



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

**CASE OF CHAPPELL v. THE UNITED KINGDOM**

*(Application no. 10461/83)*

JUDGMENT

STRASBOURG

30 March 1989

**In the Chappell case\*,**

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,  
Mrs D. BINDSCHEDLER-ROBERT,  
Mr B. WALSH,  
Sir Vincent EVANS,  
Mr R. MACDONALD,  
Mr R. BERNHARDT,  
Mr A. S. SPIELMANN,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 November 1988 and 24 February 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 December 1987, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10461/83) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by a British citizen, Mr Anthony Richard Malcolm Chappell, in October 1982.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in

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\* Note by the Registrar: The case is numbered 17/1987/140/194. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 January 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr B. Walsh, Mr R. Macdonald, Mr R. Bernhardt and Mr A. Spielmann (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the representative of the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the registry received the Government's memorial on 24 May and the applicant's on 2 June 1988; in a letter of 21 July, the Secretary to the Commission informed the Registrar that the Delegate did not wish to file a memorial.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 23 August 1988 that the oral proceedings should open on 22 November 1988 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr J. GRAINGER, Assistant Legal Adviser,  
Foreign and Commonwealth Office,

*Agent,*

Mr N. BRATZA, Q.C.,

*Counsel,*

Mr N. HODGSON, Lord Chancellor's Department,

*Adviser;*

- for the Commission

Mr Gaukur JÖRUNDSSON,

*Delegate;*

- for the applicant

Mr C. ROSS-MUNRO, Q.C.,

Mr D. T. SEROTA, Barrister-at-Law,

*Counsel.*

The Court heard addresses by Mr Bratza for the Government, by Mr Gaukur Jörundsson for the Commission and by Mr Ross-Munro for the applicant. Replies were also given, orally or in writing, to questions put by the Court and by two of its members individually.

7. The Commission lodged two documents, at the Court's request, on 19 September 1988. On 18, 21 and 22 November the applicant filed a number of documents, including further particulars of his claim under Article 50 (art. 50) of the Convention, an outline of which he had furnished on 3 November.

## AS TO THE FACTS

### I. INTRODUCTION

8. Mr Chappell, who was born in 1948, lives at Frome, Somerset.

In late 1980 and until the end of April 1981, he operated - through Video Exchange Limited, a company which he controlled - a club for the exchange of video cassettes, under the name of the Video Exchange Club. The company recorded cassettes which were subsequently made available to subscribers to the club, of whom there were some 4,000. A substantial number of the recordings distributed through the club had been made in breach of copyright, although the applicant contended that he had received counsel's advice to the effect that the club's exchange activities were within the law.

9. The applicant's business came to the notice of two film companies and two organisations formed to protect film producers and film distributors, respectively, from activities carried out in breach of copyright ("the Plaintiffs"). The investigator employed by the Plaintiffs, a former policeman, discovered and reported to them that their copyright was, in his view, being breached by the applicant and his company ("the Defendants").

Accordingly, on 26 February 1981, the Plaintiffs, as a preliminary step in an action against the Defendants, applied to the High Court for interim relief in the form of an order known as an "Anton Piller order" (see paragraphs 10-24 below). Their application was supported by two affidavits, one sworn by the investigator and the other by W., a solicitor. The order was made on the same day by Mr Justice Whitford. The Defendants were not present in court: in accordance with the practice in such cases (see paragraph 11 below), no notice was given to them of either the application or its outcome.

### II. ANTON PILLER ORDERS IN GENERAL

#### A. Nature and contents

10. Under section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 - now section 37 of the Supreme Court Act 1981 -, the English High Court had and has a general power to grant an injunction by interlocutory order in all cases in which it appears to be just or convenient so to do. Order 29, rule 2, of the Rules of the Supreme Court specifically empowers it to make orders "for the detention, custody or preservation of any property which is the subject-matter of the cause or matter".

In this context, the High Court developed - in particular from 1974 onwards - the practice of granting in appropriate cases to the plaintiff or intending plaintiff in civil proceedings "Anton Piller orders", so called after the name of a case in which their use was approved by the Court of Appeal (Anton Piller KG v. Manufacturing Processes Ltd [1976] 1 All England Law Reports 779). They are of a procedural and essentially provisional nature only, being granted pending the trial of the action on the merits.

11. One of the basic purposes of this interlocutory measure being to preserve for that trial evidence in the possession of the defendant or prospective defendant, its essence is surprise. For this reason, the court - by virtue, so it was held in the Anton Piller case, of a power deriving from its inherent jurisdiction - grants the order on an ex parte application, that is without the defendant's being given notice and without his being heard. For the same reason, the application is invariably heard in private and the defendant will become aware of the order's existence only when it is served on him with a view to immediate execution.

Over the years, the principles governing the grant and the terms of these orders have been restated and refined in numerous judgments.

12. An Anton Piller order will normally contain restrictive or mandatory injunctions:

(a) prohibiting the defendant from dealing with materials that are the subject of the action (for example, "pirate" - that is, unlicensed or unauthorised - video tapes);

(b) requiring the defendant to disclose to the person serving the order the whereabouts of all such materials and details of suppliers and customers, and to deliver up the materials to the plaintiff;

(c) requiring the defendant to make within a specified time-limit an affidavit containing all the information to be disclosed by him under the order;

(d) requiring the defendant to permit the plaintiff to enter specified premises for the purpose of searching for and removing specified items.

As regards this last injunction, the court will confine the items specified to documents and materials directly relating to the action. It will also restrict the time of entry (commonly from 9 a.m. to 6 p.m. on weekdays) and the number of persons who are to be permitted to enter (very rarely more than four or five). The latter will include the plaintiff's solicitor, who is an officer of the court (see paragraph 17 in fine below).

13. Whilst Anton Piller orders have been made in a wide variety of cases, the great majority are granted in proceedings involving allegations of infringement of patents, trade marks or copyright or of passing off. Of these, by far the most frequent have been cases involving pirate records, tapes and video cassettes, where the risks of suppression of evidence are especially strong. It appears that some 500 such orders were made each year between 1975 and 1980, but the current figure has dropped to between 50 and 100.

This reduction reflects the decrease in the incidence of video piracy, which in the late 1970's and early 1980's had attained epidemic proportions.

### **B. Procedure, conditions and terms**

14. An Anton Piller order is usually applied for at the very outset of proceedings, at the same time as the writ commencing them is proposed to be issued.

The plaintiff or intending plaintiff will submit to the court a draft of the order sought, accompanied by supporting evidence in the form of affidavits (or drafts to be sworn subsequently). The evidence, which is often provided by a professional investigator, will outline the plaintiff's business and how it is alleged to be prejudiced by the defendant's activities. There will be a description of those activities, very often including a record of a visit to the defendant's premises and the purchase and presence there of, for example, pirate video cassettes.

15. The plaintiff must, however, state at the beginning what his charges are and what facts they are based on; he must not use an Anton Piller order as a means of finding out what sort of charges he can make (per Lord Justice Lawton in *Hytrac Conveyors Ltd v. Conveyors International Ltd* [1982] 3 All England Law Reports 415).

Furthermore, he is under a duty to disclose all material facts when applying for the order. Failure to comply, even innocently, with this obligation will, unless the court in its discretion otherwise decides, lead to a refusal or discharge of the order, even though there may be facts justifying its grant.

16. Before making an Anton Piller order, the court must be satisfied that:

(a) the plaintiff has made out an extremely strong prima facie case that his claim will succeed on the merits;

(b) the actual or potential damage is very serious for him; and

(c) there is clear evidence that the defendant has in his possession incriminating documents or things, and that there is a real possibility that, if he is forewarned, he may destroy such material.

17. If so satisfied, the court will nevertheless accede to the application only on terms which will be incorporated in its written order, in the form of undertakings given to the court. These are designed to protect the position of the absent defendant, counsel for the plaintiff being under a duty to ensure that the order contains all proper safeguards for this purpose. The court determines in its discretion what undertakings are to be given, there being no invariable rules or practice in this respect. Examples are the following, item (a) being found in all, and items (b), (c) (i) and (c) (ii) in most cases:

(a) an undertaking by the plaintiff to pay to the defendant any damages sustained by him as a result of the making of the order;

(b) an undertaking by the plaintiff that the order and other relevant documents, such as the affidavit evidence underlying it, the writ instituting the proceedings and the notice of the next hearing, will be served on the defendant by the plaintiff's solicitors;

(c) undertakings by those solicitors:

(i) to offer to explain to the person served, fairly and in everyday language, the meaning and effect of the order, and to inform him that he has the right to obtain legal advice before complying with the order or parts thereof, provided such advice is obtained forthwith;

(ii) to retain in their custody any items taken by or delivered to them pursuant to the order;

(iii) to answer any question from the defendant as to whether an item is within the scope of the order;

(iv) to prepare, before their removal from the premises, a list of the items taken;

(v) to use any information or document obtained under the order only in connection with the civil proceedings in question;

(vi) to ensure that the exercise of rights under the order remains at all times under the control of a solicitor.

The significance of the intervention of a solicitor in this procedure and in the undertakings given is that solicitors are officers of the Supreme Court and, as such, subject to its inherent jurisdiction in disciplinary matters. A failure by a solicitor to comply fully with an undertaking given by him personally to the court in his professional capacity will render him liable to summary proceedings for contempt of court with a potential sanction of imprisonment, a fine or an order to pay compensation or costs. It will also constitute professional misconduct, punishable in professional disciplinary proceedings by striking off the roll, suspension from practice or a financial penalty.

### **C. Execution**

18. In addition to the fact that it is issued to a private party in civil proceedings, and not to the police in criminal proceedings, an Anton Piller order is to be distinguished from a search warrant in that it confers no right of forcible entry onto premises. Its terms require the defendant to permit the plaintiff to enter, but it remains open to the defendant to refuse and, if he so wishes, to apply by urgent motion for variation or discharge of the order (see paragraph 20 below). He is, however, under pressure to give permission, especially since refusal to comply will expose him to the risk of proceedings for contempt of court on the motion of the plaintiff, with a possible penalty of imprisonment. Moreover, even if the defendant later

succeeds in having the order discharged, his disobedience whilst it was in force will - unless it was made in circumstances in which it was a nullity in law - still constitute a contempt, albeit one which will probably be treated as technical and will usually attract no penalty (per Lord Justice Buckley in *Hallmark Cards Inc. v. Image Arts Ltd* [1977] Fleet Street Reports 153).

19. It is common practice - and this has received judicial approval - to arrange for a policeman to be present, outside the premises, when an Anton Piller order is being executed, with a view to forestalling any breach of the peace.

#### **D. Remedies for the defendant**

20. An Anton Piller order will expressly reserve to the defendant liberty to apply by urgent motion for its variation or discharge on giving specified notice to the plaintiff (usually 24 hours but sometimes less). Being an essentially provisional measure, it will in any event limit the duration of the relief which it affords to a specified period, generally about one week. On the expiry of that period, there will in principle be a hearing *inter partes* at which the court will review the order and consider whether the relief should be continued. On that occasion, or at any time subsequently, the defendant may apply for the order to be varied or discharged. Whilst the court may set aside the order even after its execution, it will not do so unless discharge was applied for reasonably soon thereafter and will serve some practical purpose (*Booker McConnell plc v. Plascow* [1985] Reports of Patent Cases 425).

An Anton Piller order can be set aside if there existed no, or no sufficient, grounds for its making, if the plaintiff failed to disclose material facts when applying for it or, it seems, if it was improperly or oppressively executed.

If the order is set aside, the defendant will be relieved from complying with the injunctions contained therein and any materials seized thereunder will be returned to him. Partial relief of a similar nature may also be granted by the court even if the application for discharge is unsuccessful (see paragraphs 44-45 below).

21. In addition or as an alternative to applying for the order's discharge, the defendant may seek damages under the plaintiff's cross-undertaking (see paragraph 17 (a) above) on the ground that the order was improperly obtained or executed. Damages may be awarded even if the order is not set aside and even if the plaintiff's action succeeds on the merits (*Columbia Picture Industries Inc. v. Robinson* [1986] 3 All England Law Reports 338). Whilst they may be determined earlier, claims for damages are usually stood over until the trial on the merits (*Dormeuil Frères SA v. Nicolian International (Textiles) Ltd* [1988] 3 All England Law Reports 197). Damages are primarily intended to compensate the defendant for loss

occasioned by the order but they may be aggravated if it was executed in an excessive or improper manner (see the Columbia Picture Industries case).

22. If the defendant considers that the plaintiff or his solicitors are in breach of their undertakings contained in the Anton Piller order or that the latter have acted improperly in executing it, he can proceed against them for contempt of court (see paragraph 17 in fine above).

23. The defendant can also claim damages for trespass if, for example, entry to his premises was obtained by a trick or without real consent, or materials were removed without justification under the order.

24. In the Columbia Picture Industries case, Mr Justice Scott reviewed extensively the law and practice relating to Anton Piller orders. He considered that the availability of damages did not meet the main objection to the procedure, namely that it produced for the defendant, without his being heard, damaging and irreversible consequences, often in the form of the closure of his business.

Furthermore, whilst it was proper to make Anton Piller orders in suitable cases, they had, in his opinion, been too readily granted and with insufficient safeguards for defendants, the balance that had to be struck between the rights at issue having swung much too far in favour of plaintiffs. He was of the view that the draconian and essentially unfair nature of an Anton Piller order from the defendant's point of view required that it be restricted to the minimum extent necessary to achieve its purpose and he gave several examples of steps to be taken to meet this standard.

### III. THE ANTON PILLER ORDER MADE IN THE PRESENT CASE

#### A. Contents

25. The interlocutory relief obtained by the Plaintiffs on 26 February 1981 in the shape of the Anton Piller order was granted until 5 March 1981 or until further order. The Defendants were given liberty to apply to the court for variation or discharge of the order on giving 24 hours' notice to the Plaintiffs.

26. The order contained, inter alia, the following.

(a) An injunction prohibiting the Defendants from making, selling, hiring, distributing or parting with possession of any unlicensed copies of any films the copyright in which was owned by the Plaintiffs, and from parting with possession of any documents relating to the supply of such copies to or by the Defendants.

(b) An injunction requiring the Defendants to permit not more than three persons authorised by the Plaintiffs, together with a solicitor and one other solicitor or employee of the Plaintiffs' solicitors, to enter forthwith specified premises on any weekday between 8 a.m. and 9 p.m. for the purpose of

searching for and removing into the custody of the Plaintiffs' solicitors any unlicensed copies of the said films and any documents appearing to relate to the acquisition, supply or disposal of such copies. The premises identified in the order were those under the control of Mr Chappell and his company; they were in fact where he carried on business but - apparently unbeknownst to the Plaintiffs - they were also occupied by him in part as his home (see paragraph 36 below) and constituted at the time his only residence.

(c) An injunction requiring the Defendants to reveal to the Plaintiffs' solicitors the whereabouts of, and to deliver to them, all the aforesaid copies and documents in the Defendants' possession.

(d) Injunctions requiring the Defendants to disclose to the Plaintiffs' solicitors the names and addresses of the Defendants' suppliers of and customers for unlicensed copies of the said films; and to swear, within four days after service of the order, an affidavit setting forth this information ("the affidavit of disclosure").

27. The order also contained undertakings by the Plaintiffs or their solicitors in terms akin to those mentioned in paragraph 17 above, other than items (c) (iii), (c) (iv) and (c) (vi), together with an undertaking not to commence or instigate criminal proceedings against any of the Defendants in respect of the acts forming the subject-matter of the action. The undertaking to inform the Defendants of their right to obtain legal advice related, however, solely to the requirement to disclose particulars of their suppliers and customers (see paragraph 26 (d) above but cf. paragraph 38 below).

## **B. Execution**

### *1. Arrangements with the police*

28. The Anton Piller order was executed on 2 March 1981, simultaneously with a police search warrant. The circumstances that led to this special feature of the present case are set out below.

29. On 16 February 1981 the Plaintiffs' investigator, posing as a customer, had visited Mr Chappell's business premises in order to collect pirate video cassettes of three films, the copyright in which was allegedly owned by the Plaintiffs. He was also shown an extract from another cassette which he considered obscene; in his affidavit in support of the application for the Anton Piller order, he stated that he was asked if he was interested in cassettes of this kind but "did not pursue this as such material is not of interest to my [employers]".

In fact, the investigator went immediately to the Bath police and informed them about the material he regarded as obscene. He saw Detective Chief Inspector A, to whom he sent a written statement on 17 February. On the same day he told the Plaintiffs' solicitors - who had been instructed

following his report to obtain an Anton Piller order - that the police were "interested in the porno material" he had seen and that he would "make arrangements with the police in Bath".

30. On 24 February 1981 the investigator telephoned Detective Chief Inspector A at the request of the Plaintiffs' solicitors to inform him that an Anton Piller order was to be applied for on 26 February, the intention being to serve and execute it on 2 March. He arranged with A that, if the order was obtained, there would be a meeting between those who were to execute it and the police at Bath police station at 10.45 a.m. on 2 March. The reason for this arrangement was that the police planned to execute, in connection with possible proceedings under the Obscene Publications Act 1959 and at the same or about the same time as the order, a warrant to search the Defendants' premises for and seize any pornographic video films.

31. During the course of the application for the order on 26 February 1981, the following exchange took place between counsel for the Plaintiffs and Mr Justice Whitford:

"(Counsel): My Lord, there is one other matter which I ought to draw to your Lordship's attention and that is that the local police force are very much interested in these defendants in relation to matters which are not the subject of this action, namely, the adult films.

(The judge): Yes. Well, that is a different matter altogether.

(Counsel): My Lord, it is a different matter, but I felt I ought to draw your Lordship's attention to the fact that they propose a visitation upon [the applicant] and his company at about the same time as we propose to serve this order upon them.

(The judge): Yes, but they are not interested in ...

(Counsel): No.

(The judge): ... these films.

(Counsel): They are just interested in the obscenity.

(The judge): It's only the self-incrimination.

(Counsel): My Lord, that's right.

(The judge): So far as that is concerned there is no indication that the police are ...

(Counsel): None whatever.

(The judge): As to that you gave the undertaking."

32. A letter of 27 August 1981 from the Plaintiffs' solicitors to Mr Chappell - which was put in evidence by the Plaintiffs in another connection

- contained the following passage concerning the arrangements with the police:

"We would like to deal ... with the point about the simultaneous execution of the police search warrant with the [Anton Piller order] ... [We] would like to make our position plain ... On 17 February [we] first received instructions to obtain an [order]. It is quite clear from our attendance note of the conversation that [the investigator] also told [H.] that the police were interested in you and [the applicant's company] in relation to pornographic material. It was also clearly assumed that should the police wish to take action then a joint execution of the search warrant and the [order] would be the ideal arrangement. Obviously anything other than a simultaneous execution might well prove to be to little or no effect. Of course no one could be certain at that time that such simultaneous execution would take place since it depended, inter alia, on a judge granting a full Anton Piller order and the police obtaining a search warrant quite apart from any other practical difficulties. That was the position when the application before the application judge was made on [26] February [1981]. Let us be quite clear, we do not in any way deny that it was the intention that the [order], if granted, would be served and executed at the same time as the search warrant, assuming that [that] was granted to the police and that the other arrangements could be made. We repeat that such is obvious. We also think reference to the transcript [of the hearing concerning the application for the order] makes it quite clear that the application judge was informed of the police interest and the likelihood or possibility of a search warrant being executed."

33. As soon as the Anton Piller order was made on 26 February 1981, the Plaintiffs' solicitors informed the Bath police, who had obtained a search warrant on the same day. The previous arrangements were confirmed.

#### *2. The events of 2 March 1981*

34. At 10.45 a.m. on 2 March 1981 the Plaintiffs' party (H., another solicitor and three employees of the Plaintiffs, including the investigator) met the police at Bath police station. They then went, together with the police party responsible for executing the search warrant (eleven or twelve policemen in plain clothes, led by A), to the Defendants' premises.

35. On arrival, the investigator went in first, again posing as a customer, his stated object being to be able to "observe what happened right from the start".

A few minutes later, A, who was accompanied by some of the Plaintiffs' party including H. but by no policemen, rang the doorbell. The lady who opened the door initially refused entry but, after being shown the search warrant, she reluctantly admitted the group (see also paragraph 43 (d) below).

36. The premises were on four floors. The ground-floor entrance gave access to a passage and stairs leading to the other floors. On the first of those were Mr Chappell's office and a general office; on the second, his bedroom, a room used for processing video cassettes and the office of an employee of his company; and on the third, three further offices.

37. Detective Chief Inspector A and those accompanying him found Mr Chappell in his office, where he was served with the search warrant. The other ten or eleven policemen entered the building at 11.40 a.m. Having been assigned to various rooms or tasks, they began their search; it was concluded at 4.20 p.m., after 274 items (mostly video tapes) had been logged and signed for.

38. As soon as the warrant had been served and whilst the police were beginning their search, H. served the Anton Piller order on Mr Chappell and informed him of its effect. Furthermore, in accordance with the general obligation incumbent on solicitors in such cases, he went further than his express undertaking (see paragraph 27 above), in that he urged Mr Chappell to obtain legal advice on the order in its entirety. The latter asked for a member of his usual firm of solicitors to attend, but the only person available was a trainee solicitor. On his arrival shortly afterwards, Mr Chappell, who was distracted by the police search, was advised of the implications of the order and accepted service of it; service was accepted on behalf of his company by the trainee solicitor.

Thereupon - but not before - the Plaintiffs' party started their search of the premises, which was conducted simultaneously with the police search and concluded at about the same time. They seized, *inter alia*, 377 video cassettes as pirate copies; some of these, in which the copyright was not owned by the Plaintiffs, were subsequently returned to Mr Chappell.

39. The applicant maintained that, owing to the simultaneous searches, he was unable to supervise the operations and take note of the material seized. In particular, he stated that the Plaintiffs' solicitors took a number of private, confidential and personal documents, having no bearing on the action for breach of copyright. The Government submitted that, not being a party to the search, they could not comment on or dispute these contentions.

A note on the solicitors' file records that H. went through the drawers of correspondence and other documents and "encountered some protest" from Mr Chappell "who attempted to separate material which was not relevant", but that "all necessary material was finally removed". No itemised list of the seized material was prepared, neither was this required under the order (see paragraph 27 above), but the applicant did take copies of some of it. The Commission found it "clear" that personal correspondence had been examined and, in certain cases, taken by the solicitors.

40. The aforesaid and another note made by the Plaintiffs' solicitors reveal that they returned after the search to the police station and, in Mr Chappell's absence, went through the documentation seized by the police and copied or borrowed certain relevant items.

#### IV. SUBSEQUENT COURT PROCEEDINGS

##### A. High Court

41. The matter of the Anton Piller order came before the High Court (Mr Justice Dillon) on 5 March 1981 for a hearing *inter partes* (see paragraph 20 above). The applicant did not then seek the discharge of the order on the ground that it had been improperly obtained, although he did apparently ask for the return of the seized cassettes.

As regards the affidavit of disclosure which was due to be filed by the Defendants by 6 March 1981 (see paragraph 26 (d) above), Mr Justice Dillon, by order of 9 March, extended the time-limit to 14 March: at the hearing the Defendants had given various undertakings to the court, including one to disclose the same information as that originally stipulated under the Anton Piller order and to make the corresponding affidavit. The time-limit was subsequently extended, by agreement between the parties, to 27 March. However, the applicant, who had changed solicitors twice and visited the Plaintiffs' solicitors' office several times to examine the seized materials, continued to refuse to file the affidavit; he objected, in particular, to giving details of the members of the Video Exchange Club.

42. On 6 May 1981 the Plaintiffs served on the Defendants a notice of motion for contempt of court for failure to comply with the disclosure undertaking given to Mr Justice Dillon; in it they sought Mr Chappell's committal to prison.

On 26 May the applicant withdrew his instructions from his professional advisers and thereafter conducted his case in person. He then issued a variety of cross-motions against the Plaintiffs. In one of these, dated 21 July, he requested that the Anton Piller order be set aside; that the Defendants be released from their undertakings; that the seized materials be returned to them; that the Plaintiffs' action be dismissed; and that he be awarded damages. His principal ground for claiming this relief was that the order had been improperly obtained, served and executed - notably on account of the combined searches by the Plaintiffs and the police and the failure to inform Mr Justice Whitford of the plans in this connection - with the result, he submitted, that the order and the evidence obtained thereunder were invalid.

Another cross-motion by Mr Chappell related to alleged contempt of court by the Plaintiffs and their investigator, notably for failure to comply with undertakings incorporated in the order.

43. On 10 November 1981, after hearing substantial argument and several witnesses (including the applicant and others who had been present at the search), Mr Justice Warner gave judgment in the High Court on the

Plaintiffs' and Mr Chappell's motions. He addressed, *inter alia*, the following matters.

(a) After describing an Anton Piller order as being of a "draconian nature", he quoted in this connection the following dictum of Mr Justice Browne-Wilkinson in the High Court:

"... [T]he rule of full disclosure to the court is almost more important in Anton Piller cases than in other *ex parte* applications. Since Anton Piller orders give compulsory rights of inspection, once those inspections have taken place the information procured from [them] is in the hands of the other side and the situation is irreversible."

(b) He noted that although the investigator's affidavit in support of the application for the order contained sufficient evidence to warrant the latter's making, it included two inaccuracies which were neither trivial nor immaterial, one being the omission of a clear explanation of his contact with the police on 16 February 1981 (see paragraphs 9 and 29 above).

(c) He recited the exchange between counsel and Mr Justice Whitford on 26 February 1981, but described the Plaintiffs' actual intentions in respect of their proposed co-operation with the police as being "more accurately described" in their solicitors' letter of 27 August 1981 (see paragraphs 31-32 above).

(d) Whilst finding that the lady who gave admission to the premises (see paragraph 35 above) "obviously took it that H. and the others were police officers", he was of the view that the Anton Piller order had been validly served.

(e) He examined various complaints concerning the execution of the order and noted that Mr Chappell "was able to look after his interests as well as anyone in his position would have been". He nevertheless adverted to the difficulties created for a defendant by the simultaneous execution of a search warrant and an Anton Piller order, as regards supervision of the searching and taking advice from and giving instructions to his solicitor. To protect the defendant, he suggested, the warrant and the order should be served at the same time but the two searches should be conducted consecutively.

(f) He was satisfied that various allegations of improper behaviour on the part of the Plaintiffs and their solicitors, relating to matters other than the obtaining, service and execution of the order, were unfounded.

(g) He arrived at the following conclusions:

"... [T]here was nothing inherently wrong with the mode of execution of the Anton Piller order, except that the presence of the police executing their search warrant at the same time made it more oppressive than it should have been ... [T]he real vice lies in the fact that Mr Justice Whitford was not told with all the candour that was called for in the circumstances what the intentions of the plaintiffs and the police were. He ought ... at least to have been told that it was intended that the Anton Piller order ... and the search warrant ... should be executed at the same time ....

... [T]he plaintiffs' failure fully to inform Mr Justice Whitford ... [did not go to the question whether the order should be made at all]. It only meant that [he] did not consider whether he should include in his order some safeguard against the risk of the simultaneous execution of the search warrant and of the order proving oppressive ... If [he] had known all that I have learnt ... about the way in which [the applicant's company] conducted its business, he would have been all the more certain that he should make the order."

44. In the light of the foregoing, Mr Justice Warner gave the following decisions.

(a) Whilst he could not undo the irreversible, he would not allow the Plaintiffs to derive any further advantage from the Anton Piller order. Accordingly, he released the Defendants from the disclosure undertaking given to Mr Justice Dillon (see paragraph 41 above) and set aside those parts of the original order that required disclosure of particulars of suppliers and customers (see paragraph 26 (d) above).

(b) He declined to order return of the materials seized under the order.

(c) He held that he could neither dismiss the Plaintiffs' action nor, at that stage, award damages to Mr Chappell.

(d) Whilst the Defendants were undoubtedly in contempt of court for failure to make the affidavit of disclosure, no penalty should be imposed: it would be incongruous to release them from their undertaking and at the same time punish them for non-compliance.

(e) He dismissed Mr Chappell's cross-motion for contempt of court.

## **B. Court of Appeal**

45. On 15 June 1982, the Court of Appeal rejected an appeal by Mr Chappell against dismissal of his contempt motion and allowed a cross-appeal by the Plaintiffs. The judgments given contained, inter alia, the following points.

(a) Whilst an Anton Piller order was necessary and salutary in certain cases, it was a draconian measure. It infringed what is normally the fundamental principle of *audi alteram partem*, as a result of proceedings in which the defendant had not been heard and of which he had not even previously been informed. Hence the importance of full disclosure to the court from which the order was sought and of observing not only in the letter but in the spirit the stipulations it incorporated for the defendant's protection.

(b) Whilst Mr Justice Whitford had not been adequately informed of the plan to execute the order and the search warrant simultaneously, there had been no deliberate intention to deceive him.

(c) There had not been a plot by the Plaintiffs to enter the premises without permission, but it was "disturbing" that the Defendants were not given a proper opportunity to refuse entry at the door. Once inside, the Plaintiffs' solicitors had behaved with complete propriety and Mr Chappell,

far from being "shattered", as he had contended, was "reasonably calm and collected".

(d) There was no objection in principle to a search warrant and an Anton Piller order obtained in respect of the same premises being executed "more or less contemporaneously", lest valuable evidence be lost. However, Lord Justice Oliver added that, if this was intended, the court from which the order was sought had to be told in advance so that it could consider safeguards for the defendant as regards, for example, the order of the searches or the conduct of the plaintiff on obtaining entry. In Lord Justice Lawton's view, steps should be taken to ensure that the two searches were not conducted "simultaneously" and that the solicitors executing the order did not seem to be "the hangers on of a squad of police officers".

(e) Mr Chappell had admitted dealing in "a substantial volume" of pirate material, he had not applied to Mr Justice Dillon in March 1981 for discharge of the order but had instead given wide undertakings, and the order was necessary for the Plaintiffs' protection.

Whilst describing what had happened as "unfortunate and regrettable", the Court of Appeal concluded that it was not necessary to set the Anton Piller order aside for the purpose of doing justice to Mr Chappell. It therefore restored the order, including the original disclosure requirements, but found it inappropriate to impose a penalty for his contempt of court in having failed to comply with his obligations in this respect.

The Court of Appeal also refused leave to appeal to the House of Lords. A petition by Mr Chappell for such leave was rejected by the House of Lords on 7 October 1982.

## V. LATER EVENTS

46. Mr Chappell had continued, until the end of April 1981, to operate a club for the exchange of video cassettes, but rather unsuccessfully on account of the seizure of his stock and books. On 21 December 1982 the action for breach of copyright was concluded by a High Court order, to which he, allegedly under duress of the risk of self-incrimination, and the Plaintiffs consented. This order:

(a) recorded the agreement of the Plaintiffs and Mr Chappell to release each other from all liability arising from the subject-matter of the action and its pursuit by the Plaintiffs;

(b) restrained Mr Chappell from any dealings with unlicensed copies of any films the copyright in which was owned by the Plaintiffs;

(c) required him to make an affidavit setting out the information about his suppliers and customers which the Anton Piller order had directed him to disclose by affidavit (see paragraph 26 (d) above), but omitting the names and addresses of bona fide members of the Video Exchange Club;

(d) released the Plaintiffs and their solicitors from their undertakings incorporated in the Anton Piller order, including that as to the confidentiality of the material obtained thereunder;

(e) directed that "all the documents and films" relating to the action be returned to Mr Chappell, after erasure of the films from the cassettes;

(f) directed that all further proceedings in the action be stayed.

## PROCEEDINGS BEFORE THE COMMISSION

47. In his application (no. 10461/83) lodged with the Commission on 11 October 1982, Mr Chappell raised a variety of complaints concerning mainly the terms, content and manner of service of the Anton Piller order; he invoked Articles 3, 5, 6 and 8 (art. 3, art. 5, art. 6, art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1).

48. On 14 March 1985, the Commission declared the application admissible as regards the complaint that there had been an unjustified interference with the applicant's rights under Article 8 (art. 8) of the Convention by reason of the way in which the order was served and the subsequent search was carried out on the premises in question. The remainder of the application was declared inadmissible, notably a complaint about the existence of Anton Piller orders in general and (on the ground of non-exhaustion of domestic remedies) certain allegations concerning the seizure during the search and misuse of private documents.

In its report of 14 October 1987 (made under Article 31) (art. 31), the Commission expressed the opinion, by six votes to five, that there had been no violation of Article 8 (art. 8). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment.

## FINAL SUBMISSIONS TO THE COURT

49. At the hearing on 22 November 1988 the Government invited the Court "to decide and declare that the facts disclose no breach by the United Kingdom of the applicant's rights pursuant to Article 8 (art. 8) of the Convention".

The applicant, for his part, submitted that the "Government have not discharged their burden of establishing that [the interference] comes within Article 8 para. 2 (art. 8-2)" and that "there was therefore a breach".

## AS TO THE LAW

### I. INTRODUCTION

50. Mr Chappell alleged that he had been the victim of a breach of Article 8 (art. 8) of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This claim was contested by the Government and rejected by a majority of the Commission.

51. Before the Court, the Government accepted that there had been an "interference" with the exercise of the applicant's right to respect for his "private life" and "home". Mr Chappell, for his part, conceded that the interference had the aim, which was legitimate under paragraph 2 of Article 8 (art. 8-2), of protecting "the rights of others", in that it served to defend the Plaintiffs' copyright against unauthorised infringement.

The Court sees no reason to differ on either of these points. It will therefore concentrate on the issues that formed the core of the arguments before it, namely whether the interference was "in accordance with the law" and was "necessary in a democratic society".

### II. "IN ACCORDANCE WITH THE LAW"

52. An interference cannot be regarded as "in accordance with the law" unless, first of all, it has some basis in domestic law (see, for example, the *Leander* judgment of 26 March 1987, Series A no. 116, p. 23, para. 50).

The applicant did not deny that this condition was satisfied, but he saw the legal basis for Anton Piller orders as residing solely in the inherent jurisdiction of the courts, whereas the Government attributed it partly to statute and partly to common law.

The English courts have indeed referred in this context to their inherent jurisdiction, particularly as regards the *ex parte* nature of Anton Piller orders; in other respects their making appears to be founded on the general statutory power of the courts to grant injunctions and on the Rules of the Supreme Court (see paragraphs 10-11 above). In any event, even if the applicant's view were to be adopted, there would in the Court's opinion still have been a sufficient legal basis for the interference complained of, since

"law" includes unwritten or common law (see, for example, the Malone judgment of 2 August 1984, Series A no. 82, p.31, para. 66).

53. The applicant submitted that the grant and the execution of the Anton Piller order in his case were not "in accordance with the law" since they did not comply with English law. In support of his submission, which was accepted by a minority of the Commission, he relied on the following factors:

(a) the inadequate disclosure to Mr Justice Whitford, when the order was originally sought, of the arrangements between the Plaintiffs and the police (see paragraphs 29-33, 43 (g) and 45 (b) above);

(b) the manner in which the Plaintiffs gained admission to the premises on 2 March 1981, which in effect denied him his right to refuse entry (see paragraphs 35, 43 (d) and 45 (c) above);

(c) the fact that the searches of the premises by the Plaintiffs and the police were conducted simultaneously and by a total of sixteen or seventeen people, and the adverse effects of this on Mr Chappell's ability to supervise the operations (see paragraphs 34, 38 and 43 (e) above);

(d) the absence from the Anton Piller order of the usual undertaking to inform the person served of his right to obtain legal advice (see paragraphs 17 (c) (i) and 27 above) and the alleged fact that Mr Chappell did not receive proper legal advice before the Plaintiffs' search was effected (see paragraph 38 above);

(e) the fact that no inventory of the material seized was prepared (see paragraph 39 above);

(f) the removal of a number of private papers unconnected with the copyright action (see paragraph 39 above);

(g) the Plaintiffs' access, after their search of Mr Chappell's premises, to other documents of his at Bath police station (see paragraph 40 above).

54. The Court observes that factors (a), (b) and (c) were raised by the applicant before, and examined in detail by, the domestic courts (see paragraphs 41-45 above). It is true that at the end of the day no penalty was imposed on Mr Chappell for his contempt of court in failing to file the affidavit of disclosure. However, this relief was afforded solely because Mr Justice Whitford had not been fully informed of the arrangements with the police. Both the High Court and the Court of Appeal rejected Mr Chappell's cross-motion relating to alleged contempt of court by the Plaintiffs in not abiding by their undertakings incorporated in the Anton Piller order. Above all, neither court held that the three factors in question rendered the order or its execution unlawful: thus, Lord Justice Lawton in the Court of Appeal said that he could "see no reason why the ... order ... should not stand".

In these circumstances, the Court is unable to arrive at a different conclusion. It recalls that the Court's power to review compliance with domestic law is limited, it being in the first place for the national authorities,

notably the courts, to interpret and apply that law (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 22, para. 48).

55. Neither is the Court persuaded that the remaining matters relied on by the applicant suffice to establish that the interference was not in conformity with English law.

As to factor (d), Mr Chappell did in fact, notwithstanding the terms of the order, receive legal advice before the Plaintiffs began their search (see paragraph 38 above). Furthermore, that advice was described by Mr Justice Warner in the High Court as "the only sensible advice" that could have been given.

As to factor (e), the Anton Piller order did not require that an inventory of the seized material be prepared (see paragraph 27 above).

The complaint concerning the removal of private papers (factor (f)) was declared inadmissible by the Commission (see paragraph 48 above), with the result that this point falls outside the scope of the case before the Court.

Finally, factor (g) concerns an occurrence after the actual search of the premises and thus does not bear directly on, and cannot be regarded as decisive for an assessment of, the lawfulness in domestic terms of the interference complained of. The Court notes moreover that the applicant's complaints in regard to this occurrence were held by the domestic courts to be unfounded.

56. It remains to consider whether the further requirements which the Court has identified as flowing from the phrase "in accordance with the law" were satisfied.

The relevant texts and case-law were all published, so clearly no problem arises concerning the law's "accessibility", as that expression is understood in the Court's earlier judgments.

As regards "foreseeability", as likewise understood, the applicant maintained that the granting of Anton Piller orders and, in particular, their terms were largely matters of discretionary practice and that the state of the law was too "amorphous" for it to constitute "law" for the purposes of paragraph 2 of Article 8 (art. 8-2).

The Court does not share this view. Since 1974 a substantial body of case-law has restated and refined the principles followed by the English courts as regards Anton Piller orders (see paragraphs 10-24 above). It is true that some variations may occur as between the content of individual orders. Nevertheless, the basic terms and conditions for the grant of this relief were, at the relevant time, laid down with sufficient precision for the "foreseeability" criterion to be regarded as satisfied.

57. In its report, the Commission examined whether the legal basis for the interference at issue satisfied the further criterion of showing respect for the applicant's rights, and concluded that it did. In so doing - the Delegate explained at the hearing - the Commission had had in mind dicta of the

Court exemplified by the following passage from its Olsson judgment of 24 March 1988 (Series A no. 130, p. 30, para. 61 (b)):

"The phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by, *inter alia*, paragraph 1 of Article 8 (art. 8-1) ...."

An Anton Piller order is granted without the defendant's being notified or heard and is capable of producing damaging and irreversible consequences for him (see paragraphs 11 and 24 above). For these reasons it is essential that this measure should be accompanied by adequate and effective safeguards against arbitrary interference and abuse. In point of fact, the order made against Mr Chappell and his company was coupled with a number of safeguards of various kinds, to which the Court refers below in its examination of the necessity of the interference.

### III. "NECESSARY IN A DEMOCRATIC SOCIETY"

58. Mr Chappell did not allege that the grant of the Anton Piller order in his case, as such, was not "necessary in a democratic society". However, as regards its terms, he questioned the adequacy of the safeguards incorporated in and the remedies available to him in respect of the order, especially in view of the irreversible consequences of its implementation. Above all, he directed his submissions to the manner in which the measure had been executed: adverting to the factors set out at (b) to (g) in paragraph 53 above, he contended that the interference with his rights was not proportionate to the legitimate aim pursued. A minority of the Commission agreed with this conclusion.

#### **A. The grant and terms of the order, as such**

59. The order made against Mr Chappell and his company was granted only after Mr Justice Whitford had been supplied with evidence establishing that the requisite conditions were met (see paragraphs 9 and 16 above). Bearing in mind the nature and scope of the applicant's business (see paragraphs 8, 38 and 45 (e) above), the Court - quite apart from any question of the United Kingdom's margin of appreciation - entertains no doubt that the actual grant of the order was a necessary step in the effective pursuit by the Plaintiffs of their copyright action.

60. It has also to be noted that the order itself incorporated significant limitations on its scope. Thus, the relief afforded was granted for a short period only; restrictions were placed on the times at which and the number of persons by whom the Plaintiffs' search could be effected; and any materials seized could be used only for a specified purpose (see paragraphs

25, 26 (b) and 27 above). In this way, the measure was accompanied by safeguards calculated to keep its impact within reasonable bounds. Furthermore, these safeguards were buttressed by a series of undertakings given by the Plaintiffs or their solicitors, and a variety of remedies was available to the applicant in the event that he considered the order to have been improperly executed (see paragraphs 27 and 20-23 above).

On the subject of safeguards, the applicant submitted that if the arrangements between the Plaintiffs and the police had been more fully disclosed to the High Court at the outset, further conditions would have been imposed. Their result, he said, would have been to preclude the two searches of his premises being conducted simultaneously. Whilst this may be so, the Court does not consider that on this account the order, in substance, was not "necessary". At most, this point may go to the question, which the Court examines below, whether the actual execution of the order was proportionate to the legitimate aim pursued.

61. Mr Chappell further maintained - and in this he was supported by a minority of the Commission - that the High Court was unable to supervise implementation of the Anton Piller order to a sufficient degree. In his view, its execution should, rather than being left to the Plaintiffs' solicitors, have been entrusted to or supervised by an independent court official.

The Court is not persuaded by this argument. It is true that a solicitor executing such an order may find himself faced with a conflict between his obligations to his client and his duty to the court, as one of its officers. However, a solicitor who fails to abide by an undertaking of his incorporated in the order lays himself open to heavy penalties, even to the point in some circumstances of putting his professional career in jeopardy (see paragraph 17 in fine above).

## **B. The execution of the order**

62. There remains the question whether the actual execution of the order can be regarded as "necessary" and, in particular, as proportionate to the legitimate aim pursued.

The Court, first of all, finds itself unable to accept that factors (d), (e), (f) and (g) set out in paragraph 53 above justify the applicant's allegation in this respect. Factor (f) relates to a matter which the Commission declared inadmissible (see paragraph 55 above). The other three, on which the Court refers to its observations in paragraph 55 above, are not in its opinion of sufficient weight to warrant a finding of disproportionality.

63. Of more consequence are the remaining factors relied on, namely the manner in which the Plaintiffs gained entry to the applicant's premises and the fact that the latter were searched, simultaneously, by sixteen or seventeen people.

The Court would agree with the criticisms of these aspects of the case made by the Court of Appeal, which described what happened as "disturbing" and "unfortunate and regrettable" (see paragraph 45 above).

64. Mr Chappell was admittedly not afforded a proper opportunity to refuse the Plaintiffs entry to his premises at the door, since members of their party entered together with Detective Chief Inspector A (see paragraphs 35, 43 (d) and 45 (c) above).

However, the applicant subsequently raised no objection on this score. Indeed, rather than exercising his right of asking the Plaintiffs to leave, he acquiesced, after receiving legal advice, in their search operations. Moreover, it was not until such advice had been tendered that those operations were put in hand (see paragraph 38 above).

65. Manifestly the simultaneous searches by the police and the Plaintiffs must have been distracting for Mr Chappell and must have created difficulties for him, as regards supervision and as regards taking advice from and giving instructions to his solicitor. Indeed, Mr Justice Warner recognised that this circumstance made the execution of the Anton Piller order "more oppressive than it should have been" (see paragraph 43 (g) above).

Against this have to be weighed the following factors. Firstly, it is clear that the two searches concerned at least partly the same materials. Secondly, the applicant made no request for one of the searches to be deferred until the other had been completed. Thirdly, the domestic courts - after hearing first-hand evidence - found that in fact Mr Chappell was able to look after his interests whilst the order was being implemented (see paragraphs 43 (e) and 45 (c) above). Finally, Mr Justice Warner found that "there was nothing inherently wrong with the mode of execution" of the order and the Court of Appeal concluded that it was not necessary to set the order aside for the purpose of doing justice to Mr Chappell (see paragraphs 43 (g) and 45 above).

66. In the light of the above, the Court is of the opinion that the shortcomings in the procedure followed - which, by its very nature, was bound to cause some difficulties for the applicant - were not so serious that the execution of the order can, in the circumstances of the case, be regarded as disproportionate to the legitimate aim pursued.

This being so, the Court does not find it necessary to go further into the matter - which was examined by the majority of the Commission in some detail - of the remedies available to the applicant.

#### IV. CONCLUSION

67. In conclusion, no breach of Article 8 (art. 8) has been established in the circumstances of the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 8 (art. 8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 March 1989.

Rolv RYSSDAL  
President

Marc-André EISSEN  
Registrar