**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

**IN THE CAUSE**

**Her Majesty's Attorney General (Appellant) v.**

**Punch Limited and another (Respondents)**

**[2002] UKHL 50**

**LORD NICHOLLS OF BIRKENHEAD**

My Lords,

1. This appeal concerns the interaction of two principles of fundamental importance in this country: freedom of expression, and the rule of law. On 26 July 2000 the magazine 'Punch' published an article written by Mr David Shayler, a former member of the Security Service, under the heading 'MI5 could have stopped the bomb going off'. The Attorney General brought contempt of court proceedings against the magazine's publisher, Punch Ltd, and its editor, Mr James Steen. Silber J held that publication of this article was a contempt of court. He fined the company £20,000 and Mr Steen £5,000. The company did not appeal, but Mr Steen did. The majority of the Court of Appeal, Lord Phillips of Worth Matravers MR and Longmore LJ, considered there had been no contempt. In the minority, Simon Brown LJ, would have upheld the judgment of Silber J. So, by a majority of two to one, the decision of Silber J was set aside. The Attorney General has now appealed to your Lordships' House.

2. Contempt of court is the established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration of justice. It is an essential adjunct of the rule of law. Interference with the administration of justice can take many forms. In civil proceedings one obvious form is a wilful failure by a party to the proceedings to comply with a court order made against him. By such a breach a party may frustrate, to greater or lesser extent, the purpose the court sought to achieve in making the order against him. That is not the form of contempt in question in this case. In 1997 the court made an order against Mr Shayler, restraining him from disclosing information about the Security Service. But neither Punch Ltd nor Mr Steen was a party to those proceedings. No order was made against either of them.

3. The form of contempt asserted by the Attorney General in the present case is different, although closely related. Sometimes the purpose a court seeks to achieve in making an order against a party to proceedings may be deliberately impeded or prejudiced by the conduct of a third party. This may take more than one form. The third party may be assisting, that is, aiding and abetting, a breach of the order by the person against whom the order was made. Then he is an accessory to the breach of the order. That also is not the case presented by the Attorney General against Mr Steen, although the case could have been framed in this way. Punch Ltd and Mr Steen furthered Mr Shayler's breaches of the order made against him by publishing an article he wrote specially for them. However, the Attorney General has not advanced a case against Mr Steen or the company on this footing.

4. Aiding and abetting a breach of the order by the person specifically restrained by the order is not always an essential ingredient of 'third party' contempt. The purpose of a court in making an order may be deliberately frustrated by a third party even though he is acting independently of the party against whom the order was made. An interlocutory order for the non-disclosure of information is the paradigm example of the type of order where this principle is in point. The *Spycatcher* litigation is the best known recent instance of this. It is a contempt of court by a third party, with the intention of impeding or prejudicing the administration of justice by the court in an action between two other parties, himself to do the acts which the injunction restrains the defendant in that action from committing if the acts done have some significant and adverse affect on the administration of justice in that action: see Lord Brandon of Oakbrook in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 203D, 206G-H, and, for the latter part, Lord Bingham of Cornhill CJ in *Attorney General v Newspaper Publishing plc* [1997] 1 WLR 927, 936. Lord Phillips MR neatly identified the rationale of this form of contempt, at [2001] QB 1028, 1055, paragraph 87:

> "The contempt is committed not because the third party is in breach of the order - the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted."

5. I shall have to consider later what is meant by 'the purpose of the judge in making the order' and like expressions. In the Court of Appeal Lord Phillips MR's approach on this point resulted in his giving contempt of court in this context a narrower scope than Lord Brandon.

6. The Attorney General's claim in the present case is of this character. The Attorney General's case against Punch Ltd and Mr Steen is presented solely on the basis that they deliberately impeded or prejudiced the purpose the court sought to achieve in making its non-disclosure order against Mr Shayler.

*The history*

7. I must first summarise the events leading up to these contempt proceedings. A fuller narrative can be found in the judgment of Lord Phillips MR, at [2001] EWCA Civ 403, [2001] QB 1028, 1033-1036, paragraphs 2-19. David Shayler served as an officer with the Security Service, colloquially known as MI5, from November 1991 until he resigned in October 1996. His terms of service included extensive prohibitions on publishing information about the Security Service. When Mr Shayler left he took with him copies of many confidential documents containing sensitive information relating to intelligence activities of MI5. According to the Attorney General, Mr Shayler then disclosed some of this material to a newspaper publisher, Associated Newspapers Ltd. Articles written by Mr Shayler, or based on information provided by him, were published in the 'Mail on Sunday' and the 'Evening Standard' in August 1997.

8. In expectation of publication of a further article the Attorney General intervened and brought civil proceedings against Mr Shayler and Associated Newspapers. On 4 September 1997 Hooper J granted an interlocutory injunction against Mr Shayler. By this order, expressed to continue until the trial of the action or further order meanwhile, Mr Shayler was restrained from disclosing to any newspaper or anyone else:

> "any information obtained by him in the course of or by virtue of his employment in and position as a member of the Security Service (whether presented as fact or fiction) which

> relates to or which may be construed as relating to the Security Service or its membership or activities or to security or intelligence activities generally."

9. Two provisos were attached to the order. First, the order did not apply to any information in respect of which the Attorney General stated in writing that the information is not information whose publication the Crown seeks to restrain. Second, the order did not preclude repetition of information disclosed in the 'Mail on Sunday' on 24 August 1997.

10. A similar order, although not in precisely identical terms, was made against Associated Newspapers. Neither Mr Shayler nor Associated Newspapers objected to the making of these orders.

*Mr Shayler and Punch*

11. Mr Shayler first wrote for 'Punch' in February 1999. Mr Steen was aware of the terms of the interlocutory non-disclosure orders made against Mr Shayler. Indeed, he had obtained copies of the injunctions from the Treasury Solicitor. This did not deter him. He still wished to employ Mr Shayler to write about the Security Service. He considered Mr Shayler would be capable of writing an interesting column in a journalistic style. Mr Steen intended that the column would criticise the performance of the security services, expose their alleged errors and inefficiencies, and show that their alleged incompetence has led to serious and sometimes tragic results. Mr Steen considered that Mr Shayler's standing, in the eyes of readers, was that he had been 'on the inside', that he knew what he was talking about, and that he was able to comment on security and related matters.

12. Mr Shayler started writing a regular fortnightly column in September 1999. Following his eighth piece in the magazine, the Treasury Solicitor, acting on behalf of the Attorney General, wrote to Mr Steen in December 1999. He reminded Mr Steen of the existence of the orders. He said he had been instructed that some of the material in the articles was damaging to national security.

13. A lively correspondence ensued. The Treasury Solicitor urged Mr Steen 'to take advantage of the proviso to the injunction allowing for the Crown to confirm that it does not object to publication of certain material'. Mr Steen responded that editorial steps were taken to ensure the injunctions were not breached. No material published could remotely be considered to threaten national security. He accused the Treasury Solicitor of attempting to force 'Punch' to submit to government censorship. The correspondence ended in January 2000 with a letter from the Treasury Solicitor stating that the purpose of the injunctions was not to prevent criticism of the Security Service but to prevent damage to national security.

*The offending magazine article*

14. On Friday 21 July 2000 Mr Steen received from Mr Shayler a draft article, with a view to publication on Wednesday of the following week. The draft dealt with the Bishopsgate bomb in 1993 and the death of WPC Yvonne Fletcher outside the Libyan Embassy in 1984. It was the published version of this article which led to these contempt proceedings.

15. The draft article identified the sources of two pieces of intelligence. This was a matter of concern to Mr Steen. So he got in touch with the Treasury Solicitor. At about 1 pm on Friday 21 July he faxed a copy of the article to the Treasury Solicitor, for consideration by the Attorney General. Mr Steen was anxious to obtain a speedy response. Following some telephone

conversations the Treasury Solicitor faxed a letter to Mr Steen at midday on Monday 24 July. The Treasury Solicitor stated that his clients were satisfied that publication of the article in its existing form would damage national security. The text had been scrutinised over the weekend, and scrutiny was continuing. This involved consultation with other government departments. Comments on the text would be unlikely before close of business on that day. Mr Steen was asked to take no further steps meanwhile towards publication of the article.

16. Mr Steen did not respond to this faxed letter. However, having considered the matter with Mr Shayler, Mr Steen made some amendments to the draft article by deleting certain passages.

17. Shortly after 1 pm on the following day, Tuesday 25 July, the Treasury Solicitor faxed the amendments his clients wished to see made. If these amendments were made the Attorney General would agree to the publication of the article. He would consider any amended version Mr Steen might wish to put forward.

18. Mr Steen did not answer this fax. By now the article had been finalised and sent to the printers.

19. On the following day, Wednesday 26 July, the next issue of 'Punch' was published. The cover consisted of a slightly amended copy of the Treasury Solicitor's letter of 24 July, with the heading 'Inside whistleblower David Shayler tells the story MI5 doesn't want you to read'. Inside was Mr Shayler's article. The article was a little different from the draft version sent to the Treasury Solicitor, but it did not reflect the amendments sought by the Treasury Solicitor on 25 July. The article contained information whose publication had been prohibited by the non-disclosure orders. It contained three pieces of information not previously published. The first two concerned the two suspects connected with the Bishopsgate bombing. The third related to the way the Security Service surveillance operated.

*The contempt proceedings: the judge's decision*

20. For the defendant company or Mr Steen to be guilty of contempt of court, the Attorney General must prove that they did the relevant act (actus reus) with the necessary intent (mens rea). In a careful and thorough judgment Silber J concluded, in paragraph 62, that the actus reus had been proved: the defendants published the article which was in breach of the terms of the injunctions, with the result that the purpose of the court in making those injunctions was subverted and, in consequence, there has been some significant and adverse effect on the administration of justice. The judge held that the purpose of the court in granting the injunctions was not to protect national security but to ensure that until trial there should be no disclosure of information obtained by Mr Shayler in his employment: see paragraph 52.

21. The judge held that the Attorney General also succeeded in proving the necessary mens rea. Mr Steen is an intelligent and articulate journalist. He knew of the terms of the injunctions. He knew also that publication of the article was a breach of the injunctions, and he intended to act in breach of them: paragraph 75. He intended by publication to impede or prejudice the administration of justice by thwarting or undermining the intended effect of the injunctions: paragraph 78.

*The Court of Appeal*

22. In reaching the contrary overall conclusion Lord Phillips MR characterised the court's purpose in granting the injunctions differently from the judge. Lord Phillips said that the correct

approach was to proceed on the basis that Hooper J's purpose in granting the injunctions was 'to prevent the disclosure of any matter that arguably risked harming the national interest': paragraph 100. He held that republication of material already in the public domain did not constitute the actus reus of contempt but that publication of the three items of previously unpublished material did. Publication of this material defeated the purpose of the injunction: paragraph 114.

23. As to mens rea, Lord Phillips held that in order to establish contempt the Attorney General needed to demonstrate that Mr Steen knew publication would interfere with the course of justice by defeating the purpose underlying the injunctions. That the Attorney General had failed to do. The evidence did not lay the ground for a finding that Mr Steen must have appreciated that the three items of previously unpublished information had not been published before and that publication of them might arguably be a threat to national security: see paragraphs 115-118.

24. Longmore LJ, at paragraphs 137-138, expressed the purpose of the injunctions in wider terms than Lord Phillips. He concluded that the purpose was to prevent publication before trial of *any* information derived from Mr Shayler not already in the public domain. So the actus reus of contempt was committed. But the necessary mens rea was not established. Mr Steen might have thought that the purpose of the order was to restrain only the publication of material dangerous to national security. Mr Steen contended that he had no intention to publish any such information, and the contrary was not established.

25. Simon Brown LJ, dissenting, agreed with Lord Phillips' conclusion about the purpose of the injunctions: paragraph 129. But, even so, the necessary mens rea was established. It might well be that Mr Steen had no intention of endangering national security and that he did not think he was doing so. But he knew he was not qualified to make that kind of judgment. He cannot have failed to appreciate that it was for this very reason there was a bar on publication pending trial by a judge. He intended to take upon himself the responsibility for determining whether national security was risked, and thereby he thwarted the court's intention: paragraph 131.

26. On this appeal Mr Steen accepts that in publishing the offending article he committed the actus reus of contempt. The sole issue on this appeal is whether his intention in acting as he did constituted the intention requisite for contempt of court in this case.

*Freedom of expression, national security and the rule of law*

27. This appeal concerns a restraint on the freedom of expression. Freedom of expression includes, importantly, the right to impart information without interference by public authority, to use the language of article 10(1) of the European Convention on Human Rights. Restraints on the freedom of expression are acceptable only to the extent they are necessary and justified by compelling reasons. The need for the restraint must be convincingly established. Restraints on the freedom of the press call for particularly rigorous scrutiny.

28. This appeal also concerns protection of national security. National security is one of the reasons, set out in the familiar list in article 10(2) of the Convention, which may justify a restraint on freedom of expression. The interests of national security may furnish a compelling reason for preventing disclosure of information about the work of the Security Service.

29. But, let it also be said at once, the Security Service is not entitled to immunity from criticism. In principle the public has a right to know of incompetence in the Security Service as in any other government department. Here, as elsewhere where questions arise about the

freedom of expression, the law has to strike a balance. On the one hand, there is the need to protect the nation's security. On the other hand, there is a need to ensure that the activities of the Security Service are not screened unnecessarily from the healthy light of publicity. In striking this balance the seriousness of the risk to national security and the foreseeable gravity of the consequences if disclosure occurs, and the seriousness of the alleged incompetence and errors sought to be disclosed, are among the matters to be taken into account.

30. The rule of law requires that the decision on where this balance lies in any case should be made by the court as an independent and impartial tribunal established by law. Clearly, if a decision on where the balance lies is to be effective, the court must be able to prevent the information being disclosed in the period which will necessarily elapse before the court is in a position to reach an informed decision after giving a fair hearing to both parties to the dispute. Once public disclosure occurs confidentiality is lost for ever. If disclosure were permitted to occur in advance of the trial serious and irreparable damage could be done to national security.

31. Thus, depending on all the circumstances of the case, a temporary injunction for a reasonable period pending the trial may be necessary for the protection of national security. Even a temporary restriction on the exercise of freedom of expression is not to be imposed lightly. News is a perishable commodity. Public and media interest in topical issues fades. But, when granted, such an injunction becomes an integral feature of the due administration of justice in the proceedings in which it was made.

32. Equally clearly, if a temporary injunction is to be effective the law must be able to prescribe appropriate penalties where a person deliberately sets the injunction at nought. Without sanctions an injunction would be a paper tiger. Sanctions are necessary to maintain the rule of law; in the language of the Convention, to maintain the authority of the judiciary. If the rule of law is to be meaningful, the decision of the court on how, and to what extent, the status quo should be maintained pending the trial must be respected. It must be respected by third parties as well as the parties to the proceedings.

*The terms of Hooper J's order*

33. I come now to one of the difficulties in the present case. The Attorney General has stated that his purpose in seeking an interlocutory injunction against Mr Shayler was not to stifle criticism of the security service. His purpose was to protect national security. But whether disclosure of any particular information would pose a risk of damaging national security is a matter of dispute between the Attorney General and Mr Shayler, a dispute which can only be resolved at the trial of the action.

34. This situation gives rise to a practical difficulty in the formulation of an interlocutory injunction. It is a difficulty of a type familiar enough in the drafting of many forms of interlocutory injunctions. What is needed, so far as this can be achieved, is a form of words which is apt to keep confidential until the trial information whose disclosure arguably poses a risk of damaging national security but which is not wider in its scope. In principle, an order having a wider scope is not sustainable as a necessary restriction. A restraint on the publication of manifestly innocuous material is, in principle, excessive. The order of Hooper J, for instance, is capable of catching information which is plainly not confidential. In the course of oral argument my noble and learned friend Lord Steyn instanced information about the quality of food served in the staff cafeteria of the Security Service.

35. Here arises the practical difficulty of devising a suitable form of words. An interlocutory

injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. An order expressed to restrain publication of 'confidential information' or 'information whose disclosure risks damaging national security' would be undesirable for this reason.

36. For the same reason an order restraining publication of material whose disclosure '*arguably* risks damaging national security', or words to the like effect, would not be satisfactory. Its ambit would not be sufficiently certain. An injunction against Mr Shayler drawn in such terms would clearly exclude from its scope some information whose disclosure would be harmless. But such a formula would still not produce a clear boundary line. Including the word 'arguably' in the injunction would not render clear a boundary which otherwise would lack certainty in its application. There may well be matters where it would not be readily obvious whether disclosure would or would not 'arguably' risk damaging national security. There may well be matters whose disclosure would attract diametrically opposite views, the Attorney General contending that disclosure would risk damaging national security and Mr Shayler contending that disclosure would not even arguably pose such a risk. An interlocutory order ought not to be drawn in terms where it is apparent that such a dispute may arise over its scope.

37. I shall return to this question, and its practical implications, at a later stage. For the moment it is sufficient to note that Hooper J's order, set out above, avoided this difficulty by being expressed in clear, if wide, terms. The scope of the order was clear.

*The purpose of Hooper J's order*

38. Before considering what was the 'purpose' of Hooper J's order it is necessary to be clear on what this expression, and cognate expressions, mean in this context.

39. On this two points seem to me clear. Fundamental to the concept of contempt in this context is the intentional impedance or prejudice of the purpose of the *court*. The underlying purpose of the Attorney General, as the plaintiff in the proceedings against Mr Shayler, in seeking the order against Mr Shayler is nothing to the point. Lord Oliver of Aylmerton adverted to this distinction in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223:

> "Purpose", in this context, refers, of course, not to the litigant's purpose in obtaining the order or in fighting the action but to the purpose which, in seeking to administer justice between the parties in the particular litigation of which it had become seized, the court was intending to fulfil."

40. The second point is that the purpose of the court in making an interlocutory order means no more than the effect its terms show it was intended to have between the parties to the action in which it was made. Normally there will be no difficulty in gleaning this purpose from a reading of the order. The purpose of the order and its terms are co-extensive. It is right this should be so. If third parties are bound to respect the purpose of an order made in an action between other persons, it is essential they should be able to perceive this purpose readily from reading the order.

41. In the Court of Appeal Lord Phillips MR expressed a different view. He said that the effect and primary purpose of the third party contempt jurisdiction are to render it a criminal

offence for any third party who is aware of the injunction to commit 'the *potential* wrong which the injunction is designed to prevent'. That, he said, is surely the most serious aspect of the contempt, and the fact that it will at the same time render the litigation pointless is a subsidiary consideration. He rejected the principle as summarised by Lord Brandon in the passage I have mentioned. A principle of this width, he said would run foul of the established principle of English law that an injunction does not bind a third party: see paragraphs 84-87.

42. From a reading of his judgment as a whole it is clear that Lord Phillips was troubled by the width of the interlocutory order which led to these contempt proceedings. I share his concern. But I fear that this disquiet led Lord Phillips astray on the basic principles of this jurisdiction.

43. When proceedings come before a court the plaintiff typically asserts that he has a legal right which has been or is about to be infringed by the defendant. The claim having come before the court, it is then for the court, not the parties to the proceedings or third parties, to determine the way justice is best administered in the proceedings. It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the court's determination on what interim protection is needed and is appropriate. Third parties are required to respect this determination, as expressed in the court's order. The reason why the court grants interim protection is to protect the plaintiff's asserted right. But the manner in which this protection is afforded depends upon the terms of the interlocutory injunction. The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done. Third parties are in contempt of court if they wilfully interfere with the administration of justice by thwarting the achievement of *this* purpose in *those* proceedings.

44. This is so, even if in the particular case, the injunction is drawn in seemingly over-wide terms. The remedy of the third party whose conduct is affected by the order is to apply to the court for the order to be varied. Furthermore, there will be no contempt unless the act done has some significant and adverse effect on the administration of justice in the proceedings. This tempers the rigour of the principle.

45. Departure from this straightforward approach runs into serious practical difficulties. If, in this context, the purpose of the court in granting an interlocutory injunction means something other than the effect its terms show it was intended to have between the parties, how is a third party to know what it is? How is a third party to know what is the purpose, which he must respect, if it is something other than the purpose evident on the face of the order? Uncertainty is bound to follow, with consequential difficulties in proving that a third party knowingly impeded or prejudiced the purpose the court sought to achieve when granting the injunction. I see no justification or need to go down this route, which is not supported by authority.

46. This discussion does, of course, underline how important it is for courts to seek to ensure that injunctions are not drawn in wider terms than necessary. This is of particular importance when the terms of the injunction may, in practice, affect the conduct of third parties.

47. On this basis I turn to consider the purpose of Hooper J's order. In my view, not only was the scope of the order clear, so also was its purpose; clear, indeed, beyond a peradventure. Self-evidently, the purpose of the judge in making the order was to preserve the confidentiality of the

information *specified in the order* pending the trial so as to enable the court at trial to adjudicate effectively on the disputed issues of confidentiality arising in the action. This is apparent from merely reading the order. The Attorney General's claim for a permanent injunction might be defeated in advance of the trial if, before the trial, Mr Shayler was at liberty to put this information into the public domain. In other words, but to the same effect, the purpose of the court in making the order was to ensure that the court's decision on the claims in the proceedings should not be pre-empted by Mr Shayler disclosing any of the information specified in the order before the trial.

48. This being the purpose of the injunction, the actus reus of contempt lies in thwarting this purpose by destruction of the confidentiality of the material which it was the purpose of the injunction to preserve.

49. As already stated, Mr Steen accepts that the publication of the offending magazine article constituted the actus reus of contempt. He is right to do so. He did an act which Hooper J's order prohibited Mr Shayler from doing. Publication of the information by 'Punch' was destructive in part of the purpose of Hooper J's order.

50. Although Mr Steen seems not to accept this, this is not a case where the conduct was inconsistent with the court's order in only a technical or trivial way. Disclosure of the three pieces of information mentioned above, not previously published, has had a significant and adverse effect on the trial of the action against Mr Shayler. Contrary to the court's object in granting the interlocutory injunction, the Attorney General's claim to keep these pieces of information confidential has now been thwarted in advance of the trial.

*Mens rea: Mr Steen's intention*

51. Before your Lordships' House the argument presented on behalf of Mr Steen was that it matters not whether the purpose of Hooper J's order was as set out above or as stated by Lord Phillips MR. Either way, the Attorney General failed to prove that Mr Steen possessed the necessary mens rea. Mr Steen's evidence was that he thought the purpose of the order was to prevent damage to national security, it was not his intention to damage national security in any way, and he did not consider he was doing so. Before Silber J the Attorney General did not seek to challenge Mr Steen's evidence that when he published the article he did not believe it contained any damaging disclosures. Accordingly, so the argument runs, the Attorney General did not establish that Mr Steen intended to thwart the court's purpose in making the interlocutory injunction.

52. I am not impressed by this argument. The facts speak for themselves. Mr Steen is an intelligent man and experienced journalist. He knew that the action against Mr Shayler raised confidentiality issues relating wholly or primarily to national security. He must, inevitably, have appreciated that by publishing the article he was doing precisely what the order was intended to prevent, namely, pre-empting the court's decision on these confidentiality issues. That is knowing interference with the administration of justice.

53. I do not see how on this issue, which is the relevant issue, the admitted or proved facts are susceptible of any other interpretation. The judge was entitled so to conclude, even though these conclusions were not put in so many words to Mr Steen in the course of his cross-examination. No credible alternative conclusion regarding Mr Steen's relevant beliefs or intentions has been advanced on his behalf. Mr Steen may have thought the order was intended to protect national security, and that publication would not damage national security. He may have had, as he says,

no intention of damaging national security. Those beliefs and intentions are not inconsistent with an intention to take it upon himself to make a decision which, as he knew, the court had reserved to itself. I have to say, however, that even on the basis of his stated beliefs and intentions Mr Steen's conduct was surprisingly irresponsible. He frankly admitted, as is obvious, that he was not qualified to assess whether disclosure of any particular information would damage national security. Despite this he proceeded to publish information whose disclosure was, as he knew, asserted by the Attorney General to be damaging to national security.

*Information in the public domain*

54. Mr Steen raised a further point, concerning republication of information already in the public domain. To this I must now turn.

55. Disclosure of information which is already fully and clearly in the public domain will not normally constitute contempt of court in the type of case now under discussion. Contempt lies in knowingly subverting the court's purpose in making its interlocutory order by doing acts having some significant and adverse effect on the administration of justice in the action in which the order is made. If the third party publishes information which is already fully and clearly in the public domain by reason of the acts of others, then the third party's act of publication does not have this effect. It does not have an adverse effect on the administration of justice in the action. The court's purpose in making its interlocutory order has, by then, already been defeated by the acts of others. This is so, whether those acts occurred before or after the court made its order.

56. In the present case Mr Steen advanced an argument that, although the three items of information already mentioned were not in the public domain, the Attorney General failed to prove that Mr Steen *knew* this was so. I cannot accept this submission. I am far from persuaded that the Attorney General is obliged to prove such knowledge in the absence of any evidence or suggestion that Mr Steen mistakenly thought the information was already public knowledge. It is not necessary, however, to express a concluded view on this in the present case. Suffice to say, when the contents of the article were under review and under discussion between the Treasury Solicitor and Mr Steen, Mr Steen did not suggest that this material, or the substance of it, was already public knowledge. Had Mr Steen believed that was the position he would surely have raised this point at that time. Having seen Mr Steen give evidence in the witness box the judge was entitled so to conclude: see paragraphs 71-72 of his judgment. This being so, the judge was entitled to draw the inference that when publishing the article Mr Steen was not acting in the mistaken belief that this information was already in the public domain.

57. In my view therefore this appeal succeeds. Silber J was right to hold that both the actus reus and mens rea were proved to the requisite high standard. I would set aside the order of the Court of Appeal and restore the order of the judge.

*Government censorship*

58. There remain two matters of general importance I must mention. Lord Phillips MR was critical of the role afforded to the Attorney General by the proviso to Hooper J's order. This, he said, subjects the press to the censorship of the Attorney General: paragraph 104.

59. I respectfully disagree. This criticism misunderstands the purpose and effect of the proviso. By including this proviso in his order the judge was not thereby passing to the Attorney General the ability to rule definitively on what the person enjoined or a third party might not publish. The injunction was granted 'until further order'. Mr Shayler or a third party whose

conduct is affected by the order was always at liberty to apply to the court for the order to be varied so as to permit disclosure of particular information. The court retained control throughout. The object of the proviso was to provide an additional facility for such persons, of which they might take advantage if they wished. It added to the rights of such persons, not detracted from them. A court order which otherwise represents a justified and proportionate restraint on freedom of expression cannot become objectionable by the inclusion of this proviso in the order. Speed is of importance to the media. The proviso sets out a simple, expeditious and inexpensive procedure which avoids the necessity of an application to the court whose outcome would not be in dispute.

60. Nevertheless, the inclusion of this proviso in the order may give the *appearance* of delegating control of what may be published to the Attorney General. This is better avoided. It is desirable, therefore, that in future this type of order, when it includes this type of proviso, should on its face make plain that the party enjoined, and anyone else whose conduct is affected by the order, has the right to apply to the court for a variation of its terms.

*The wording of this type of order*

61. The second matter I must mention, to which I have already alluded, concerns the difficulty of drafting an interlocutory order in terms which are sufficiently certain but go no wider than is necessary to restrain disclosure of information in respect of which the Attorney General has an arguable case for confidentiality. In the present case the wide terms of Hooper J's order did not operate in a disproportionately restrictive manner so far as Punch Ltd and Mr Steen were concerned. They knowingly published previously unpublished material whose disclosure was, as they knew, asserted by the Attorney General to be damaging to national security.

62. This may not always be so. In particular, an interlocutory injunction in the wide form used in the present case may well in practice have a significant 'chilling' effect on the press and the media generally, inhibiting discussion and criticism of the Security Service. Parts of the media may well be discouraged from publishing even manifestly innocuous material which falls within the literal scope of the order. A newspaper may be unwilling to approach the Attorney General, the plaintiff in the action in which the order was made. An application to the court for a variation of the order may involve delay and expense. Even less attractive is the prospect of proceeding to publish without further ado, at the risk of having to face contempt proceedings and penal sanctions. The ability to defend such proceedings, on the basis that disclosure of the material had no adverse effect on the administration of justice, will not usually afford much consolation to a journalist.

63. This is not a satisfactory state of affairs. It is to be hoped that it may be possible to devise an improved form of words for interlocutory injunctions of this type which will give the Attorney General the protection he seeks in sufficiently certain terms but without being as all embracing as the order in the present case. It is to be hoped that the drafting difficulties may be capable of being overcome, at least to some extent. This is a matter for consideration by the Attorney General in the first instance. It is also a matter judges will wish to have in mind in future when asked to make interlocutory orders in this type of case.

**LORD STEYN**

My Lords,

64. For the reasons given by my noble and learned friend Lord Nicholls of Birkenhead in his opinion I would also set aside the order of the Court of Appeal and restore the order of the judge. While I have had no difficulty in arriving at the conclusion that the appeal should succeed, I have been troubled by what seemed to me the over-wide terms of the injunction granted in the present case. I was concerned that the House ought not to give its imprimatur to such a wide wording of this type of order. Having studied Lord Nicholls' judgment, and taking into account in particular paragraphs 34-36 and paragraphs 61-63 of his judgment, my fears are allayed.

**LORD HOFFMANN**

My Lords,

65. Mr Shayler was a Crown servant in the Security Service who undertook to maintain the confidence of information which he obtained in the course of his employment. In August 1997, after leaving the Service, he wrote or provided information for newspaper articles in breach of his undertaking. On 4 September 1997, on the application of the Attorney-General, Hooper J. granted an injunction until trial or further order restraining Mr Shayler from disclosing any information obtained in the course of his employment. The order was subject to two exceptions: first, any information in respect of which the Attorney-General stated in writing that the Crown did not seek to restrain publication and secondly, the repetition of information already disclosed in one of the newspaper articles.

66. The primary effect of such an injunction is to regulate the conduct of the person against whom it is made. But it also has an indirect effect upon the conduct of third parties. In general, it is a contempt of court for anyone, whether party to the proceedings or not, deliberately to interfere with the due administration of justice. One species of such interference, identified by the House of Lords in *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, is the deliberate publication of information which the court has ordered someone else to keep confidential. Publication interferes with the administration of justice because it destroys the subject-matter of the proceedings. Once the information has been published, the court can no longer do justice between the parties by enforcing the obligation of confidentiality.

67. In the present case the respondent Mr Steen, as editor of "Punch", engaged Mr Shayler to write articles about security matters. Mr Steen was aware of the terms of the injunction, having taken the precaution of obtaining a copy from the Treasury Solicitor. After publishing several articles without seeking to avail himself of the proviso for obtaining the Attorney-General's consent, he submitted a draft to the Treasury Solicitor in July 2000. The Treasury Solicitor replied at once saying that in his opinion publication would be a breach of the injunction and damaging to national security. He said he would need more time to consult relevant departments before being able to say precisely which passages were objectionable. Mr Steen did not wait but published the article with some amendments of his own devising. On the cover of the magazine he published the Treasury Solicitor's letter with the words "Inside whistleblower David Shayler tells the story MI5 doesn't want you to read."

68. It is not disputed that the publication of the article was a breach of the injunction by Mr Shayler. It contained information obtained in the course of his employment which did not fall within either proviso. Mr Steen might well have been liable for aiding and abetting his contempt of court. But that is not the way the Attorney-General has chosen to present the case. He says that Mr Steen is personally guilty of contempt under the principle in *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 because his publication interfered with the administration of

justice. It destroyed confidentiality which it was the purpose of the injunction to protect.

69. Mr Steen accepted in evidence that he had known that the article breached the terms of the injunction. But he thought that the purpose of the injunction was to protect national security and he did not think he had published anything which could damage national security. Asked whether he was in a position to make a judgment on these matters, he agreed that he was not.

70. Silber J, in a lucid judgment to which I would pay tribute, rejected the submission that the purpose of the injunction was limited to protecting national security. No doubt that was the purpose of the Attorney-General in bringing proceedings and the underlying reason why the judge made the order. But the purpose of the order was no more nor less than to do what the order purported to do, namely to restrain the publication, pending trial or further order, of information falling within its terms and not excepted by the provisos. The order said nothing about national security. The question of whether, at a later stage, all or any of the information within the terms of the order should be subject to further restraint was left for decision by the judge at the trial. Meanwhile, the purpose of the order was to prevent this exercise from becoming pointless, as to all or part, by reason of prior publication.

71. The judge accordingly found that Mr Steen had published information which materially frustrated the purpose of the court's order and that he had acted intentionally because he knew that the purpose of the injunction was to prevent publication of (inter alia) the very information which he published. He held him to be in contempt.

72. The majority of the Court of Appeal allowed the appeal, substantially because it took a different view of what was meant by the purpose of the injunction and considered that the Attorney-General had failed to prove that Mr Steen intended to frustrate it. Lord Phillips of Worth Matravers MR said ([2001] QB 1028, 1058, para 100) said that the purpose of the Attorney-General in obtaining the injunctions was "to prevent publication of material that might be prejudicial to national security" and that it was proper to infer that the judge had the same "ultimate purpose" in granting the injunctions. So the purpose of the injunction was to preserve the confidentiality of material "whose disclosure arguably posed a risk of damaging national security". Simon Brown LJ appears to have agreed: see p. 1064, para 129. On the other hand, Longmore LJ said (at p. 1065, para 137) that the purpose was "to prevent publication, before trial, of any information derived from Mr Shayler which was not already in the public domain."

73. I respectfully disagree with both these analyses of the purpose of the injunction. In *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 223 Lord Oliver of Aylmerton enlarged upon what he understood by "the purpose" of the injunction. It was not, he said, the litigant's purpose in obtaining the order or in fighting the action but?

> "the purpose which, in seeking to administer justice between the parties in the particular litigation of which it had become seized, the court was intending to fulfil."

74. In the case of a negative interlocutory injunction, the purpose which the court is intending to fulfil is ordinarily to preserve the existing position pending a decision on the merits. It does not involve any decision as to whether any particular act falling within the prohibition would, or even arguably would, infringe the plaintiff's rights. It is true that a judge will not make such an order unless he considers that, in the words of Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 there is a serious question to be tried. But otherwise the decision to grant or withhold such an order is usually based upon discretionary considerations of the

balance of convenience. As Lord Diplock said in the *Cyanamid* case (at p. 406):

> "…[T]he decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action."

75. Considerations of discretion and the balance of convenience are even more important when it comes to deciding upon the scope of the interlocutory injunction. Although, as I have said, Hooper J's order necessarily entailed that he thought that the Attorney-General's claim gave rise to a serious issue to be tried, it does not follow that he thought that the disclosure of any piece of information falling within the terms of the injunction would be arguably damaging to national security. It was no doubt equally obvious to him that the terms of the order covered such matters as the cafeteria food to which Lord Steyn referred in argument. But he made the order in the terms which he did because of the inherent difficulty of devising a form of words which would distinguish in advance between such harmless disclosures and information which would be damaging to national security without creating such uncertainty as to make the order difficult both to enforce and to comply with. He therefore chose to frame the order in wide terms, leaving the defendant or a third party to apply to the court to vary its terms to exclude specific publications which they claim would be innocuous: see Sir John Donaldson MR in *Attorney-General v Newspaper Publishing plc* [1988] Ch. 333, 375. In so doing, he would have had to balance the inconvenience to the defendant or a newspaper in having to apply for a variation against the risk to national security if a more narrowly drafted order inadvertently allowed something damaging to slip through the net.

76. The purpose of the order was therefore in my opinion simply to prevent from happening whatever the order said should not happen. As Silber J pointed out, the order says nothing about national security. Nor does it except material already in the public domain, apart from the article mentioned in the first proviso. I respectfully think that all the members of the Court of Appeal fell into the very confusion against which Lord Oliver had warned; a confusion signalled by the phrase "ultimate purpose" used by the Master of the Rolls (at p. 1058, para 100) to describe the state of mind of the judge when he made the order.

77. The practical consequences of this confusion are vividly recognised in the dissenting judgment of Simon Brown LJ. If the purpose of the order were indeed to prevent disclosure of any matter that arguably risked harming the national interest, then proof of mens rea for contempt would involve proving to the criminal standard that Mr Steen knew that the materials which he published arguably risked harming the national interest. The fact that Mr Steen was ill-equipped to form a view on the matter would not assist the Crown. People often hold strong and bona fide views about matters of which they know virtually nothing. The result would be, as Simon Brown LJ pointed out, that the injunction would be virtually unenforceable against third parties like Mr Steen. They would be entitled to make the very judgment which the judge granting the order had reserved for decision at the trial and, provided they did so honestly, would be entitled with impunity to destroy the effect of the order. Simon Brown LJ was rightly, if I may say so, unable to accept this conclusion, but I find it difficult to see how he was able to escape it after accepting the view of the Master of the Rolls about the purpose of the order. It was at this point that in my opinion the reasoning of the Court of Appeal went astray.

78. Counsel for Mr Steen relied heavily upon a passage in a letter written by Mr Sean Martin on behalf of the Treasury Solicitor explaining the principles upon which he acted in giving consent to publication:

> "[T]he purpose of the injunction is not to prevent the publication of [innocuous] matters, nor indeed to prevent criticism of the Security Service, but is to prevent damage to national security."
>
> He says that if the Treasury Solicitor described the prevention of damage to national security as "the purpose of the injunction", he was entitled to think that anything which would not damage national security fell outside the injunction.

79. I think that this is disingenuous. It is perfectly clear that the injunction was intended to restrain publication of everything which it prohibits from being published. That is what it says. Although Mr Martin speaks of "the purpose of the injunction", it is clear in the context that he is speaking of the Attorney-General's purpose in obtaining the injunction. Mr Steen could not possibly have thought that the Treasury Solicitor was inviting him to form a judgment on what would damage national security.

80. The Master of the Rolls, in his concluding paragraphs, accepted that the effect of his judgment was virtually to destroy the contempt jurisdiction against third parties which had been recognised in the *Times Newspapers* case. But he thought that it did not matter very much because ordinarily the third party could be proceeded against for aiding and abetting a contempt by the party against whom the injunction had been made:

> "It will not be often that a third party comes into possession of information that has emanated from the confidant and has not yet entered the public domain, but where publication is not one to which the confidant is party." (p 1062, para 123)

81. That may be so, but it should be observed that *Times Newspapers* was just such a case. There was no injunction against the confidant because he was living abroad. The proceedings against one newspaper were for frustrating the purpose of an injunction which had been granted against another newspaper. In such a case, there could be no question of aiding and abetting. On the contrary, the one newspaper was trying to steal a march on the other.

82. My Lords, I must in conclusion advert to the comments of the Master of the Rolls on the second proviso, allowing for the consent of the Attorney-General to publication. He said, at p 1059, para 104, that it "subjects the press to the censorship of the Attorney-General" and expressed the view that it infringed article 10 of the European Convention on Human Rights. It was, he said, wrong to restrain the publication of "manifestly innocuous material" without the consent of the Attorney-General.

83. I am bound to say that I think that this overstates the case by a very considerable margin. The control of publication is always in the hands of the court. Restraint of publication by the court on grounds of national security is a well established exception to the freedom conferred by article 10. If Mr Shayler or Mr Steen thought that the Attorney-General was withholding his consent to the publication of "manifestly innocuous material" it would have been open to them to apply to the judge under the procedure described by Sir John Donaldson MR in *Attorney-General v Newspaper Publishing plc* [1988] Ch. 333, 375, which, as he said, "works speedily and well", for a variation of the order.

84. The reason for the inclusion of the second proviso was in my opinion no more than to assist the defendant and any third parties by providing a quick and inexpensive way of excluding "innocuous material" from the order without requiring them to apply to the court for a variation. It was necessary because, without it, a publication falling within the terms of the order would

have been a contempt even if innocuous and even if the Attorney-General had in fact given his consent: see *R v Inland Revenue Commissioners, Ex p Kingston Smith* [1996] STC 1210, 1217. Without the second proviso, the order would have been more onerous. Obviously it would have been still better if one could have devised a form of injunction which prohibited only the publication of harmful material, allowed the publication of innocuous material and left no room for dispute about the category into which any item of information fell. But I can quite understand that Hooper J felt unable to produce a form of words which would have this effect when applied to a mass of information of which he had no knowledge. In those circumstances it seems to me that the form of order which he made was well within the ambit of his discretion.

85. I would allow the appeal and restore the decision of Silber J.

LORD HOPE OF CRAIGHEAD

My Lords,

86. In this case the Attorney General invokes the inherent jurisdiction of the court to ensure the effective administration of justice. The relief which he seeks is punishment of the publisher ("the company") and the editor of "Punch" magazine ("the respondent") for contempt of court. The contempt which they are alleged to have committed was causing an article to be published containing material which the court had by means of interlocutory injunctions made clear that it intended was not to be published. The injunctions were pronounced in proceedings to which neither the company nor the respondent were a party. But that is not an obstacle to a finding that they were in contempt. The Attorney General's contention is that their actions impeded or interfered with the administration of justice by the court in the proceedings in which the orders were made. He says that their actions did so by thwarting or undermining the intended effect of the injunctions.

87. The essential distinction between the liability of a party to the litigation for contempt of court and that of a third party was explained by Lord Oliver of Aylmerton in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 217F-218B. Where the alleged contemnor is a party to the litigation and bound by the order or is someone acting for him or at his direction, all that has to be proved is that the order was served on that person and that he has done that which the order has prohibited. But where it is alleged that a stranger to the litigation is in contempt the position is different. As Salmon LJ said in *Jennison v Baker* [1972] 2 QB 52, 61, the public at large no less than the individual litigant have a very real interest in justice being effectively administered. The power to commit for contempt ensures that acts and words tending to obstruct the administration of justice are prohibited. So a stranger is liable for contempt if his act constitutes a wilful interference with the administration of justice by the court in the proceedings in which the order was made. It has also to be shown there was an intention on his part to interfere with or impede the administration of justice. This is an essential ingredient, and it has to be established to the criminal standard of proof. But the intent need not be stated expressly or admitted by the defendant. As is the case where the question of intention, or mens rea, arises in criminal cases, it can be inferred from all the circumstances including the forseeability of the consequences of the defendant's conduct: *Attorney General v Newspaper Publishing plc* [1988] Ch 333, 374-375, per Sir John Donaldson MR.

88. The interlocutory injunctions were pronounced on by Hooper J on 4 September 1997 in proceedings by the Attorney General against, first, David Michael Shayler and, second, Associated Newspapers Limited. Their effect was to continue interlocutory injunctions which had been obtained from Keene J on 30 August 1997. Neither Mr Shayler nor Associated

Newspapers appeared when the action came before Hooper J, but solicitors for Associated Newspapers had written a letter consenting to the order which Hooper J subsequently made against them. The two orders were in similar terms, but the order which is most directly in point in this case is that which was pronounced against Associated Newspapers. Hooper J ordered that it be restrained:

> "until further order, whether by itself, its servants or agents or otherwise howsoever from publishing to any person any information obtained by it from the first defendant and obtained by the first defendant in the course of or as a result of his employment in and position as a member of the Security Service, whether in relation to the work of, or in support of, the security and intelligence services or otherwise; provided that this order does not apply to: (1) any information in respect of which the plaintiff (whether at the request of [the defendants or any of them] or any third party, or of his own motion) makes a statement in writing (either personally or by the Treasury Solicitor) that such information is not information in respect of which the Crown seeks to restrain publication; (2) the repetition of information disclosed in 'The Mail on Sunday' on 24 August 1997."

89. The respondent was the editor of "Punch" when an article containing the relevant material was published in issue 111 of the magazine on 26 July 2000. Neither he nor the company disputed the fact that they were aware of the terms of the interlocutory injunctions. The principal issues at the trial were whether it had been proved to the criminal standard of proof that the actus reus of contempt had been committed by them and, as to mens rea, that the conduct complained of was specifically intended to impede or prejudice the administration of justice.

90. The trial judge, Silber J, held that both points that had to be established had been proved. He set out his reasons for doing so in a commendably clear and careful judgment. As to the actus reus, he held that it had been proved that the defendants frustrated or thwarted the purpose of the court's order. He said that the purpose of the order was to prevent disclosure of the material covered by the injunctions without the consent of the Attorney-General until after the trial, and that the defendants' conduct had a significant and adverse effect on the administration of justice: para 57. As to mens rea, he observed that the purpose of the court in granting the injunctions was to prevent publication or disclosure of information falling within paragraph 1 of the order but not covered by the provisos: para 76. He said that he was satisfied that the defendants intended to impede or prejudice the administration of justice by thwarting or undermining the intended effect of the injunctions by publishing material which the court had intended by means of the injunctions not to be published pending trial of the action against Mr Shayler and Associated Newspapers: para 78. The company did not appeal against this judgment. But the respondent did so, and his appeal was allowed by the Court of Appeal: [2001] EWCA Civ 403, [2001] QB 1028.

91. The facts are not now in dispute. But the case has raised two important issues of principle. The first is whether the judge was right to describe the purpose of the injunctions as being to prevent disclosure of the information until after the trial. The second is whether the terms of the injunctions went beyond what was necessary and appropriate, having regard to the purpose for which the orders were made.

*The purpose of the injunctions*

92. The respondent's challenge to the judge's decision in the Court of Appeal concentrated on the issue of mens rea. The essence of his defence was that he did not wish to do anything that

might damage national security and that he did not believe that the article which he published contained any such information. This defence was rejected by the judge as irrelevant, in view of his finding as to the purpose of the injunctions. The judge held that it was sufficient that his conduct was intended to impede and prejudice the administration of justice by disclosing material which the court intended should not be published until after the trial. The respondent's primary argument in the appeal was that that the judge should have accepted his evidence that he believed that the purpose of the injunctions was to prevent the publication of matter that might be damaging to national security, and that his mistake as to their true purpose meant that he did not have the necessary mens rea when he acted in a way that defeated that purpose.

93. The Court of Appeal expressed unease about his proceeding on this narrow basis. As Lord Phillips of Worth Matravers MR explained, [2001] QB 1028, 1040H-1041C, para 38:

> "A court may have more than one purpose in granting an interlocutory injunction. The immediate purpose of restraining named defendants from publishing specific material will necessarily be to ensure that those defendants do not publish the material. An ulterior purpose may be to ensure that the material remains confidential until its status is determined at trial and the ultimate purpose may be to ensure that any parts of the material that are likely to damage the national interest remain permanently confidential. It seemed to us that the appellant's case raised the question of which purpose was the *relevant* purpose under the principles of the law of contempt developed in the *Spycatcher* cases: *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191."

At the suggestion of the court a further ground of appeal was added, to the effect that the judge should have held that the purpose of the court in granting the injunctions was to prevent the publication of matter likely to harm national security and that, accordingly, the actus reus of the alleged contempt was publishing matter that was likely to harm national security.

94. The scope of the appeal having been thus enlarged, Lord Phillips of Worth Matravers MR conducted a detailed examination of the jurisprudence which is to be found in the *Spycatcher* cases. He then sought to define the issues in the case. He said that the Crown has no right to restrain a newspaper from publishing information about government unless (i) disclosure of the information will be contrary to the public interest and (ii) the information has not already been disclosed: [2001] QB 1028, 1044C-D, para 46. He said that the question that lay at the heart of the appeal was whether a third party who, with knowledge of an order that specific material is not to be published, publishes the material automatically commits a contempt of court, or whether he commits a contempt of court only if he thereby knowingly defeats *the purpose* for which the order was made: p 1051C-D, para 73. I do not think that anything that he said in the course of this part of his judgment is controversial.

95. I have more difficulty with the conclusion Lord Phillips of Worth Matravers MR reached as to the purpose of the injunctions in the present case. Having examined the speeches in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, he indicated at p 1054E-G, para 84 that he saw no difference in the application of the principle of contempt between material which was subject to an interlocutory injunction and the situation where the court had granted a final injunction against publication. At p 1054F-G he said:

> "It seems to me that in ordering an interim injunction in a case such as this the primary object of the court is to prevent what will *arguably* constitute a legal wrong for which

> damages will not be an adequate remedy. The party against whom the injunction is granted will be in criminal contempt if he breaches the injunction. The effect, and, so it seems to me, the primary purpose, of the third party contempt jurisdiction is to render it a criminal offence for any third party who is aware of the injunction to commit the *potential* wrong which the injunction is designed to prevent. That surely is the most serious aspect of the contempt, and the fact that it will at the same time render the litigation pointless is a subsidiary consideration."

He then examined the *Spycatcher* contempt case, *Attorney General v Newspaper Publishing plc*, The Times, 28 February 1990, in which Nicholls LJ had held that the purpose of the injunctions was that the material to which they related should remain unpublished until trial. Having done so, he concluded that the actus reus of contempt was not the publication of the material covered by the order but the destruction of the confidentiality of the material which it had been the purpose of the injunction to preserve: p 1057E, para 97.

96. At p 1058B-C, para 100 Lord Phillips of Worth Matravers MR said:

> "It has never been disputed that the purpose of the Attorney General in commencing the substantive proceedings and obtaining the interlocutory injunctions was to prevent the publication of material that might be prejudicial to national security. I consider that it is proper to infer that Hooper J had the same ultimate purpose in granting the interlocutory injunctions."

At p 1060F-G, para 114 he again said that the purpose of the injunction was to preserve until trial the confidentiality of material whose disclosure *arguably posed a risk* of damaging national security [his emphasis]. At p 1064B-C, para 129 Simon Brown LJ said that he agreed with the conclusion of the Master of the Rolls in paras 100 and 114 of his judgment that the purpose of the injunctions was to preserve until trial the confidentiality of material whose disclosure "arguably posed a risk of damaging national security." At p 1065H, para 137 Longmore LJ said that that the purpose of the order was to prevent publication, before trial, of any information that was not already in the public domain.

97. Although Simon Brown LJ said that he agreed with Lord Phillips of Worth Matravers MR about the purpose of the injunctions, it is clear that in his dissenting judgment he reached a quite different conclusion on the question of mens rea. The Master of the Rolls said at p 1060H, para 115 that to establish contempt the Attorney General needed to demonstrate knowledge that the publication would interfere with the course of justice "by defeating the purpose underlying the injunctions." The Attorney General had set out simply to prove that the respondent knew that the publication was one which the defendants to the action were enjoined from making under the terms of the injunctions. This, he said, did not go far enough. There was no basis in the evidence for a finding that the respondent must have appreciated that publication might be a threat to national security, nor was it established that he knew that the article continued information not previously published. Longmore LJ agreed with the Master of the Rolls: p 1066A-B, para 138. Simon Brown LJ, on the other hand, expressed his conclusion as to mens rea in these words at p 1064H-1065B, para 131:

> "True it may be, as Mr Steen protests, that he had no *intention* of endangering national security and did not think he was doing so. That, however, is not the point. As he himself candidly admitted, he was not qualified to make that kind of judgment. If, as I would hold, he cannot have failed to appreciate that it was for this very reason that, pending a trial at which the court could have ruled on the substantive question, there was a bar on

> publication unless only the Attorney General consented to it, then he was guilty of the contempt alleged against him: he intended to take upon himself the responsibility for determining whether national security was risked and thereby he thwarted the court's intention."

98. I respectfully agree with everything that Simon Brown LJ said in that paragraph, and on this ground I would allow the appeal. But the fact that he was able to reach that conclusion while agreeing with Lord Phillips of Worth Matravers MR's statements as to the purpose of the injunctions suggests there was in reality no common understanding on this vital point. I think that the point requires further examination. For this purpose it is necessary to go back to first principles.

99. The purpose for which the court grants an interlocutory injunction can be stated quite simply. In *American Cyanamid Co v Ethicon* Ltd [1975] AC 396, 405D Lord Diplock described it as a remedy which is both temporary and discretionary. Its purpose is to regulate, and where possible to preserve, the rights of the parties pending the final determination of the matter which is in issue by the court. That purpose should not be confused with the court's reasons for deciding that it would be appropriate to grant an interlocutory injunction. The court must of course have a good reason for granting an order of this kind. It must be satisfied in the first place that a sufficient ground has been stated to show that there is a real dispute between the parties. As Lord Diplock put it in *American Cynamid Co v Ethicon Ltd* at p 407, the court must be satisfied that there is a serious question to be tried. It must then consider whether the balance of convenience lies in favour of granting or refusing an interlocutory injunction. But it is in no position to reach a final decision at the interlocutory stage on the matters which are in dispute between the parties. It is no part of the court's function at that stage to resolve conflicts of evidence or questions of law that require detailed argument. All it can do is preserve the status quo in the meantime until these matters can be determined at the trial.

100. It is true, as Lord Phillips of Worth Matravers MR said at p 1054E-F, para 84, that in many cases the claimant's objective is achieved when an interlocutory injunction is granted and that the stage of a substantive hearing is never reached. This may be because the parties are content to settle their dispute at that stage or because the need for a final order has been overtaken by events. The grant or refusal of an interlocutory injunction is almost always decisive in industrial dispute cases because the dispute is usually settled one way or the other before there is time for the action to proceed to trial, as Lord Fraser of Tullybelton observed in *N W L Ltd v Woods* [1979] 1 WLR 1294, 1308F. But this does not alter the fact that the court's purpose, when it grants the order, is to preserve the rights of the parties pending a final determination of the issues between them by the court. Furthermore, as Lord Oliver said in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223A-B, "purpose" in this context refers not to the litigant's purpose in obtaining the order or in fighting the action, but to the court's purpose. That is the purpose which the court was intending to fulfil in seeking to administer justice between the parties in the particular litigation of which it has become seized.

101. Confidential information is, as Mr Sumption QC for the Attorney General said in the course of his speech, particularly fragile. It is not hard to see that litigation as to whether information is entitled to be protected on the ground that it is confidential would be rendered pointless if the information were to be published before trial. The purpose of an interim injunction in a case of this kind, where the Attorney General sues in the public interest, is not therefore difficult to identify. It is to protect the public interest against an injury for which it could not be adequately compensated if the issue of confidentiality were to be resolved in favour

of the Attorney at the trial.

102. Lord Phillips of Worth Matravers MR sought to identify the immediate, ulterior and ultimate purposes of an interlocutory injunction: p 1040H-1041B, para 38. I doubt very much however, whether this is helpful. In my opinion the only purpose that is relevant to the question whether a contempt has been committed is the purpose which the court was seeking to serve in the interests of justice. The Master of the Rolls described this as the ulterior purpose of the injunction. He said that the ulterior purpose of the injunctions which were granted in this case was to ensure that the material remained confidential until its status was determined at trial. He then said that their immediate purpose was to restrain the defendants from publishing the material. I think that it would be more accurate to regard this as the means which were chosen by the court to ensure that the material remained confidential. He said that the ultimate purpose of the injunctions was to ensure that any parts of the material that were likely to damage the national interest remained permanently confidential.

103. The theme of Lord Phillips of Worth Matravers MR's judgment is that the primary purpose of the contempt jurisdiction is to render it a criminal offence for any third party who is aware of the injunction to commit the *potential* wrong which the injunction was designed to prevent: see p 1054G, para 84 [his emphasis]. But I think, that this tends to confuse the issue as to the purpose of the injunctions. It also overlooks a crucial distinction between injunctions which are final and those which are interlocutory. The question whether there was a need for a permanent order cannot be answered until the issues between the parties have been determined at the trial. Interlocutory injunctions are designed to ensure the effective administration of justice, so that the rights which it is the duty of the courts to protect can be fairly determined and effectively protected and enforced by the courts: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 216A-B, per Lord Oliver.

104. In my opinion the position can be stated more simply. The *purpose* of the interlocutory injunctions which were pronounced in this case was to ensure that the material as a whole remained confidential until its status had been determined by the court. The *reason* why they were granted was because there was a serious question for the court to resolve as to the status of that information, and because the balance of convenience favoured this course. The *method* which was chosen was to prohibit publication of that information until further order of the court except to the extent which was permitted by the provisos.

105. It seems to me that this analysis, which separates purpose from reason and purpose from method, is more in keeping with the way the matter has been approached in the authorities. As Lord Oliver explained in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223F, there can never be any doubt in anyone's mind what the court's purpose was in making an order prohibiting the publication of confidential information such as that obtained by a person in the course of his employment as a member of the security services. It was to preserve the claimant's right to keep the information confidential until the action had been tried. It was to ensure that the issues were determined by the court, without the claimant's rights being prejudiced in the meantime by the doing of the very act which the action sought to prevent. Moreover, if there is room for genuine doubt about what the court's purpose is, the party charged with contempt is likely to escape liability for want of the necessary mens rea. That is why it is so important to define the purpose of the interlocutory injunction correctly. In my opinion that must be done by examining the purpose which the *court* was intending to fulfil. That is the criterion. The court's purpose must not be confused with the issue between the parties. This is a matter which can ultimately only be resolved at the trial.

106. Lord Phillips of Worth Matravers MR said at p 1058C-D, para 100 that the court's purpose in granting the injunctions was "to prevent the disclosure of any matter that *arguably risked* harming the national interest." This was in keeping with his description of the primary purpose of the third party contempt jurisdiction at p 1054F-G, para 84. But it is plain that the effect of describing the court's purpose in this way was to deprive the claimant of the protection of the injunctions. The introduction of the word "arguably" may have been intended to recognise that the resolution of the issue lay in the future. But its effect was to remove the judgment as to whether or not to publish from the court and transfer it to the third party. It enabled the respondent to avoid a finding of contempt by showing that he had an honest belief that the material which he published was not of that character. This then enabled the Court of Appeal to conclude that he had an honest belief that the purpose for which the injunctions were granted did not apply to that material. It enabled the Master of the Rolls to say, at p 1060G-H, para 115, that the respondent's evidence that he was anxious not to publish any material which would harm national security and that he did not believe that the material which he published carried the risk of causing such harm focused on the correct issue of fact so far as mens rea was concerned. All of this led directly to the Court of Appeal's finding that he was not in contempt.

107. In my opinion the correct issue of fact was that identified by Simon Brown LJ at p 1065A-B, para 131. This was whether the respondent, who admitted that he was not qualified to judge whether publication of the material endangered national security, appreciated that there was a bar on publication unless the Attorney General consented to it. The respondent cannot have failed to have understood this point, for the reasons given by judge which were not challenged in the appeal. He admitted that the article offended against the wording of the injunctions. As Silber J said in paragraph 74 of his judgment, the fact that he sought the approval of the Treasury Solicitor before publication shows that he knew that the material which the article contained fell within their terms when he published the article. I would respectfully disagree with majority in the Court of Appeal. I would hold that the necessary mens rea for a finding that the respondent was in contempt of court was established.

*The wording of the injunctions*

108. Lord Phillips of Worth Matravers MR said at p 1058H, para 103, that there were a number of objections to the Attorney General's contention that no newspaper could knowingly publish any matter that fell within the wide terms of the injunction against Associated Newspapers without first obtaining clearance from himself. At p 1059A-G, paras 104-109 he said that this was to subject the press to the censorship of the Attorney General, that it resulted in the imposition of a restriction on freedom of the press that was disproportionate to any public interest in breach of article 10 of the Convention and that the proposition could not be reconciled with the duty imposed on the court by section 12(3) of the Human Rights Act 1998, which applies if a court is considering whether to grant any relief which, if it were to be granted, might affect the exercise of the Convention right to freedom of expression. Section 12(3) provides:

> "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

109. Lord Phillips of Worth Matravers MR had already expressed his concern on these points at p 1044E-H, paras 47 and 48 when he was considering the implications of Silber J's judgment. The trial judge recognised that the injunctions probably covered matters other than those

affecting national security. The Master of the Rolls said it followed from this that the injunctions extended beyond the categories of information that the Crown was entitled to require should remain confidential and that, by endorsing the terms of the injunction to which Associated Newspapers submitted by consent, the court in effect made it a criminal offence for newspapers to publish matter which they would otherwise have been lawfully entitled to publish. He saw this as imposing a significant fetter on the press.

110. These objections, if well founded, would indeed be formidable. They would justify the conclusion which Lord Phillips of Worth Matravers MR then reached at p 1059H, para 110, that the law of contempt was being extended in this case beyond the principle that it is an offence intentionally to interfere with the course of justice. Mr Price for the respondent did not address these objections, but they were addressed by Mr Sumption and I think that they are so important that they require to be dealt with. I am, not persuaded that they are based on a correct analysis of the purpose and effect of the proviso in the context of injunctions which are not final but interlocutory.

111. I take as my starting point for an examination of this issue the principle that an injunction must always be expressed with precision and with clarity. As Lord Deas put it in a Scottish case, if an injunction is to be granted at all, it must be in terms so plain that he who runs may read: *Kelso School Board v Hunter* (1874) 2 R 228, 230. This is because of the penal consequences that will follow if it is breached. Then there is another important principle. The prohibition must extend no further than is necessary to serve the purpose for which the order is to be made.

112. The background to the injunctions which were granted by Hooper J is to be found in section 1(1) of the Official Secrets Act 1989. It provides that it is an offence for a person who is or has been a member of the security and intelligence services without lawful authority to disclose to any person any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services. As against that, Mr Shayler has asserted the right of the public to be provided with information which will enable it to assess whether the powers given to the security and intelligence services are being abused and whether these services are being run properly. He maintains that any disclosures by him were made in the public interest and in the exercise of his right of freedom of expression as guaranteed by the common law, the Human Rights Act 1998 and article 10 of the Convention.

113. Of course, any prohibition on the publication of information is a restraint on free speech. The right to freedom of expression which is guaranteed by article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is engaged. This is not an absolute right, as the broad language of article 10(1) which protects the right to impart information and ideas without interference by public authorities is qualified by article 10(2). It provides:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, …for the protection of the … rights of others, for preventing the disclosure of information received in confidence …"

114. The word "necessary" in article 10(2) raises the question of proportionality. But in my opinion there can be no objection to an interim injunction against the publication of information

on the ground of proportionality if three requirements are satisfied. The general principles which are to be applied where questions are raised about proportionality are now well established: see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547A-B, per Lord Steyn; *R (Pretty) v Director of Public Prosecutions* [2001] 3 WLR 1598, 1637A-B; *R v Shayler* [2002 ] 2 WLR 754, 783F-H, 786A-B. In this context the requirements that must be met are: (one) that there is a genuine dispute as to whether the information is confidential because its publication might be a threat to national security, (two) that there are reasonable grounds for thinking that publication of the information before trial would impede or interfere with the administration of justice and (three) that the interference with the right of free speech is no greater than is necessary. Close attention to the facts is needed when consideration is given to the question whether the protection is necessary. The purpose of the order provides the context, and it is crucial to the whole exercise that this is correctly identified. Its purpose is to ensure that the other party to the dispute does not assume the responsibility of deciding for himself whether the material is of such a nature that the Attorney General is entitled in law to protection against its publication.

115. The question whether the statutory interference with the right to freedom of expression was greater than was required in order to achieve the legitimate object of acting in the interests of national security was examined by your Lordships in *R v Shayler* [2002] 2 WLR 754. It was held that sufficient safeguards were built into the Act, that the prohibition in section 1(1) came within the qualification in article 10(2) of the Convention and that it was a justified interference with the right to freedom of expression guaranteed by that article.

116. Any formalities, conditions, restrictions or penalties, to be permitted by article 10(2), must satisfy the principle of proportionality. In summary, they must be sensitive to the facts of the case, they must be rational, fair and not arbitrary, and they must impair the fundamental right no more than is necessary. In my opinion these tests must be satisfied at every stage in the judicial process that is liable to affect the exercise of the fundamental right. This includes the stage when the court is deciding whether or not to make an interlocutory injunction, and if so in what terms. It also includes the stage when the court is considering whether the order should be varied following an application for that purpose by any third party before the trial. The need to have regard to these tests at each stage is reinforced by section 12(4) of the 1998 Act, which provides that the court must have regard to the importance of the Convention right if the court is considering whether to grant any relief which, if granted, may affect the exercise of the Convention right.

117. Lord Phillips of Worth Matravers MR said that he did not agree with the judge that the purpose of the injunctions extended to the restraint of publication of material which could not possibly be detrimental to the national interest and to material which had previously been published. This was because of the mechanism which was provided to avoid that result in the first proviso: p 1058E-H, paras 101-102. He recognised the attraction of this arrangement between the parties to the action. But he said that a critical issue was raised as to its effect on third parties who were not subject to the order. In his view it subjected the press to the censorship of the Attorney General.

118. Similar observations are to be found in *Attorney General v Times Newspapers Ltd* [2001] EWCA Civ 97; [2001] 1 WLR 885, although the context of that case was different as the order in question was not an interlocutory one made before trial. The judge ordered that no order be made in the action upon the defendants giving an undertaking. An application was later made for the undertaking to be varied to permit certain information to be published. The Master of the Rolls observed that it was desirable that there should usually be consultation between a

newspaper and representatives of the British Secret Intelligence Service before the newspaper published information that might include matters capable of damaging the service or endangering those who serve in it. He then said at p 896C-D, para 34:

> "I do not, however, think it right to impose on TNL the requirement that they should seek confirmation from the Attorney General or the court that facts that they intend to republish have been sufficiently brought into the public domain by prior publication so as to remove from them the cloak of confidentiality. That is a matter on which an editor will be in a position to form his own judgment and he should be left responsible for exercising that judgment. That is consonant with article 10 of the Convention and section 12 of the 1998 Act."

119. I agree with Lord Phillips of Worth Matravers MR that the way in which the orders in this case were framed can be regarded as satisfactory as between the parties to the action. Indeed, as I mentioned in para 3, solicitors for Associated Newspapers wrote a letter indicating their consent to the order which was to be pronounced against them. Any attempt to lessen the breadth of the opening words by identifying in advance items of information which were not to be covered by them would almost certainly have been too cumbersome. Some other way of providing relief had to be devised. The method which was devised, and which was plainly regarded by Associated Newspapers as acceptable as they did not object to it, was to allow for decisions to be made as to the need for this protection to be taken ad hoc by the Attorney General subject to the overall supervision of the court. This is the method described in the first proviso.

120. Leaving aside for the moment the question of interference with the Convention right to freedom of expression, I do not think that there can be any objection in principle to this method of relief. It is normal practice in claims for infringement of copyright for injunctions to be pronounced against the defendant which permit infringing acts done with the licence of the holder of the copyright. The same cannot be said of actions for breach of confidence between private individuals, where particulars are normally given of the information for which the claimant seeks protection. But section 1(1) of the Official Secrets Act 1989 sets the scene for the wording that was needed in this case. It casts its net widely across the entire range of information which is or has been in the person's possession as a member of the security and intelligence services. It then creates an exception in favour of the disclosure of information where this is done with lawful authority. The opening words of the injunctions which Hooper J pronounced in this case are in keeping with those of section 1(1) of the 1989 Act. The system for providing relief, which is in equally broad terms, reflects the fact that the guardian of the public interest in these matters is the Attorney General.

121. The question is whether Lord Phillips of Worth Matrvavers MR's criticism of the injunctions, and of the terms of the first proviso in particular, as an interference with the Convention right to freedom of expression is justified. I recognise the force of his criticisms, but I do not think that they are justified. The system which allows for a statement in writing to be obtained from the Attorney General or the Treasury Solicitor is not an exercise in censorship. It is a mechanism for relaxing the scope of the injunction. It provides a cheap, simple and convenient way of obtaining clearance before the trial for the publication of material to whose publication no objection can properly be taken on the grounds of confidentiality or national security. The whole process is then subject to the further order of the court. A refusal of clearance by the Attorney General or the Treasury Solicitor is not the last word on the matter.

122. Above all, full weight must be given to the purpose of these injunctions. They were

interlocutory injunctions. It was not the intention when they were granted that they should be permanent. Their purpose was to serve the interests of the administration of justice by preserving the confidentiality of the information until trial. As Simon Brown LJ observed at p 1065A-B, para 131, the court's intention would be thwarted if a third party to the action were to take upon himself the responsibility for determining whether or not the information risked national security. That is the context in which the necessity for a restriction on the Convention right must be judged. The court remains available to give its own judgment before the trial as to whether publication of the material in the meantime would be objectionable, having regard to the purpose of the order and the requirements of the principle of proportionality.

123. So I do not think that the terms of the injunctions can be regarded as disproportionate in view of this safeguard. Nor do I think that there is any incompatibility with the respondent's right under article 10(1) of the Convention, to which particular regard must be had under section 12(4) of the Human Rights Act 1998. The restriction on the publication of the information before trial can be justified as being in the public interest in a democratic society. The requirement of proportionality is satisfied (one) because the opening words of the order are qualified by the first proviso, (two) because the extent of the injunction remains subject to the further order of the court and (three) because the court itself must observe the principle of proportionality when it deals with any application before the trial for relaxation of the scope of the injunction. It was not suggested that the orders made by Hooper J, which were made before the coming into force of the 1998 Act, were in conflict with section 12(3) of that Act. But the fact that this subsection is now in force, and that it will apply in the event of an application being made to the court for a further order before trial, supports the view which I favour that the interlocutory injunctions which were pronounced in this case are not incompatible with the article 10 Convention right.

124. That all having been said, I agree with my noble and learned friend Lord Nicholls of Birkenhead that it would be better to avoid the appearance of delegating control of what may be published to the Attorney General by making it plain on the face of the order that anyone whose conduct is affected by the order has the right to apply to the court for a variation of its terms. That could be done by inserting a further proviso. As for the width of the language, I have already mentioned the fact that the context for the words which were chosen in this case is provided by the width of the words used in section 1(1) of the Official Secrets Act 1989. But I agree that it would be wise not to regard the formula that was used in this case as the last word on the subject, and that it would be preferable to use a more precise formula if this can be devised.

*Conclusion*

125. For these reasons, and for those given by Lord Nicholls and Lord Hoffmann whose speeches I have had the opportunity of reading in draft and with which I agree, I too would allow the appeal and restore the order of the trial judge.

**LORD WALKER OF GESTINGTHORPE**

My Lords,

126. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Hope of Craighead. For the reasons given in their opinions, with which I am in full agreement, I would allow this appeal and restore the order of Silber J.