Freedom of Expression, Breach of Confidence and *American Cyanamid*

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I: INTRODUCTION

From October 1992 until June 1994, a company named European Pacific used the New Zealand courts to shield its misdeeds from the glare of publicity, or as one of their lawyers called it, "prurient public inquisitiveness".[1] The principal legal means used to achieve this was the action for breach of confidence. The most important defence to this action, the public interest defence, was of little consequence.

The cases surrounding the Winebox documents are the most significant and interesting on confidence in New Zealand for some years.[2] The Winebox documents contain evidence of large-scale circumvention of New Zealand tax law by some of this country's largest companies. The public interest in the documents is widely acknowledged.[3] Despite this, the owners of the documents, the European Pacific Group, were able to use actions for breach of confidence to prevent disclosure of the documents for over eighteen months.

Part II of this article concentrates on the present state of the public interest defence to the action for breach of confidence. There will be discussion of its history, role and operation. Of particular importance is the manner in which the defence operates at the interlocutory stage, as discussed in Part III. Part IV analyses how the courts decide whether or not to apply the defence when they have not had the benefit of hearing the full facts at trial. Parts V and VI discuss the operation and the adequacy of the defence in litigation relating to the Winebox documents. It will consider whether the defence was of actual practical significance in the litigation and whether the courts were able to use it to protect the public interest. The history and details of Winebox events will be discussed at some length. This is necessitated, in part, by a lack of academic discussion of

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1 Craddock QC; see "The wine-box inquiry: A saga of stalling tactics", *The Independent*, 12 July 1996, 8.

2 Burrows, "Media Law" [1994] NZ Recent Law Rev 280, 294.

3 See text infra in Part V.

the Winebox cases elsewhere. Finally, in part VII, recommendations for reform are considered, including the possibility of both legislative and common law remedies. In particular, the potential role of the New Zealand Bill of Rights Act 1990 in shaping the development of this area of the law is examined.

II: BREACH OF CONFIDENCE AND THE PUBLIC INTEREST

1. The Action for Breach of Confidence

"No person is permitted to divulge to the world information which he [or she] has received in confidence."[4] Two elements are required for information to be protected as confidential by the law.[5] First, the information must have the necessary quality of confidence about it. There is some question as to whether this limits the test to information deemed intrinsically confidential, or whether it is simply intended to mean private information not publicly known. Justice Gallen in *M v Independent Newspapers*[6] preferred the latter interpretation. Second, the information must be imparted in circumstances importing an obligation of confidence. The courts will look at this matter objectively, taking into account not only what the defendant knew, but also what she or he ought to have known. A third element, namely a breach or threatened breach of the obligation of confidence, is required for a successful action. Detriment has been suggested as a fourth element,[7] but was not felt to be an essential element by either Lord Keith or Lord Goff in the *Spycatcher* litigation.[8] There is no logical reason why an inability to prove detriment should deprive the plaintiff of a remedy.

2. Breach of Confidence and the Media

An obligation of confidence will typically spring from a relationship, often contractual, between two parties. A duty of confidence can also attach to a third party who comes into possession of information that it knows to be confidential. The third party may know that the information was disclosed to it in breach of confidence; or the confidential nature may be evident from the information itself.[9] The necessary degree of knowledge may include situations where a third party media organisation ought to have known that disclosure was in breach of

4 *Fraser v Evans* [1969] 1 QB 349, 361.
5 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.
6 [1992] 1 ERNZ 202.
7 Supra at note 5, at 47 per Megarry VC; *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 36 per La Forest J.
8 *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 All ER 545, 640; 659 (HL).
9 Ibid, 658.

confidence.[10] Even where the organisation has received the information "innocently", if it later becomes aware that the information was disclosed in breach of confidence, it is liable to be prevented from breaching that confidence.[11]

3. Defences to the Action for Breach of Confidence

In *Attorney-General v Guardian Newspapers (No 2)*[12] Lord Goff indicated that there were three "limiting principles" to breach of confidence actions.[13] The first is that confidentiality only applies to information to the extent that it is confidential. This simply means that protection will not be given to information already so generally accessible that it cannot be regarded as confidential. This was the dominant factor leading to a refusal of an injunction in the New Zealand *Spycatcher* litigation.[14] It is little more than an indication of the scope of the first of Megarry VC's elements in *Coco v AN Clark*. The second limitation is that "useless" information or trivia will not be treated as confidential. This is also supported by the dicta of Megarry VC in *Coco*, who felt that the action could not be used to protect "trivial tittle-tattle".[15] The third limiting principle is that sometimes the public interest may favour disclosure.

4. The Origins and Development of the Public Interest Defence

In *Gartside v Outram*,[16] Wood VC held that there was "no property" in information evidencing fraud.[17] Today the action for breach of confidence is considered to be based in equity rather than in property, tort or contract.[18] Accepting equity as the jurisdictional basis of confidence law means that the

10 See Burrows, *News Media Law in New Zealand* (Wellington: Oxford University Press, 3rd ed 1994) 165.

11 Supra at note 4; see Walker, *The Law of Journalism in Australia* (Sydney: Law Book Co, 1989), 363.

12 Supra at note 8.

13 Ibid, 659.

14 *Attorney-General for United Kingdom v Wellington Newspapers* [1988] 1 NZLR 129, 163 (CA).

15 Supra at note 5, at 48.

16 (1857) 26 LJ Ch 113.

17 Ibid, 116.

18 See Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 LQR 463. It has also been discussed as an action sui generis and sometimes the various concepts are intermingled. The obligation of confidence has recently come to be described as a fiduciary obligation. Lord Justice Millett, writing extra-judicially, has described confidentiality as a category of fiduciary obligation (see Millett LJ, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214). Care must however be taken not to confound confidence law with fiduciary obligations in the sense in which that term is usually used. Millett LJ described the obligation of confidence as a "quite different fiduciary relationship" that "generate[s] different obligations"; *Attorney-General v Blake, The Times*, 22 December 1997, Court of Appeal, Lord Woolf MR, Millett and Mummery LJJ, 8.

public interest defence operates as a defence in the true sense of the word.[19] Equity allows the courts to acknowledge that an obligation of confidence exists, and yet refuse to enforce that obligation if the public interest so demands. The alternative view, that if it is in the public interest for information be disclosed then that information lacks the quality of confidence altogether, has been described as a "legal fiction".[20] Nevertheless, Wood VC's statement that "there can be no confidence as to the disclosure of iniquity"[21] is used by many judges to initiate their discussions of the public interest defence.[22]

5. The Nature of the Information

Public interest will be a defence to an action for breach of confidence when the information contains evidence of "any misconduct of such a nature that it ought in the public interest to be disclosed to others."[23] This raises the question of what constitutes such misconduct. In *Initial Services Ltd v Putterill*[24] Lord Denning MR indicated that this would include a wider range of misconduct than solely crime or fraud, and adopted the above statement of Wood VC. Although in the same case Salmon LJ recognised that what is regarded as iniquitous by courts will vary with time,[25] so that iniquity alone is an inadequate definition of the relevant misconduct. Lord Denning acknowledged this in *Fraser v Evans*.[26] Lord Wilberforce commented also in the *British Steel* case[27] that the rule "extends in fact beyond 'iniquity' to misconduct generally".[28] Iniquity is best seen as an example of the type of information to which the public interest rule is likely to apply.

Various authors have attempted to categorise conduct which falls within the defence. In *The Legal Implications of Disclosure in the Public Interest*, Cripps groups cases into:

(i) immorality, crime and fraud;
(ii) matters not necessarily involving "misdeeds", but "dangerous" to safety, mental and physical health or respect for law and law enforcement; and
(iii) other subject-matters.[29]

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19 See Cripps, *The Legal Implications of Disclosure in the Public Interest* (London: Sweet & Maxwell, 2nd ed 1994), 25.

20 See Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (Sydney: Law Book Co, 1996) 101, 103.

21 Supra at note 16, at 114.

22 See for example, supra at note 14.

23 *Initial Services Ltd v Putterill* [1968] 1 QB 396, 405 per Lord Denning (CA).

24 Ibid.

25 Ibid, 410.

26 Supra at note 4.

27 *British Steel Corp v Granada Television Ltd* [1981] AC 1096.

28 Ibid, 1169.

29 Supra at note 19, at 84-108.

Pizer suggests that the public interest falls into three broad categories:

(i) the prevention of harm;
(ii) the improvement of the administration of justice; and
(iii) the realisation of the democratic ideal.

However these are flexible as the law must "keep pace with changing attitudes",[30] and although the cases may appear to fall into identifiable categories, these are in no way restrictive. Even Ungoed-Thomas J's definition; actions "destructive of the country or its people",[31] which is adopted by Gurry,[32] is too narrow. Could it be said that a musician's misleading publicity, as in *Woodward v Hutchins,*[33] is "destructive" of anyone? All this unfortunately leads to the irritating statement that the public interest defence applies to whatever information the courts decide it is in the public interest to know. This is usually information relating to things which may harm the public, or to misconduct that it is in the public interest to discourage.

6. Circumstances Surrounding the Disclosure

Deciding on whether or not to allow the public interest defence is not a matter of simply examining the information itself. The courts must consider and balance a number of public interests, and the circumstances surrounding disclosure.

The manner in which the information was obtained may be relevant, such that where information has been obtained illegally, the public interest in discouraging such behaviour is a strong factor weighing against disclosure.[34] The courts justify this by arguing that it is only done when there is a greater public interest in discouraging the activity and maintaining confidences, than there is in the information. Notably, the attitude in the United States differs greatly from that in England and New Zealand. It seems that American courts will not inquire into how a journalist obtained her or his information. In *Liberty Lobby Inc v Pearson*[35] Holtzoff J commented that if the courts could so enquire "we would not have a free press; we would have a controlled press."[36]

The motives of the discloser are also relevant, as the courts wish to not only discourage illegal gathering of information, but also to dissuade those who contemplate breaking confidences for reward. As Lord Denning commented, "[i]t

30 Pizer, "The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?" (1994) 20 Melb U L Rev 67, 70.
31 *Beloff v Pressdram Ltd* [1973] 1 All ER 241.
32 Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984) 334.
33 [1977] 1 WLR 760 (CA).
34 See for example *Francome v Mirror Newspapers Ltd* [1984] 2 All ER 408 (CA).
35 261 F Supp 726 (1966).
36 Ibid, 727; noted supra at note 19, at 135.

is a great evil when people purvey scandalous information for reward."[37] Despite these concerns, relevant motives have been largely ignored in many decisions. Lord Denning himself allowed disclosure in *Woodward v Hutchins*,[38] where the defendant was clearly motivated by profit.

The identity of the disclosee can often be significant. *Francome v Mirror Group*[39] illustrates that the public interest may be limited to disclosure to a specific person or body. In refusing to allow a general publication, Donaldson MR noted that there could be a public interest in disclosure of the information to the police and the Jockey Club, as it related *inter alia* to alleged breaches of the rules of racing.[40] The identity of the disclosee could also be relevant to the existence of an obligation of confidence. In *Re A Company's Application*,[41] Scott J suggested that an employee's duty is unlikely to extend to a restraint on reporting misdeeds to the appropriate regulatory authority or Inland Revenue.[42] On other occasions the appropriate recipient may be the general public, as emphasised in *Fraser v Evans*:[43]

> There are some things which are of such public concern that the newspapers, the Press, and indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression.

If the information relates to misdeeds that affect the general public, it is likely that it will be the general public who are the appropriate recipients.[44] Publication to a general audience may also be permissible when the otherwise appropriate recipient is an interested party. This situation arose in *Lion Laboratories Ltd v Evans*.[45] The English Court of Appeal felt that the Home Office, perhaps initially the appropriate recipient of the information, had become "an interested and committed party,"[46] and the court therefore ruled that the information should be disclosed to a wider audience.

The timing of the disclosure, and the immediacy of the interest in making the information public, are most relevant at the interlocutory stage. A strong public interest in immediate disclosure may deter the court from awarding an interim injunction. For example, in *Lion Laboratories* the immediate risk of wrongful prosecutions was considered a strong factor in favour of disclosure. If information is dated, as with *Spycatcher* and the cabinet discussions in *Attorney-*

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37 Supra at note 23, at 406.
38 Supra at note 33.
39 Supra at note 34.
40 Ibid, 414.
41 [1989] 1 Ch 477.
42 Ibid, 482.
43 Supra at note 4, at 363 per Lord Denning.
44 See supra at note 23.
45 [1985] 1 QB 526 (CA).
46 Ibid, 553 per Griffiths LJ.

General v Jonathan Cape Ltd,[47] there is less likely to be a strong public interest in maintaining its confidentiality, thus also tipping the scales towards disclosure.

7. The Onus of Proof

The plaintiff has a prima facie right to confidence unless the defendant can demonstrate that the right is outweighed by other considerations. An exception arises when the plaintiff in a breach of confidence action is the Government. This is perhaps because the courts start from the premise that Government's workings should be open to public scrutiny, and it is then for the Government to demonstrate why it should not be so in a particular case.[48]

8. A Balancing of Interests

Even if information is obtained in a blatantly illegal manner, the strength of the public interest in that information could recommend disclosure. It has been argued that it is undesirable that the notion of "the public interest" be allowed to override the defendant's unconscionability in breach of confidence cases.[49] An alternative view is that if there is a sufficient public interest in certain information, the court does not regard the defendant's breach of confidence as wholly unconscionable.

Before a judge can properly conduct a weighing up of interests, she or he must be clear as to what interests are involved. Numerous cases indicate that judges seem to consider their role to be one of balancing competing public interests. For example in *Lion Laboratories* Stephenson LJ considered the Court's role to be to balance the "public interest [in] the preservation of the right of organisations, as of individuals, to keep secret confidential information" against what may be a "public interest in admittedly confidential information."[50] In the final House of Lords *Spycatcher* case, Lord Goff defined the public interest defence as "a limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure."[51]

It must be remembered, however, that if the public interest defence is allowed, the plaintiff is denied the private interest she or he has in preventing a breach of confidence. Burrows, for example, writes that the public interest defence will succeed when "the public interest in disclosing the information

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47 [1976] 1 QB 752.

48 See *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

49 See *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Service and Health* (1990) 95 ALR 87, 125 per Gummow J.

50 Supra at note 45, at 536.

51 Supra at note 8, at 659.

outweighs the interest of the plaintiff in keeping it confidential".[52] In *Beloff v Pressdram Ltd*[53] Ungoed-Thomas J acknowledged the private interest in confidentiality, saying that "[p]ublic interest, as a defence in law, operates to override the rights of the individual".[54] The balance to be struck is between a mixture of public and private interests, both for and against upholding the confidence.[55]

III: THE INTERLOCUTORY INJUNCTION[56]

1. The Position Before 1975

The ability to grant interlocutory injunctions has been described as "the most striking remedy wielded by contemporary courts."[57] Prior to 1975 there was reluctance to place fetters upon its application, Lord Denning in *Hubbard v Vosper*[58] commented that "[t]he remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."[59] Nevertheless it became accepted practice that interlocutory relief would only be granted after a plaintiff had made out "a fair prima facie case".[60] In *Zaidener v Barrisdale Engineers Ltd*[61] Wilmers LJ said that "the court will not grant an interlocutory injunction unless satisfied that there is a real probability of the plaintiff succeeding on the trial of the suit."[62] Similarly, the defendant's rights would only be interfered with if the probability was "in favour of his case ultimately failing in the issue of the final suit".[63]

2. *American Cyanamid Co v Ethicon Ltd*[64]

In this case both the High Court and the Court of Appeal applied the prima

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52 Supra at note 10, at 169.

53 Supra at note 31.

54 Ibid, 260.

55 See the introduction to Clarke (ed), *Confidentiality and the Law*, (London: Lloyds of London Press, 1990).

56 Strictly speaking, the term "interlocutory injunction" refers to an order pending trial, whereas "interim injunction" identifies an order for a temporary period. The two terms have, however, come to be used interchangeably and the same principles have been applied to both forms of relief. See *McGechan on Procedure* (Wellington: Brookers, 1997) 5-46.

57 Leubsdorf, "The Standard for Preliminary Injunctions" (1978) 91 Harv LR 519, 525.

58 [1972] 2 QB 84.

59 Ibid, 96.

60 *Kerr on Injunctions* (3rd ed, 1888), 11-12.

61 [1968] RPC 488.

62 Ibid, 495; Lord Justice Diplock (as he then was) agreed.

63 Supra at note 60.

64 [1975] AC 396.

facie test. In rejecting the claim for interlocutory relief, Russell LJ in the Court of Appeal said that "if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."[65]

The prima facie test was, however, criticised by Lord Diplock in the House of Lords. The interlocutory injunction hearing risked evolving into a lengthy mini-trial where counsel argued the substantive merits of the case. In *American Cyanamid* itself the Court of Appeal heard two weeks of argument on a complicated matter of polymer chemistry and patent infringement. Furthermore, in attempting to reach a view on the merits the Court had to rely on affidavit evidence untested by cross-examination.[66] Lord Diplock commented that the prima facie rule risked clogging the courts' discretion and stressed that no such rule existed. His Lordship said that terms such as "a prima facie case" led to confusion. The Court should simply satisfy itself "that the claim is not frivolous or vexatious .... that there is a serious question to be tried"[67]

Once satisfied that there was a serious question to be tried, Lord Diplock said that the court should then proceed to make two further inquiries. First, it should be considered whether damages are an adequate remedy for either party. If this inquiry proves inconclusive, since evidence as to the adequacy of damages will often be contradictory,[68] the court should then go on to consider the second matter involving identification of where the balance of convenience lies.

3. Lord Diplock's Principles

(a) A Serious Question to be Tried

Although Lord Diplock's dicta in *American Cyanamid* seems to suggest that "a serious question to be tried" means only that the claim must not be frivolous or vexatious, these latter terms have largely been ignored in subsequent cases. Indeed, in *Mothercare Ltd v Robson Books Ltd*[69] Megarry VC expressly rejected them, saying that he "would not hold that an honest but virtually hopeless claim should be rewarded with an interlocutory injunction just because it cannot be described as being 'frivolous or vexatious' in the accepted sense."[70] "A serious question to be tried" has been variously taken to mean that "there is a substantial question to be investigated",[71] that there is "a finite, non-trivial probability of

65 Cited by Lord Diplock, ibid, 404.
66 See supra at note 20, at 578.
67 Supra at note 64, at 407.
68 For example see *Series 5 Software v Philip Clarke* [1996] FSR 273, 278.
69 [1979] FSR 466.
70 Ibid, 468.
71 *Northern Drivers Union v Kawau Island Ferries Ltd* [1974] 2 NZLR 617 (CA), 620 per McCarthy P.

success"[72] or that there is "an arguable case".[73] Justice Slade in *Re Lord Cable (deceased)*,[74] decided soon after *American Cyanamid*, went so far as to say that the plaintiff must adduce evidence to demonstrate "a real prospect of succeeding in his claim for a permanent injunction at the trial."[75] As indicated by these terms the court still has some regard to the substantive merits of the case, disclosed at the time of the application, but the threshold which the plaintiff must attain before an injunction is granted is significantly lower than having to demonstrate a prima facie case.

(b) The Adequacy of Damages

There has been confusion in some cases as to whether the inquiry into the adequacy of damages forms part of the balance of convenience test, or whether it is prior and separate. Lord Diplock stated that "[i]t is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of the balance of convenience arises"[76] implies that the adequacy of damages question could be decisive. The object of the interlocutory injunction is to prevent irreparable harm being done to the rights at issue in the main action.[77] Where damages are an adequate remedy, this threat of irreparable harm, and hence the need for injunctive relief, does not arise. In practice, however, judges have not treated the adequacy of damages as decisive.[78] Evidence is often contradictory, and the differences cannot be resolved by cross-examination.[79] Moreover, courts may be reluctant to apply the test where non-pecuniary interests are involved. In reality the court will often proceed to look at the balance of convenience.[80]

(c) The Balance of Convenience

Lord Diplock did not attempt to identify the factors that the court should take into account when deciding where the balance of convenience lies. His Lordship said that such an attempt would be unwise, as the relevant matters, and the weight to be attached to them, will vary from case to case.[81] It was, however, noted that the extent to which each party would be incapable of being compensated in damages in the event of succeeding at trial, would always be an

72 *Sony Music Australia Ltd v Tansing* (1993) 27 IPR 649, 655 per French J.
73 Gray, "Interlocutory Injunctions Since Cyanamid" 40 [1981] CLJ 307, 310.
74 [1977] 1 WLR 7.
75 Ibid, 19.
76 Supra at note 64, at 408.
77 See supra at note 73, at 326.
78 Ibid.
79 Supra at note 68, at 284.
80 Ibid.
81 Supra at note 64, at 408.

important factor.[82] Other matters that the courts have considered important have been the behaviour of the parties, delay or acquiescence by the parties, general financial considerations such as the effect of the grant or refusal of an injunction on the parties' respective businesses, and the public interest.[83]

(d) The Relative Strength of Each Party's Case

Although in many cases before *American Cyanamid* the likelihood of a party succeeding at trial was an important factor in the balance of convenience, Lord Diplock is said to have ruled this out in all but the most exceptional case.[84] His Lordship said that "it may not be improper" to take the relative strength of each party's case into account, "if the extent of the uncompensatable disadvantage to each party would not differ widely".[85] It was added that:[86]

> [An assessment of the merits] should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

(e) Preservation of the Status Quo

Lord Diplock said that "[w]here other factors appear to be evenly balanced it is a counsel of prudence to ... preserve the status quo."[87] This approach favours plaintiffs. It often seems to be assumed by judges that the plaintiff is seeking an injunction in order to prevent the defendant altering the status quo.[88] There are of course exceptions, for example where the defendant already has an established business. If the plaintiff seeks to prevent the continuation of that business, a refusal of the injunction will maintain the status quo.

4. The Application of Lord Diplock's Principles in New Zealand

Lord Diplock's *American Cyanamid* principles have been endorsed in numerous New Zealand cases, although a flexible attitude is sometimes taken towards their application. First, as to the issue of whether there is a serious question to be tried, it has been stressed that this must not be brushed over lightly,[89] even to the extent that there is no reason why the court "should not

82 Ibid, 408-409.
83 See discussion infra at part IV.
84 See supra at note 68, at 285.
85 Supra at note 64, at 409.
86 Ibid.
87 Ibid, 408.
88 See supra at note 73, at 336.
89 *Ansell v NZI Finance Ltd* (HC Wellington, A434/83, 30 November 1983, Eichelbaum J).

consider carefully the merits of the plaintiff's claim, both in fact and in law, and if necessary embark on a full examination of the legal issues involved."[90] Second, as to the balance of convenience, particularly where this is fairly even, "regard to the relative strengths of the cases of the parties will usually be appropriate."[91] In some cases the courts must look beyond the balance of convenience, to "where overall justice lies,"[92] an approach not inconsistent with the objects of the balance of convenience test. The test weighs the respective risks of injustice to each party and the court may take into account the overall justice of the situation to determine where any risk of injustice lies. In *Cayne v Global Natural Resources Pty Ltd*[93] May LJ referred to the balance of convenience test as being the "balance of the risk of doing an injustice".[94] For example in *Tucker v News Media Ownership Ltd*,[95] a case involving media disclosure of personal facts about the plaintiff, the potential consequences of disclosure (possibly life-threatening) for Mr Tucker seemed to outweigh the uncompensatable detriment to the media organisation of being denied its right to publish. To grant the injunction would, however, create an injustice from the defendant's point of view, as rival media organisations were still able to carry the story, and indeed in some cases had already done so. Justice McGechan concluded that the overall justice of the case required that the injunction be denied.

The risk of injustice is particularly high when an injunction is likely to have final effect. In *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* Cooke P said:[96]

> [Counsel submitted] that an over-mechanical following in the High Court of New Zealand of the two-stage approach enunciated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 has resulted in plaintiffs in passing off and other actions obtaining too easily injunctions which, although nominally interim, have had the effect of putting an end to litigation. We accept that this is at least a danger against which it is necessary to guard.

5. Re-examination of Lord Diplock's Principles in *Series 5 Software*

More recently, in *Series 5 Software Ltd v Clarke*,[97] Laddie J thoroughly re-examined Lord Diplock's judgment in *American Cyanamid*, recalling that in many earlier cases the strength of a party's claim had been an important factor in

90 *Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd* [1984] 2 NZLR 154, 157 per Hardie Boys J.
91 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140, 142 per Cooke J.
92 Ibid, 142.
93 [1984] 1 All ER 225 (CA).
94 Ibid, 237.
95 [1986] 2 NZLR 716 (HC).
96 Supra at note 91, at 142.
97 Supra at note 68.

determining the balance of convenience. Indeed in *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*,[98] decided only months before *American Cyanamid*, Lord Diplock had himself referred to the importance of the strength of the plaintiff's claim. *Hoffman-La Roche* was not mentioned in *American Cyanamid* and Laddie J therefore doubted whether a complete departure from the earlier cases was intended. Whilst Lord Diplock clearly wished to remove any requirement that the plaintiff establish a prima facie case, Laddie J questioned whether he had intended that the merits of a claim be reduced to irrelevance in most situations.

The view that Lord Diplock intended to exclude consideration of the merits was based on two passages in *American Cyanamid*. In the first Lord Diplock said:[99]

> [I]f the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application.

Justice Laddie thought that although it had been expressed as "it may not be improper", there was nothing in this statement to prevent that Court from looking at the strength of a party's case. Lord Diplock was concerned to avoid the mini-trials that had troubled the courts previously, but if affidavit evidence gave a clear view of the relative strengths, then the court could properly take this into account.

The second passage read:[100]

> [A]ssessing the relative strength of the parties' cases], however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

Justice Laddie commented:[101]

> If this means that the court *cannot* take into account its view of the strength of each party's case if there is any dispute on the evidence, as suggested by the use of the words 'only' and 'no credible dispute', then a new inflexible rule has been introduced to replace that applied by the Court of Appeal.

The effect of this would be that a defendant could simply point to disputed facts in his or her affidavit evidence, and then invite the court to ignore the apparent strengths of the plaintiff's case. Justice Laddie argues that Lord

98 [1975] AC 295.
99 Supra at note 64, at 409.
100 Ibid.
101 Supra at note 68, at 285.

Diplock's concern was to prevent mini-trials where difficult questions of fact and of law were raised, however he did not intend to exclude consideration of the relative strengths of the parties' cases in the majority of applications for interlocutory relief.

Justice Laddie thought that when deciding whether to grant interlocutory relief, the court should bear the following matters in mind:[102]

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.
2. There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.
3. Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law.
4. Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, (d) any clear view the court may reach as to the relative strength of the parties' cases.

6. The Reception of *Series 5* in New Zealand

Series 5 has already received judicial approval at High Court level in New Zealand. In *United Pukekohe Ltd v Grantley*[103] Baragwanath J, hearing an injunction application, said that he would apply the *American Cyanamid* approach subject to the ultimate consideration of where the interests of justice lie. His Honour then added "[b]ut I do so on the basis adopted by Laddie J in *Series 5 Software Ltd v Clarke* ... of considering also whether a worthwhile tentative appraisal can be made of the strength of the respective parties' cases."[104]

Series 5 was also discussed by McGechan J in *Telecom Corporation of New Zealand Ltd v Colour Pages Ltd.*[105] His Honour began by noting the severity of the orthodox *American Cyanamid* position. That is, the Court is only able to have regard to the relative strengths of the parties' claims almost as a last resort.[106] The modern New Zealand approach, as expounded in *Klissers* is more moderate, Justice McGechan ventured to suggest that any difference between the proper New Zealand approach and *Series 5* was more apparent than real.[107] His Honour emphasised the flexibility inherent in the New Zealand approach and was wary of introducing any new rigidity. The importance of *Series 5* therefore, may

102 Ibid, 286.

103 [1996] 3 NZLR 762.

104 Ibid, 764; Justice Baragwanath also expressed approval of *Series 5* in *Unilever Plc v Cussons Ltd* [1996] 7 TCLR 334.

105 HC, Wellington, CP 142/97, 14 August 1997, McGechan J.

106 Ibid, 11.

107 Ibid, 13.

be that it reminds the courts of the dangers of *American Cyanamid* and that the merits of a claim should not be ignored in a clear case.

IV: INTERLOCUTORY INJUNCTIONS TO RESTRAIN ALLEGED BREACH OF CONFIDENCE

1. The Application of *American Cyanamid* to Breach of Confidence

(a) A Serious Issue to be Tried

Where it is clear that the public interest defence will succeed the plaintiff does not have "a seriously arguable case". The difficulty, however, is the degree to which the defence must be made out.

Three broad approaches have evolved; the strict pro-confidence approach, the classic approach, and the freedom of speech approach. If the strict approach is adopted, the public interest defence will only tilt the balance in the defendant's favour if it is *very likely* to succeed at trial. This was the test applied by Donaldson MR in *Attorney-General v Observer Ltd.*[108] The classic approach is less exacting. For example the Court in *Lion Laboratories* held that the relevant standard is a "serious defence of public interest which *may succeed* at the trial".[109] Adherents of the third approach recognise that an injunction is a restriction on the right of free speech and are reluctant to award such an injunction against a defendant who raises the public interest defence. The greatest champion of this view has been Lord Denning. In *Hubbard v Vosper*[110] he said that an injunction should not be awarded against a defendant who has a *reasonable* defence of public interest. Lord Denning believes that the position on injunctions in actions for breach of confidence should move to resemble that in defamation,[111] where it is the *plaintiff* that must show that there is no reasonable possibility of the defence succeeding, a far weaker test than asking whether the defence is likely to succeed. The reasonable standard was also applied by Goff J, now Lord Goff, in *The Church of Scientology of California v Kaufman.*[112] Although his Lordship argued against the adoption of any rigid rule in favour of disclosure he thought that "a *reasonable case* of defence of disclosure in the public interest is a very telling factor weighing against the grant of an interlocutory injunction."[113]

108 [1989] 2 FSR 1, 18.

109 Supra at note 45, 539 per Stephenson LJ (emphasis added).

110 Supra at note 58.

111 Ibid, 96-97; see also Lord Denning's dissent in *Schering Chemicals Ltd v Falkman Ltd* [1982] 1 QB 1, 8.

112 [1973] RPC 627.

113 Ibid, 631 (emphasis added).

(b) The Balance of Convenience

Where the defendant cannot establish the defence to the required standard, and particularly with the pro-confidence and classic approaches this is often the case, judges fall back on the balance of convenience test. As will be seen in the Winebox cases, in the absence of an immediate threat to the public welfare, the balance of convenience is almost always determined in the plaintiff's favour. Judges view the threat to the plaintiff of disclosure as disproportionate to the damage that may be caused to a media organisation by a delay in publication.

V: THE WINEBOX CASES

> There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret.[114]
>
> Lord Denning.

> For two years before the government established the inquiry, Cook Islands tax-dodge company European Pacific – formerly owned by Fay Richwhite, the Bank of New Zealand and Brierley Investments – used our courts to stop the business press and TVNZ's *Frontline* programme from revealing details of schemes that cost our government hundreds of millions of dollars in corporate taxes.[115]
>
> North and South.

1. Introduction

As noted in Part I, the focus of this article on the public interest defence to breach of confidence was first prompted by the Winebox cases. These cases remain an excellent demonstration of the problems with the balance struck between freedom of communication and confidence interests, and particularly the problems with breach of confidence injunctions.

2. The History of the Winebox Documents

The Winebox is a collection of documents relating to the activities of the European Pacific group of companies. The documents, which belonged to European Pacific, were originally removed and copied by George Couttie, an employee of the group. The documents remained for some time in the offices of an Auckland businessman, Stephen Lunn, before copies began appearing

114 Supra at note 4, at 362.

115 McLoughlin, "Politics", *North and South*, September 1996, 42.

elsewhere in September and October 1992. Copies of some of the documents were delivered to journalists at *The Independent* and the *National Business Review* ("*NBR*") in October 1992; articles based on the documents appeared in the *Independent,* on 16 October, and in *NBR* on 23 October. Copies relating to transactions involving the Bank of New Zealand ("BNZ") were tabled in Parliament by Winston Peters MP on 23 September and 7 October 1992. On 11 November 1992 Peters made a speech in the House in which he identified the Magnum transaction and read from internal European Pacific documents that warned that the transaction was in breach of s 62 of the Companies Act 1955. Lunn himself delivered a set of the documents to the Serious Fraud Office ("SFO") on 29 October 1992.[116]

3. The Contents of the Winebox: The Magnum Transaction

Debate over the nature of the documents continued throughout 1993 and 1994. Much of this was in the House, injunctions having been obtained against the media. Finally, in August 1994 the Prime Minister announced that a commission of inquiry would be created to examine the issues raised. On 12 September 1994 the Governor General appointed Sir Ronald Davison to head that inquiry.

The transactions evidenced by the documents have now been examined at the Commission of Inquiry into Certain Matters Relating to Taxation. The Commissioner, Sir Ron Davison, decided that in order to fulfill the task outlined in part (a) of his terms of reference, namely to examine the conduct of the Inland Revenue Department ("IRD") and the SFO, it was necessary for him to establish the true nature of the Winebox transactions.[117] During the first phase of the inquiry the IRD identified sixty sets of transactions contained in the Winebox.[118] One of these transactions, referred to as the Magnum transaction (because the initial investment came from Magnum Corporation, now DB Group), was outlined by the Commission in a letter to the Prime Minister of the Cook Islands on 30 May 1995: [119]

> The relevant steps occurring in the Cook Islands on 27 July 1988 begin by the payment of interest by one European Pacific company to another, in respect to which it is said that Cook Islands withholding tax was payable at the rate of 35% - being a sum of $881,582. Deloittes confirm that such an amount was paid

116 See *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559, (HC) 563; *European Pacific Banking Corporation v TVNZ* [1994] 3 NZLR 43 (CA), 44; Wishart, "The Paradise Conspiracy" (Auckland: Howling at the Moon Productions, 1995); *North and South,* February 1996; Report of the Commission of Inquiry Into Certain Matters Relating to Taxation (hereafter the "Winebox Report").

117 Ibid, 1:3:8.

118 Ibid, Appendix B, 1.

119 *Controller and Auditor-General v Davison* [1996] NZAR 145, 164-165 (CA) (emphasis added).

into account number 70CIGPA at the European Pacific Banking Corporation (EPBC) and a receipt issued.

On the same day the Cook Islands Government Property Corporation (CIGPC) purchased a promissory note from a member of the European Pacific group for $10,881,582, and sold it to another member of the group for $10,050,000 - a loss of $831,582. $831,582 was then transferred from 70CIGPA to 70CIGPC (the account of CIGPC) at EPBC. The nature of this payment is unclear. One European Pacific document describes it as an "advance", but the money was not repaid. The economic effect of these transactions is to pay back all but $50,000 of the amount of withholding tax paid.

On 28 July 1989, the same steps are followed for the second payment of interest, except that the full amount of withholding tax is repaid - being $1,169,609.

Both the receipts or certificates evidencing the payment of withholding tax were presented in New Zealand by a member of the European Pacific group. This led to a reduction in the tax to be paid by that company in New Zealand of $2,051,191. *Accordingly, at the end of these transactions, European Pacific are better off by $2,001,191, the Cook Island Government is better off by $50,000 and the New Zealand Government is worse off by $2,051,191.*

The President of the Court of Appeal, Sir Ivor Richardson, and his immediate predecessor Lord Cooke, have both described the Magnum transaction as the sale of tax certificates.[120] In essence, the Cook Islands Government sold European Pacific a tax certificate for a small fee. This tax certificate was then presented to the New Zealand IRD on the basis that it represented a legitimate tax payment to a foreign government. As a consequence, European Pacific received a tax credit in excess of two million dollars. In *Brannigan v Davison*,[121] their Lordships in the Privy Council said that the arrangements to "pay" the tax and then to receive a refund "were part of a single, pre-arranged scheme. Their economic effect was to pay back almost all the tax paid."[122]

It is important to outline briefly European Pacific's position on the Magnum transaction, as it does not share the Court of Appeal's view. In cases where a taxpayer claims a credit for tax paid to a foreign government, s 301(b) of the Income Tax Act 1976 (in force at the time) requires that the taxpayer:

> [F]urnishes to the Commissioner all information (including information in relation to any amount to which *the taxpayer* is entitled in respect of any relief or repayment of the foreign tax) necessary for determining the amount of the credit.

120 Ibid, 165, per Richardson J; 157 per Cooke P.

121 [1997] 1 NZLR 140.

122 Ibid, 143.

Although the Cook Islands Government repaid almost the entire amount of tax for which European Pacific was claiming the credit, this repayment was made to a different company in the group from the one that paid the tax. Therefore, European Pacific argues that there is no obligation on *the taxpayer* to give the IRD any information relating to the repayment.[123] Essentially, the parties may have cleverly exploited a loophole in the statute, but that they did not do anything illegal.

4. The Commissioner's Findings

The Commissioner found that there was no express statutory duty to disclose certain matters to the IRD and that there had therefore been no breach. The Commissioner said:[124]

> [I]t is a feature of New Zealand/Australian/UK law that the form over substance doctrine can be used as an escape route in these three jurisdictions, but in few others. In his recent judgment in *Brannigan & KPMG v Davison* ... Richardson J took the opportunity to highlight the recent Australian decision in *FCT v Spotless Services Limited* (1995) 95 ATC 4775. It is interesting to note that the decision in *Spotless* would almost certainly be different in the United States.

At the time the Commissioner was writing his report, the Full Court decision in *Spotless* had already been overturned by a unanimous bench of seven judges in the High Court of Australia.[125] Although the Commissioner did not expressly rely on *Spotless Services*, itself a case concerning the activities of European Pacific and the Cook Islands, this demonstrates that the form over substance doctrine is not settled in this area. Lord Cooke in the recent House of Lords decision in *IRC v McGuckian*[126] advocated a shift towards consideration of the underlying purpose of the legislation. The Commissioner's findings were the subject of judicial review proceedings in the High Court,[127] and are currently on appeal to the Court of Appeal.

There is a strong argument that the form over substance rule is insufficient in instances of sham, where the form merely conceals a fraudulent reality, and that this was the case with the Magnum transaction. Those who wish to speculate on the argument may note the words of Lord Templeman in *Challenge Corporation Ltd v CIR*,[128] a Privy Council case appealed from New Zealand; that

123 See the discussion between Tony Molloy QC and David Henry, the Commissioner for Inland Revenue, on this matter; *Fraser* (TVNZ Broadcast) 29 May 1994.

124 Supra at note 116, at 2:2:9.

125 See *FCT v Spotless Services Ltd* (1996) 96 ATC 5, 201.

126 [1997] 1 WLR 991.

127 *Peters v Davison*, (HC Auckland, CP 432/97, 23 March 1998, Smellie J).

128 [1986] 2 NZLR 513.

"[e]vasion occurs when the Commissioner is not informed of all the facts relevant to an assessment of tax."[129] The statement quoted in the judgment of Cooke P in *Controller and Auditor General v Davison*, [130] that "tax evasion usually involves fraud, deceit, and the concealment or non disclosure of the true facts,"[131] may also be relevant. Those considering these statements may recall that European Pacific's internal correspondence spoke of the desirability of not making "detection an easier task for the authorities".[132]

5. The Winebox and the Public Interest

Despite the result of the Inquiry, there has still been a widely held view that the public interest in the Winebox documents is sufficient to override their confidentiality. A report tabled by Parliament's Privileges Committee decided that the documents should, in the public interest, be published by the House, notwithstanding that they were still subject to court injunctions.[133] The Court of Appeal had previously dropped broad hints that these injunctions would be discharged should the matter reach trial.[134]

In *Fay, Richwhite and Co Ltd v Davison*[135] the Court of Appeal held that the Commissioner did not err in ruling that the public interest in the Winebox documents outweighed the interest of taxpayer confidentiality. President Cooke, as he then was, felt that this conclusion was almost inevitable.[136] Public interest also played a role in the Court of Appeal's refusal to allow the Cook Islands' auditors to use Cook Islands' sovereign immunity as a means of avoiding giving evidence to the Commission.[137] An argument by four European Pacific employees that their giving evidence to the Commission would breach Cook Islands' law,was similarly rejected, and the Privy Council dismissed their appeal.[138]

The Judges in the Court of Appeal have also given fairly clear indications of what they think of the transactions contained in the Winebox. In *Controller and Auditor General v Davison*[139] Cooke P suggested that the transactions could be described as "the sale of tax credits" and that the Winebox provided evidence that the Cook Islands Government and its instrumentalities were "engaged to a major

129 Ibid, 561.
130 Supra at note 119.
131 Arnold, *The Taxation of Controlled Foreign Corporations: an International Comparison* at 117-8, quoted by Cooke P, ibid, 154.
132 Internal Memorandum 25 November 1987; see supra at note 116, at 46.
133 (1994) 540 NZPD 1563, (8 June 1994).
134 Supra at note 116, at 47.
135 [1995] 1 NZLR 517 (CA).
136 Ibid, 524.
137 Supra at note 119; *KPMG Peat Marwick v Davison; Brannigan v Davison* [1996] NZAR 145.
138 Supra at note 1, at 8. Note that only three of the four appealed.
139 Supra at note 119.

extent in such mixed-up activities."[140] Justice Richardson (with whom McKay J concurred) felt that the Winebox is "believed to contain evidence of a conspiracy to which the Cook Islands Government was party to make an abusive claim to foreign tax credits".[141] This finding was also welcomed by Thomas J.[142] Justice Henry observed that:[143]

> There is evidence presently before the Commissioner to support a contention that some of the transactions may have defrauded the New Zealand revenue or provided a means for evading tax.

Others, of course, have been less subtle. Winston Peters MP called the architects of the transactions "international money-laundering criminals".[144]

The public interest in the detection and denunciation of large scale tax evasion is obvious. Tax evaders are "parasites who suck out the life-blood of our society",[145] forcing others to shoulder the burdens they shirk. There is also a strong argument that even if the Commissioner is right, and the Winebox transactions did not constitute tax evasion, there would still be a public interest in disclosure. There may also be a public interest in tax avoidance. The Commissioner of Inland Revenue, David Henry, has said that the Winebox documents "show blatant tax avoidance and cast little credit on the business ethics of the designers".[146] Tax avoidance is not a criminal offence, but if the Commissioner of Inland Revenue finds that the main purpose of a transaction has been to avoid tax, then he may impose tax as if the transaction had not been entered into. This power was contained in s 99 of the Income Tax Act 1976 and is now in s BB9 of the Income Tax Act 1994.[147] It is known as the General Anti-Avoidance Provision. President Richardson has said that this provision:[148]

> [I]s perceived legislatively as an essential pillar of the tax system designed to protect the tax base and the general body of taxpayers from what are considered to be unacceptable tax avoidance devices.

If taxpayers are avoiding tax and the Commissioner of Inland Revenue does not know of it, then tax that should be paid, is not paid. There is a public

140 Ibid, 157.
141 Ibid, 177.
142 Ibid, 189.
143 Ibid, 180.
144 (1994) 539 NZPD 567, (22 March 1994).
145 *IRC v Rossminster Ltd* [1980] 2 WLR 1, 19 per Lord Denning; see Molloy, *Thirty Pieces of Silver* (Auckland: Howling at the Moon, 1998) 271.
146 See supra at note 116, at 46.
147 See Ohms, "When does legal tax avoidance become criminal tax evasion?", *The Independent*, 16 August 1996, 32; Ohms, "Tax Dodging - What's legal? What's not?", *The Independent*, 23 August 1996, 23; Molloy, *Molloy on Tax Disputes, Investigations and Crimes* (Auckland: Fishermore Press, 1988).
148 Supra at note 129, at 545.

interest in information relating to such activities being disclosed. This public interest may only extend to disclosure to Inland Revenue. In the Winebox case, however, the IRD initially failed to investigate the matter, and its staff have since admitted that they did not understand the Magnum transaction until "it became an issue on television."[149] The IRD was an "interested party", similar to the Home Office in *Lion Laboratories*, and this created a public interest in more general disclosure.

6. The Winebox in the Courts

(a) *European Pacific Banking Corporation v Fourth Estate Publications Ltd*[150]

The first Winebox case to reach the courts followed reports based on the documents in *The Independent* and *NBR*. European Pacific sought an injunction preventing further publications against the publishers of both newspapers based on wrongful use of confidential information, breach of copyright and conversion.

The defendant newspapers argued that there was a public interest in disclosure. In particular, they argued that the documents contained evidence of transactions designed to avoid or circumvent New Zealand tax laws. They also alleged breaches of s 62 of the Companies Act 1955 and that foreign companies were avoiding provisions of the Land Settlement Promotion and Land Acquisition Act 1952. The defendants also suggested that there was a further public interest in the involvement of the publicly owned BNZ in these transactions.

Justice Henry acknowledged that these could properly be described as matters of public interest. Nevertheless, it was for the defendants to establish that the public interest was sufficient to override the obligation of confidence. As Henry J noted, this created some difficulty, because both parties had chosen not to disclose any of the documents to the Court. *The Independent* and *NBR* did not want to bring their documents to Court for fear that the Court would fail to find a public interest in them and award a permanent injunction. If this happened the newspapers could be ordered to return the documents. European Pacific naturally wanted to minimise exposure of documents they held.

It is questionable whether any determination of the public interest issue would have been possible without further disclosure. Justice Henry held, however, that such a determination was unnecessary at the interlocutory stage. In awarding the injunction, Henry J essentially applied the *American Cyanamid* test, although the case itself was not cited. There was little doubt that the plaintiffs had a "seriously arguable" claim. The remaining issue was therefore

149 Comment by Anthony Loo, Inland Revenue Tax Intelligence Unit Manager; see *New Zealand Herald*, 30 August 1996, A4.

150 Supra at note 116.

determination of the balance of convenience. His Honour held that this lay with the plaintiffs and noted that two principal factors had weighed his judgment. First, if publication were allowed, the plaintiff's preferred remedy would be lost. Second, the transactions in the Winebox had occurred prior to March 1989. His Honour felt this meant that there was no real need for present disclosure.[151] The only possible loss to the defendants was a delay in publication, something Henry J thought was "difficult to identify."[152] The fact that the documents had been stolen from the plaintiff also appears to have been influential. Any possible harm that delay could cause to the public interest was not mentioned, although his Honour did mention that matters should proceed quickly to trial.[153]

Matters did not proceed quickly to trial. The Winebox would not come before a court again for over a year and the injunction was to remain in force until June 1994.

(b) European Pacific Banking Corporation v Television New Zealand Ltd[154]

Although the injunction against the business press remained in force, during 1993, Television New Zealand ("TVNZ") was producing a documentary detailing the activities of European Pacific. This documentary was scheduled to screen in December 1993.[155] European Pacific became aware of the documentary's existence, and again went to court seeking injunctions. *European Pacific Banking Corporation v Television New Zealand Ltd* was heard before Robertson J in late January 1994.

European Pacific first argued that TVNZ was bound by the 1992 injunction against *The Independent* and *NBR*. Justice Robertson did not think it necessary to make a finding on this point. In fact, the interesting issue of the extent to which an injunction against one media organisation can serve to bind others who are aware of it, was never resolved in Winebox litigation. His Honour suggested that the matter will depend upon whether New Zealand courts follow the decision of Donaldson MR in *Attorney-General v Newspaper Publishing Plc*,[156] where his Honour indicated that media organisations who knowingly publish material covered by an injunction are likely to be held in contempt of court.[157] Analogously, in *Attorney-General v Times Newspapers Ltd*[158] the House of Lords found *The Sunday Times* in contempt of court for publishing extracts from

151 It is in fact possible that the JIF deals were still operating when the Winebox case first went to court.The injunction may have been sought to safeguard transactions still in progress.

152 Supra at note 116, at 566.

153 Ibid, 565.

154 HC Auckland, CP 768/93, 3 February 1994, Robertson J.

155 See Wishart, supra at note 116, at 212.

156 [1987] 3 WLR 942 (CA).

157 See Burrows, supra at note 10, at 174.

158 *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191.

Spycatcher while injunctions were in force against other newspapers.[159]

As there was no definite finding as to whether TVNZ was bound by the earlier injunctions, it was able to once more bring the defence of public interest before a court. Justice Robertson discussed the public interest issue at some length, and acknowledged that there was such an interest in the information TVNZ wished to disclose. Nevertheless, his decision was substantially the same as that of Henry J in 1992: that matters should be determined at trial. His Honour held that the balance of convenience (although he preferred the term "balance of justice") favoured European Pacific and that the status quo should be preserved until trial.[160] As the case concerned events which had occurred five years ago, Robertson J decided that the sense of immediacy, important in cases such as *Lion Laboratories,* was not present.[161] Nevertheless, his Honour recognised that there had now been "an effective gag on disclosure for almost 15 months",[162] emphasising that "the time is long since past when the core issues which are outstanding should be conclusively resolved".[163] A restraint was granted, but only until 30 April 1994.

The parties returned briefly to the High Court on 24 March, when Robertson J altered his earlier orders to allow the defendants to publish fair and accurate reports of any proceedings in the House.[164] On 30 March, Henry J made a further alteration, extending the orders to cover additional documents.[165] When the parties appeared for a third time before Robertson J on 12 April,[166] the Winebox had been further discussed in Parliament, and the defendants argued (along *Spycatcher* lines) that the information was in the public domain to such an extent that it was no longer confidential. Justice Robertson disagreed, suggesting that although some information may have been in the public domain, the documents themselves were not. Therefore the orders should continue until 23 May when the matter was set to go to trial. The Winebox cases illustrate that an injunction will only be refused on the basis that the information is in the public domain, if there has been extensive publication (as there was in *Spycatcher*). Some details of the Winebox were revealed in the *NBR* and *Independent* articles in October 1992. A front page article in *NBR* on 23 October 1992 identified the Magnum transaction and alleged that it breached s 62 of the Companies Act 1955 which prevents companies assisting in the purchase of their own shares. It also alleged that European Pacific had received legal advice

159 *The Guardian* and the *Observer*; see supra at note 19.

160 Supra at note 155, at 9.

161 Ibid, 10.

162 Ibid, 4.

163 Ibid, 12.

164 *European Pacific Banking Corporation v TVNZ Ltd,* (HC Auckland, CP 768/93, 24 March 1994, Robertson J).

165 *European Pacific Banking Corporation v TVNZ Ltd,* (HC Auckland, CP 768/93, 30 March 1994, Henry J).

166 *European Pacific Banking Corporation v TVNZ Ltd,* (HC Auckland, CP 768/93, 12 April 1994, Robertson J).

warning of the breach.[167] The article did not, however, deal with the tax credit sale aspect of Magnum, nor were other Winebox transactions canvassed. Justice Robertson's finding that the Winebox information was not in the public domain appears to be correct, although it seems artificial to distinguish between the information and the documents themselves.

On 16 May 1994 the Court of Appeal delivered its judgment on appeals made by European Pacific against interlocutory orders for it to disclose certain information, and against the High Court's refusal to order TVNZ to disclose the source of its information. The High Court trial, where it was hoped the public interest issue would finally be determined, had not yet been heard. Nevertheless the Court of Appeal judges gave strong hints as to what they thought on this matter. In a judgment with which Casey and McKay JJ concurred, Cooke P said that the defendants had a "seriously arguable case for their defence of iniquity."[168] He also suggested that "the inference is open that when initially allowing the credit the Commissioner was not aware of material facts."[169] Remembering that European Pacific's principal argument is that the law did not require it to disclose the fact of the repayment of "tax"; it certainly did not consider it a "material fact" from the Commissioner of Inland Revenue's point of view.

The High Court trial never took place. For over eighteen months European Pacific had succeeded in obtaining interim injunctions on the basis that its rights needed to be protected until it could have the case heard at trial. In the weekend prior to the trial, European Pacific negotiated a settlement with TVNZ. The basis of the settlement was that European Pacific would discontinue court action, allowing the *Frontline* documentary to screen, and in return TVNZ would hand back any Winebox documents that it held but had not already used.[170] European Pacific told the court that it was ending legal action because the contents of TVNZ's documentary were already in the public domain, as a result of Winston Peters' speeches in Parliament.[171] Interestingly, Robertson J had rejected this exact argument when it was made by TVNZ in April. European Pacific's settlement only applied to the case against TVNZ. The 1992 injunctions against *The Independent* and *NBR* remained in force.

7. The Winebox in the Public Domain

During almost two years of Winebox related litigation, no New Zealand court held that the public interest in the Winebox outweighed the documents' confidentiality. In each case the issue was avoided by resort to the *American Cyanamid* balance of convenience. Events in Parliament were the cataylst for the

167 "Lawyers warn, but EPI still helps Magnum avoid tax" *NBR*, 23 October 1992, 1.

168 Supra at note 116, at 47.

169 Ibid, 46.

170 See Wishart, supra at note 116, at 258.

171 Ibid, 258.

publication of the Winebox. A full set of Winebox documents was tabled in Parliament on 16 March 1994 by Winston Peters MP.[172] He had attempted to table the documents on sixteen previous occasions, but was blocked each time by Government Members.[173] The tabling of the documents was not the end of the matter. Noting that court injunctions against publication of the documents were still in force, Speaker Peter Tapsell refused to allow the documents to be published,[174] and the matter was referred to the Privileges Committee.[175]

The Committee received legal advice from Solicitor-General John McGrath, Clerk of the House David McGee, and Law Commission President Sir Kenneth Keith, and advised the House on 8 June 1994 that it had "concluded that the public interest in this case justifies a recommendation to the House that the documents referred to should now be printed, and recommends accordingly."[176] The Winebox documents went on sale the next day. It seems that the House's decision was, in part, prompted by lack of progress in the courts. In his advice to the Privileges Committee, the Solicitor-General observed that "[g]iven the lengthy delays to date in the 1992 proceedings it seems hardly likely that the issue will be resolved judicially in the near future in that context."[177]

Thus *NBR* returned to the Auckland High Court seeking to discharge the 1992 injunctions. There was obviously no sense in the Court attempting to preserve confidence in documents that were on sale at the Government Book Shop, five minutes walk away. European Pacific did not oppose *NBR*'s application and the injunctions were discharged.[178]

VI: PROBLEMS REVEALED

The Winebox cases reveal a number of problems with both the *American Cyanamid* approach and its relationship with the public interest defence, and the way in which competing public interests are assessed generally in breach of confidence. The public interest in the Winebox documents is widely acknowledged, and yet interim injunctions prevented their publication for over eighteen months. How did this happen?

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172 539 NZPD 419, 16 March 1994.

173 See Wishart, supra at note 116, at 232.

174 539 NZPD 470, 17 March 1994 Of course, the Speaker cannot prohibit the publication of documents generally. She or he can, however, rule on what the Clerk of the House may or may not do with them; see Privileges Committee, *Question of Privilege Referred to the Committee on 1 June 1994* AJHR I.15A, 6.

175 Committee members were Doug Graham, Bill Birch, Don McKinnon, David Lange and David Caygill (whose place was taken by Jonathan Hunt on the final day).

176 *Report of the Privileges Committee on the Question of Privilege concerning the printing of the documents tabled by the Member for Tauranga on 16 March 1994* June 1994, AJHR I 15 A, 4. See also supra at note 134.

177 Ibid, 10.

178 See "NBR Wins Europac Battle", *NBR*, 10 June 1994, 1.

1. The Onus of Proof and the "Seriously Arguable" Case

In both the *Fourth Estate* and the *TVNZ* cases, defences aside, there had clearly been a breach of confidence and thus a "seriously arguable case". The onus was on the defendants to show that there was a public interest in publication. The defendants were unable to discharge this burden. In the *Fourth Estate* case the judge cited the lack of evidence. The defendants alleged that the Winebox contained evidence of transactions designed to circumvent New Zealand tax laws, but they do not seem to have explained the transactions to the Court. The "sale of tax credits" aspect was not fully understood in 1992.[179] In 1994 TVNZ came to Court with better evidence of the iniquity in the Winebox transactions. Professor Prebble, a tax expert from Victoria University in Wellington, and Mr Brian Tyler, a former Auditor-General, supplied affidavits to the effect that the Winebox transactions were illegal. As in 1992, however, it was held that the iniquity issue should be determined at trial. In summary: the onus of the proof is placed on the defendant; the defendant must provide evidence of a public interest; the court refuses to look at this evidence because it should be determined at trial.

This shows the difficulty of the "seriously arguable case" standard. Because the plaintiff need only demonstrate an arguable case, the defendant must prove the public interest defence to a high standard to deny that the plaintiff has any sort of case. The defendant is rarely able to do this.

2. The Balance of Convenience Test

Use of the *American Cyanamid* balance of convenience test immediately places the plaintiff in a strong position. If the Court had allowed publication, European Pacific would have lost the possibility of keeping the documents confidential indefinitely. There is a general view that damages are rarely adequate compensation for this loss. To shift the balance back in their favour, the defendants needed to show that they would suffer some loss if an injunction was awarded and they later won at trial. They were unable to do this because the Court did not place any value on their immediate right to freedom of expression. A temporary restraint on a newspaper's freedom to publish was considered to cause no loss. On the basis of this opinion, it will be very difficult for a media organisation to ever tip the balance of convenience in its favour, even when it is almost certain to win at trial.

In *Cambridge Nutrition Ltd v British Broadcasting Corp*[180] the English Court of Appeal recognised that a simple application of *American Cyanamid* risked unfairly restraining the defendant's freedom of expression. Lord Justice

179 There is no mention of the sale of tax credits in the articles in *The Independent* and *NBR* published prior to the 1992 injunction; see also Wishart, supra at note 116, at 134.

180 [1990] 3 All ER 523.

Kerr said:[181]

> It seems to me that cases in which the subject matter concerns the right to publish an article, or to transmit a broadcast, whose importance may be transitory but whose impact depends on timing, news value and topicality, do not lend themselves easily to the application of the *Cyanamid* guidelines.

Lord Justice Kerr, Ralph Gibson LJ and Eastham J agreed that in such cases, where there was an uncompensatable disadvantage to both parties, it was appropriate to consider the merits of the case. Furthermore, Kerr LJ argued that all things being equal, a doubtful contract should never prevail over freedom of speech. Regrettably, the judges in the Winebox cases, and in other breach of confidence cases, have seemed all too willing to allow claims of confidence to prevail over freedom of expression.

3. Failure to Recognise the Defendant's Right to Freedom of Expression

In the *Fourth Estate* case Henry J said that it was difficult to identify any real loss that would be caused to the defendants if publication were restrained. Loss from an inability to publish stories was described as "quite insufficient".[182] This reasoning demonstrates a failure to attach sufficient importance to the defendant's fundamental right to freedom of expression. New Zealand has affirmed its commitment to this freedom in s 14 of the New Zealand Bill of Rights Act 1990 ("NZBORA"); how can a court dismiss a restriction on this fundamental freedom as "vague" and "insufficient"?

4. Failure to Recognise the Public Interest in Freedom of Expression

Justices Henry and Robertson thought that the matters allegedly contained in the Winebox could be properly described as in the public interest. They did not consider that any significant detriment would be caused to the public interest by a delay in disclosure. Provided that a crime has already taken place, a delay in its coming to light will not harm the public interest.

The undesirability of placing restrictions on freedom of expression was discussed at first instance in *Attorney-General v Guardian Newspapers Ltd (No 2)*.[183] Counsel for *Times Newspapers Ltd* argued that the court should consider Art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which confers a right of freedom of expression.[184] It

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181 Ibid, 535.

182 *European Pacific Banking Corporation v Fourth Estate Publications*, supra at note 116, at 566.

183 Supra at note 8.

184 Ibid, 580.

was further argued that there must be a "pressing social need" for any restriction and that the restriction must be "proportionate to the legitimate aim pursued."[185] In the Court of Appeal, Scott J concluded that there was no pressing social need for the injunctions, nor were the injunctions proportionate to the aim pursued. These words were approved by Lord Goff, when the case came before the House of Lords. His Lordship stated that restrictions on freedom of expression, in English law, require the existence of a "pressing social need", and that "interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued".[186] These words were approved by Lord Keith in *Derbyshire County Council v Times Newspapers Ltd.*[187] Although the term "pressing social need" comes from the European Convention, Lord Keith said that "in the field of freedom of speech there was no difference in principle between English law on the subject and Art 10 of the Convention."[188] Some members of the European Court of Human Rights would limit prior restraint even further: Justice Morenilla maintained that prior restraint should only be imposed in circumstances where disclosure would result in immediate, serious and irreparable damage to the public interest.[189]

Most of these comments were made in relation to defamation actions. But the fact that breach of confidence actions, especially when an interim injunction is requested, pose a threat to freedom of expression has been recognised by judges elsewhere. Lord Denning in *Schering Chemicals Ltd v Falkman* said that freedom of the press "is not to be restricted on the ground of breach of confidence unless there is a 'pressing social need' for such restraint".[190] This was approved by Kirby P in the New South Wales chapter of *Spycatcher.*[191] Lord Oliver, describing the *Spycatcher* litigation, writes:[192]

> The end result of the case is that the "Observer" and "The Guardian" won their point. They were free to publish what had been public ever since the decision of the Vice-Chancellor to discharge the injunction. They succeeded in the end in establishing that that decision was right and right for the correct reasons. But they were free after a period of some two years of inhibition .... The public, whose interest it was claimed was being protected by the proceedings, has in fact been deprived over the past two years of the benefit, for what it is worth, of discussion of Mr. Wright's allegations - whether true or untrue - by journalists and commentators.

185 Ibid, 580; see also supra at note 19, at 62.

186 Supra at note 8, at 660.

187 [1993] 2 WLR 449 (HL).

188 Ibid, 460.

189 *The Observer, Guardian and Sunday Times v UK* (1991) cited in Fenwick, *Civil Liberties* (Cavendish Publishing, 1993), 127.

190 Supra at note 111, 22.

191 *Attorney-General (UK) v Heinemann Publishers* (1987) 10 NSWLR 86, 169.

192 Oliver L, "Spycatcher: Confidence, Copyright and Contempt" 23 Is LR 407, 425.

In the Winebox case the New Zealand public was similarly deprived. What is more, if the matter had ever gone to trial, it is exceedingly likely that *The Independent* and *NBR* would have been able to show a public interest in the Winebox documents.[193] This makes the Winebox case a more serious restraint on freedom of expression than *Spycatcher*, where the House of Lords has never admitted an overriding public interest in the information, but rather made its decision on the basis that the confidentiality in the book had been destroyed by worldwide publication.

The practical reality of the application of *American Cyanamid* meant that freedom of expression was unreasonably restricted; Lord Diplock did not intend such results. In *NWL v Woods*, his Lordship said:[194]

> My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid v Ethicon Ltd* to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply.

Such attention to practical realities was lacking in the Winebox cases on breach of confidence.

VII: REFORM

1. Introduction

This part discusses how the law of breach of confidence can be reformed. Some guidelines as to how legislation could be used to achieve this were proposed by the United Kingdom Law Commission in 1981.[195] The focus is on whether the action can be reformed by the courts, rather than Parliament, so as to attach adequate value to freedom of expression using the NZBORA for inspiration.

2. A Solution in the Common Law

The beauty of the common law lies in its adaptability. Judges shape the common law to meet new requirements, often finding more elegant and appropriate solutions than are provided by the blunt tool of legislation.

193 See earlier discussion of the public interest in the documents.

194 [1979] 1 WLR 1294 (HL).

195 *Breach of Confidence*, Law Com No 110 (1981). These proposals were analysed in Cripps, "The Public Interest Defence to the Action for Breach of Confidence and the Law Commission's Proposals on Disclosure in the Public Interest", (1984) 4 Oxford Journal of Legal Studies 361. See also Jones, "The Law Commission's Report on Breach of Confidence" [1982] CLJ 40.

Consistency is important, and change will usually be gradual, but the courts are nevertheless able to adapt and mould the law to meet society's demands expressed, through Parliament, in the NZBORA. Such development has already occurred to a much greater extent in the areas of privacy and defamation; *Lange v Atkinson*[196] is a classic example of the law being adapted to the needs of modern society.

(a) Freedom of Expression

In the Winebox cases, the defendants wished to impart certain information to others. The fact that they were restrained from doing so was a limit on their fundamental right of freedom of expression, affirmed by s 14 of the NZBORA. The matter was raised by defence counsel in the 1992 case. Counsel for Stephen Lunn (the fourth defendant), told the Court that the parties were "fairly and squarely in the middle of a matter that section 14 must have considerable relevance [to]."[197] Despite this, no reference was made to the NZBORA in the judgment.

(b) The Bill of Rights Act and the Common Law

The NZBORA was passed to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand". These "fundamental freedoms", contained in Part II of the Act, include freedom of expression. Section 14 provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information of any kind and in any form.

The freedoms in Part II of the Act are expressed as absolutes. They are, however, subject to s 5 which provides:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Although there has been a great deal of discussion on how the NZBORA ought to influence the interpretation of statutes,[198] less consideration has been given to how the Act should affect the common law. There are, however, strong grounds for believing that the common law should be given an application consistent with the NZBORA. Section 3 specifies that the Act applies to acts

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196 Court of Appeal, 25 May 1997, CA 52/97.

197 See "Special Report", *NBR*, 6 November 1992, 26.

198 See, for example, *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *R v Butcher* [1992] 2 NZLR 257 (CA); *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA).

done by the judicial branch of government. This cannot have been an unintended slip of the drafter's pen; the Canadian Charter of Rights and Freedoms, on which the Bill of Rights is closely based, omits such a provision. Public law commentator Phillip Joseph writes that there is little reason in principle why the Act should not apply to common law rules,[199] although he doubts whether this was intended. Support can also be found in dicta of Cooke P, in *Ministry of Transport v Noort*.[200] The then President of the Court of Appeal specifically acknowledged that the Act may apply to the common law.[201] Extrajudicially, Lord Cooke has written that the developing common law must be moulded to accommodate the Bill of Rights Act.[202] Recently in *Lange v Atkinson*, at High Court level, Elias J was clear that the Court should give effect to the Bill of Rights in developing the common law.[203] Section 4, which says that the NZBORA shall not prevail over express provisions in other enactments, obviously does not affect the application of the Act to the common law. Therefore, if the common law is to place limits on freedom of expression, it must be shown that these are reasonable limits pursuant to s 5.

(c) Reasonable Limits

The courts should approach the question of reasonable common law limits on Bill of Rights' freedoms in the same way that they have approached limits imposed by legislation. In determining reasonable limits, the Court of Appeal has adopted the framework used by the Supreme Court of Canada in relation to limits on the Canadian Charter of Rights and Freedoms.[204] To be a reasonable limit, a law must meet two requirements. First, it must fulfil a purpose that is sufficiently important to justify the limiting of fundamental freedoms. Freedoms must not be restricted for trivial reasons. Only if the law's objective relates to a matter that is of substantial and pressing concern in a free and democratic society, will it be allowed to limit the Bill of Rights. Second, the limit must be a reasonable and proportional way of advancing the objective. There must be a clear link between the law's objective and the limit, and the freedom in question should be impaired only so far as is necessary to achieve the objective. [205]

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199 Joseph, *Constitutional and Administrative Law in New Zealand* (The Law Book Co, 1993) 856.

200 Supra at note 198.

201 Ibid, 271.

202 "A Sketch from the Blue Train - Non-discrimination and freedom of expression: the New Zealand contribution" [1994] NZLJ 10, 11.

203 Her Honour found support for this proposition in *Solicitor-General v Radio New Zealand Ltd* [1994] 1NZLR 48, 58 (HC) and *Duff v Communicado Ltd* [1996] 2 NZLR 89, 99 (HC).

204 See *Ministry of Transport v Noort* supra at note 198.

205 See *R v Oakes* [1986] 1 SCR 103; see also the Chief Justice of Canada's summary of the *"Oakes Test"* in *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 373-374. This was adopted by Richardson J in *Ministry of Transport v Noort* supra at note 198, at 283.

(d) Breach of Confidence and Reasonable Limits

There can be little doubt that the objectives of the law of breach of confidence are sufficiently important to justify some restriction on freedom of expression. The courts have recognised that there is a strong public interest in preserving confidences. If the law wishes to prevent breaches of confidence, rather than only punishing those who do it with damages, some limit must be placed on freedom of speech.

The second issue is proportionality. Limiting freedom of expression to the extent that the New Zealand public are deprived for two years of information relating to the possible fraudulent theft of millions of dollars of their money, is not a proportional response to the objective of upholding confidences.

The law should uphold confidences, if necessary limiting freedom of speech, but should not order prior restraint where the public interest in information outweighs the public interest in maintaining confidences. Nor should damages be awarded in such circumstances. Such measures are only justified when the public interest in preserving a confidence outweighs the other public interests involved. Once the issue of public interest has been raised, the onus must shift to the plaintiff to show that the balance of public interests is in preserving its confidences. In weighing this balance the court must give proper consideration to the public interest in freedom of expression. Other factors, such as how the information was obtained and the appropriate recipient, should also be considered. A former editor of the *Sunday Times* has referred to breach of confidence law as "one of the unique restrictions on the freedom of the press in Britain".[206] The same is true in this country to an unacceptable extent and the Winebox cases demonstrate the need for reform.

(e) Reasonable Limits and Injunctions

Proportionality also requires that restraint should not be ordered at the interlocutory stage, unless the public interest demands it. Prior restraint is a drastic interference with freedom of speech.[207] The Winebox cases point to the ease with which injunctions can be obtained for breach of confidence. The *American Cyanamid* test is inappropriate for breach of confidence actions and the balance of convenience test is undesirable. Judges have already expressed reservations about the *American Cyanamid* approach.[208] In the Hong Kong *Spycatcher* case Kempster JA argued that even if a serious issue to be tried could be shown, the public policy issues at stake "cannot await trial and must immediately be addressed; one of the most important being the gravity of

206 Mr Harold Evans, former editor of *The Sunday Times*, as quoted by Kempster JA in the Hong Kong chapter of *Spycatcher*, [1989] 2 FSR 671, 673.

207 See comments of Lord Scarman in *Attorney-General v BBC* [1980] 3 WLR 109, 138.

208 Comments of Lord Oliver, supra at note 192, at 419.

interference, albeit temporary, with the free-flow of information".[209] Although the New Zealand courts' approach to interim injunctions is not strictly that of Lord Diplock, the presence of *American Cyanamid* is evident in the decision in the *Fourth Estate* case. The courts must move away from a strict approach and make greater efforts to consider the merits and the practical realities of a claim for an injunction. Justice Laddie's decision in *Series 5* encourages judges to consider the merits if there is a clear view of the case and *Klissers* can be read in the same way, but where important freedom of expression rights are at stake some regard should always be had to the merits.

One laudable recent decision is the judgment of Elias J in *PC Direct Ltd v Best Buy Ltd*.[210] In that case her Honour attached significant weight to the s 14 right to freedom of expression in weighing the overall justice in an application for an injunction to restrain trade mark infringement.[211] Her Honour highlighted the fact that the granting of interlocutory relief is discretionary and that she was concerned "not to cut across the rights to freedom of speech and to receive information protected by s 14 of the New Zealand Bill of Rights Act 1990".[212] The overall justice of the case was best served by denying the injunction.

This concern for freedom of expression should be reflected in breach of confidence cases. If the plaintiff is unable to demonstrate that there is insufficient public interest in the information to warrant disclosure, then no injunction should be issued.

3. Another Reason for Reform

Inappropriate interim injunctions may, in fact, end up defeating the law's objective of balancing interests and maintaining confidences. If *The Independent* and *NBR* had chosen to make the entire contents of the Winebox public as soon as they had received it, it is unlikely that any restraint of publication would have been ordered. The ratio of the *Spycatcher* cases is that the court will not forbid further publication of material already completely in the public domain. Moreover, the newspapers would not have been punished with damages at trial where the public interest defence is likely to have succeeded. As long as the newspapers published before any hint of injunctions, and the risk of being in contempt of court, they would have been better off to make the contents of the Winebox completely public. Putting documents irretrievably in the public domain is as easy as scanning them and putting them on the Internet.[213] Such

209 [1989] 2 FSR 671, 675.

210 (1997) 7 TCLR 452.

211 There is a peculiar flaw in s 8(1A) of the Trade Marks Act 1953 that prevents comparative advertising using the logos of other businesses even where there is no risk of confusion.

212 Supra at note 211, at 462.

213 For an example of this, see Glantz, *The Cigarette Papers* (California: University of California Press, 1996). This case related to thousands of pages of internal tobacco company documents, which are found at http://www.library.ucsf.edu/tobacco/cigpapers/.

decisions should not be taken by individuals who are not in a position to objectively judge the public interest. The process of law should encourage parties to bring these matters to court.[214]

VIII: CONCLUSION

The public interest defence to breach of confidence actions, in its present state, was unable to prevent an eighteen month restraint on publication of the Winebox documents. The public interest in these documents is now widely acknowledged. A fraud on the IRD is essentially a fraud on the people of New Zealand. The New Zealand public therefore have the strongest possible interest in knowing of it, and what is being done to prevent it. It is also arguable that there is a public interest in knowing about tax avoidance schemes, in cases where the IRD is failing to attack them as they are able to do under the Income Tax Act. The fact that it was possible to keep the Winebox documents from the public for so long represents a failure of the public interest defence and of the test applied at the interlocutory stage.

This article has revealed a number of problems with the law as it stands. The *American Cyanamid* approach to the granting of interlocutory injunctions as it is currently applied in our courts is unsuitable for breach of confidence injunction applications where there is a public interest in disclosure. The questions asked: whether there is a seriously arguable case; whether damages are an adequate remedy; and where the balance of convenience lies, are not able to account for the public interest in freedom of expression. The courts have shown too great a readiness to grant injunctions in breach of confidence cases, and this article has demonstrated the effects of this readiness. Breach of confidence actions were used to keep details of large-scale circumvention of our tax laws, information of acknowledged public interest, out of the public domain for eighteen months. The public interest defence to breach of confidence proved inadequate and unworkable in the current injunction framework.

Finally, this article has argued for reform. "The Bill of Rights Act is intended to be woven into the fabric of New Zealand law";[215] it can and should be a catalyst for the reform of confidence law, particularly the availability of prior restraint. In cases where prior restraint is requested and the defendant raises a *serious case* of public interest, the onus should then fall on the plaintiff to show why it is in the public interest that information be kept confidential. This will mean that judges must attempt to reach a decision on public interest issues at the interlocutory stage. *American Cyanamid* should be abandoned when freedom of expression is at stake. It is anomalous that Blackstone's rule against prior

214 See Kirby J's review of Cripps, "The Legal Implications of Disclosure in the Public Interest" (1988) 62 ALJ 397.

215 *R v Goodwin* [1993] 2 NZLR 153, 156 per Cooke P.

restraint, so soundly embedded in defamation, is ignored in breach of confidence. If the plaintiff is unable to demonstrate to the court why prior restraint should be ordered, then the defendant's right to publish must prevail. Onerous damages should, however, be awarded at trial against defendants who make spurious claims of public interest.

Generally, freedom of expression needs to be accorded greater recognition in the confidence area. Judges must view any proposed restriction on freedom of expression as being of significant detriment to the defendant. This detriment is already acknowledged in defamation and privacy law. Judges must also acknowledge the general public interest in freedom of expression and give this considerable weight in any balancing of public interests. It is hoped that once these reforms are in place, information of a significant public interest will not in the future be kept from the New Zealand public.

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