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OPEN JUSTICE AND STATE SECRETS

The principle of open justice is one of the essential characteristics of the common law judicial tradition. Generally speaking, it is taken for granted that court proceedings are open to the public and may be freely reported. The leading English exposition of the principle is to be found in the House of Lords decision in *Scott v Scott*¹ which has been accepted as authoritative in Australia and other parts of the Commonwealth. In the United States of America support for the principle has been found in the Constitution. And the principle is recognized in a number of international human rights instruments.²

The principle is not absolute. It can, of course, be displaced by statute. But even at common law certain exceptions have been recognized. The main exception is concerned with the interests of justice itself.³

The speeches in *Scott v Scott* made no specific exception to the principle of open justice in the interest of national security. But it is significant that the decision was followed so closely by the outbreak of the First World War. Decisions during that period, and during the Second World War, gave support to the notion that the general exception to the principle of open justice formulated in *Scott v Scott* permitted some measure of secrecy in litigation for material related to issues of defence and national security. The State will also frequently wish to maintain secrecy for information related to diplomacy and inter-governmental relations, information related to policy making within government (eg Cabinet deliberations, advice to Ministers) and a variety of other sorts of information.

The cases indicate a range of judicial responses to government claims

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1 [1913] AC 417.

2 Garth Nettheim, "The Principle of Open Justice" (1984) 8 U Tas L Rev 25.

3 Garth Nettheim, "Open Justice versus Justice" (1985) 9 Adel LR 487.

to maintain secrecy for such material when it is sought as evidence in court proceedings:

1. The court may conclude that the issue presented by the litigation is simply non-justiciable.
2. The court may decide that the testimony should not be admitted in evidence on the basis of "Crown privilege" (or "public interest privilege" as it is now generally known).
3. The court may hear the proceedings *in camera*.
4. The court may make particular protective orders, eg, that certain testimony, or the identity of witnesses, should not be published.

(1) *Non-Justiciability*

In the famous case of *Liversidge v Anderson*,⁴ the plaintiff brought an action for false imprisonment against the Home Secretary who had ordered his detention under Regulation 18B of the Defence (General) Regulations 1939. Regulation 18B provided:

If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations. . . and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

Liversidge's argument was, briefly, that there was no basis on which the Secretary of State could have the requisite "reasonable cause to believe" in regard to him. He applied for particulars (a) of the grounds on which the Home Secretary had reasonable cause to believe that he was a person of hostile associations and (b) of the grounds on which he had reasonable cause to believe that, by reason of such hostile associations, it was necessary to exercise control over him. The courts held that he was not entitled to such particulars.

The House of Lords held (against Lord Atkin's celebrated dissent) that, in the context, the requirement that the Secretary of State have "reasonable cause to believe" the requisite matters indicated a subjective rather than an objective test and was therefore not examinable in the courts. Various considerations led their Lordships to this result, including the sensitivity of the material on which the Home Secretary might be relying. Viscount Maugham said:

[I]t is obvious that in many cases he will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this and like matters for the defence of the realm. A very little consideration will show that the power of the court (under s 6 of the Act) to give directions for the hearing of proceedings *in camera* would not prevent confidential matters from leaking out, since such matters would become known to the person detained and to a number of other persons. It seems to me impossible for the court to come to a conclusion adverse to the opinion of the Secretary of State in such a matter. It is beyond dispute that he can decline to disclose the

information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed. It is not ad rem on the question of construction to say in reply to this argument that there are cases in which the Secretary of State could answer the attack on the validity of the order for detention without raising the point of privilege. It is sufficient to say that there must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature. That must have been plain to those responsible in advising His Majesty in regard to the Order in Council, and it constitutes, in my opinion, a very cogent reason for thinking that the words under discussion cannot be read as meaning that the existence of "reasonable cause" is one which may be discussed in a court which has not the power of eliciting the facts which in the opinion of the Secretary of State amount to "reasonable cause".⁵

A similar result had been reached during the First World War in the High Court of Australia, reversing a decision of the Victorian Full Supreme Court. Regulation 55(1) of the War Precautions Regulations 1915 provided:

Where the Minister has reason to believe that any naturalized person is disaffected or disloyal he may by warrant under his hand order him to be detained. . .

The applicant in *R v Lloyd; Ex parte Wallach*⁶ challenged his detention by habeas corpus proceedings. The return to the writ stated that he was detained upon a warrant which recited that the Minister for Defence, upon information furnished to him, had reason to believe and did believe that the applicant was disaffected or disloyal. The Victorian Supreme Court required the Minister to attend to give evidence on the matter but, when the Minister was sworn in, he claimed Crown privilege against any obligation to disclose the information on which he had relied or to disclose the reasons for his action. The claim was accepted by Cussen and A'Beckett JJ, against a spirited dissent from Madden CJ who also took the view that the return to the writ was bad — the warrant should have set out facts sufficient to support the Minister's conclusion. But Madden CJ and A'Beckett J (Cussen J dissenting) held that regulation 55 was ultra vires the War Precautions Act 1914 and that the applicant should be discharged. The High Court in *Lloyd v Wallach*⁷ reversed the judgment on the basis that the regulation was intra vires, and that the return to the writ was valid. The power given to the Minister by regulation 55 was held effectively to be non-justiciable. Griffith CJ said:

[H]aving regard to the nature of the power and the circumstances under which it is to be exercised it would, in my opinion, be contrary to public policy, and, indeed,

5 Ibid 221-222. See also 254 per Lord Macmillan, 265-267 per Lord Wright and 279-281 per Lord Romer. For comment on the case see Heuston, "*Liversidge v Anderson* in Retrospect" (1970) 86 LQR 33 and "*Liversidge v Anderson*: Two Footnotes" (1971) 87 LQR 161.

6 [1915] VLR 476.

7 (1915) 20 CLR 299.

inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings.⁸

In a more recent Australian decision, *Church of Scientology v Woodward*⁹ the plaintiffs, in an action for declarations and an injunction, alleged, inter alia, that the Australian Security Intelligence Organisation (ASIO) had exceeded its statutory powers in obtaining, correlating, evaluating and communicating intelligence about them which could not properly be characterised as "relevant to security" within the language of the Australian Security Intelligence Act 1979 (Cth) because it related to persons who were not security risks. On demurrer the statement of claim was struck out by Wilson J in the High Court who accepted the Solicitor-General's argument that the matter was not justiciable. He did so on a number of grounds, including:

[T]here remains what to my mind is an insuperable objection extending to all the issues I have mentioned. It is the notion that the Court can examine the intelligence in question and receive evidence, presumably in the presence of the plaintiffs if not in open court, concerning the Director-General's reasons for believing the communication to be for "purposes relevant to security and not otherwise", and then decide for itself the purpose of the communication, and the truth of its subject matter. The likelihood is that a hearing on such issues would be aborted at the outset by reason of problems of privilege and secrecy, but in any event I cannot discern any legislative intent to have questions of security ventilated in a court proceeding surrounded with none of the safeguards that are provided for the review of adverse security assessments. I find the inference in favour of the defendants' submission on justiciability to be irresistible.¹⁰

The appellants appealed to the Full Court of the High Court but the appeal was dismissed: *Church of Scientology Inc v Woodward*.¹¹ Gibbs CJ and Mason J (constituting a statutory majority) took the view that the statement of claim disclosed no reasonable cause of action in that there was no indication that ASIO had gone beyond its statutory functions, properly interpreted; Murphy and Brennan JJ took a contrary view but would have required amendment of the statement of claim. What is significant, for the purposes of the present discussion, is what the judges had to say on the issue of justiciability. Only Gibbs CJ agreed with Wilson J that the issues raised were non-justiciable; Mason, Murphy and Brennan JJ established a majority for justiciability.

Even Gibbs CJ's finding for non-justiciability was qualified. His analysis of the Act led him

to the conclusion that it was not intended that a court should have power to decide whether ASIO has exceeded its proper function, and obtained intelligence which is not relevant to security, *in a case where bad faith is not*

8 Ibid 304-305.

9 (1980) 31 ALR 609.

10 Ibid 622-623.

11 (1982) 43 ALR 587.

alleged, and it is not suggested that any private right has been infringed. . .

The argument for the plaintiffs in essence is that the courts have power to control ASIO in the exercise of its functions of collecting and assessing intelligence, *even though no private right is affected and bad faith is not alleged.* However, it seems to me impossible for a court to say that any intelligence collected *in good faith* — ie for purposes believed to be relevant to security, and not for some ulterior purpose — is not relevant to security, since it may, in the light of other material, bear on the question whether a person is or is not a security risk. For all these reasons I consider that the legislation does not entrust to the courts the power to decide that ASIO may not obtain particular intelligence on the ground that it is not relevant to security.¹²

The views of Mason J stand in marked contrast:

The pervasive intention to confine ASIO's activities and to confine them to matters relevant to security destroys the suggestion that ASIO's activities should be completely immune from judicial review for *ultra vires*. And there are very powerful reasons why Parliament would wish to restrict ASIO's activities in this way. Surveillance in association with the obtaining, storage and dissemination by a government organization of information relating to private citizens can only be justified in a democratic society by the need to protect that society, that is, on security grounds. . .

No-one could doubt that the revelation of security intelligence in legal proceedings would be detrimental to national security. But it does not follow that ASIO's activities should be completely free from judicial review. To so conclude would be to ignore the protection which is given by the doctrine of Crown privilege to information the disclosure of which is prejudicial to national security.

It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence is "for purposes relevant to security". Courts constantly determine issues of relevance.¹³

Murphy J placed justiciability on a constitutional basis by reference to the Constitution s 75(iii) and (v):

ASIO and its officers are also subject to the judicial constraints which apply to every other branch of the Executive Government. Parliament has not purported to immunise ASIO from judicial process and could not constitutionally do so. The Constitution provides that the

¹² Ibid 595 (Emphasis supplied).

¹³ Ibid 601.

Commonwealth and its officers are answerable to judicial process.¹⁴

He went on to stress the necessity for judicial control by reference to the findings of Australian and overseas inquiries indicating a characteristic tendency of security agencies to "exceed, and misuse, their powers". He continued:

Any powers granted to ASIO and exercisable by its Director-General or other officers must like other powers be used in good faith, for the purposes for which they are conferred and with due regard to those affected. That is the general rule. . . These implied conditions are not to be taken as excluded except by unmistakable language.¹⁵

Brennan J was categorical that the issues raised by the plaintiffs were justiciable. In language reminiscent of Lord Atkin's dissent in *Liversidge v Anderson* he said:

The Organization's functions are not defined in terms of what the Organization believes them to be. The provisions of the Act, not the Organization's opinion, furnish the measure of its legitimate functions.¹⁶

He conceded that there could be problems of proof, but

the difficulties inherent in questions of national security do not affect the justiciability of the issues, though they are of major importance in determining the sufficiency of evidence bearing on those issues.¹⁷

It is submitted that the majority view in the *ASIO* case is to be preferred to the minority views or the decisions in the wartime cases. It will be a rare case in which national security can only be protected by denying justiciability.

Two 1984 decisions of the House of Lords have considered the role of the court in the face of executive claims based on national security, and both stop short of a wholesale denial of justiciability. Neither case quite fits into the topic of this chapter because in neither case was there any specific State secret to be preserved from court disclosure. However, both cases are worth noting.

In the *GCHQ* case¹⁸ the House of Lords denied justiciability in the interest of national security but the denial was not unqualified. The Government Communications Headquarters (*GCHQ*) was concerned with the protection of UK official communications and the provision of signals intelligence to the government but its functions were generally known at the relevant time.¹⁹ Staff had a long standing right to belong to national trade unions. Over a period, the operations of *GCHQ* were disrupted by industrial action by the national trade unions — mostly, the disputes were not related to the work of *GCHQ* as such, but industrial action in 1981 in particular was conducted on the basis of the

14 Ibid 606.

15 Ibid 608-609.

16 Ibid 611.

17 Ibid 614.

18 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

19 Ibid 940 per Lord Fraser of Tullybelton.

vulnerability of GCHQ and some other agencies. In December 1983, the Minister for the Civil Service (Mrs Thatcher) issued an oral instruction that the conditions of service of GCHQ staff would be revised so as to exclude membership of any trade union other than an approved departmental staff association. There was no prior consultation with the staff. Judicial review was sought on their behalf claiming that the instruction was invalid on the ground that the lack of consultation constituted breach of a duty to act fairly.

Their Lordships rejected or distinguished arguments that the prerogative source of the power exercised by the Minister made it non-justiciable. They also gave a broad reading to the concept of "legitimate expectation" so that the failure to consult would have invalidated the instruction, but for the Minister's argument that consultation might itself have caused risk to national security. This was accepted as justifying her action. But their Lordships required more than a mere assertion to that effect.

Lord Fraser of Tullybelton said:

The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged on the ground that it has been reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security. Authority for both these points is found in *The Zamora*²⁰ . . . The affidavit, read as a whole, does in my opinion undoubtedly constitute evidence that the minister did indeed consider that prior consultation would have involved a risk of precipitating disruption at GCHQ. I am accordingly of opinion that the respondent has shown that her decision was one which not only could reasonably have been based, but was in fact based, on considerations of national security, which outweighed what would otherwise have been the reasonable expectation on the part of the appellants for prior consultation. . .²¹

All members of the House took a similar view. Lord Scarman added the following remarks:

My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist; in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the

20 [1916] 2 AC 77. Lord Fraser also cited *Chandler v DPP* [1964] AC 763.

21 [1984] 3 All ER 935, 944-945.

interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a commonsense limitation recognised by the judges as to what is justiciable; and the limitation is entirely consistent with the general development of the modern case law of judicial review.²²

Lord Diplock, by contrast, permitted himself a more sweeping statement on justiciability:

National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my noble and learned friend Lord Roskill establish and commonsense itself dictates, a matter on which those on whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.²³

It is submitted that this overstates the position, and that the courts are correct in requiring evidence to support executive claims based on such concepts as national security.

But how much evidence? The answer may vary according to the context in which the issue arises. In a case decided shortly before the *GCHQ* case, the House of Lords divided on the sufficiency of evidence to support an executive claim about national security: *Secretary of State for Defence v Guardian Newspapers Ltd.*²⁴

The Crown brought proceedings against *The Guardian* for recovery of a photostat of a "Secret" Defence Ministry memorandum. The document concerned the handling of publicity relating to the installation of cruise nuclear missiles at the RAF base at Greenham Common. A copy had been leaked to *The Guardian* which published it. The reason why the Crown sought return of the photostat was in order to discover, from markings on the document, the identity of the person who had leaked it. The newspaper resisted the action by relying on s 10 of the Contempt of Court Act 1981. Section 10 provides that a person is not required to disclose "the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

The House of Lords affirmed decisions of the trial judge and the Court of Appeal that the Crown was entitled to return of the document.²⁵ All agreed that the onus of proving that a case fell within

22 *Ibid* 948

23 *Ibid* 952.

24 [1984] 3 All ER 601.

25 The document had been returned after the Court of Appeal decision, and a civil servant subsequently pleaded guilty to an offence under the Official Secrets Act 1911 s 2.

the exception of s 10 lay on the party seeking disclosure and that the standard of proof required to satisfy the court that disclosure was necessary was the civil standard, ie, the balance of probabilities.

The question then became whether the evidence relied upon by the Crown was sufficient to establish that disclosure was necessary in the interests of national security. Lord Diplock, Lord Roskill and Lord Bridge of Harwich held that it was — the risk to national security lay not in the publication of the particular document but in the possibility that the official who leaked it might in future leak other classified documents, disclosure of which might have more serious consequences for national security. Lord Fraser of Tullybelton and Lord Scarman, dissenting, considered that the evidence before the trial judge by itself was not sufficient to establish that disclosure was necessary.

The point of citing the *GCHQ* and *Guardian* decisions is to fortify the proposition that the courts today tend to require the existence of some evidence before they accede to executive claims based on such concepts as national security, and they are reluctant to treat such issues as non-justiciable. When the information to support such executive claims is really secret it can, as noted in the *Scientology* case, be protected by the doctrine of “Crown privilege”.

(2) “Public Interest Privilege”

Six months after its decision in *Liversidge v Anderson*, the House of Lords gave judgement in *Duncan v Cammell, Laird & Co Ltd*.²⁶ It was an action for damages for negligence in respect of deaths in the sinking of a new submarine, “Thetis”, during submersion tests in 1939. The defendant contractors, at government direction, objected to producing various documents including plans and specifications for various parts of the vessel, on the basis that disclosure would be injurious to the public interest. The objection was successful.

On the question whether a Ministerial claim to privilege should be conclusive, the Lord Chancellor, Viscount Simon, quoted Pollock CB in *Beatson v Skene*:

It is manifest it [the claim to privilege] must be determined either by the presiding judge, or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service — *an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against*.²⁷

In response to argument that the court had power to inspect such documents for itself, Lord Simon said:

In many cases there is a further reason why the court should not ask to see the documents, for where the Crown is a party to the litigation, this would amount to communicating with one party to the exclusion of the other, and it is a first principle of justice that the judge should

²⁶ [1942] AC 624.

²⁷ 5 H & N 838, 853, cited in [1942] AC 624, 639. (Emphasis supplied).

have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.²⁸

As is well known, courts have since abandoned the principle laid down in *Duncan v Cammell Laird & Co Ltd* that a ministerial claim to public interest privilege is conclusive on the courts, and they have reasserted a power to inspect for themselves documents for which such a claim is made.²⁹ In the leading English case of *Conway v Rimmer*³⁰ Lord Reid said:

I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh, then the Minister's view must prevail. . .

It appears to me that, if the Minister's reasons are such that a judge can properly weigh them, he must, on the other hand, consider what is the probable importance in the case before him of the documents or other evidence sought to be withheld. If he decides that on balance the documents probably ought to be produced, I think that it would generally be best that he should see them before ordering production and if he thinks that the Minister's reasons are not clearly expressed he will have to see the documents before ordering production. I can see nothing wrong in the judge seeing documents without their being shown to the parties. Lord Simon said (in *Duncan's* case) that "where the Crown is a party . . . this would amount to communicating with one party to the exclusion of the other." I do not agree. The parties see the Minister's reasons. Where a document has not been prepared for the information of the judge, it seems to me a misuse of language to say that the judge "communicates with" the holder of the document by reading it. If on reading the document he still thinks that it ought to be produced he will order its production.³¹

Other members of the House of Lords were also clear that sensitive documents could be amply protected by being inspected in private³² and also, when appropriate, by ordering disclosure of portions only of

28 [1942] AC 624, 640-641.

29 As long ago as 1913, the High Court of Australia held that it was entitled to inspect real evidence (radio equipment) for which Crown privilege had been claimed on defence grounds, and to overrule the privilege claim: *The Marconi's Wireless Telegraph Co Ltd v The Commonwealth* (1913) 16 CLR 178 -- Griffith CJ and Barton J; Isaacs J dissenting.

30 [1968] AC 910.

31 *Ibid* 952-953.

32 *Ibid* 964, 971 per Lord Morris of Borth-y-Gest, 979 per Lord Hodson, 981 per Lord Pearce, 995-996 per Lord Upjohn.

documents.³³ (They did privately inspect the documents in question in the case and decided that they should be disclosed to the other side).

All members of the House of Lords were definite that the actual decision in *Duncan v Cammell Laird & Co Ltd* was correct, and that such secret defence material should not have been produced.

Lord Reid spoke of other classes of documents "which ought not to be disclosed whatever their content may be" including Cabinet minutes and "all documents concerned with policy making". Subsequent cases, however, have clarified that the Court has the ultimate power of decision even in regard to such high-level policy documents.³⁴

Material relating to defence and security is considered to be particularly sensitive. In *Church of Scientology v Woodward*³⁵ Mason J agreed that "the revelation of security intelligence in legal proceedings would be detrimental to national security". And he conceded that a successful claim to Crown privilege would make the task of an applicant for judicial review of ASIO activity very difficult.

The fact that a successful claim to Crown privilege handicaps one of the parties to litigation is not a reason for saying that the court cannot or will not exercise its ordinary jurisdiction; it merely means that the court will arrive at a decision on something less than the entirety of the relevant materials.³⁶

Brennan J also considered the issue:

Yet discovery would not be given against the Director-General save in a most exceptional case. The secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc is essential to national security, and the public interest in national security will seldom yield to the public interest in the administration of civil justice.³⁷

But he added:

Nevertheless, the veil of secrecy is not absolutely impenetrable, for the public interest in litigation . . . is never entirely excluded from consideration (*Sankey v Whitlam*. . .).³⁸

Murphy J, too, contemplated that the court might look critically at a claim to public interest privilege in such a case.

If a case comes before the courts where it is claimed on what appear to be reasonable grounds that ASIO has misused its powers, it is to be expected that the courts will be astute to ensure that misuse of power is not cloaked by claims of national security.³⁹

33 *Ibid* 988 per Lord Pearce.

34 *Sankey v Whitlam* (1978) 142 CLR 1; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090. For a comparable American decision, see *United States v Nixon* (the Watergate tapes case) 418 US 683, 94 SCt 3090, 41 L Ed 2d 1039 (1974).

35 (1982) 43 ALR 587.

36 *Ibid* 603.

37 *Ibid* 615.

38 *Ibid*.

39 *Ibid* 609.

The *Scientology* case was one in which the material for which privilege was claimed was central to the very issue being litigated, ie, whether certain activities allegedly carried out by ASIO were lawful.

Questions about the admissibility in court proceedings of "State secrets" more typically arise in litigation, civil or criminal, conducted for other purposes. There is strong authority that the case for excluding such material may weigh less heavily in the balance when the proceedings are criminal. The US Supreme Court in *United States v Nixon* relied partly on this factor in overriding the President's claim, in criminal proceedings against White House officials, to resist discovery of tape recordings of his conversations with those officials on the basis of the public interest in the confidentiality of Executive discussions. But the court did suggest that even the need for disclosure of information in a criminal trial might not be sufficient to justify disclosure of military, diplomatic or national security secrets and that such material might even be exempt from *in camera* inspection.⁴⁰

However, the High Court of Australia recently rejected such an argument in ruling on the issue of public interest privilege in *Alister v The Queen*.⁴¹ Three men, members of the Ananda Marga sect, were convicted in the Supreme Court of New South Wales of conspiracy to murder the leader of an organization known as the National Front. Their appeal to the NSW Court of Criminal Appeal was unsuccessful. They sought special leave to appeal to the High Court on three grounds. The High Court, by a 3:2 majority,⁴² granted special leave on the ground that the trial judge had erred in law in setting aside a subpoena for production of ASIO material concerning the key prosecution witness. The trial judge had made the order on the basis of an affidavit by the Commonwealth Attorney-General stating that the public interest in national security required that ASIO should not be required to indicate whether any such documents even existed, let alone to produce them. The High Court ordered the Director-General of ASIO either to declare that ASIO had no such documents or to produce such documents to the court for inspection.

Subsequently ASIO documents were produced for inspection. The High Court held by a 4:1 majority that the documents would not have been relevant to the trial of the appellants. But they declined to allow counsel to see them even though the Attorney-General, in a fresh affidavit, expressed no objection to counsel seeing them. Murphy J, dissenting, considered that the court should have had the benefit of argument from counsel on the relevance of the material.⁴³

Similarly, in an earlier case, Ellicott J in the Federal Court stressed the "critical importance" of the court being assisted by counsel in ruling on claims to public interest privilege: *Haj-Ismael v Minister for Immigration and Ethnic Affairs*.⁴⁴ In that case the claim to privilege was made by affidavit by the Attorney-General, but counsel for the Crown in the actual litigation (a deportation case) had no access to the documents and was, therefore, unable to assist the court. Ellicott J said:

40 *United States v Nixon* (1974) 418 US 683, 706.

41 (1983) 50 ALR 41.

42 Gibbs CJ, Murphy and Brennan JJ; Wilson and Dawson JJ dissenting.

43 *Alister v The Queen* (1984) 51 ALR 480.

44 (1981) 36 ALR 516, 526-527.

If for some reason it [the Executive government] wishes to deal with the question of production of documents separately from the counsel it briefs in a particular case the appropriate course is for the learned Attorney-General or Solicitor-General to appear before the court to argue the question. Obviously there could be no objection to their having access to what are regarded as sensitive government documents.⁴⁵

In a situation where the claim to privilege is advanced by the Government as a non-party to the proceedings, or the claim is advanced (as in *Haj-Ismaïl*) other than by counsel representing the government as a party, neither side will, presumably, have seen the material in question. The judge will have seen it, if he has submitted the material to *in camera* inspection but, as noted, Lord Reid in *Conway v Rimmer* rejected the notion that this presented any problem in terms of "communicating with one party to the exclusion of the other".⁴⁶ Presumably the judge is expected to put the material out of his mind once he has ruled that it should not be admitted in evidence.

Is the situation different where counsel for the government as a party to the litigation has seen the material, even if only for the purpose of assisting the court by arguing that it should not be disclosed in the proceedings? In such a situation one party as well as the judge will have seen the material.

It appears that this is accepted as presenting no problem. There would, however, be a problem if counsel for the government party not only had access to material which the judge ruled to be privileged but also proceeded to make use of it in the proceedings, (eg as a basis for cross-examination). The New South Wales Court of Appeal in *Ex parte Brown; re Tunstall*⁴⁷ was definite that such a situation constituted a denial of natural justice.

Assuming that counsel for the party opposing discovery does have access to the material, so as to be able to assist the court in ruling on a privilege claim, it will be a rare case in which the parties seeking discovery are able to provide similar assistance. Generally, parties seeking discovery of material do so precisely because they do not have access to it.⁴⁸ They may not even know if particular material exists, or, if it does exist, what it may contain.⁴⁹ Not only does this limit the assistance they can provide to the judge in ruling on the privilege claim, they also face the risk of having their application for discovery thrown out, without court inspection, on the basis that it is a mere "fishing expedition".⁵⁰

Parties seeking access to information are therefore in a position of considerable disadvantage in arguing their claims to such access before a court or tribunal. Are there ways of mitigating that disadvantage? Beaumont J in the Federal Court of Australia recently grappled with a similar problem arising under the Freedom of Information Act 1982

45 *Ibid* 527.

46 [1968] AC 910, 952-953.

47 (1966) 67 SR (NSW) 1.

48 Unless he has a leaked copy, eg *Rogers v Home Secretary* [1973] AC 388.

49 *Eg Alister v The Queen* (1983) 50 ALR 41.

50 *Eg Burmah Oil v Bank of England* [1980] AC 1090, 1117 per Lord Wilberforce dissenting.

(Cth). In *Harris v Australian Broadcasting Corporation*⁵¹ Beaumont J had made an order under the Act that C might have access to "purely factual material" but not other material in certain reports. The case came back before Beaumont J in *Harris v Australian Broadcasting Corporation* (No 2)⁵² to settle which of the material was "purely factual" and severable so that C might have access. Harris, who was opposing disclosure, and the ABC had copies of the reports; C did not.

Beaumont J said:

Having heard argument on the point, I was reluctant to proceed to an *in camera* inspection without the benefit of submissions from all parties. I therefore directed that the matter be argued in open court, but as a matter of principle by reference to categories of disputed material. I further directed that the applicant and the first respondent indicate to each other what sections of the text of the reports should, in their submission, be given to Mr Cosby as being "purely factual material" within the terms of the order made on 4 October, 1983. I also invited counsel for the applicant and the first respondent to prepare and make available to the third respondent a document setting out the categories of disputed material as each saw it as a matter of principle so that the argument could proceed in a meaningful fashion so far as the third respondent was concerned.⁵³

Whether these arrangements overcame C's disadvantage is open to question but they undoubtedly mitigated it to some degree.

Further variation can arise where the government is a party to litigation and, far from resisting discovery of secret material sought by the other side, itself wishes to place such material before the court while simultaneously seeking to prevent any wider disclosure. This is commonly achieved by applying for the proceedings, or part of the proceedings, to be conducted *in camera*.

(3) *Proceeding in Camera*

*Norman v Matthews*⁵⁴ arose from proceedings under the Defence of the Realm Consolidation Act 1914 (UK) involving orders for seizure and destruction of documents (which were described as "calculated to prevent or injure recruiting").⁵⁵ The plaintiff unsuccessfully sought certiorari to quash the destruction order. He also brought an action in the County Court for detinue, but the action was struck out, as frivolous and vexatious, in a proceeding which was heard *in camera*. The plaintiff appealed to the Divisional Court, partly on the ground that the judge had no power to hear the matter *in camera*.

Lush J drew attention to the fact that he and Avory J had heard the certiorari application *in camera*, on the basis that it would not be consistent with the public welfare and safety for the documents to be

51 (1983) 50 ALR 551.

52 (1983) 50 ALR 567.

53 *ibid* 568.

54 (1916) 85 LJ (KB) 857.

55 *ibid* 860.

discussed in open court, and he stated that the County Court judge was entitled to do likewise. He added that a Court ought not lightly to decide that proceedings be heard *in camera* but it could do so, in conformity with *Scott v Scott*, if it concluded that it was necessary in order to secure that justice was done. He went on to indicate that the issue of necessity was a question within the discretion of the judge.

Now the order of the magistrate for the destruction of these documents proceeded on the basis that the contents of the documents were such that it would not be compatible with the public welfare or safety that publicity should be given to them and that if the person whose books had been destroyed could bring an action against those instrumental in moving the Court to make the order, and insist on the trial of that action taking place in open Court, the very mischief might be done which the regulation was intended to obviate. It is quite impossible to say in such cases as this, having regard to the circumstances, that the County Court Judge has not jurisdiction to make the order. If there were materials before him on which to exercise his discretion, there is an end of this appeal. It is not necessary to say whether one would or would not agree with his judgement. I see no ground for differing from it; but if there were jurisdiction, the plaintiff would have no right to object that he had not exercised his discretion wisely.⁵⁶

Sankey J agreed. He conceded that to hear a case *in camera* is a very exceptional course but that it could be justified in the present litigation (as in numerous other recent cases) by reference to the judgements in *Scott v Scott*, notably Lord Haldane LC's statement that "it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment" if the court were not closed, or Lord Shaw's exceptional case where secrecy is of the essence of the cause.

An even more startling decision was that of the King's Bench Division in *R v Governor of Lewes Prison; Ex parte Doyle*.⁵⁷ Doyle sought habeas corpus on a variety of grounds including the ground that his commitment to prison (for his participation in the Dublin Easter rebellion) followed conviction by a field general court martial which had been closed to the press and the public, notwithstanding a rule that such proceedings should be held in open court. Viscount Reading CJ decided that the circumstances in Ireland at the time were so disturbed as to attract the inherent jurisdiction, recognised in *Scott v Scott*, to close a court if such a precaution is necessary for the administration of justice. Darling, Avory, Rowlatt, Bailhache, Atkin and Sankey JJ agreed. The court was particularly conscious of the possibility of retaliation against witnesses if the public had been admitted. This may have been a genuine problem at the time, but nonetheless it seems remarkable that common law inherent jurisdiction to close a court should survive in the face of an unequivocal rule providing the contrary.

In *Robbie v Director of Navigation*⁵⁸ there, was legislation on both

⁵⁶ Ibid 859.

⁵⁷ [1917] 2 KB 254.

⁵⁸ (1944) 44 SR (NSW) 407.

sides of the issue. The case concerned a court of marine inquiry convened under the Navigation Act 1912 (Cth). Section 367 (2) provided that such proceedings should be heard in open court. However, s 8 of the National Security Act 1939-1943 (Cth) authorised courts to require exclusion of "persons or classes of persons" if satisfied that it is necessary to do so in the interests of public safety or defence. The Court in question ordered that proceedings should be heard *in camera* because questions as to the courses of the ships during wartime would be discussed. The Court's decision was taken on appeal to the Supreme Court and a similar request was made that the appeal be heard *in camera*. Halse Rogers J decided that hearing of the appeal in open court could not in any way be prejudicial to the public safety, and refused the request, but he held that the matter was one in the absolute discretion of the court in question.

It is today common for Official Secrets Acts or similar legislation to make express provision for prosecutions to be conducted in closed court. In a Canadian case *R v Treuu*⁵⁹ in which the accused's conviction was quashed by the Quebec Court of Appeal, Kaufman JA referred to the fact that:

at first instance the Crown availed itself of the provisions of s 14(2) of the Official Secrets Act, RSC 1970, c 0-3, which permits certain proceedings to be held *in camera*. The result of this was that a great air of mystery surrounded the case, and I am pleased to note that, with the co-operation of counsel for both sides, it was unnecessary to exclude the public from the hearing of this appeal.⁶⁰

For the United Kingdom, s 8(4) of the Official Secrets Act 1920 also gives a court power to exclude all or any part of the public during proceedings for an offence under the Act on the specific ground that publication of evidence given or statements made in those proceedings would be "prejudicial to the national safety". The power was invoked in *Attorney General v Leveller Magazine*⁶¹ (discussed below).

In most cases where proceedings are held *in camera* the parties themselves will be present and entitled to participate through their representatives. But there may be occasions where the government wishes to exclude even the other party from the proceedings or from part of them. Such a situation arose in a deportation appeal before the Administrative Appeals Tribunal: *Re Pochi and Minister for Immigration and Ethnic Affairs*.⁶² Police intelligence information to support the deportation order was admitted in confidential session of the Tribunal.⁶³ The appellant was excluded from the Tribunal while the evidence was given; his legal advisers were permitted to be present but were not permitted to acquaint the appellant with the evidence.

59 (1979) 49 CCC (2d) 222.

60 *Ibid* 225.

61 [1979] 2 QB 31.

62 (1979) 2 ALD 33.

63 S 35 of the Administrative Appeals Tribunal Act 1975 (Cth) provides that proceedings should normally be public but also confers power on the Tribunal to order restrictions on access, publication or disclosure where it is "satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason".

Ultimately the Tribunal recommended that the deportation order be revoked. The Tribunal is not bound by the rules of evidence⁶⁴ but Brennan J, presiding, pointed out that it is bound to observe the rules of natural justice. He went on to hold that natural justice in such a case requires that a decision be based on evidence which has some probative value in the sense that it amounts to proof rather than suspicion.⁶⁵ Evidence given in confidential session from which the applicant had been excluded would have to have "probative force. . . of particular cogency" if it were to be acted on. (Similarly he held that the hearsay character of much of the evidence reduced its probative value).

Brennan J noted that to exclude the public from a hearing under s 35 of the Administrative Appeals Tribunal Act 1975 (Cth) is a serious step.

Serious though the exclusion of the public is, the exclusion of a party from a hearing which affects his interests is a much graver step. To exclude a party from such a hearing, even if his legal advisers are permitted to remain, is to deny him a full opportunity to cross-examine upon, to comment on or to controvert the case against him — a denial which, in the absence of statutory authority, would constitute an indefensible denial of fair treatment by the Tribunal.⁶⁶

However, the statutory authority conferred by section 35(2) was intended for use. But to exclude a party a further criterion must be satisfied. As it must appear that his exclusion is essential to preserve the proper confidentiality of the information needed to determine the application, it is necessary to show that the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party. This criterion is not easy to satisfy though it is possible to do so. . .⁶⁷

Nevertheless, if an applicant is not given a full opportunity to deal with confidential information adverse to his interests, the probative force of the information must be particularly cogent if that information is to be acted upon. There are notorious risks in failing to hear an opposing view — slender proofs may falsely seem irrefragable, and the scales of justice may falsely seem to be tipped by the weight of insubstantial factors.

In the present case, the public interest in protecting the sources of information used to combat crime was paramount, and it was necessary to ensure confidentiality of the evidence which referred to information of that kind given to Detective Jenkins. In a court of law, the evidence

64 S 33, Administrative Appeals Tribunal Act 1975 (Cth).

65 This proposition, derived from several English and US cases, was endorsed on appeal by the Federal Court: *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139. It has also been endorsed by the Privy Council: *Mahon v Air New Zealand* (1984) 50 ALR 193.

66 (1979) 2 ALD 33, 54.

67 *Ibid* 56.

would not have been given at all: *Marks v Beyfus* (1890) LR 25 QBD 494 at 498. Accordingly, the applicant and the public (but not the applicant's counsel and solicitors) were excluded while Detective Jenkins gave some of his evidence. But the evidence given in camera before me did not live up to expectations in that it lacked the cogency which would support a finding of fact against the applicant.⁶⁸

The Minister appealed to the full Federal Court which dismissed the appeal.

(4) *Protective Orders*

A court may have power to limit disclosure or publication of certain testimony. In particular, it may order that a witness should not be identified by name. Such an order was made in a case in which a woman was charged with blackmailing two clients of her brothel. The judge directed that the two witnesses should be identified *at the trial* only as Y and Z, but he made no specific order about publication. Subsequently their identities were disclosed in a newspaper. In *R v Socialist Worker Printers and Publishers Ltd; ex parte Attorney General*,⁶⁹ those responsible for the publication were held guilty of contempt of court.

Counsel for the defendants argued that an order not to disclose the names of witnesses could be justified only in the same circumstances as would justify an order to hold proceedings *in camera*, but Lord Widgery CJ rejected the argument

because there is such a total and fundamental difference between the evils which flow from a court sitting in private and the evils which flow from pieces of evidence being received in the way which was followed in this case. The great virtue of having the public in our courts is that discipline which the presence of the public imposes on the court itself. . .

When one has an order for trial in camera, all the public and all the press are evicted at one fell swoop and the entire supervision by the public is gone. Where one has a hearing which is open, but where the names of the witnesses are withheld, virtually all the desirable features of having the public present are to be seen. The only thing which is kept from their knowledge is the name of the witness. Very often they have no concern with the name of the witness except a somewhat morbid curiosity. The actual conduct of the trial, the success or otherwise of the defendant, does not turn on this kind of thing, and very often the only value of the witness's name being given as opposed to it being withheld is that if it is published up and down the country other witnesses may discover that they can help in regard to the case and come forward. That, of course, is not unusual, and if the witnesses' names are not given, it may tend to prevent other witnesses coming forward in that way.

⁶⁸ Ibid 57.

⁶⁹ [1975] QB 637.

Having said that, however, it seems to me that one cannot fairly compare the consequences of an in camera hearing with the consequences of an open hearing with a restriction on the names of witnesses. It seems to me quite impossible for counsel for Mr Foot to say, as he boldly does, and he must be commended for it, that there is really no difference, and the only way in which one can achieve the kind of result achieved here is to go the whole way and have the hearing in camera. Indeed in the end I think that must be his submission: one must either satisfy the rules for an in camera hearing or one must go to the other extreme and have every word of the evidence said aloud.

I do not believe that we are faced with those stark alternatives. I think that there is a third course suitable and proper for this kind of case of blackmail where the complainant has done something disreputable or discreditable, and has something to hide and will not come forward unless thus protected.⁷⁰

Is the procedure capable of abuse? Presumably, any procedure is capable of abuse. John Mortimer QC in his role as author created a fictional situation for television in which a person claimed to be a victim of blackmail specifically for the purpose of gaining the benefit of such an order to protect his identity.⁷¹

The power to make protective orders has also been used in national security cases to protect from public disclosure the identity of security officers, intelligence agents and so on. It is not beyond the bounds of possibility that this power too, might be used to achieve dramatic effect, namely to impress on a judge or, particularly, a jury, the high sensitivity of the material in question.

The passage from Lord Widgery was approved by Beattie J of the New Zealand Supreme Court, in a national security context, in *Attorney-General v Taylor*.⁷² In a trial under the Official Secrets Act the judge made an order "prohibiting the publication of anything that may lead to the identification of officers of the New Zealand Security Service. They will be described by a letter or symbol in each case". The defendants acted in breach of this order and were held guilty of contempt. Beattie J noted that s 15(3) of the Official Secrets Act 1951 permitted the court to exclude all or any portion of the public from the hearing of a prosecution under the Act on application by the prosecution. He held that it was also open to a court to take the less drastic step taken in the particular case.

In *Taylor v Attorney-General* the Court of Appeal affirmed the decision by majority.⁷³ Wild CJ referred to the New Zealand Security Intelligence Service Act 1969, to s 15(3) of the Official Secrets Act 1951 and to the court's inherent jurisdiction. He continued:

[T]he judge was, in my opinion, bound to recognize and

70 Ibid 651-652. Milmo and Ackner JJ agreed with Lord Widgery.

71 John Mortimer, "Rumpole and the Old Boy Net" in *Rumpole and the Golden Thread* (1983) 97.

72 [1975] 2 NZLR 138.

73 [1975] 2 NZLR 675.

give effect to the will of Parliament as reflected in the Act that the security service should be maintained as an effective instrument to protect national security. Having regard to the nature of the charge and the evidence in the depositions there was plainly ample ground for the view that public disclosure of the names of the witnesses would impair the effectiveness of the security service to carry out that statutory function; and that an order which did no more than prohibit publication of anything that might lead to the identification of those witnesses at an otherwise entirely public trial was necessary in the interests of justice to protect a service whose duty, as the case itself demonstrated, includes bringing to justice alleged offences against the Official Secrets Act 1951.

In that connection it is important to recognise the limited extent of the orders made. The Court did not close its doors. No one was shut out. The witnesses were there to be seen and heard by everyone present. It was only their names that were not given and the publication of material leading to their identification as witnesses at the trial that was prohibited.

In my opinion it was clearly within the Judge's inherent jurisdiction to make the order in question. I cannot accept that that jurisdiction was, in the circumstances of the case, cut down by any statutory provision.

I think the position is correctly stated by Master Jacob in "The Inherent Jurisdiction of the Court" (Current Legal Problems 1970 23) in the following passage at p 24.

"... the term 'inherent jurisdiction of the court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision."

For the reasons given I am satisfied that Beattie J had jurisdiction to make the order. That the appellant understood its import and its application to him personally, as well as to others, is clear beyond doubt upon the admitted facts related earlier in this judgment. His wilful defiance of the order was in my judgment a *deliberate flouting of the Court's authority*. I would, therefore, dismiss this appeal.⁷⁴

Richmond J was in general agreement with the Chief Justice. But whereas Wild CJ had spoken of the order being "necessary in the interests of justice", Richmond J considered that an order protecting the identity of witnesses might be justified by a less stringent standard than

74 Ibid 679-680. (Emphases supplied).

that of necessity. In referring to *R v Socialist Worker Printers and Publishers Ltd; ex parte Attorney-General* he said:

No precise test was formulated by the Court, but it is clear that it could not have been said that unless the names were suppressed it would be virtually impossible for the processes of justice to be carried out. With respect, I agree with the view there taken. The strict test laid down in *Scott v Scott* was adopted because a hearing in secret would run counter to the basic principle of the common law "that every court of justice is open to every subject of the King" ((1913) AC 417, 440 per the Earl of Halsbury). But in the lesser situation of protecting the identity of witnesses at a hearing in public a somewhat less strict test is applicable in determining the inherent jurisdiction of the Court.⁷⁵

Woodhouse J dissented on the basis that the judge's order was expressed so broadly as to exceed any inherent jurisdiction, and also on the basis that various statutory provisions operated to supplant such inherent jurisdiction. He also took the view that the strict test from *Scott v Scott* was applicable and was not satisfied.

The case makes it plain (as in other cases where the Court exercises its inherent jurisdiction) that the particular power to exclude the public is one to be exercised not for the sake of individual litigants or witnesses but in the interests of the administration of justice itself. Here the issue concerns the protection of the names of persons associated with a trial held in open Court — but the same principles apply as was emphasised in *R v Socialist Worker Printers and Publishers Ltd, Ex parte Attorney General*. . .

That was a blackmail case and it was held by the Divisional Court that it was in the interests of the future administration of justice that there should be non-disclosure of the name of the complainants at a hearing in open Court. Anonymity, no doubt, will produce personal advantages in such a case for the complainant himself but the essential element giving rise to the jurisdiction is not his personal situation but the continuing interests of justice — the need to ensure that blackmailing activities should not be encouraged by making it virtually impossible for future victims to come forward in order to give their necessary evidence in open Court.

The question in the present case, therefore, is not whether the administration of the security service might suffer inconvenience if the names of security officer witnesses were to be published; or whether those particular men themselves might be disadvantaged in some general way that was unconnected with their evidence given at the trial or the part they had played in it. The real question is whether their anonymity as witnesses was required in the long term interests of justice itself and in contrast to their anonymity as agents, which the Court could not protect for the

75 Ibid 682-683.

reasons I have given. At best I think the very limited advantage of the permissible order would bear upon the administrative convenience of the service and so be regarded perhaps as a matter of public interest. But I am unable to understand how that sort of public interest can be equated with the continuing interests of the administration of justice where the identification of the men as security officers can be proscribed only in relation to their role as witnesses at the trial and yet be left wide open to publication by reference to their status as agents alone. So that even if the order could be read in the limited sense I am of the opinion that it was made without jurisdiction.⁷⁶

A similar situation came before the Queen's Bench Divisional Court in *Attorney-General v Leveller Magazine*⁷⁷ involving contempt proceedings against the publishers and editors of three periodicals. The difference was that there was specific statutory power to exclude people from the court on "national safety" grounds.

Three men had earlier undergone committal proceedings for offences under the Official Secrets Acts 1911-1939. Under s 8(4) of the Official Secrets Act 1920 the court was empowered to exclude all or any part of the public during any part of the hearing of proceedings for an offence under the Acts "on the ground that the publication of any evidence to be given or of any statement to be made in the course of proceedings would be prejudicial to the national safety". Such power was to be in "addition and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings". Section 8(4) was invoked during the committal proceedings to allow tapes of a conversation between the three accused to be played *in camera*.

After the playing of the tapes, which took several hours, the Crown sought to call an expert witness to comment on the tapes and to explain their relevance from the standpoint of security. No application was made to hear the witness *in camera*, but the Crown made it clear that, if the evidence was to be given in open courts, the identity of the witness should be suppressed and he should be referred to as "Colonel A". The justices ruled that Colonel A's identity must be disclosed to the court and to defence counsel and the defendants, though his name might be written down. The prosecution was unwilling that this should be done, regarding a possible disclosure of Colonel A's identity as injurious to national safety and also dangerous to Colonel A in person. So a Colonel B was called instead of Colonel A — Colonel B's personal security was apparently not at risk. Colonel B wrote his name on a piece of paper which was shown to the court, the defence counsel and the defendants, and he gave his evidence. There was subsequently some disagreement as to whether the Court had made a formal ruling in relation to Colonel B, but the case proceeded on the basis that no such ruling had been given.

After the committal proceedings had concluded the periodicals published the identity of Colonel B. As a consequence the Attorney-General initiated the contempt proceedings.

The respondents argued that a direction or mandatory order was

⁷⁶ Ibid 690-691.

⁷⁷ [1979] QB 31.

required before they could be held in contempt for breach, but Lord Widgery CJ, delivering the judgment of the Divisional Court, held that mere permission for Colonel B to write down his name, in accordance with the ruling given in respect of Colonel A, was sufficient to ground contempt proceedings.

It is within the knowledge of all of us that the device of allowing a witness to write his name down is widely used. Counsel for the Attorney-General suggested that in the present case this would be making use of section 8(4) of the Official Secrets Act 1920 which I have already read. His argument was that the words in that subsection "all or any portion of the public shall be excluded during any part of the hearing" covered the situation where the public is "excluded" from hearing a part of the evidence. He described it as an exclusion *pro tanto*. We do not think the section is apt to describe that situation. The public is indeed "prevented" from hearing a part of the evidence. But "excluded" means excluded from the court.

On the other hand, if the evidence, in whole or in part, of the witness in question could properly be heard in camera, we see no difficulty in allowing him to write down his name. This is far less restrictive of the public's rights than a hearing in camera would be. The justices could have sat in camera to hear Colonel B identified, or to hear the whole of his evidence. They could have done that either by virtue of section 8(4) of the Act of 1920 or the very wide terms of section 6 of the Criminal Justice Act 1967, or, indeed at common law: see *Rex v Governor of Lewes Prison, Ex parte Doyle*, . . . which must surely have provided thus for disclosure likely to be against the national safety. In those circumstances, the suppression of Colonel B's identity would not offend the principle of *Scott v Scott* . . . The device of writing down a witness's name is a convenient way of achieving a result which otherwise would only be achieved by the court going into camera . . . Reference should be made to a further argument . . . to the effect that the respondents could not be guilty of contempt, unless it could be shown that the disclosure of Colonel B's identity in some way interfered with the course of justice. We do not find it possible to accept that argument. The contempt here relied upon is *the deliberate flouting of the court's intention*. The public has an interest in having the courts protected from such treatment and that is the public interest on which the Attorney-General relies.⁷⁸

The case went on to the House of Lords which allowed the appeal. The majority of their Lordships were not in fundamental disagreement with the principles enunciated by the Divisional Court but took the view that evidence given in open court by Colonel B himself had permitted his identity to be easily discovered from publicly available sources.

Lord Diplock considered that Lord Widgery's CJ various references to

flouting of the court's authority or intention were not sufficiently precise to lead inexorably to the conclusion that what the defendants did amounted to contempt of court. Closer analysis was needed. The only "ruling" that the magistrates had in fact given was that the witness should be referred to *at the hearing in their court* as "Colonel B" and that his name must be written down and shown only to the court, the defendants and their counsel. None of the appellants had committed any breach of that ruling. The essence of contempt of court is interference with the due administration of justice, whether in a particular case or generally — not the flouting of an individual court or judge. Lord Diplock referred to the general principle of open justice and to *Scott v Scott*, and continued:

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.⁷⁹

Lord Diplock then mentioned the power to sit *in camera* conferred by s 8(4) of the Official Secrets Act 1920 (and by s 12(1)(c) of the Administration of Justice Act 1960), but noted that the Crown "was content to treat a much less drastic derogation from the principle of open justice as adequate to protect the interest of national security". He continued:

I do not doubt that, applying their minds to the matter that it was their duty to consider — the interests of the due administration of justice — the magistrates had power to accede to this proposal for the very reason that it would involve less derogation from the general principle of open justice than would result from the Crown being driven to have recourse to the statutory procedure for hearing evidence *in camera* under section 8(4) of the Official Secrets Act 1920; but in adopting this particular device which on the face of it related only to how proceedings within the courtroom were to be conducted it behoved the magistrates to make it clear what restrictions, if any, were intended by them to be imposed upon publishing outside the courtroom information relating to those proceedings and whether such restrictions were to be precatory only or enforceable by the sanction of proceedings for contempt of court.⁸⁰

Lord Diplock remarked that such an explicit statement might not be

79 [1979] AC 440, 450. For comment see (1980) 96 LQR 22.

80 *Ibid* 451.

necessary in many cases, such as *R v Socialist Worker*, where “the result intended to be achieved by a ruling by the court as to what is to be done in court is so obvious as to speak for itself”, but he did not think that the instant case fell into that class.

The ruling that the witness was to be referred to in court only as “Colonel B” was given before any of his evidence had been heard and at that stage of the proceedings it might be an obvious inference that the effect intended by the magistrates to be achieved by their ruling was to prevent his identity being publicly disclosed. As I have already pointed out however, the evidence that he gave in open court in cross-examination did in effect disclose his identity to anyone prepared to take the trouble to consult a particular issue (specified in the evidence) of a magazine that was on sale to the public. This evidence was elicited without any protest from counsel for the prosecution; no application was made that this part of the evidence should be heard in camera; no suggestion, let alone request, was made to members of the press present in court that it should not be reported; and once it was reported the witness’s anonymity was blown. In these circumstances whatever may have been the effect intended to be achieved by the magistrates at the time of their initial ruling, this, as it seems to me, had been abandoned with the acquiescence of counsel for the Crown, by the time that “Colonel B’s” evidence was over. I see no grounds on which a person present at or reading a report of the proceedings was bound to infer that to publish that part of the colonel’s evidence in open court that disclosed his identity would interfere with the due administration of justice so as to constitute a contempt of court. . .

Difficulties such as those that have arisen in the instant case could be avoided in future if the court, whenever in the interests of due administration of justice it made a ruling which involved some departure from the ordinary mode of conduct of proceedings in open court, were to explain the result that the ruling was designed to achieve and what kind of information about the proceedings would, if published, tend to frustrate that result and would, accordingly, expose the publisher to risk of proceedings for contempt of court.⁸¹

Viscount Dilhorne questioned the existence of any power in a court to make direct orders affecting the press or other media in their conduct outside the court. Unlike Lord Diplock, he considered that the statutory power of the court to sit *in camera* under s 8(4) of the Official Secrets Act 1920 does not extend to authorise an order that the identity of a witness giving evidence in open court should not be disclosed. Nor could the ruling in relation to Colonel B’s identity be justified on the test laid down by Lord Loreburn in *Scott v Scott* to justify exercise to the court’s inherent power to proceed in camera, namely that otherwise “the administration of justice would be rendered impracticable”; however less

81 *Ibid* 452-453.

stringent criteria were applicable to a protective order. Under the inherent power of a court to control proceedings it has jurisdiction to permit material to be written down instead of being presented orally. Where this is done to preserve the anonymity of a witness "a person who seeks to frustrate what the court has done may well be guilty of contempt".⁸² It was only because Colonel B had allowed his own identity to be revealed that he favoured allowing the appeals.

Lord Russell of Killowen considered that the magistrates' ruling could only be supported by considerations related to protection of the due administration of justice, and not on the basis of national safety *per se*, but that it could be justified on the former basis.

It is true that in this case the application by the Crown to which the magistrates acceded was based upon the suggestion that revelation of the witness's identity would be inimical to national safety, and no specific mention appears to have been made of the requirements of the due administration of justice. But this was a prosecution under the Official Secrets Act. In my opinion it really goes without saying that behind the application (and the decision) lay considerations of the due administration of justice. In the first place an alternative to the *via media* adopted would be an application that "Colonel B's" evidence be taken in camera, and in principle the less that evidence is taken in camera the better for the due administration of justice, a point with which journalists certainly no less than others would agree. In the second place a decision of anonymity — the *via media* — would obviously, and for the same reasons, be highly desirable in the interest of the due administration of justice as a continuing process in future in such cases. In the third place it appears to me that the furtherance of the due administration of justice was the only ground to support the decision of the magistrates. . .

I do not, my Lords, regard as of any relevance the question whether the magistrates had any power or authority directly to forbid all publication of "Colonel B's" identity. The field in which contempt of court, or, as I prefer to describe it, improper interference with the due administration of justice may be committed is not circumscribed by the terms of an order enforceable against the accused. I find no problem in the concept that a decision or direction may have no immediate aim and no direct enforceability beyond the deciding and directing court, but yet may have such effect in connection with contempt of court. Merely to state, as is the law, that in general contempt of court is the improper interference with the due administration of justice is to state that it need not involve disobedience to an order binding upon the alleged contemnor.⁸³

And Lord Russell agreed that it was only because of the fact that

⁸² *Ibid* 458.

⁸³ *Ibid* 467-468.

Colonel B's testimony, given in open court, itself served to reveal his identity that the publications could not amount to contempt of court.

Lord Edmund-Davies took a more stringent line:

The whole proceedings . . . must be regarded as having taken place upon the basis that a committal was sought upon the single ground (a) that the magistrates had given a direction that no attempt must be made to disclose the identity of "Colonel B", and (b) that deliberate publication of his identity by the appellants sprang from their determination to disregard that direction. That and that alone was the case which the appellants were called upon to meet.⁸⁴

And that case had been destroyed once the Attorney-General conceded that there had been no such formal direction. He went on to express uneasiness about the view expressed by Lord Widgery CJ that "the deliberate flouting of the court's *intention*" is sufficient to constitute criminal contempt. Criminal sanctions require some certainty as to the proscribed conduct, and condemnation is "objectionable when the implication underlying the court's conduct is simply a matter of conjecture". For similar reasons he said that he was not wholly satisfied with the *ratio decidendi* in *R v Socialist Worker*. Neither in that case nor in the instant case "did the court give any direction against publication purporting to operate outside the courtroom. It has to be said that hitherto the view seems to have been widely accepted that no such power exists". He continued:

After considerable reflection I have come to the conclusion that a court has no power to pronounce to the public at large such a prohibition against publication that all disobedience to it would automatically constitute a contempt. It is beyond doubt that a court has a wide inherent jurisdiction to control its own procedure. In certain circumstances it may decide to sit wholly or in part in camera. Or witnesses may be ordered to withdraw, "lest they trim their evidence by hearing the evidence of others" (as Earl Loreburn put it in *Scott v Scott*). Or part of a criminal trial may be ordered to take place in the absence of the jury, such as during the hearing of legal submissions or during a "trial within a trial" regarding the admissibility of an alleged confession. Or the court may direct that throughout the hearing in open court certain witnesses are to be referred to by letter or number only. But it does not follow that, were a person (and even one with knowledge of the procedure which had been adopted) thereafter to make public that which had been wholly or partially concealed, he would be ipso facto guilty of contempt.⁸⁵

He referred to s 12 of the Administration of Justice Act 1960 which he treated as declaratory of the common law position, and continued:

And what appears certain is that at common law the fact

⁸⁴ Ibid 460.

⁸⁵ Ibid 464.

that a court sat wholly or partly in camera (and even where in such circumstances the court gave a direction prohibiting publication of information relating to what had been said or done behind closed doors) did not of itself and in every case necessarily mean that publication thereafter constituted contempt of court.

For that to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future. So the liability to be committed for contempt in relation to publication of the kind with which this House is presently concerned must depend upon all the circumstances in which the publication complained of took place.⁸⁶

Lord Edmund-Davies considered it desirable that a court should clearly indicate, in making any such procedural decisions, that they are aimed at ensuring the due administration of justice and that anyone publishing material or otherwise acting in a manner calculated to prejudice that aim would run the risk of contempt proceedings. "Farther than that, in my judgement, the court cannot go. As far as that they could, as I believe, with advantage go." Such a statement would clarify what was the court's intention, and even though disregard would not of itself necessarily constitute contempt, the persons concerned would be in no position to argue (as in *R v Socialist Worker* or the instant case) that they had not understood what was required of them. However he stopped short of saying that such a warning would always be a necessary precondition to a committal for contempt.

Lord Scarman also considered that the foundation for the common law power to depart from the principle of open justice is a concern for the due administration of justice. Of the various formulations in *Scott v Scott* he considered that of Viscount Haldane LC to be the basis of the modern law, ie, that "to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made".

It follows: (1) that, in the absence of express statutory provision (eg section 8(4) of the Act of 1920) a court cannot sit in private merely because it believes that to sit in public would be prejudicial to national safety, (2) that, if the factor of national safety appears to endanger the due administration of justice, eg by deterring the Crown from prosecuting in cases where it should do so, a court may sit in private, (3) that there must be material (not necessarily formally adduced evidence) made known to the court upon which it can reasonably reach its conclusion.⁸⁷

He agreed with Lord Widgery CJ that the lesser step of allowing a piece of evidence to be written down and requiring it not to be mentioned in

⁸⁶ Ibid 465.

⁸⁷ Ibid 471.

open court is a valuable and proper extension of the common law power to sit in private, and he considered that *R v Socialist Worker* was correctly decided.

As to contempt, Lord Scarman thought it was a misconception to regard it as being an offence because it is the breach of a binding order; rather, the offence is interference, with knowledge of the court's proceedings, with the course of administration of justice. But could the justices' ruling be justified as being to avert an interference with the administration of justice? Here Lord Scarman was left in a state of doubt. The justices clearly had regard to national security, but it was not certain that they took into account the risk to the administration of justice. Similarly there was uncertainty as to the nature of their "ruling" — was it a prohibition or merely a request? As a result, that "certainty which the criminal law requires before a man can be convicted of a criminal offence is lacking", and he, too, would allow the appeals.

But, for the majority of their Lordships, the appeals would have been dismissed but for the fact that Colonel B had effectively "blown his own cover" by the testimony he gave in open court.

In *Broadcasting Corporation of New Zealand v Attorney-General*⁸⁸ a High Court judge went to the other extreme. A man had pleaded guilty to a drug offence and was remanded to the High Court for sentencing. He had, however, given some assistance to officials investigating drug trafficking and this was to be advanced as a factor in mitigation of sentence. When counsel drew Moller's J attention to this, and that there might be reason to be concerned for the man's safety, the judge ordered that the proceedings should not be included in the list of court business for the day, and he ordered that the public should be excluded from the court. No public pronouncement was made as to the identity of the offender, the nature of the offence or the sentence imposed, nor was any statement made of reasons for dealing with the matter *in camera*. It was purely fortuitous that a reporter happened to enter the courtroom and was told to leave, so that he became aware of what was occurring. As a result the fact of such secret proceedings attracted considerable publicity. The Broadcasting Corporation and a newspaper company moved that the orders be varied or rescinded, and the motion was removed into the Court of Appeal.

The Court of Appeal took the view that the charge against the man was not one of the more serious drug offences and also that the sentence actually imposed was not so unusually lenient as to attract attention. Accordingly his interests could have been protected by less drastic measures. All members of the Court placed the case squarely within the context of the principle of open justice as expounded in cases such as *Scott v Scott*. All agreed that the judge's order should be rescinded, and orders were substituted to suppress publication of the offender's name and to forbid publication of any of the facts before the judge other than the guilty plea, the nature of the offence, and the sentence.

Woodhouse P noted that some information about the case was publicly available through the "Record of Prisoners Tried and Sentenced" but that the judge's order placed reporters and others in considerable doubt about the use which they might make of such information. In his view the

judge's order was made without jurisdiction. He reaffirmed his dissenting opinion in *Taylor v Attorney-General*⁸⁹ that statutory provisions demonstrated "a legislative intention to supplant any pre-existing inherent power to sit *in camera* on criminal cases".⁹⁰ Section 46 of the Criminal Justice Act 1954 (NZ) enabled the court to make an order prohibiting publication of the name of an offender. Section 375(1) of the Crimes Act 1961 (NZ) authorized exclusion of the public on several grounds (the interests of justice, public morality or reputation of victims of certain offences) but was subject to an express provision against exclusion of any barrister, solicitor or "accredited news media reporter". This proviso, Woodhouse P pointed out, had not been discussed in *Taylor v Attorney-General*, in which the Court had been concerned only with the power in s 375(2) to restrict publication of evidence. In the present case the judge had made no order under s 46 or s 375(2) and his exclusion order could not be supported by s 375(1) because it extended to accredited news media reporters. In the absence of any residual inherent jurisdiction, the order could not stand, and more limited orders should be substituted based on s 46 and s 375(2).

Cooke J differed from the President in that he considered that the court's inherent jurisdiction was not displaced by the statutory provisions. This view was based on the proposition that s 375 applied only "on any trial" and to reports of "the evidence adduced" — there was no trial and no evidence where a prisoner was committed for sentence only. (Woodhouse P interpreted s 375 more broadly so as to cover sentencing proceedings). But Cooke J also said that even if the statutory provisions did apply the inherent jurisdiction remains intact, and he relied on the majority judgments in *Taylor v Attorney-General*. However he considered that the judge's order, while within jurisdiction, went beyond what the circumstances required.

[I]t seems to me that a joint memorandum from counsel would have been enough. When taken into account together with the probation report and the police summary, it would have enabled the judge to pass sentence in public, after hearing oral submissions in the ordinary way and without either imperilling the prisoner or overlooking anything in his favour.⁹¹

But in light of the publicity the case had since received he agreed with Woodhouse P that orders should be made (based, in Cooke's J view, on the court's inherent jurisdiction) suppressing the man's name and limiting publication of the evidence. Richardson J agreed with Woodhouse P that s 375(1) supplanted any inherent jurisdiction in the matter of excluding access to criminal *trials*, but he agreed with Cooke J that s 375(1) did not extend to proceedings to impose sentence — consequently, exclusion from such proceedings remained a matter of the court's inherent jurisdiction. But a court exercising such inherent jurisdiction ought to be influenced by the public policies reflected in the statutory power, so that lawyers and news media representatives should not be excluded in the absence of strong justification. In regard to restrictions on publicity,

89 [1975] 2 NZLR 675.

90 [1982] 1 NZLR 120, 125.

91 *Ibid* 130.

Richardson J proceeded in accordance with the majority holding in *Taylor v Attorney-General* that s 375(2) and s 46 did not supplant the court's inherent jurisdiction. However:

Any departure from the principle of open justice in this regard must be no greater than is required in the overall interests of justice.⁹²

The judge's order in the case was wider than required, and he agreed with the orders proposed by Woodhouse P.

Conclusion

The several cases in this section have been discussed at some length because of the marked differences among the judges on a number of the central points at issue in regard to the power of a court to make protective orders and the effect of those orders. On some of those points it is not possible to state the law with certainty, at least in the absence of statutory clarification (and sometimes even in the presence of attempts at statutory clarification!). The following is an attempt to draw together the various strands of thinking revealed in the judgments:

- Judges are generally inclined to favour the use of protective orders as a less drastic derogation than closed courts from the principle of open justice.⁹³
- The prevailing view appears to be that a protective order to limit publication may be authorised on the basis of the inherent jurisdiction of the court, if it is not specifically authorised by statute (and if not specifically excluded by statute).
- There is judicial support for the view that such inherent jurisdiction may be invoked only in the interest of "the administration of justice".⁹⁴
- There is divided opinion on the question whether the standard is less stringent than the *Scott v Scott* test of "necessity" to warrant closing the court.⁹⁵

⁹² *Ibid* 135.

⁹³ *R v Socialist Worker Printers and Publishers Ltd; ex parte Attorney-General* [1975] QB 637, 651-652 per Lord Widgery CJ; *Attorney-General v Taylor* [1975] 2 NZLR 138, 144-146 per Beattie J; *Taylor v Attorney General* [1975] 2 NZLR 675, 679-680 per Wild CJ, 682-683 per Richmond J; *Attorney-General v Leveller Magazine* [1979] QB 31, 43-45 per Lord Widgery CJ; [1979] AC 440, 451-452 per Lord Diplock, 467 per Lord Russell of Killowen, 471 per Lord Scarman. *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120.

⁹⁴ *Taylor v Attorney-General* [1975] 2 NZLR 675, 684-685 per Richmond J, 688-691 per Woodhouse J; *Attorney-General v Leveller Magazine* [1979] AC 440, 450-452 per Lord Diplock, 457-458 per Viscount Dilhorne, 467 per Lord Russell of Killowen, 471-472 per Lord Scarman; *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 123, 125 per Woodhouse P, 130-132 per Cooke J, 133-135 per Richardson J.

⁹⁵ Support for the "necessity" test: *Taylor v Attorney-General* [1975] 2 NZLR 675, 679-680 per Wild CJ, 690-691 per Woodhouse J; *Attorney-General v Leveller Magazine* [1979] AC 440, 450 per Lord Diplock, 471 per Lord Scarman; *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 130-131 per Cooke J, 135 per Richardson J.

Support for a less stringent test: *Taylor v Attorney-General* [1975] 2 NZLR 675, 682-683 per Richmond J; *Attorney-General v Leveller Magazine* [1979] AC 440, 458 per Viscount Dilhorne.

- There is concern that the intended scope of such orders should be made clear.⁹⁶
- There has been strong questioning whether an exercise of the court's inherent power can lawfully extend to bind non-parties in regard to conduct outside the court room.⁹⁷
- There is strong judicial authority that breach of such an order will only amount to contempt of court if such breach itself adversely affects "the administration of justice".⁹⁸

Legislative Protection of State Secrets in Court

Undoubtedly, it was in order to overcome some of these uncertainties that, in 1984, special legislation was felt to be necessary in Australia to allow the identity of certain officers of the Australian Secret Intelligence Service (ASIS) to be protected in court proceedings. The proceedings were proposed Victorian criminal prosecutions against the officers arising from a bungled training exercise which attracted media attention under such titles as "the ASIS Sheraton Raid". The Commonwealth Government was unwilling to permit the officers to be identified. The Victorian Government insisted that prosecutions should proceed. Eventually Parliaments in both jurisdictions passed legislation specifically to authorise the making of protective orders in the particular proceedings.

The Victorian Parliament enacted the Criminal Proceedings Act 1984. Section 2 provides the following definition:

"Criminal proceedings" means proceedings for or with respect to the committal for trial of any person for: an indictable offence or the trial of any person for a summary or indictable offence arising out of or in any way relating to the incident which occurred at the Sheraton Hotel in Melbourne on the night of 30 November, 1983, involving the Australian Secret Intelligence Service and includes any application under this Act.

Section 3 provides as follows:

3. (1) Notwithstanding any other law or practice, if it

96 *R v Socialist Worker Printer & Publishers Ltd; ex parte Attorney-General* [1975] QB 637, 644-645, 646 per Lord Widgery CJ; *Attorney-General v Taylor* [1975] 2 NZLR 675, 690 per Woodhouse J; *Attorney-General v Leveller Magazine* [1979] QB 31, 43 per Lord Widgery CJ; [1979] AC 440, 449, 451-453 per Lord Diplock, 455 per Viscount Dilhorne, 459-463, 465-466 per Lord Edmund-Davies, 473 per Lord Scarman; *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 122 per Woodhouse P, 130 per Cooke J.

97 *R v Socialist Worker Printers & Publishers Ltd; ex parte Attorney-General* [1975] 637, 650 per Lord Widgery CJ; *Taylor v Attorney-General* [1975] 2 NZLR 675, 684 per Richmond J, 689-690 per Woodhouse J; *Attorney-General v Leveller Magazine* [1979] AC 440, 451-452 per Lord Diplock, 455-456 per Viscount Dilhorne, 463-464 per Lord Edmund-Davies, 467-468 per Lord Russell of Killowen, 471 per Lord Scarman; *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 130 per Cooke J.

98 *Attorney-General v Taylor* [1975] 2 NZLR 138, 147 per Beattie J; *Attorney-General v Leveller Magazine* [1979] AC 440, 449-452 per Lord Diplock, 465 per Lord Edmund-Davies, 467-468 per Lord Russell of Killowen, 469 per Lord Scarman, *contra* [1979] QB 31, 45 per Lord Widgery CJ; *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120.

appears to a court on the application of the Attorney-General of the Commonwealth of Australia or the Attorney-General of Victoria, that it is or may be expedient in the interest of the national or international security of Australia or in the interests of the physical safety of the accused or a witness or any other persons so to do the court may —

- (a) order that the whole or any part of the criminal proceedings before it shall take place in a closed court;
 - (b) give directions that throughout or during any part of the proceedings such person or classes of persons as the court determines shall be excluded;
 - (c) give directions prohibiting or restricting the disclosure of information with respect to the proceedings;
 - (d) order that no report of the whole or a specified part of or relating to the proceedings shall be published;
 - (e) make such order and give such directions as it thinks necessary for ensuring that no person without the approval of the court has access whether before during or after the hearing of the proceedings to any indictment, affidavit, exhibit, or other document used in the proceedings or to the records of the court relating to the proceedings.
- (2) The powers conferred by sub-section (1) shall be in addition to and not in derogation of any other powers of the court.

Section 4(1) deals with the situation if judgment cannot be given in open court:

4. (1) Where any order or direction under this Act prevents judgment being given in open court the court shall as soon as practicable after the criminal proceedings have been disposed of cause to be published in open court a full statement of the case and its disposition but such statement shall not identify any person or refer to any facts, matters or circumstances in such a way as to prejudice or affect the operation of any order or direction made under this Act.

Section 4(2) requires that such a statement be forwarded to the Attorney-General to be laid before each House of Parliament for seven sitting days. Section 5 gives the Supreme Court power to punish a person for contravention of, or failure to comply with, an order or direction made under s 3. Section 6 states that the Act does not apply to or in relation to any order or direction made later than two years after the commencement of the Act.

The Commonwealth Parliament for its part enacted the Judiciary Amendment Act 1984 adding a new Part VIII to the Judiciary Act 1903. The purpose of the Commonwealth Act is to extend the effective reach

of orders made in relation to "proceedings", which term is defined in s 46 to mean —

criminal proceedings arising out of, or in any way relating to, the incident that occurred at the Sheraton Hotel in Melbourne on the night of 30 November, 1983, involving the Australian Secret Intelligence Service.

Part VIII applies to all natural persons, whether or not Australian citizens or resident in Australia, and to bodies corporate, whether or not incorporated in Australia (s 47). It binds the Crown in right of the Commonwealth, all States, the Northern Territory and Norfolk Island (s 48). Section 49 provides that if a court makes an order in "proceedings" (as defined) to close the proceedings or part of them, to exclude persons, to prohibit or restrict disclosure of information or publication of a report or to deny access to documents or records, and such an order is made on the ground that it is

necessary or desirable in the interests of the national or international security of Australia or in the interests of the physical safety of the accused, of a witness or of any other person. . .

contravention or failure to comply with the order by "a person" (as defined) is forbidden and may be punished by the Federal Court.

The Attorney-General is required to table before each House of Parliament an annual report about proceedings in which such orders were made (s 50). Part VIII does not apply in relation to an order made later than two years after the commencement of the Victorian Act (s 51).

The Sheraton incident occurred on 30 November, 1983. Soon after the ASIS personnel involved initiated proceedings in the High Court for injunctions to restrain the Commonwealth from disclosing their identities to the Chief Commissioner of the Victorian Police for the investigation of possible breaches of State law. Such disclosure, it was argued, would be in breach of their contracts of employment. On 19 December an interlocutory injunction was granted by consent and certain undertakings were given to the court. After the enactment of the Victorian and Commonwealth Acts applications were made to the High Court to dissolve the interlocutory injunction and to lift the undertakings on the ground that the legislation had removed any cause for concern about national and international security. On 2 May, 1984, Dawson J refused the applications.⁹⁹

At the end of July the applications for permanent injunctions came before the full High Court by way of case stated procedure. That course was taken, apparently, as a means of protecting the identity of the plaintiffs which may have been at greater risk of disclosure in a full trial. And the High Court proceedings were themselves heard in open court although, as noted below, some of the material before the court was restricted. The case stated procedure presented certain difficulties to the court. Indeed, Mason J commenced his judgment with the words:

There is an air of unreality about this stated case. It has

the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart.¹⁰⁰

By a 6:1 majority the Court, on 6 November, 1984, rejected the applications, thus ruling that the Commonwealth was entitled to disclose the identities to the Victorian police. The Court rejected the plaintiff's central argument and held that, even if confidentiality of their identity was a term of their contract of employment, that term could not prevail against the requirements of subjection to the criminal law. Deane J put the matter in a nutshell in commencing his judgment:

These five cases illustrate the abiding wisdom of the biblical injunction against putting one's "trust in men in power" (Psalms 146:3; Jerusalem Bible, p 927). The plaintiffs have been described without dissent as "upright, decent men serving their country". The two rocks upon which they founder are, however, propositions of law which are not to be moved to meet the exigencies of hard cases. Shortly and relevantly stated, those propositions are: (i) that neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorize illegality, and (ii) that the courts of this country will not enforce the terms of a promise not to disclose information in circumstances where such enforcement would obstruct the due administration of the criminal law.¹⁰¹

An argument that non-disclosure was required by national security considerations was also rejected because the Commonwealth Government, far from advancing such a claim, had effectively conceded that disclosure subject to the terms of the special legislation would not jeopardise national security.

In the absence of the legislation it was acknowledged that disclosure of identities would be prejudicial to national and international security. This raises the question of the effectiveness of the legislation, as Gibbs CJ noted:

Apart from the fact that it is naturally left to the discretion of the Victorian courts to decide whether to make the [protective] orders, it may well be doubted whether it would be beyond the capacity of a determined foreign intelligence agency to discover the identity of the plaintiffs, once police investigations and subsequent prosecutions were set in train. It should be noted that it is alleged that consequences of the most serious kind — *the nature of which is more particularly mentioned in a part of the record to which, at the request of the Commonwealth, access has been prohibited without the approval of the court* — might ensue to the plaintiffs and other persons if the names of the plaintiffs were disclosed.¹⁰²

Deane J also questioned the effectiveness of the legislation.¹⁰³ He, too, referred to protective orders made in the High Court itself:

100 *A v Hayden* (no 2) (1984) 56 ALR 82, 91.

101 *Ibid* 125-126.

102 *Ibid* 85. Emphasis supplied.

103 *Ibid* 129.

[S]ome of the material before the court has been kept secret, with the consequence that full disclosure of the factual merits of the case which the plaintiffs make against the Commonwealth is precluded and meaningful discussion of the considerations which would have been relevant to answering one question which it has proved unnecessary to answer (Question 4 in M104 of 1983) would not have been possible. The parties have, however, agreed that there are exceptional and compelling considerations going to national security which have required that the confidentiality of the relevant material be preserved. Indeed, the fact that all parties are agreed on the need for secrecy has itself been an important factor in my concurrence in the departure from the ordinary principle that justice must be openly administered in open court (cf *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 254).¹⁰⁴

In the outcome the remarkable 1984 legislation was never tested as the Victorian authorities decided not to proceed with prosecutions.¹⁰⁵

It is, perhaps, appropriate that the permissible restrictions on the open justice principle should be specified in legislation rather than left to the vagaries of judicial development. True, judicial restatements of the principle in cases such as *Scott v Scott* may be almost as influential as statutory or even constitutional restatements. But it must be recalled that the *Scott v Scott* restatement was necessary because of prior judicial erosion of the principle. And it dealt only with closure of court proceedings to the public; on the question of protective orders, judges have lacked any similarly definitive statement of principles and have gone off in all directions.

In addition, different subjects of adjudication may require different forms of permissible departure from the open justice principle, eg family law proceedings, juvenile proceedings, sexual offences. Public interests other than that of justice may need to be accommodated in different contexts, eg secrecy and confidentiality, privacy, reputation. And the balance between the open justice principle and competing public interests may need to be reconsidered from time to time in accordance with changing circumstances — important considerations relating to family law as enunciated in *Scott v Scott* have changed markedly in subsequent years.

Nonetheless, any legislation should be drafted with the open justice principle firmly established as the norm from which any departures should be closely confined. This has in fact been the course followed in some recent legislation of the Commonwealth Parliament. The Administrative Appeals Tribunal Act 1975 (Cth), for example, provides in s 35(1) that, subject to the section, "the hearing of a proceeding before the Tribunal shall be in public". Section 35(2) confers a broad discretion on the Tribunal to make orders excluding persons or prohibiting or restricting disclosure or publication of material. But s 35(3) provides that in considering whether to make such an order,

104 Ibid 130-131.

105 *Sydney Morning Herald*, 22 December 1984.

the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all parties. . .