SPYCATCHER DOWNUNDER: *ATTORNEY GENERAL FOR THE UNITED KINGDOM* V *HEINEMANN PUBLISHERS AUSTRALIA*

MATTHEW HOWARD*

> It would seem that, over the last 5 years ... former officers ... have felt free to disclose confidential information received by them while in the Service, and have done so without any action being taken against them ..., it must have been apparent to anyone who had cause to consider the matter, that, as a result of the acquiescence, or inaction, of the British Government, the Service has, for years, leaked like a sieve.[1]

Introduction

William Shakespeare and Peter Wright are both Englishmen who turned their hands to literary pursuits. Shakespeare wrote a play called *Much Ado About Nothing*, while Wright wrote a book which might aptly have shared that appellation, but was, in fact, entitled *Spycatcher*. This article does not consider exactly why anybody would read, or write, a book which consists mostly of information which is either already published, or which "reveals" obsolete details of secret service operations and technology "in a style which ... seems more appropriate to 'Boys Own Paper' or 'Biggles Flying Omnibus' ".[2] Rather, this note considers the High Court decision[3] as

* B Juris (Hons) LLB (WA).

1. *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, 378 Powell J.
2. Ibid, 373.
3. *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* [No 2] (1988) 62 ALJR 344. Hereinafter referred to as *Spycatcher*.

to whether the United Kingdom Government[4] could prevent the publication of *Spycatcher* in Australia, and some of the background to that decision.

Before the *Spycatcher* decision it was clear that there was a common law rule that a forum court would not enforce a foreign law which could be said to be a penal or a revenue law. It was not always clear whether a particular law fitted within one of these categories, but the rule was clearly established. Whether the rule extended to deny enforcement of a foreign public law was not free from doubt, as the judgment of the Court of Appeal in *Attorney-General for New Zealand v Ortiz*[5] indicated. In that case Lord Denning MR was clear that such public laws would not be enforced, while Ackner LJ took a different view. The issue was not resolved by the House of Lords in that case[6] and must still be regarded as an open question in England. This is borne out by the House of Lords decision of *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* where all their Lordships agreed that "at present the international rule with regard to the non-enforcement of revenue and penal laws is absolute",[7] but none positively endorsed the rule's application to public laws. Such statements do not go as far as *Dicey & Morris* who state that "English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State",[8] although it may be possible to read Lord Mackay's judgment in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd*[9] as endorsing the approach of *Dicey & Morris*.[10]

The majority of the High Court in the *Spycatcher* case resolved this issue, for Australia at least, by formulating a base principle that a court will not enforce a claim of a foreign state which arises

4. Although the Plaintiff in this action, and ultimately the appellant before the High Court, was the Attorney-General for the United Kingdom, I will refer to that party as the United Kingdom Government for obvious reasons.
5. [1984] AC 1.
6. [1984] AC 35.
7. [1986] 1 AC 368, 428.
8. *Dicey and Morris on The Conflct of Laws* Eleventh Ed (London: Stevens & Sons Ltd, 1987) Vol 1, 100.
9. Supra n 7, 437.
10. See *Cheshire & North's Private International Law* Eleventh Ed (London: Butterworths, 1987) 120.

from the exercise, by that foreign state, of powers which are peculiar to government. Hence a foreign penal statute will still be unenforceable, but now as a manifestation of the broader principle stated in the majority judgment. A further consequence is that what were previously termed "public" laws of a foreign state can be seen as another manifestation of the broader principle and, therefore, are unenforceable. The statement of this broader principle which can be seen as having underpinned the previous non-enforcement of foreign penal and revenue laws is the central importance of the *Spycatcher* decision.

Background to the High Court decision

Peter Wright spent over 20 years as an Officer of MI5, working in counter espionage for 12 of those years. During that time he was privy to highly classified information and during his last years at MI5 he was on the personal staff of the Director General of the British Security Service. After retiring, Wright left England, settled in Tasmania, and became an Australian citizen. While living in Tasmania, Wright was approached by Heinemann Publishers Australia Pty Ltd, to write his memoirs.[11]

Apart from certain autobiographical details, the bulk of *Spycatcher* dealt with four areas:

1 Technology employed by the British Security Service for the purposes of electronic surveillance and interception;

2 Operations of the Service using electronic surveillance and interception which breached British and International law;

3 Investigations with respect to Soviet penetration of the Service prior to 1971; and

4 Wright's service as personal consultant to the Service's Director General.

It was admitted that these parts of the book had been written with knowledge gained by Wright during his time as an officer of MI5.

11. Heinemann Publishers was the Defendant, and then the Respondent to the action taken by the United Kingdom Government. It was agreed throughout that Heinemann Publishers would be restrained from publishing *Spycatcher* if the United Kingdom's claim against Wright was successful.

The book did not receive rave judicial reviews as can be seen from the above quoted remarks of Powell J, and Kirby P's description of *Spycatcher* as "nothing more than one rather cantankerous old man's perspective of things notorious or description of technology long outdated, people long since dead and controversies tirelessly worked over by the numberless writers ... who have already ploughed the particular field."[12]

Despite this, the United Kingdom Government launched an unprecedented campaign to prevent the book's publication in the United Kingdom, New Zealand and Australia, the details of which are set out in Kirby P's judgment.[13] The *Spycatcher* case came to the High Court from the New South Wales Court of Appeal[14] which had, by a majority, affirmed the first instance decision of Powell J[15] to refuse the United Kingdom Government's claim to restrain the publication of *Spycatcher* in Australia.

The High Court decision

The High Court unanimously, in two judgments, affirmed the decision of the New South Wales Court of Appeal and so dismissed the appeal of the United Kingdom Government. The first judgment was a joint judgment of all the judges, except Brennan J, who, characteristically, preferred to express himself separately.

The United Kingdom Government's case before the High Court was much as it had been in the Courts below and was based on three alternate limbs. These were that "the proposed publication of *Spycatcher* amounted to a breach of fiduciary duty, a breach of the equitable duty of confidence or, alternatively, a breach of the contractual obligation of confidence on Mr Wright's part ..."[16]

Powell J at first instance considered each of these heads of claim, as did all three judges in the New South Wales Court of Appeal. However, in the Court of Appeal Street CJ[17] and Kirby P,[18] in

12. *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 166.
13. Ibid, 130-135.
14. (1987) 10 NSWLR 86
15. (1987) 8 NSWLR 341.
16. Supra n 3, 344.
17. Supra n 14, 99-101.
18. Ibid, 140.

separate judgments, were of the view that the true nature of the United Kingdom Government's case was the protection of the British public interest. This was specifically rejected by McHugh JA (as he then was) who stated that the protection of the British public interest was the motivation for the action, but that "[m]otivation for an action is not to be confused with the different point [of] whether the action constitutes the enforcement of a public or penal law".[19]

In the High Court, the majority judgment followed the majority in the Court of Appeal below and treated these three alternate personal claims as being manifestations of one broad claim by the United Kingdom Government. That is, all the claims had "as their foundation the peculiar relationship between the United Kingdom Government and Mr Wright as an officer of the British Secret Service",[20] and therefore the central interest of the United Kingdom Government in bringing the three claims was "to ensure the continued secrecy of the operations of the British Secret Service by enjoining disclosure of information relating to those operations and by discouraging revelations by others".[21] This approach of the majority was also adopted by Brennan J.[22]

The characterisation of the United Kingdom Government's case as involving, in reality, only one claim was crucial to the decision arrived at by the High Court. Their Honours clearly decided that, however couched, the United Kingdom Government was not seeking to enforce personal rights against Wright, but was rather attempting to enforce some kind of broader claim. This approach removed the need for the High Court to define the exact nature of the relationship between Wright and the United Kingdom Government, as well as bringing to the fore the common law rule that a court should not enforce a penal, public or revenue law of a foreign government.

This is in sharp contrast to the decision at first instance, in which Powell J devoted a considerable portion of his reported judgment to defining the relationship between Wright and the United

19. Ibid, 195.
20. Supra n 3, 347.
21. Ibid, 350.
22. Ibid, 351.

Kingdom Government; and only five paragraphs to the principle of the non-enforcement of foreign penal, public or revenue laws, before deciding it had no application to this case.

Having concluded that the United Kingdom Government was attempting to enforce a non-private right against Wright the majority of the High Court referred to the common law rule of non-enforcement of foreign penal, public or revenue laws and noted that it is "sometimes described as a rule of public international law, and, at other times as one of private international law".[23] Their Honours accepted that the rule applied to deny the enforcement of foreign penal laws, and then considered the rule's application to foreign public laws. Their Honours firstly stated that the expression "public laws" had no "accepted meaning in our law".[24] Rather, the terms "public interests" or "governmental interests" were preferred as they signified that the rule applied to claims which sought to enforce the interests of foreign governments arising out of the exercise of powers which were peculiar to government.[25] As stated above, their Honours by referring to the unenforceability of foreign governmental interests were not just expanding the common law rule beyond the non-enforceability of foreign penal and revenue laws, but were in fact stating the underlying principle which supported the previously established common law rule.

In this regard the High Court developed Lord Denning MR's judgment in *Attorney-General for New Zealand v Ortiz*.[26] There, his Lordship had indicated that foreign laws which involve an exercise by a foreign government of sovereignty outside its territory would not be enforced by a forum court.[27] Hence his Lordship indicated the type of laws which would not be enforced rather than enumerating strict categories.

The majority of the High Court stated a rule which was very similar to that stated in *Dicey & Morris*, namely, that "the prohibitions on the enforcement of penal and revenue laws are examples of a wider principle that a State cannot enforce its public law or

23. Ibid, 347.
24. Ibid, 348
25. Ibid.
26. Supra n 5.
27. Ibid, 21.

its political or prerogative rights".[28]

Brennan J, rather than stating a broad principle as the majority had done, founded his decision on the narrower ground that "an Australian Court should refuse to enforce an obligation of confidence in an action brought for the purpose of protecting the intelligence secrets and confidential political information of a foreign government".[29] His Honour then set out, and differentiated between, two bases upon which a court might refuse to enforce such an obligation of confidence. The first basis was that although an obligation of confidence was created by the law of the foreign government, it would be against the public policy of the forum state to enforce the obligation. The second basis was that the Court denied "the capacity of the foreign law to govern the transaction which gives rise to the claimed obligation".[30] In this instance his Honour held that the first basis, and not the second, was relevant to the claims of the United Kingdom Government.

The facts of the *Spycatcher* case were clearly within the narrow principle stated by Brennan J, which, he said, was grounded in public policy. His Honour then embarked on an exercise, after the event, to justify why the stated principle reflected public policy. A similar exercise was undertaken by the majority in its judgment as to why its newly formulated principle was correct.

The one concern which lay behind the two principles propounded by the High Court was that the Court should not have the potential to embarass the Executive in its international relations. Pursuant to this, *Buchanan v McVey*,[31] in which Kingsmill-Moore J had said that the only safe course for courts to adopt was the universal rejection of all foreign governmental claims, was cited with approval in both judgments. Kingsmill-Moore J had supported this by saying that courts were not equipped to select which claims should be enforced and any attempt so to decide would inevitably involve the relevant court making "an incursion into political fields with grave risks of embarrasing the executive in its foreign relations".[32]

28. Supra n 8, 106.
29. Supra n 3, 351.
30. Ibid, 351-2.
31. [1954] Ir R 89 (noted at [1955] AC 516).
32. As cited in (1988) 62 ALJR 344, 349. It is interesting to note that the House of Lords in *Williams and Humbert* (supra n 7, 433, 440) viewed this decision narrowly as being one concerning a claim by a foreign government to enforce a revenue law. The High Court took a somewhat wider view of the scope of this case.

The majority added that such risks were particularly acute when the foreign state's claim arose out of powers peculiar to government exercised by that foreign state in the pursuit of its national security.

The majority then tested its approach by setting up the following hypothesis. The majority stated that should the Australian Government have made a claim similar to that made by the United Kingdom Government, it would have been tested against the criterion of public policy to see if public policy favoured publication or the enforcement of the confidence. If this approach was adopted in relation to a like claim in an Australian court by a foreign state, rather than the approach actually propounded by the majority, then the majority stated that the foreign claim would have to satisfy the Australian public policy test. According to the majority this could lead the Court to invidious comparisons between the public policy of Australia and the foreign state. The potential for such comparisons was identified as inevitably involving "a real danger of embarrassment to Australia in its relationship with that State".[33]

A question which arises is why the Court should be in an invidious position of comparing the Australian public interest with the public interest of the foreign state at this stage. Why should the Court be considering the public policy of the foreign state at all at the point of deciding whether or not to hear the case? Surely in deciding whether to hear the foreign claim the Court should consider only the public interest of Australia. If it appeared that the Australian Executive was not concerned about the Court embarrassing it, or if the Executive considered that it was in the public interest for the merits of the foreign claim to be *heard* by an Australian court, then why should the case not be heard? Where would be the potential for the Court to be placed in an invidious position at this stage of the proceedings?

Brennan J was also concerned that if Australian courts did not universally refuse to enforce an obligation of confidence said to be owed to a foreign government, the Australian Executive could be embarrassed internationally. The risk of such embarrassment was against Australia's public policy and this then was the basis of not

33. Supra n 3, 349.

enforcing the United Kingdom Government's claim.

Leaving this issue for the moment, the judgments then dealt with evidence given by the Australian Executive, through the Secretary of the Department of Prime Minister and Cabinet, that it was in Australia's interests that the publication of *Spycatcher* in Australia be restrained. Given that the judgments were at their core concerned with protecting the Executive and so Australia's public interest, it might have been thought that this evidence could prove a stumbling block to the reasoning of the High Court. After all, if the Executive was not concerned about being embarrassed or the impact on Australia's foreign relations by supporting the United Kingdom government's claim, why should the High Court be?

This was very much the approach adopted by Street CJ in the New South Wales Court of Appeal. Street CJ, the only judge of the eleven Australian judges to hear the case who found for the United Kingdom Government, after an extensive analysis of principle and history, concluded that "it lies within the authority of the local sovereign, within any constraints of internal laws operative in the local country, to decide on an ad hoc basis the extent of the assistance to be rendered to the foreign sovereign".[34] His Honour said that such assistance may go as far as the local sovereign "lifting the jurisdictional fetter on the local courts"[35] and thereby allowing the enforcement of the claim of the foreign sovereign. This statement of principle by Street CJ had within it the qualification that the local sovereign had to act within the constraints of its own laws in deciding whether to support the foreign government or not. This qualification reflected an earlier statement of Street CJ that "the only internal or local law fettering the Australian Government in this regard is the need to submit its executive support for the United Kingdom Government's claim to being tested by reference to Australian public interest".[36] Street CJ's principle could then be seen as being consistent with the approach taken by the High Court to claims made by the Australian Executive as set out in *Sankey v Whitlam*[37] and the cases which followed this decision.[38] This ap-

34. Supra n 14, 122.
35. Ibid.
36. Ibid.
37. (1978) 142 CLR 1.
38. Such as *Alister v R* (1984) 154 CLR 404.

proach, broadly, was to evaluate the Executive's public interest claim against other public policy considerations and then for the Court to reach an independent decision on whether the Executive's claim should be upheld.

The High Court was, however, unmoved by the Australian Executive's claim that the publication of *Spycatcher* was not in the interests of Australia. Brennan J in his judgment said that the court was "unfitted" to decide whether "Australian security and foreign relations are to be served by permitting or prohibiting disclosure".[39] One might wonder why Brennan J was reticent here when the Court has on a number of occasions adjudicated on claims made by the Executive in respect of national security. An example of this may be found in his Honour's own judgment in *Church of Scientology v Woodward* where speaking of ASIO's claim that its conduct was within Australia's security interests, he said "[t]he court is not bound by the Organisation's opinion as to what constitutes security or what is relevant to it ... It is sufficient to say that the difficulties inherent in questions of national security do not affect the justiciability of the issues".[40] Further, in Brennan J's view in the *Spycatcher* case if the Court did not assess for itself Australia's security and foreign relations then the Court could either accept, without question, the views of the Australian Executive or choose to ignore the claim by the foreign government completely. This conclusion again seems contrary to recent High Court decisions, an example of which is the decision of Brennan J himself in *Alister v R*. In that case his Honour criticized the trial judge for accepting, without further testing, a claim made in an affidavit of the Attorney-General. Rather, his Honour said the trial judge should have undertaken for himself a balancing function to see if "the public interest [would] be best served and least injured in the circumstances ... by compelling or by refusing to compel disclosure to the Court of the information".[41]

The majority of the High Court expressly rejected Street CJ's approach on two grounds. The first was that it allowed the Executive

39. Supra n 3, 352.
40. (1982) 154 CLR 25, 75.
41. (1984) 154 CLR 404, 453.

to determine who was to have effective access to the Courts which, the majority said, was unacceptable. This, of course, ignores the qualification in Street CJ's principle that the decision of the Executive was subject to the evaluation and determination of the Court itself. The second ground was that "the possibility of detriment to Australia's national security interests cannot transmogrify the character of the claims".[42] This echoed Kirby P's statement that the affidavit of the Secretary of the Department of Prime Minister and Cabinet could not alter the character of the United Kingdom government's claim.[43]

Another rejection of Street CJ's approach can be found in the judgment of Kirby P. His Honour found, even accepting in its entirety the affidavit of the Secretary of the Department of Prime Minister and Cabinet, that the Court's jurisdiction was not affected by this evidence. Having found that the claim of the United Kingdom government was unenforceable, Kirby P said "[t]he Court has no jurisdiction to enforce it. It would be a remarkable innovation of lawmaking if jurisdiction could be conferred, where it does not otherwise exist, by nothing more than an affidavit by a public official", and "[t]o unlock the door of the Court's jurisdiction ... a key fashioned by a rather more formal process, must be produced".[44]

Leaving aside the question as to whether it is correct to say that the forum court has no jurisdiction to consider the merits,[45] Kirby P's comments seem to be self-serving. It was a common law rule, adopted by the courts, which rendered the United Kingdom claim unenforceable in the first place by denying the court jurisdiction to entertain it. It is a rule, as the majority of the High Court explained, based on public policy. If indeed it can be demonstrated that in a specific case public policy favoured the enforcement of a foreign claim, then surely the court could adopt a different jurisdictional rule also based on public policy without the need for legisla-

42. Supra n 3, 351.
43. Supra n 14, 145.
44. Ibid, 179-180.
45. *Dicey & Morris* express this differently by saying that "it is the foreign State which has no international jurisdiction to enforce its law abroad, and the [forum] court will not exercise its own jurisdiction in aid of an excess of jurisdiction by the foreign State". Supra n 8, 102.

tion. After all the present common law rule is without a legislative basis.

Both judgments of the High Court and that of Kirby P suggested that the proper approach would have been the introduction of legislation to allow the United Kingdom access to a local court to enforce the obligation of confidence against Wright. A possible consequence of this is that a foreign government, aware that Australian courts will reject out of hand its governmental claim, will in future approach the Australian Executive for support for its claim via appropriate legislation. Presumably, the Australian Executive would then decide whether or not to support the foreign governmental claim with all of the risks to its foreign relations with that State which the High Court assiduously sought to avoid. On the other hand, had the High Court adopted Street CJ's approach the Australian Executive would still be approached by the relevant foreign government for the kind of support that was given to the United Kingdom in the *Spycatcher* case. The Australian Executive's decision would, of course, then carry the same risks as any decision it made with respect to the introduction of supporting legislation as set out above, the important difference being, with the approach set down in *Spycatcher*, that any embarrassment caused to the Executive in its international relations will be at the hand of the Executive itself. If Street CJ's approach had been adopted, any claim by the Australian Executive in support of a foreign government's claim would be scrutinised against public policy and then either accepted or rejected by the court. Under this approach the Australian Executive could never guarantee that the merits of the foreign claim would be considered. This is not the case if the Australian Sovereign legislates to allow the foreign claim to be heard.

Conclusion

The *Spycatcher* decision sets down the principle that a certain class of claims by foreign governments, as defined in the majority's judgment, will not be considered by Australian courts. The bald decision of the Court may be welcomed as a clarification of the law in this area, assuming that the majority's principle proves easier to apply than the previous formulation that actions to enforce public, penal and revenue laws are not to be heard by a forum court.

However, when the Court departed from the statement of the

principle, and either attempted to explain the reasoning behind the principle or moved to consider the evidence from the Australian Executive, its judgments seem questionable. This is because the Court in these areas departed, without explanation, from approaches which had been accepted by previous High Court cases over the last decade. In the light of this, it is perhaps appropriate to conclude with the following consideration.

The Australian Executive went further than merely saying that the claim of the United Kingdom Government should be heard, and indicated that Australia's public interest would be positively served by the claim being upheld. Clearly the Australian Executive signalled to the Court that Australia's public interest would not be damaged by the claim being heard; the Court, as set out above, decided differently.

However, in *A v Hayden [No 2]*[46] four of the judges[47] had indicated that should the Australian Executive decide that something would not damage the public interest then a private litigant could not assert that the public interest was at risk. Murphy J expressed this most clearly, saying "where the executive disclaims an adverse effect on national security it is difficult to imagine how a court could properly entertain the claim by another".[48]

In the *Spycatcher* case the High Court departed from this view, without explanation, and concluded that Australia's interests dictated that the claim of the United Kingdom Government should not be heard. The central consideration in deciding this was the Court's concern for protecting the Executive. By ignoring the evidence from the Executive the Court ended up affording protection to the Executive which had neither asked for nor wanted it. It is perhaps imaginable that the Executive was not pleased at being protected from itself in this manner.

46. (1984) 156 CLR 532.
47. Ibid, 549 Gibbs CJ, 564 Murphy J, 576-578 Wilson and Dawson JJ.
48. Ibid, 564.