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PRIME MINISTER

THE JOAN MILLER CASE

We are likely to have advice tomorrow from the Solicitor General that we should not appeal against today's decision to refuse us an injunction banning the publication of "One Girl's War". The Solicitor takes this view because:

(i) There is a low chance that our appeal will succeed;

and

(ii) Our claim was lost, I am told, because of a clause in the Irish constitution regarding freedom of information. This would allow us to distinguish the Miller case from the Wright case, and give us reason for pursuing an injunction in the Australian courts in respect of Wright's book but not in the Irish courts in respect of Miller's.

The Solicitor General and Treasury counsel will come to a final view overnight, so that an urgent decision can be made tomorrow.

N.L.W.

NLW

2 December, 1986.

I have had a word with him this evening. The Irish decision I understand can readily be distinguished from the Australian case

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10 DOWNING STREET

From the Principal Private Secretary

3 December 1986

Dear Michael,

"ONE GIRL'S WAR" BY JOAN MILLER

The Prime Minister has seen the letter which the Solicitor General sent today to the Home Secretary about the proceedings regarding Joan Miller's book.

As I told Juliet Wheldon on the telephone this morning the Prime Minister agrees with the course of action proposed by the Solicitor General. That is, we should not appeal in the Irish courts against Miss Justice Carroll's judgement refusing our application for an injunction to restrain publication of this book; we should pursue further with our Irish lawyers whether we have a claim for an account for profits; and we should continue for the time being the English proceedings.

I am sending a copy of this letter to Stephen Boys Smith (Home Office), Tony Galsworthy (Foreign and Commonwealth Office), Sir Antony Duff and Mr. Mallaby.

Yours sincerely,
Nigel Wicks

N L WICKS

Michael Saunders, Esq.,
Law Officers' Department

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JB

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ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

01-405 7641 Extn

Prime Minister

Agree to drop the Irish claim for action; and to continue the English action for the time being?

N.L.W.
3.12

The Rt. Hon.Douglas Hurd CB. MP.
Secretary of State for the Home Department
Home Office
50 Queen Anne's Gate
London SW1

3 December 1986

Dear Douglas

"ONE GIRL'S WAR" BY JOAN MILLER

The High Court in Dublin yesterday refused to grant our application for an injunction to restrain publication of Joan Miller's book in inter partes proceedings. I am enclosing a copy of the Judgment of Miss Justice Carroll.

You will see from the Judgment that it is founded entirely upon a provision of the Irish Constitution. Because there was no Irish public interest in overriding the Constitutional right to publish, the case fell.

I have sought the advice of our Irish lawyers on the prospects for an appeal. As you will see from the enclosed letter (which I have just received), they are far from optimistic. In my view, to lose the case on the basis of a particular provision of the Irish Constitution is the least unhelpful ground on which to fail. In bringing the proceedings we have confirmed our consistent enforcement of the duty of confidentiality of "insiders". In the light of the Judgment and of the advice of our Irish lawyers, I would advise against any appeal. A reversal in the Irish Supreme Court would attract further attention to the freedom to publish in the Republic. It might be based on less acceptable grounds than the Constitutional provision. If we were, however, to appeal, we should do so as soon as possible. The book has been on sale in Ireland since the ex parte injunction was lifted. Our prospects of success, which are not good in any event, decrease with any delay. A decision therefore needs to be taken during the course of this morning.

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You will recall that besides seeking an Injunction in these proceedings, we have made a claim for an account for profits. I will be pursuing further with our Irish lawyers whether this claim should be pursued. No decision on this needs to be taken for the moment.

Consideration will also need to be given to the implications the Irish Judgment may have on the English proceedings. I think it likely that the defendants will now apply to activate the inter partes proceedings. The Irish Court recognised that "the considerations which would move the Courts in the UK in this matter are different to the considerations here". I see no reason at present to discontinue the English proceedings. The Irish Judgment and the consequent sale of many copies of the book in the Republic may, however, have some influence on the English Court when our application is heard.

I am copying this letter to the Prime Minister, the Secretary of State for Foreign and Commonwealth Affairs, Sir Anthony Duff and Mr Mallaby.

Unrevised

1986 No. 11243P

THE HIGH COURT

BETWEEN:

THE ATTORNEY GENERAL FOR ENGLAND AND WALES

Plaintiff

and

BRANDON BOOK PUBLISHERS LIMITED

Defendant

Judgment of Miss Justice Carroll delivered the 2nd day of December 1986

The Plaintiff has come to Court seeking to restrain the publication of a book written by a deceased member of the British Secret Service, which I have read overnight.

This case is based solely on the principle of confidentiality as no considerations of public interest arise in this jurisdiction. The Plaintiff claims that the confidentiality derives from the employment of the authoress.

Any consideration of the question of preventing publication of material of public interest must be viewed in the light of the Constitution. Article 40 (6) (1) guarantees liberty for the exercise of the right of citizens to express freely their convictions and opinions subject to public order and morality. In the expansion of that, the article refers to the organs of public opinion preserving their rightful ~~for~~ liberty of expression provided it is not used to undermine public order or morality or the authority of the State. There is no question of public order or morality or the authority of the State being undermined here. Therefore in my opinion there is, prima facie, a constitutional right to publish information and the onus rests on the Plaintiff to establish, in the context of an interlocutory application, that the constitutional right of the Defendant

should not be exercised.

Counsel for the Plaintiff has referred to House of Spring Gardens Limited and Others .v. Point Blank Limited and Others (1984 I.R. 611). The judgment of Costello J. was cited with approval by O'Higgins C.J. at page 696. The principles which he formulated were based on a consideration of a number of cases, all of which concerned obligations of confidence between private parties, e.g. privately printed etchings, a secret recipe for compounding medicine, copyright in drawings for tools, information about folding buildings, information about a Swiss patent, information about a carpet grip, a private report by a Public Relations Consultant to the Greek Government and information communicated by inventors in the course of business negotiations. All of these instances in which the Court came to the protection of the imparter of information had a private or an industrial or trade setting.

Costello J. himself says in the quotation set out at page 696 that he formulates the principles"which I think should be applied in a case like the present one",i.e. the protection of secret trade information. He talks of the degree of skill, time and labour involved in compiling the information, which puts it in a trade setting and has no parallel with the present case.

McCarthy J. makes the observation at page 709 that the obligations of secrecy while enforced by equitable principles depend more upon commercial necessity than moral duty.

This reinforces my view that what was at issue and what was laid down in the House of Spring Gardens case were the principles to be applied between private individuals in a commercial context.

I accept that communications between husband and wife

would also be protected on different grounds, as in Argyle .v. Argyle (1967 1 Chancery 302). That is a completely separate category which has no relevance here.

The publication which is sought to be prevented here is not a private confidence or trade information but information shared between a Government and a private individual. It seems to me that a distinction can and should be drawn between a Government and a private person. This was considered in the Australian case Commonwealth of Australia .v. John Fairfax and Sons Limited 147 C.L.R. 39. At page 51 Mr. Justice Mason says as follows:-

"The equitable principle has been fashioned to protect the personal private and proprietary rights of the citizen not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the Government, but it is to say that when equity protects Government information it will look at the matter through different spectacles. It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussions and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss

"review and criticise Government action.

Accordingly the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."

I consider that that correctly states the law. Mr. Justice Mason was talking there in the context of the Government of Australia asking the Courts of Australia to restrain publication where the question of public interest did arise and which would arise here if the Government of Ireland were the Plaintiff. But here the Plaintiff is the representative of a Foreign Government. There is no question of the public interest of this State being affected. The considerations which would move the Courts in the United Kingdom in this matter are different to the considerations here. It is for this reason that the case of the Attorney General .v. The Observer Limited and Others and the Attorney General .v. Guardian Newspapers Limited and Others (Court of Appeal, unreported, the 25th July 1986) is not in point. There conflicting public interests had to be weighed. In his judgment at page 17 Sir John Donaldson Master of the Rolès says:

"Where there is confidentiality, the public interest in its maintenance has to be overborne by a countervailing public interest if publication is not to be restrained. In some cases the weight of the public interest in the maintenance of the confidentiality will be small and the weight of the public interest in publication will be great. But in weighing these countervailing public interests or perhaps more accurately those countervailing aspects of a single

"public interest, both the nature and circumstance of the confidentiality and the nature and circumstance of the proposed publication have to be examined with considerable care."

Those considerations do not apply here. The considerations which do apply are:

(a) the Defendant has a constitutional right to publish information which does not involve any breach on part of the copyright

(b) the public interest in this jurisdiction is not affected by the publication

(c) there is no breach of confidentiality in a private or commercial setting and

(d) there is no absolute confidentiality where the parties are a Government and a private individual.

Therefore it appears to me that no cause of action has been shown. ~~Therefore~~ In the context of this case the issue to be tried is whether there is a cause of action or not.

In those circumstances I have no doubt that the balance of convenience must lie with the right of the Defendant to exercise its constitutional right to publish. The exercise of a constitutional right cannot be measured in terms of money: is at stake is the very important constitutional right to communicate now and not in a year or more when the case has worked its way through the Courts.

McCann FitzGerald Sutton Dudley

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Our Ref: DC.HC.TL

Your Ref:

Date: 3 December 1986

Mr Michael Saunders
Attorney Generals Chambers
Royal Courts of Justice
Strand
London

Re :- HBM Attorney General .v. Brandon Book Publishers Limited

Dear Mr Saunders

You will by now have received copy of the unapproved transcript of the judgment of Carroll J delivered this morning, wherein she refused the Crown's application for an interlocutory injunction restraining the publication of Ms Miller's book. Since then, we have had several conversations with Mr Hoskar in which we have discussed our most appropriate course of action in the light of the judgment.

Our immediate concern must be with whether or not we ought appeal the interlocutory order to the Supreme Court. Technically, we are entitled to a period of twenty-one days from date of perfection of the order in which to appeal, and in the ordinary course, several days might now elapse before perfection. Both counsel and ourselves agree however that, in fact, if any convincing appeal were to be made, we would have to make application to the Supreme Court not later than at the sitting of that court this morning at 11 a.m., for either the immediate hearing of an appeal, or for a further ad interim injunction pending an appeal, which itself might be heard next week. Were we to delay such an application, we would undoubtly fail on appeal simply on the grounds that injunctive relief could no longer serve any useful purpose.

The judgment given is, we think clearly appealable on a number of grounds.

The judge determines in effect that in this matter, the Crown has no cause of action in Ireland. Her reasoning opens with an arguement as to constitutional rights which both counsel and ourselves find unconvincing, but also probably irrelevant. She distinguishes the House of Spring Gardens Case (the leading Irish authority on rights as to confidential information) on the grounds that this can only be said to operate in the commercial field. This may be a valid distinction, although it does not of course necessarily affect the contractual duties of confidence owed by an employee to an employer. The judge then cites an Australian authority which, from the given quotation, appears to determine that the confidential duties of a public servant towards his government are to be found by reference to the public interest or public policy, and that such public interest or policy would not justify restraint simply because an intended publication might lead to discussion or criticism of government action. The judge approves this Australian authority as a correct statement of law, and it is upon it that her decision really appears to rest.

For Carroll J. the principle established seems to be that because confidential obligations between public servants and their employers are to be governed by the public policy or interest of the states in which those servants are employed rather than by any form of private right, they cannot come within the exceptional cases for restraint allowed by the Constitution - Irish public policy being the only such policy coming within those constitutional exceptions. This seems deliberately to ignore the Crown's claims that Ms Miller's absolute duty of confidentiality arose as a necessary implication of her contract of service. The judge does refer to the judgment of Donaldson M R in the Observer Case, but choses to interpret that as indicating the application of public policy principles rather than contractual ones.

As to the substance of the Crown's cause of action therefore, our appeal might proceed first on the basis that the judge had misunderstood the nature of the rights of confidentiality existing as a matter of English law between the Crown and its servants, and further that she had misinterpreted the constitutional provisions as qualifying contractual or other rights which have never been considered to be so affected.

Our other major ground of complaint would be that the Court

has sought on an interlocutory application to determine against the plaintiff an obviously arguable question of law instead of determining simply whether the Crown has a reasonable case to be tried. The tests specified in the American Cyanamid Case have been approved in Ireland, and have been applied strictly, even where the arguement as between the parties has centered on legal issues, where it might otherwise be thought preferable having regard to the nature of the case and to the legal nature of the argument that such issues be dealt with at the interlocutory rather than at the trial stage. The relevant authorities were cited to the judge, but she does not appear to consider them, and perhaps attempts to forstall argument on the issues by determining that where important constitutional rights are at stake the balance of convenience must any way favour the defendant - an argument which of course presupposes that the constitutional rights are themselves clear.

Notwithstanding potential grounds of appeal however, our own and Counsel's view is that the Crown ought not appeal because, on balance, we believe it is unlikely to succeed. Apart from other issues, counsel perceives the unexpressed but underlining matters which are likely to have moved the judge. First, the almost commonly admitted facts that the contents of the book are both stale and trivial, coupled with an unwillingness in such circumstances to find for the benefit of a foreign government such an absolute duty of confidentiality as has not yet, at least, been found by an Irish court to exist for the benefit of the Irish government. Second, that if the Court were to allow relief to the Crown in this case, it could not properly refuse similar relief to any foreign government (however unpleasant its complexion) once it alleged similar terms of service for its public servants as those here alleged by the Crown. Whether or not these attitudes find expression among the judges of the Supreme Court, counsel has little doubt but that similar considerations, if no others, would move the Supreme Court to uphold the order of the judge at first instance, even if on differently expressed grounds. We think that it is probably fair to say that we would always have been concerned about the potential attitude of the Supreme Court (and in particular the attitudes of one or two of its members) towards this claim if it came before them at any stage, but where as here, it came before them after a refusal at first instance, we might find ourselves given a particularly unpleasant ride. It has to be said, on the other hand that if we do not seek to overturn Carroll J's decision, then it will be an authority quotable against us at trial, but even assuming a trial to be contemplated, we would prefer to face that difficulty then to run the very real risk of having at the trial to deal with both the unfavourable decision of Carroll J and perhaps a better reasoned but equally unfavourable decision from the Supreme Court.

As matters stand, the Crown remain entitled to go forward with its claim for an account of profits, but subject to policy considerations, counsel's own view is that it might be tactically preferable to abandon even that at this stage on the grounds that, on balance, we are at least as likely to fail as we are to succeed, and that we could now execute a relatively graceful withdrawal excusing ourselves on the grounds that the actual lack of importance of the book did not justify further argument over the principle. Perhaps more satisfactorily, and taking cue from the statement already agreed, it might be said that having regard to the lack of importance of the book, it would be inappropriate to argue for the enforcement of the Crown's rights where the Irish Courts were obviously concerned that such enforcement in the circumstances presented constitutional difficulties. We do not however have to make an immediate decision as to the disposal of the case, and counsel suggests that he should provide a written opinion on the point.

We will obviously be glad to be of any further help that we can, and we look forward to hearing from you very urgently.

Yours sincerely

DAVID CLARKE
McCANN FITZGERALD SUTTON DUDLEY

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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

Prime Minister
to note prospective
course of action

N.L.W
12.12.

The Rt Hon Douglas Hurd CBE MP
Secretary of State for the Home Department
Home Office
50 Queen Anne's Gate
London SW1H 9AT

12 December, 1986

Dear Douglas:

"ONE GIRL'S WAR"

When I wrote to you on 3 December I said that I would be pursuing with our Irish lawyers whether, despite having decided not to appeal against the High Court's decision on the injunction, we should press our claim for an account of profits. I have now received advice from Senior Counsel in the Republic which is far from sanguine about our prospects of success and I would therefore recommend against any further proceedings.

It may of course be argued that by discontinuing proceedings we have abandoned the principle which is being asserted in Australia. We would in that event point to the fact that the Irish judgment turned, to a substantial extent, on a provision of their Constitution. This explanation is not without its difficulties: others could argue that the Irish judgment denied that breach of Ms Miller's duty of confidentiality to the Crown raised a cause of action in the Republic and that in failing to pursue the claim and, in particular, the action for an account we were recognising this fact. But we must simply take a robust line on what was a somewhat opaque judgment.

This leaves the question of action in the United Kingdom. As you will know, the distributors against whom we obtained an ex parte injunction in England are contesting the order and there will be a hearing in the High Court, probably on Wednesday 17 December. Treasury Counsel's advice is that we are still likely to win at this interlocutory stage, despite what has occurred in the Republic.

He advises, however, in response to questions from the defendants about sale of the book in Northern Ireland and Scotland, that it may be necessary to take proceedings in those jurisdictions. Private offices have, I believe, already been told of this possibility which is of course the necessary corollary of the position we have taken

in England.

It would be too early to take a view on what will happen at the full trial of the "One Girl's War" action. One matter on which we should, I think, focus is the question of an account of profits. If proceedings continue, we will need to serve a statement of claim before too long and this will be influenced by whether or not we decide to pursue this remedy. The object of the account would of course be to deprive those publishing material in breach of confidence of the profits of their action and thereby to deter others who might seek to write, commission or publish such material in the future. I understand that action of this sort, when judiciously pursued, had an important deterrent effect in the USA and I can see a strong case for seeking to obtain an account of profits here if Treasury Counsel continues to advise that this relief would be open to us.

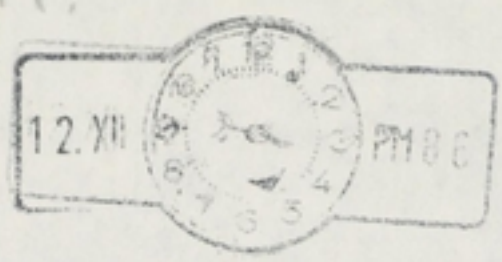
A decision on the question of an account of profits does not need to be taken until after we know the result of the inter partes hearing on Wednesday when matters may of course look rather different.

A copy of this letter goes to the Prime Minister, Geoffrey Howe, Sir Robert Armstrong and Sir Antony Duff.

Yours ever,

Patrick

Security: Secret Services PT4.



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QUEEN ANNE'S GATE LONDON SW1H 9AT

16 December 1986

Dear Patrick,

ONE GIRL'S WAR

Thank you for your letter of 12 December.

I concur with your advice that we should not mount further proceedings in the Irish Republic to seek to prevent the publication of One Girl's War. We shall have to make the best we can of our explanation, and I agree we should be robust.

I note what you say about action in the UK, and that questions may arise after the proceedings on 17 December.

Copies of this letter to go the Prime Minister, the Foreign and Commonwealth Secretary, Sir Robert Armstrong and Sir Antony Duff.

Yours,

Douglas.

The Rt Hon Sir Patrick Mayhew, QC, MP

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SECRETY

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