]

In *Hubbard v. Vosper*[44] Lord Denning M.R. seemed to suggest that a similar rule applied in relation to actions for breach of confidence where a plea of public interest was made:

> We never restrain a defendant in a libel action who says he is going to justify. . . . Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest. The reason is because the defendant, if he is right, is entitled to publish it; and the law will not intervene to suppress freedom of speech except when it is abused.[45]

Nevertheless, in other parts of his judgment in that case his Lordship stressed the need for flexibility in exercising the discretion in respect of interlocutory injunctions.[46] In *Kaufman's* case[47] Goff J. expressly adverted to this and stated his opinion on it:

[41] [1968] 1 Q.B. 396, 406.
[42] *Bonnard v. Perryman* [1891] 2 Ch. 269 (C.A.).
[43] *Ibid.* 284, *per* Lord Coleridge C.J., Lord Esher M.R. and Lindley, Bowen and Lopes L.JJ.
[44] [1972] 2 Q.B. 84.
[45] *Ibid.* 96 f.
[46] *Ibid.* 96. See also Lord Denning M.R.'s comments in *Fraser v. Evans* [1969] 1 Q.B. 349, 361 f.
[47] [1973] R.P.C. 627, 635.

> [T]he learned Master of the Rolls was not in my view there laying down that there is any absolute rule that in confidence cases an injunction must be refused where a reasonable case is made out of disclosure in the public interest, since that would be completely inconsistent with the pains both he and Megaw L.J. took to stress that the remedy by way of injunction depends upon the exercise of a flexible discretion, and because Lord Denning had in the earlier case of *Fraser v. Evans*[48] himself adverted to the possibility of the position in libel and breach of confidence actions being different in this respect.
>
> In my judgment, however, the learned Master of the Rolls was clearly saying that in this type of case a reasonable case of defence of disclosure in the public interest is a very telling factor weighing against the grant of an interlocutory injunction.[49]

It is submitted that this should be the approach taken by an Australian court in relation to the award of interlocutory relief in such cases.

The purpose of this article has been a fairly limited one: to examine the extent to which unauthorized disclosures of confidential information may be permitted where there is some sort of public interest justifying or excusing such action. The legitimate scope which has been suggested for this exception is not as wide as might be appropriate for, say, a defamation action or an action for protection of privacy.[50] Nevertheless, it was argued that since the interests protected in a breach of confidence action are based on the plaintiff's proprietary rights in his information, these should only be overridden where a clear public interest can be shown. In the author's opinion this public interest requirement is only satisfied where matters of a serious nature affecting the public are involved. This is not intended as a restrictive formula, as can be seen in cases such as *Initial Services v. Putterill*, where breaches of statutory duty and misleading conduct were held to come within it; likewise in the *Scientology* cases, where it was held to extend to matters dangerous to public health. As such the formula is flexible and allows for growth in appropriate directions: this is of course in keeping with its equitable character. On the other hand, disclosures should not be permitted simply because the confidence relates to matters which would be of public interest if made known: to permit disclosure in such situations in the absence of some wrongdoing or danger puts the rights of plaintiffs 'at large' and dependent upon subjective judicial assessment as to what is of 'legitimate' or 'overriding' public interest. It is submitted that the formulation argued for above and the qualifications suggested in relation to such things as disclosure to the proper authority and interlocutory relief provide the fairest way of balancing the private interests of individuals in their confidences on the one hand and the public interest in being apprised of designs formed 'contrary to the laws of the society, to destroy the public welfare' on the other. While this does not enshrine a public 'right to

[48] [1969] 1 Q.B. 349, 362.
[49] [1973] R.P.C. 627, 631.
[50] Compare the wider proposals for a defence of public interest in respect of privacy actions advanced by the Australian Law Reform Commission, *op. cit.* 12, ss. 24 and 25 of the Draft Uniform Bill. See also Australian Law Reform Commission, *Defamation Background Paper on Present Law and Possible Changes* (1977).

know' in the absolute sense, it nevertheless ensures that there is a proper and defined scope within which unauthorized disclosures of confidential information may justifiably occur.