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We must appeal
in my view - and all
the way. *ms.*

TO MALLABY IN CABINET OFFICE

1. THE JUDGMENT

THE FIRST POINT TO MAKE IS THAT THE JUDGMENT CONTAINS NO REASONS, MOSTLY ASSERTIONS. THE ONLY 'REASONS' ARE TO BE FOUND IN THE COMMENTS COLUMN OF THE SCHEDULE. THE JUDGE APPEARS TO HAVE ACCEPTED THAT WE HAVE DISCOVERED ALL RELEVANT DOCUMENTS.

2. WHILST ACCEPTING THAT IN THE UK A CLAIM FOR PUBLIC INTEREST IMMUNITY WOULD HAVE BEEN MADE OUT IN RESPECT OF MANY BUT NOT ALL OF THE DOCUMENTS (TOP OF PAGE 2) THE JUDGE EXPRESSLY REJECTS THE CLAIM FOR PUBLIC INTEREST IMMUNITY ON THE GROUND THAT THE AUSTRALIAN PUBLIC INTEREST IS NOT DETRIMENTALLY AFFECTED. AS HE STATES AT THE FOOT OF PAGE 2 OF HIS JUDGMENT THIS INVOLVES THE REJECTION OF THE SUBMISSIONS MADE ON BEHALF OF THE COMMONWEALTH.

3. HE HAS THUS DEALT WITH THE QUESTION OF PRODUCTION NOT ON THE BASIS OF A PII CLAIM BUT RATHER ON THE BASIS OF THE CONFIDENTIALITY OF THE DOCUMENTS NECESSITATING A DEGREE OF PROTECTION. THIS EXERCISE HAS BEEN CARRIED OUT ENTIRELY ON A CONTENT BASIS AND WITHOUT REGARD TO THE CLASS OF DOCUMENT. IT WILL BE OBSERVED THAT THE FEW DOCUMENTS, PRODUCTION OF WHICH HAS NOT BEEN ORDERED, HAVE BEEN EXCLUDED SOLELY ON THE GROUND THAT THEY HAVE NO PROBATIVE VALUE.

4. THE JUDGE CORRECTLY STATES (IN THE LAST COMPLETE PARAGRAPH OF PAGE 3) THE PRINCIPLES THAT HE SHOULD FOLLOW (VIS SCIENCE AND RESEARCH CONCIL V NASSE (1980) AC 1028). HOWEVER HE HAS FAILED TO HAVE REGARD TO THE FACT THAT THE ONLY DETRIMENT ON WHICH THE PLAINTIFF RELIES IS THE DETRIMENT WHICH FLOWS FROM PUBLICATION BY AN INSIDER. IF THAT IS THE ISSUE TO BE DECIDED, FEW IF ANY OF THESE DOCUMENTS ARE RELEVANT.

5. IT FOLLOWS THAT WHERE THE JUDGE COMMENTS THAT THE DOCUMENTS ARE RELEVANT TO 'PUBLIC DOMAIN' AND/OR 'DETRIMENT' HE IS DOING SO ON AN UNSOUND BASIS. THE IMPORTANCE OF THIS TO ANY QUESTION OF AN APPEAL IS UNDERLINED BY THE FACT THAT, WITH THE EXCEPTION OF THE DOCUMENTS RELATING TO MASSITER (SCHEDULE 1 PART 3D), THE JUDGE HAS USED AS HIS TEST OF RELEVANCE 'PUBLIC DOMAIN AND/OR DETRIMENT'.

from 19/1953

Tel no 014
dated 02.12.86

IT IS OUR VIEW THAT COMPLIANCE WITH THIS ORDER IS OUT OF THE QUESTION BECAUSE:

- (1) IT IGNORES WELL-ESTABLISHED CLASSES OF DOCUMENTS FOR WHICH PII WOULD NORMALLY BE GRANTED IN ENGLISH COURTS:
- (2) EVEN IF THE AUSTRALIAN COURT REJECTS OUR CLAIM FOR PII, THE ORDER FOR PRODUCTION HAS BEEN BASED ON CONTENTS GROUNDS WHICH ARE THEMSELVES INCONSISTENT: AND
- (3) THE ORDER IS BASED ON A VIEW OF RELEVANCE WHICH IS IN OUR OPINION FALLACIOUS IN THAT WE RELY ONLY ON DETRIMENT FLOWING FROM THE FACT THAT THE PUBLICATION IS BY AN INSIDER AND NOT ON THE DAMAGE FLOWING FROM THE CONTENTS.

IN ANY CASE WE BELIEVE THAT THERE ARE SOME DOCUMENTS, AND SOME PARTS OF OTHER DOCUMENTS, WHICH WE SHOULD UNDER NO CIRCUMSTANCES BE PREPARED TO DISCLOSE TO TURNBULL.

7. IT IS THE VIEW OF THE PLAINTIFF THAT ANY QUESTION OF HMG'S POLICY OR PRACTICE RELATING TO PUBLICATIONS BY OUTSIDERS, WHO OWE NO OBLIGATION OF CONFIDENCE TO THE CROWN, IS IRRELEVANT TO AN ACTION IN RESPECT OF A BREACH OF CONFIDENCE BY AN INSIDER. THE DEFENCE WILL CONTEST THIS VIEW, AND ARGUE THAT IT IS NOT APPEALABLE ON THIS APPLICATION.

8. ANY APPEAL COULD THUS ENGAGE THE COURT OF APPEAL IN DECIDING THE RELEVANCE TO THE ISSUE IN THE CASE OF A GOOD DEAL OF THE EVIDENCE WHICH HAS BEEN GIVEN, AND INVOLVE THE TESTING OF ALL THE OBJECTIONS TAKEN BY SIMOS THROUGHOUT THE PROCEEDINGS.

9. NOTICE OF APPEAL WOULD HAVE TO BE GIVEN AND A STAY OF THE JUDGE'S ORDER OBTAINED. IT BEING AN INTERLOCUTORY APPEAL, THE LEAVE OF THE COURT OF APPEAL WOULD HAVE TO BE SOUGHT. WE HAVE NOT MADE ENQUIRIES OF THE REGISTRAR OF THE COURT OF APPEAL BECAUSE WE HAVE NOT WISHED TO GIVE ANY INDICATION OF OUR INTENTIONS PRIOR TO YOUR HAVING AN OPPORTUNITY TO CONSIDER THE MATTER. COUNSEL BELIEVE THAT THE COURT MIGHT HEAR THE APPEAL LATER THIS WEEK, OR FAILING THAT EARLY NEXT WEEK. IT WOULD BE HELPFUL TO HAVE FROM YOU VERY QUICKLY, FOR THE PURPOSES OF THE APPEAL, A LIST OF THE DOCUMENTS WHICH WE SHOULD BE PREPARED TO DISCOVER TO THE DEFENDANTS AND OF ANY DELETIONS REQUIRED THEREIN, IN CASE THIS MIGHT HELP IN SECURING A RULING IN OUR FAVOUR.

10. WE DO NOT RECOMMEND TRYING TO REACH AN AGREEMENT WITH TURNBULL WHICH WOULD OBTAIN THE NECESSITY FOR APPEAL, BECAUSE, WHILST TIME IS UNDOUBTEDLY OF THE ESSENCE FOR THE DEFENDANTS, IN ORDER TO REACH AGREEMENT THEY WOULD REQUIRE TO SEE ALL THE DOCUMENTS WHICH THE JUDGE HAS ORDERED TO BE PRODUCED. IN ANY CASE, GIVEN A JUDGMENT SO MUCH IN HIS FAVOUR, THERE IS LITTLE INCENTIVE TO TURNBULL TO DO A DEAL.

11. WE ENVISAGE MAKING A FURTHER APPROACH TO THE COMMONWEALTH SOLICITOR GENERAL WITH A VIEW TO ENLISTING SUPPORT FOR AN APPEAL, PARTICULARLY BY WAY OF AFFIDAVIT, NOW THAT WE HAVE THE JUDGMENT OF THE COURT. WE ARE NOT, HOWEVER, VERY OPTIMISTIC ABOUT THE PROSPECTS: AND THE AUSTRALIAN GOVERNMENT MIGHT TAKE SOME TIME TO MAKE UP THEIR MINDS. IF THEY WERE PREPARED TO SWEAR AN AFFIDAVIT, WE SHOULD NEED TO SEEK LEAVE OF THE APPELLATE COURT TO ADDUCE THE NEW EVIDENCE.

PARAGRAPHS 12 TO END TO FOLLOWING IN MIFT.

SINDALL

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Item 19/1953

Tel no 014
dated 02.12.86

FOR MALLABY FROM ARMSTRONG

FOLLOWING IS CONTINUATION OF MIPT OF TODAY'S DATE.

12. IN YOUR CONSIDERATION OF WHETHER TO INSTRUCT US TO APPEAL THE FOLLOWING MATTERS WOULD APPEAR TO BE RELEVANT:

(1) THE PROSPECTS OF SUCCESS ON THE MAIN ACTION (SUBJECT TO OVERCOMING THE PROBLEM ON DISCOVERY), AS TO WHICH SEE JOINT OPINION OF COUNSEL HEREWITH ("SOMETHING MORE THAN REASONABLE PROSPECTS OF SUCCESS").

(2) THE INTERPRETATION THAT WOULD BE PLACED UPON OUR PULLING OUT OF THE CASE WITHOUT APPEALING WHEN ORDERED TO PRODUCE DOCUMENTS TO THE DEFENDANTS.

(3) THE QUESTION OF PRECEDENT IN THE ENGLISH COURTS, PARTICULARLY IN RELATION TO CLAIMS FOR IMMUNITY ON CONTENTS GROUNDS.

(4) THE PROSPECTS OF SUCCESS OF AN APPEAL ON PII, AS TO WHICH COUNSEL ADVISE THAT, WITH THIS JUDGMENT, WE HAVE A CHANCE ON THE BASIS THAT IT IS NOT NECESSARY FOR THESE DOCUMENTS TO BE DISCOVERED IN ORDER FAIRLY TO DISPOSE OF THE PLAINTIFF'S CLAIM ON THE MAIN ISSUE.

(5) A FURTHER FACTOR TO CONSIDER IS THAT, IF A PII CLAIM FAILS ONLY ON THE GROUND OF BASENESS OF DETRIMENT TO THE AUSTRALIAN PUBLIC INTEREST IE THAT; IF ALL THE OTHER NECESSARY ELEMENTS OF A PII CLAIM ARE PRESENT, THE COURT OF APPEAL MIGHT BE PREPARED TO APPLY THE TEST OF CONFIDENTIALITY STRICTLY.

(6) ANY FINDINGS OF THE COURT OF APPEAL ON RELEVANCE COULD BE DECISIVE FOR THE MAIN ISSUE.

13. WE SHALL NOT SUCCEED IN A PII CLAIM AS SUCH IN THE AUSTRALIAN COURTS UNLESS WE CAN ESTABLISH DETRIMENT TO THE AUSTRALIAN PUBLIC INTEREST, EITHER DIRECTLY OR INDIRECTLY ON THE GROUND OF COMITY.

14. THE TIMETABLE FOR AN APPEAL WOULD BE AS FOLLOWS:

(1) TOMORROW WEDNESDAY 3 DECEMBER) WE SHOULD APPLY FOR A DATE TO GO TO THE COURT OF APPEAL FOR LEAVE TO APPEAL.

(2) THE COURT WOULD PROBABLY HEAR THE APPLICATION FOR LEAVE TO APPEAL AND (IF THEY GRANTED LEAVE) THE APPEAL ITSELF ON THURSDAY 4 OR FRIDAY 5 DECEMBER.

(3) IF THE COURT REFUSED LEAVE TO APPEAL, OR HAVING GRANTED LEAVE REJECTED THE APPEAL IN TOTO, WE SHOULD APPLY FOR LEAVE TO APPEAL TO THE HIGH COURT. THAT APPLICATION COULD BE CONSIDERED EARLY NEXT WEEK; IF LEAVE WERE TO BE GRANTED (AS COUNSEL BELIEVE WOULD BE LIKELY), THE APPEAL MIGHT BE HEARD NEXT WEEK BUT WOULD PROBABLY BE HELD OVER UNTIL AFTER THE (AUSTRALIAN) SUMMER RECESS.

(4) IF THE COURT OF APPEAL ALLOWED OUR APPEAL IN TOTO, THERE WOULD BE NO FURTHER CROSS-EXAMINATION OF OUR WITNESSES AND SUBJECT TO A BRIEF RE-EXAMINATION BY SIMOS (NO DOUBT OPTIONAL) ARMSTRONG WOULD RETURN TO LONDON.

Rem 19/1953

Tel no d4
dated 02.12.80

() IF THE COURT OF APPEAL ALLOWED OUR APPEAL IN PART BUT ORDERED THE PRODUCTION OF A MORE LIMITED RANGE OF DOCUMENTS AND IT WAS THOUGHT THAT WE COULD STOMACH THAT, WE WOULD PRODUCE THE DOCUMENTS: TURNBULL WOULD NEED TIME TO CONSIDER THEM AND CROSS-EXAMINATION OF ARMSTRONG MIGHT NEED TO BE BRIEFLY RESUMED EARLY NEXT WEEK. IF WE COULD NOT STOMACH THE LIMITED LIST, WE SHOULD HAVE TO SEEK LEAVE TO APPEAL TO THE HIGH COURT.

15. IN THE MEANTIME THE PROCEEDINGS STAND ADJOURNED UNTIL THURSDAY 4 DECEMBER AT 10.00 AM.

16. THE CHOICE TODAY IS WHETHER TO GO TO APPEAL OR TO GIVE UP AND ABANDON THE CASE. WE CANNOT DISCOVER ALL THE DOCUMENTS IN THE JUDGE'S ORDER. WE CANNOT JUDGE FROM HERE THE POLITICAL CONSIDERATIONS AT YOUR END. AS WE SEE IT, HOWEVER, THERE ARE GOOD REASONS FOR GOING TO APPEAL ON THE PII CLAIM AND PURSUING IT ALL THE WAY, TO THE HIGH COURT IF NEED BE. NOW THAT ARMSTRONG'S CROSS-EXAMINATION IS COMPLETED, SOME OF THE IMMEDIATE POLITICAL INTEREST MAY DIMINISH: THERE MAY BE SOMETHING TO BE SAID FOR GIVING A LITTLE TIME FOR THAT TO BEGIN TO HAPPEN.

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18. THE AUSTRALIAN GOVERNMENT HAVE SUPPORTED US ON THE MAIN ISSUE: THEY PUT UP THEIR CABINET SECRETARY TO SWEAR AN AFFIDAVIT AND GIVE EVIDENCE, AND HE HAD A PRETTY ROUGH HANDLING BY TURNBULL AND THE JUDGE. ARGUABLY WE OWE IT TO THEM TO PURSUE ALL THE REMEDIES OPEN TO US ON THE PII CLAIM.

19. AND, FINALLY, IF THE OBJECT OF THE EXERCISE IS TO DEMONSTRATE DETERMINATION TO STOP FORMER MEMBERS OF THE SECURITY SERVICE FROM BREACHES OF DUTY OF CONFIDENTIALITY, WE SHOULD GO TO THE LIMIT ON THE PII CLAIM AND NOT BE FORCED TO GIVE UP ON THE MAIN ISSUE UNLESS AND UNTIL WE ARE, AND CAN BE SEEN TO BE, FACED WITH A CHOICE BETWEEN THE DAMAGE OF ABANDONING THE CASE AND ALLOWING WRIGHT'S BOOK TO BE PUBLISHED AND THE DAMAGE OF COMPLYING WITH THE ORDER FOR DISCOVERY. *A need*

20. IF WE ARE IN THE EVENT FACED WITH THAT CHOICE BECAUSE WE HAVE LOST AN APPEAL TO THE HIGH COURT, AT LEAST WE SHALL HAVE DONE EVERYTHING WE POSSIBLY COULD: AND OUR READINESS TO SHOW THE DOCUMENTS TO MR JUSTICE POWELL, TO THE JUDGES IN THE COURT OF APPEAL AND IF NECESSARY TO THE HIGH COURT SHOULD ACQUIT US OF ANY CHARGE OF COVERING UP GUILTY SECRETS OR OF UNWILLINGNESS TO TRUST THE AUSTRALIAN JUDICIARY.

SINDALL

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LNCYAN 1735

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Prm 19/1953

Tel no. 014
dated 02.12.86