



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

THIRD SECTION

CASE OF I.J.L. AND OTHERS v. THE UNITED KINGDOM

(Application nos. 29522/95, 30056/96 and 30574/96)

JUDGMENT

STRASBOURG

19 September 2000

FINAL

19/12/2000

In the case of I.J.L. and Others v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Sir Nicolas BRATZA,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 6 July 1999 and 29 August 2000,

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

PROCEDURE

1. The case originated in three applications (nos. 29522/95, 30056/96 and 30574/96) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three United Kingdom nationals, Mr I.J.L., Mr G.M.R. and Mr A.K.P. ("the applicants"), on 30 November, 18 December and 8 December 1995 respectively.

2. The first applicant was represented by Stephenson Harwood, the second applicant by Mishcon de Reya and the third applicant by Peters and Peters, all firms of solicitors based in London. The applicants' representatives were assisted by Mr P.J. Gardner, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr M. Eaton, Deputy Legal Adviser at the Foreign and Commonwealth Office, London. The applicants' request not to have their names disclosed was acceded to in the proceedings before the Commission. Their anonymity was maintained in the proceedings before the Court.

3. The applicants alleged, in particular, that they were denied a fair trial in breach of Article 6 of the Convention on account of the prosecution's use of statements which they had been compelled to supply at the pre-trial stage of the criminal proceedings, the refusal of the prosecution to disclose documents of relevance to their defence, improper collusion between the prosecution and other agencies and the unreasonable length of the criminal proceedings.

4. The applications were joined by the Commission. After the adoption of the Commission's partial admissibility decision on 9 April 1997, the joined applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 July 1999 the Chamber declared the applications partly admissible¹.

7. The applicants and the Government each filed observations on the merits and replied to each other's submissions. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Factual background leading to the appointment of inspectors

8. In early 1986 Guinness was competing with another public company, Argyll Group PLC ("Argyll"), to take over a third public company, the Distillers Company PLC ("Distillers"). The takeover battle resulted in victory for Guinness. Guinness's offer to the Distillers' shareholders, like Argyll's, included a substantial share exchange element and, accordingly, the respective prices at which Guinness and Argyll shares were quoted on the stock exchange was a critical factor for both sides. During the course of the bid the Guinness share price rose dramatically, but once the bid had been declared unconditional it fell significantly. According to the third applicant the share price rose in line with the range of the company's market sector and the fall was a consequence of normal market forces.

9. There were allegations and rumours of misconduct during the bid to the effect that the substantial increase in the quoted Guinness share price during the bid had been achieved as a result of an unlawful share-support operation. This involved certain persons ("supporters") purchasing Guinness shares in order to maintain or inflate its quoted share price. It was

1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

alleged that supporters were offered secret indemnities against any losses they might incur and, in some cases, also large success fees if the Guinness's bid was successful. Such inducements, if true, would have been unlawful (1) because they were not disclosed to the market under the City Code on Takeovers and Mergers and (2) because they were paid out of Guinness' own monies in breach of section 151 of the Companies Act 1985 (the "1985 Act"), which prohibits a company from giving financial assistance for the purpose of the acquisition of its own shares.

10. It was further alleged that supporters who had purchased shares under the unlawful share-support operation were indemnified and rewarded, and that some of those who had helped find supporters were rewarded by the payment of large fees which had also come from Guinness funds. It was rumoured that in most cases payments were made using false invoices which concealed the fact that payment was being made in respect of the supporters' or other recipients' participation in the unlawful share-support operation.

11. These allegations and rumours led the Secretary of State for Trade and Industry on 28 November 1986 to appoint inspectors pursuant to sections 432 and 442 of the 1985 Act to inquire into the acquisition of Distillers by Guinness and to investigate the affairs of Guinness.

B. The inspectors' investigation

12. The investigation began on 1 December 1986. On 10 December 1986 the inspectors began taking oral evidence. Mr Seelig, a director of the merchant bank advisers to Guinness, was the first witness.

13. On 18 December 1986 the inspectors requested the second applicant to provide documents relating to his company's dealings in the shares of Guinness during the takeover bid. The second applicant's solicitor provided the materials on 24 December 1986, which indicated that his company had been approached by the third applicant about supporting the Guinness takeover bid.

14. On 12 January 1987 the inspectors informed the Department of Trade and Industry (DTI) of certain matters and, on 13 January 1987, a note from the DTI solicitor recorded that there was concrete evidence of criminal offences having been committed. On the same day the DTI contacted Mr John Wood of the Director of Public Prosecutions' office (DPP). It was decided that the proper thing to do was to permit the inspectors to carry on with their inquiry and to pass the transcripts on to the Crown Prosecution Service (CPS) which had come into being in September 1986. All the applicants maintain that they were unaware of these arrangements when they were interviewed by the inspectors.

15. On 14 January 1987 the Chairman of Guinness, Mr Saunders, was dismissed from the company.

16. On 29 January 1987 the Secretary of State required the inspectors to inform him of any matters coming to their knowledge as a result of their investigation pursuant to section 437(1A) of the 1985 Act. Thereafter the inspectors passed on to the Secretary of State transcripts of their hearings and other documentary material which came into their possession. The applicants point to official documentation which in their view confirms the collusion which began to take shape.

17. On 30 January 1987 a meeting was held attended by the inspectors, the solicitor and other officials of the DTI, Mr Wood and a representative from the CPS. Among other matters, potential accused were identified, possible charges were discussed and it was stated that a decision had to be made as to when to start a criminal investigation. All concerned agreed on the need to work closely together in preparing the way for bringing charges as soon as possible. The inspectors indicated their readiness to cooperate, although they reserved the right to conduct their investigations as they thought right. The applicants maintain that they were never notified of these arrangements during their respective interviews.

18. On 5 February 1987 Mr Wood, who had been appointed head of legal services at the CPS, appointed a team of counsel to advise on the criminal aspects of the investigation. Transcripts and documents from the inspectors were passed on to the team after receipt and consideration by the DTI. The applicants state that it is a matter of fact that all the transcripts and documents which existed at that date were passed on to the team of prosecution counsel as well as all material arising after that date.

19. The interviews conducted by the inspectors were surrounded by a constant wave of media publicity.

The first applicant was interviewed by the inspectors on five occasions: on 29 January, 12 February, 11 March, 16 March and 10 April 1987. The interviews related to his involvement in advising Guinness on the bid for Distillers and in identifying investors prepared to support the bid by purchasing Guinness shares.

The second applicant was interviewed by the inspectors on two occasions: on 14 January and 2 September 1987. The interviews focused on the way in which he was drawn into the support operation for the Guinness bid and on the arrangements for the payment of the success fee to his company.

The third applicant was interviewed by the inspectors on 22 and 27 January 1987. He was accompanied by his solicitor throughout these interviews during which he was pressed to answer a number of specific questions. He maintains that he sought either in person or through his solicitor to decline to answer them but was advised throughout of the consequences of his failure to respond. He was further interviewed by the inspectors on 26 May 1987. On 17 July 1987 the third applicant's solicitors

confirmed the transcripts of the evidence which he had given, subject to a small amendment.

20. Having informed the inspectors of the particulars of his travel plans and having confirmed his availability through his solicitors or in person should it be required, the third applicant left for the United States, where he arrived on 30 September 1987. He was immediately arrested and detained pursuant to an extradition request by the United Kingdom to the United States. He returned voluntarily to the United Kingdom on 23 March 1988.

C. The criminal proceedings

21. During the first week of May 1987 the police were formally asked by the DPP's office to carry out a criminal investigation. The transcripts and documents obtained as a result of the inspectors' interviews were then passed on to the police.

22. On 7 May 1987 Mr Saunders was charged with numerous offences relating to the illegal share-support operation. The applicants state that these were holding charges and did not relate to the illegal share-support operation. The charges against Mr Saunders related to the alleged destruction of records and documents belonging to Guinness which were created during his time as chief executive of the company.

23. About one month later the DPP instructed the police to carry out an investigation into the wider aspects of the Guinness takeover. The applicants maintain that an informal police investigation against them was already under way as from 12 January 1987, having regard to the well-documented cooperation between the inspectors, the DTI and the Deputy DPP based on the transcripts of the interviews conducted by the inspectors.

24. On 8 October 1987 the first applicant was charged with nine offences relating to invoices he had caused to be submitted for advice he had given during the bid. These invoices had been submitted after the successful outcome of the Guinness bid.

25. On 13 October 1987 the second applicant was charged with eight offences relating to invoices which two companies, being wholly owned subsidiaries of the company of which the second applicant was director, had submitted for the loss on the sale of Guinness shares and for the success fee paid after the successful outcome of the Guinness bid.

26. After his return from the United States, the third applicant was charged with six offences relating to two invoices and the success fees which had been charged to Guinness following its takeover of Distillers.

27. In total, seven persons were charged with offences in connection with the Guinness takeover. All seven defendants together were arraigned before the Crown Court on 27 April 1989.

28. In view of the large number of counsel and the number of defendants, two separate trials were subsequently ordered by the trial judge

in the Crown Court on 21 September 1989. The applicants and Mr Saunders were to be tried together in a first set of proceedings and the remaining three co-defendants in a separate set of proceedings. The third applicant's application to be tried with the latter category of defendants was refused.

29. From 6 to 16 November 1989 the court held a *voir dire* (submissions on a point of law in the absence of the jury) following the application of the third applicant to rule the DTI transcripts inadmissible. He argued, principally, that the statements obtained during three interviews before the inspectors should be excluded

(i) pursuant to section 76 of the Police and Criminal Evidence Act 1984 (PACE) on the basis that they had been obtained by oppression or in circumstances which were likely to render them unreliable;

(ii) pursuant to section 78 of PACE because of the adverse effect the admission of the evidence would have on the fairness of the proceedings having regard to the circumstances in which it was obtained.

30. In a ruling given on 21 November 1989, the trial judge (Mr Justice Henry) held that the transcripts were admissible. He stated that it was common ground that the interviews were capable of being "confessions" as defined in section 82(1) of PACE. He found that, as a matter of construction of the 1985 Act, inspectors could ask witnesses questions that tended to incriminate them, that the witnesses were under a duty to answer such questions and the answers were admissible in criminal proceedings. He rejected the third applicant's assertion that the inspectors should have given a warning against self-incrimination. He was satisfied that there was no element of oppression involved in the obtaining of the evidence and that the answers were not obtained in consequence of anything said or done which was likely to render them unreliable in all the circumstances existing at the time.

31. From 22 to 24 January 1990 the court held a further *voir dire* following the application of Mr Saunders to rule inadmissible the DTI transcripts concerning the eighth and ninth interviews with him on the basis that they should be excluded either as unreliable under section 76 of PACE or pursuant to section 78 of PACE because of the adverse effect the admission of the evidence would have on the fairness of the proceedings having regard to the circumstances in which it was obtained. Reliance was placed on Mr Saunders' alleged ill-health at the time and on the fact that the two interviews in question had taken place after he had been charged.

32. In his ruling of 29 January 1990 Mr Justice Henry rejected the defence argument as to Mr Saunders' medical condition. He did, however, exercise his discretion pursuant to section 78 to exclude the evidence from the two above-mentioned interviews which had taken place after Mr Saunders had been charged on the grounds that the latter's attendance could not be said to have been voluntary. In his view, moreover, it could not

be said to be fair to use material obtained by compulsory interrogation after the commencement of the accusatorial process.

D. The applicants' trial

33. The applicants were tried together with Mr Saunders. The trial opened on 16 February 1990 and involved seventy-five days of evidence, ten days of speeches by counsel and a five-day summing-up to the jury by the trial judge.

34. In the course of the trial, Mr Saunders was the only accused to give evidence. According to the applicants, the testimony of Mr Saunders was irreconcilable with the evidence which each had given to the inspectors and prejudicial to their case that their involvement in the share-support operation had not been dishonest. The third applicant maintains that his participation in the operation was in line with City practice on takeovers, but that he was unable to obtain witnesses who would be prepared to testify to this for fear of repercussions engendered by the criminal proceedings. He claims that at the time of his trial the prosecution had in its possession extensive material arising out of other investigations into takeover bids which confirmed that share-support operations involving indemnities to the purchasers of shares were regarded as an acceptable practice in the City.

35. A large part of the evidence against the applicants consisted of evidence gathered by the DTI inspectors. In the course of the proceedings, evidence was further taken from the former finance director of Guinness, Mr Roux, who had been granted immunity from prosecution. The prosecution also referred to the statements made by the applicants in the course of their interviews by the DTI inspectors. In the third applicant's submission, the prosecution had acknowledged at the *voir dire* that this was in fact the only evidence against him.

36. The transcripts of the interviews were read out to the jury by the prosecution over a three-day period during the trial (days 45 to 47). They were used in order to establish the state of the applicants' knowledge.

37. In his summing-up to the jury, the judge referred, *inter alia*, to the answers which the applicants had given to the DTI inspectors.

38. On 22 August 1990 the first applicant was convicted of two counts of conspiracy, three counts of false accounting and one count of theft. He was fined 3,000,000 pounds sterling (GBP), with a total of five years' imprisonment in default. He was also ordered to contribute GBP 440,000 towards the prosecution's costs.

39. The second applicant was convicted of one count of conspiracy, two counts of false accounting and one count of theft. He received an overall prison sentence of twelve months and was fined GBP 5,000,000, with a four-year consecutive prison sentence in default. He was also ordered to contribute GBP 440,000 towards the prosecution's costs.

40. The third applicant was convicted of four counts of false accounting and two counts of theft. He received an overall prison sentence of two and a half years. He was also ordered to contribute GBP 440,000 towards the prosecution's costs.

41. Mr Saunders was convicted of twelve counts in respect of conspiracy, false accounting and theft. He received an overall prison sentence of five years.

E. The ruling on “abuse of process” claims

42. In the second set of proceedings concerning the other co-defendants, further challenge was made to the admissibility of the transcripts of the interviews on the ground, *inter alia*, that there was an abuse of process in that there was misconduct by the inspectors and/or the prosecuting authorities in the use of the inspectors' statutory powers for the purpose of constructing a criminal case. In particular, it was alleged by one of the co-defendants, Mr Seelig, that there was a deliberate delay in charging the accused so that the inspectors could use their powers to obtain confessions.

43. In a ruling given on 10 December 1990, Mr Justice Henry found that there was no *prima facie* case of abuse by either the inspectors or the prosecuting authorities. He had heard evidence from both the inspectors and the police officer in charge of the criminal investigation. In a ruling given on 14 December 1990, the judge rejected the application for a stay, finding that there had been no abuse of the criminal process in the questioning of the defendants or in the passing of Mr Seelig's depositions to the inspectors to the prosecuting authorities or in their conduct of the prosecution. He saw nothing improper or sinister in the decision by Mr Wood not to involve the police until the beginning of May 1987. He concluded that proper use had been made of the statutory powers. The judge also refused an application to exclude the evidence of the interviews under section 78 of PACE as constituting evidence which had such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

44. On appeal, the Court of Appeal in a judgment dated 2 May 1991 (*R. v. Seelig*) upheld the trial judge's ruling as to the admissibility of the interviews before the inspectors. On 24 July 1991 leave to appeal was refused by the House of Lords.

F. The applicants' appeal

45. All three applicants applied for leave to appeal against conviction and sentence. However, on 18 December 1990 the first applicant withdrew his appeal on grounds of his precarious state of health. On 20 March 1991 the first applicant's knighthood was annulled.

46. The second and third applicants, like Mr Saunders, were granted leave to appeal against conviction. Following a hearing, the Court of Appeal gave its judgment on 16 May 1991. It held, *inter alia*, that while there were some blemishes and infelicities in the judge's summing-up, it was in the main a masterly exposition. As regards the admissibility of the transcripts, it was held that the question had been decided, as far as it was concerned, by the decision given by another division of the Court of Appeal in the case of *R. v. Seelig*, which had held that such statements were admissible.

47. Mr Saunders' appeal was rejected on all but one count. The Court of Appeal found that the judge had erred in his direction on one count and quashed that conviction. It reduced his sentence to two and a half years' imprisonment.

48. The second applicant's appeal resulted in a moderation of his sentence in that the period to be served in default of payment of his fine was reduced and the time within which he was to pay the fine was extended.

49. The third applicant's appeal resulted in a reduction of his sentence to twenty-one months' imprisonment.

50. The orders for costs made against the second and third applicants were reduced to GBP 300,000 each. A similar order was made by the Court of Appeal in favour of the first applicant.

51. On 13 December 1991 the Disciplinary Committee of the Council of the Stock Exchange ordered that the third applicant be expelled from the Stock Exchange.

52. On 20 July 1991 Mr Saunders lodged an application (no. 19187/91) with the European Commission of Human Rights.

G. Subsequent reference to the Court of Appeal by the Home Secretary

53. On 3 August 1992 the applicants became aware for the first time of the existence of part of the material obtained by and available to the prosecution prior to their trial and which had not been previously disclosed. This evidence had been disclosed by the prosecution to the defendants in the second Guinness trial on 20 December 1991. They maintained that this material showed that share-support operations had been undertaken in relation to a number of other takeovers and had been considered to be an acceptable practice by the professional advisers involved in them. The material also included the outcome of an investigation undertaken on the initiative of the DTI and concluded on 8 December 1988 by the Licensed Dealers' Tribunal (a former disciplinary body). The Licensed Dealers' Tribunal had taken the view that share-support operations were an acceptable City practice.

54. The applicants sought disclosure of this material from the prosecuting authorities. In view of their failure to do so, they requested the

Home Secretary to refer the case back to the Court of Appeal pursuant to section 17(1)(a) of the Criminal Appeal Act 1968. On 22 December 1994 the Home Secretary referred the whole of the applicants' and Mr Saunders' case to the Court of Appeal. The European Commission stayed consideration of the admissibility of Mr Saunders' application pending the outcome of the referral proceedings. After the case was referred, the prosecution disclosed the remainder of the material. The hearing before the Court of Appeal took place between 16 and 26 October 1995.

55. On 27 November 1995, the Court of Appeal rejected the first applicant's appeal on all but one count, quashing his conviction on one of the conspiracy counts. The appeals by the second and third applicants and Mr Saunders were dismissed.

56. In its judgment of 27 November 1995, the Court of Appeal rejected the argument that the use at trial of answers given to the DTI inspectors automatically rendered the criminal proceedings unfair. It pointed out that Parliament had expressly and unambiguously provided in the 1985 Act that answers given to DTI inspectors may be admitted in evidence in criminal proceedings even though such admittance might override the privilege against self-incrimination.

57. In its judgment the court noted that the interviews with each of the accused "formed a significant part of the prosecution case".

58. With reference to the allegation that it was unfair that those interviewed by DTI inspectors should be treated less favourably than those interviewed by the police under PACE, the court noted as follows:

"... the unravelling of complex and devious transactions in those fields is particularly difficult and those who enjoy the immunities and privileges afforded by the Bankruptcy Laws and the Companies Acts must accept the need for a regime of stringent scrutiny especially where fraud is suspected ..."

59. In relation to the argument that the difference between the Companies Act and the Criminal Justice Act regimes was anomalous, the prosecution contended that:

"... the explanation lies in the very different regime of interviews by DTI inspectors compared with that of interviews either by police or the SFO [Serious Fraud Office]. DTI inspectors are investigators; unlike the police or SFO they are not prosecutors or potential prosecutors. Here, typically, the two inspectors were a Queen's Counsel and a senior accountant. They are bound to act fairly, and to give anyone they propose to condemn or criticise a fair opportunity to answer what is alleged against them. ... Usually, the interviewee will be represented by lawyers and he may be informed in advance of the points to be raised."

60. The Court of Appeal held on this point:

"Whether or not these matters constitute a sufficient explanation and whether or not the distinction is 'an anomaly', the fact remains that the distinction exists because Parliament has created it. When enacting section 2(8) of the 1987 Act, it would have been open to Parliament to have amended section 434(5) of the Companies Act and other similar provisions so as to bring them into line with section 2(8). Their decision

not to do so was no oversight. This is clear from the speech of Lord Caithness during the passage of the 1987 Bill ... He said the Government had deliberately not followed in that Bill the precedent in the Companies legislation on this very issue ... Parliament has made its intentions quite clear in section 434(5). It cannot be right for a judge to exercise his discretion to exclude evidence of interviews simply on the ground that Parliament ought not to have countenanced the possibility of self-incrimination ... However, ... a judge can, in our view, as part of the background setting, have in mind that under that [statutory] regime there is an obligation to answer the inspectors' questions on pain of sanctions."

61. The court also rejected an allegation that there had been an abuse of process in that the DTI inspectors were used wrongly as "evidence gatherers" for the prosecution or that there had been improper or unfair "collusion", as follows:

"We have carefully considered the effect of the events of November 1986 to October 1987 in the light of all the documents. We conclude that to allow the inspectors to continue their inquiry and to bring in the police only in May 1987 was a proper course subject to two essentials:

(1) That the inspectors were left to conduct their inquiries and interviews independently without instruction, briefing or prompting by the prosecuting authority. We are quite satisfied that the inspectors themselves made that clear and abided by it. Counsel also laid down those ground rules correctly and they were observed ...

(2) That the interviews were conducted fairly and unobjectionably. It was not suggested to the trial judge or before us that the inspectors could be criticised on this score. These were carefully structured sessions of proper length in suitable conditions. The appellants, experienced business men of high intelligence, were each represented either by counsel (usually Queen's Counsel) or a senior solicitor. The questions were put scrupulously fairly and the Code laid down in the Pergamon case ... was observed."

62. The court also rejected the allegation that non-disclosure prior to the trial of the material alleged to indicate abuse caused any unfairness to the applicants. It further rejected the second applicant's complaint that there had been an improper delay in charging him. The court held:

"... it has been argued that the documents which we have seen, or at least some of them, should have been disclosed at the trial. The [applicants] claim that they, by counsel, raised an issue as to the delay in bringing in the police; that being so, disclosure should have been made. Instead a PII [Public Interest Immunity] certificate ... was put before the judge. Again complaint is made that the judge did not look behind the PII certificate and examine the documents himself ...

... Upon a bare assertion that the police should have been brought in earlier, we do not consider that the [applicants] were entitled at trial to the cornucopia of privileged documents before us. The PII certificate fairly and accurately summarised the principal documents to which it referred and we consider it was properly made. No party invited the judge to go behind it and examine the documents himself. At that time the Court of Appeal had not laid down any guidelines requiring the judge to do so.

In any event, having seen all the documents, we have ... reached the conclusion that there was no abuse of process or improper collusion.”

63. The Court of Appeal rejected the applicants' complaint on the non-disclosure of certain material by the prosecution. It concluded on this point:

“In the case of all four appellants, whilst we have held that the undisclosed material should have been disclosed, we are satisfied that the procedural irregularity which occurred as a result of non-disclosure in fact occasioned no prejudice to them. The verdicts of the jury would inevitably have been the same had disclosure been made.”

64. The Court of Appeal subsequently refused to certify that the case involved a point of public importance and denied leave to appeal to the House of Lords. Following this decision no further avenue of appeal was open to the applicants.

II. RELEVANT DOMESTIC LAW

A. Appointment of inspectors

65. By section 432 of the Companies Act 1985 (the “1985 Act”) the Secretary of State may appoint one or more competent inspectors to investigate the affairs of a company and to report on them in such manner as he may direct. The Secretary of State may make such appointment if it appears that there are circumstances suggesting:

“(a) that the Company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members, or

(b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose, or

(c) that persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members, or

(d) that the company's members have not been given all the information with respect to its affairs which they might reasonably expect.” (section 432(2))

66. The Secretary of State is also empowered to appoint inspectors to

“... investigate and report on the membership of any company, and otherwise with respect to the company, for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially to influence its policy.” (section 442(1))

B. Function and powers of inspectors

67. The function of inspectors is an inquisitorial and not a judicial function. It has been summarised in *re Pergamon Press Ltd* ([1971] Chancery Reports 388, per Lord Justice Sachs, p. 401), as follows:

“The inspectors' function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action; it is no part of their function to take a decision as to whether action be taken and *a fortiori* it is not for them finally to determine such issues as may emerge if some action eventuates.”

68. Section 434 of the 1985 Act provides:

“(1) When inspectors are appointed under section 431 or 432, it is the duty of all officers and agents of the company ...

(a) to produce to the inspectors all books and documents of or relating to the company ... which are in their custody or power,

(b) to attend before the inspectors when required to do so, and

(c) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give ...

...

(3) An inspector may examine on oath the officers and agents of the company or other body corporate, and any such person as is mentioned in subsection (2), in relation to the affairs of the company or other body, and may administer an oath accordingly ...

...

(5) An answer given by a person to a question put to him in exercise of powers conferred by this section (whether it has effect in relation to an investigation under any of sections 431 to 433, or as applied by any other section in this Part) may be used in evidence against him.”

69. Section 436 of the Act provides:

“(1) When inspectors are appointed under section 431 or 432 to investigate the affairs of a company, the following applies in the case of –

(a) any officer or agent of the company,

(b) any officer or agent of another body corporate whose affairs are investigated under section 433, and

(c) any such person as is mentioned in section 434(2).

Section 434(4) applies with regard to references in this subsection to an officer or agent.

(2) If that person –

(a) refuses to produce any book or document which it is his duty under section 434 or 435 to produce, or

(b) refuses to attend before the inspectors when required to do so, or

(c) refuses to answer any question put to him by the inspectors with respect to the affairs of the company or other body corporate (as the case may be) the inspectors may certify the refusal in writing to the court.

(3) The court may thereupon enquire into the case, and, after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, the court may punish the offender in like manner as if he had been guilty of contempt of the court.”

70. Contempt of court in this context may be punished by the imposition of a fine or by committal to prison for a period not exceeding two years.

C. Provisions of the Police and Criminal Evidence Act 1984 and the Criminal Justice Act 1987

71. The relevant part of section 76 of the Police and Criminal Evidence Act 1984 (PACE) provides:

“1. In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

2. If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond a reasonable doubt that the confession (notwithstanding that it might be true) was not obtained as aforesaid ...”

72. Section 78(1) provides:

“In any proceedings the court may refuse to allow the evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

73. Under section 82(1) of PACE a “confession” includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.

74. The Criminal Justice Act 1987 confers on the Director of the Serious Fraud Office special powers to assist him in the investigation and prosecution of serious fraud. Section 2(2) requires a person whose affairs are being investigated to answer questions even if by so doing he might incriminate himself. Failure to answer may give rise to criminal sanctions (section 2(13)). Answers in this context cannot be used in evidence against a suspect unless he is prosecuted for failure, without reasonable excuse, to answer questions or unless he makes a statement in evidence which is inconsistent with a previous answer (section 2(8)).

THE LAW

I. SCOPE OF THE CASE

75. The Court observes that the applicants in their submissions alleging unfairness in the criminal proceedings brought against them rely on Article 6 § 1 of the Convention while cross-referring to the more detailed safeguards laid down in Article 6 § 3 thereof. This is especially true of their arguments in support of their complaints, firstly, that there was improper collusion between the DTI inspectors and other agencies and, secondly, that the prosecution had deliberately withheld from them materials of relevance to their defence. As to the latter issue the Court notes that the Commission in its partial admissibility decision adopted on 9 April 1997 (see paragraph 4 above) declared inadmissible the applicants' complaint under Article 6 § 3 (d) that the alleged non-disclosure of materials prevented them from securing the attendance of witnesses favourable to their defence.

76. In the Commission's opinion, all the materials at issue had been disclosed to the applicants by the time the Court of Appeal reconsidered the applicants' appeal in the reference proceedings. On the basis of the materials disclosed the applicants did not seek the attendance and examination of witnesses and it was not alleged that they were prevented at that stage from doing so. In the Commission's conclusion any defect in the original trial and appeal was remedied by the subsequent procedure before the Court of Appeal and on that account the applicants' complaint was declared inadmissible as being manifestly ill-founded. Although the applicants maintain that they were only able to supply these materials to the Court following the Government's decision to authorise their use in the proceedings before it subject to certain undertakings, the Court does not consider that this factor serves to put in issue the Commission's inadmissibility decision on this complaint.

77. However, the issue of non-disclosure, in so far as it is pleaded with respect to the wider issues of improper collusion or the lack of an adversarial procedure, is before the Court, having regard to the applicants' reliance on the provisions of Article 6 § 3, including sub-paragraph (d) thereof. In this connection, the Court recalls that the guarantees of paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B, p. 34, § 33). In the circumstances of the case, it does not find it necessary to examine the applicants' allegations separately from the standpoint of paragraph 3 (a) to (d), since they amount to a complaint that the applicants did not receive a fair trial.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

78. The applicants complained that their right to a fair procedure guaranteed by Article 6 § 1 of the Convention was breached in several respects. The relevant part of Article 6 § 1 provides:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”

A. Improper use by the prosecution of the transcripts of the applicants' interviews with the inspectors

79. The applicants maintained that the fairness of the criminal proceedings brought against them had been vitiated on account of the use made by the prosecution at their trial of the statements which they had been compelled under statute to supply to the DTI inspectors.

80. The third applicant further maintained that the prosecution had in fact conceded that he would not have been put on trial had it not been for the transcripts (see paragraph 35 above). However, he stood trial along with three other co-accused whose evidence to the inspectors was read out to the jury. Moreover, the testimony of Mr Saunders from the witness-box in response to the DTI transcripts had prejudiced the fairness of his and his co-applicants' trial. The third applicant asserted in this connection that he had in fact sought to be tried separately to avoid damage being caused to his defence, but this had been refused (see paragraph 28 above).

81. The Government conceded that, given the use made by the prosecution of the answers which the applicants supplied to the inspectors, their complaints were materially indistinguishable from Mr Saunders' complaint. In its judgment in that case, the Court found that there had been a breach of Mr Saunders' rights under Article 6 § 1 (see the *Saunders v. the United Kingdom* judgment of 17 December 1996, *Reports of Judgments and*

Decisions 1996-VI, pp. 2065-67, §§ 70-76) and that it could not speculate for the purpose of an award of just satisfaction as to what would have been the outcome of his trial had the transcripts of his evidence to the inspectors not been put before the domestic court.

82. The Court observes that all three applicants were tried together with Mr Saunders and, as for the latter, “a significant part” (see paragraph 57 above) of the prosecution case against them consisted of the transcripts of the interviews which they gave to the DTI inspectors under statutory compulsion. The transcripts of their interviews were read out to the jury by the prosecution over a three-day period (see paragraph 36 above). The Court notes that the Government have not disputed that the use of the transcripts in this manner was intended to incriminate the applicants. Indeed, the Government acknowledge that the prejudice to which they were exposed on account of the use made of the transcripts is materially indistinguishable from Mr Saunders' case.

83. The Court for its part sees no reason in the instant case to reach a conclusion different from its finding in its Saunders judgment. It finds accordingly that there has been an infringement of the right not to incriminate oneself and on that account the applicants were deprived of a fair hearing in violation of Article 6 § 1 of the Convention.

B. Alleged improper collusion

84. The applicants contended that the fairness of their trial was undermined on account of the improper collusion between the DTI inspectors and the prosecuting authorities.

85. The Government disputed this assertion.

1. The parties' submissions on the issue of improper collusion

(a) The applicants

86. The applicants stated that the whole of the material obtained from the inspectors from their interviews was provided directly to the DTI and then passed to the DPP in furtherance of carefully worked out arrangements among the agencies involved. When giving evidence to the inspectors the applicants were completely unaware of these arrangements according to which the inspectors became contributors to proceedings involving the determination of criminal charges. The result was to oblige them to give evidence in the absence of the procedural guarantees which are afforded to an accused person faced with a criminal charge and to postpone, intentionally, both the intervention of the police and the formal preferment of criminal charges.

87. The applicants insisted that it was not open to Mr Saunders to make the same submissions in his proceedings before the Convention institutions having regard to the timing of his interviews with the inspectors and his position as Chairman of a company under investigation. The Government were accordingly mistaken in assimilating their complaints with those of that applicant.

88. As proof of this collusion, the applicants relied on materials which had only been disclosed to them in mid-1995 by the authorities for the purposes of their second appeal to the Court of Appeal. These materials took the form of, *inter alia*, records of meetings, minutes and notes exchanged between officials. They contended that those materials reveal that on 16 December 1986 it was clear that the DTI and the inspectors were already liaising as to the way in which the inspectors' conduct of the investigation could provide evidence for use in subsequent criminal trials and that, prior to their interviews, the inspectors already possessed concrete evidence of very substantial potentially criminal transactions. On 12 January 1987 the inspectors notified the Secretary of State of the evidence in their possession and on 13 January 1987 the latter drew it to the attention of the DPP. By letter from the Secretary of State dated 29 January 1987, the inspectors were required to provide the Secretary of State with any information they had relating to possible criminal offences and key documents and transcripts of evidence given to them. At a meeting held on 30 January 1987 attended by the inspectors it was formally agreed that transcripts and relevant documents be first passed to the DTI and that copies be forwarded thereafter to the lawyers advising the DPP. The applicants stressed that the decision to pass the first piece of information to the prosecution was in fact taken on 12 January 1987 (see paragraphs 12-18 above).

89. According to the applicants, this concerted strategy had been put in place in order to avoid the inspectors' task being hampered by the commencement of a police investigation precisely because of the greater powers of investigation without safeguards which the inspectors could exercise. Furthermore, the fact that these arrangements were kept hidden from the applicants ensured their continued cooperation.

90. The applicants drew attention to the fact that, in their submissions to a House of Commons Select Committee on Trade and Industry which undertook a review of the investigatory powers of the inspectors, the Law Society recommended, *inter alia*, that persons who are likely to be accused must be given the same rights during the procedure before the inspectors as would be enjoyed under the criminal law. In the applicants' view, the significance of this recommendation had to be seen in the context of the great uncertainty in domestic law governing the true extent of the Inspector's powers under the 1985 Act and the lack of safeguards to prevent the impermissible degree of cooperation between the inspectors and the

prosecuting authorities. The applicants also stressed that, in the evidence which he gave to the Select Committee, the Deputy Director of Public Prosecutions at the relevant time confirmed that he had been in informal contact with the police before the actual decision was taken on 5 May 1987 to carry out a police investigation. In his evidence, he stated that the strategy worked out had been designed to allow the police inquiry to run one step behind the inspectors' investigation, given that the inspectors were passing on the transcripts of the evidence which they were collecting from the applicants.

91. The applicants stated that comparative research on fifteen of the Contracting States to the Convention revealed that only two – the United Kingdom and Ireland – failed to treat the sort of investigation opened against them by the inspectors as falling within the domain of criminal procedure or as being subject to due process requirements. Had the investigations against them taken place in one of the other thirteen Contracting Parties studied, they would have been given due notice of their nature and purpose, thus enabling them to assert their rights effectively at an early stage. The applicants maintained that Mr Saunders never advanced this argument in his case before the Convention institutions and therefore the Court's statement on the matter in its judgment (*op. cit.*, p. 2068, § 80) is irrelevant. They, however, wished to address specifically this issue and maintained in this regard that, had they been provided with Article 6 safeguards, the proceedings against them would never have occurred. In the applicants' submission, the Court of Appeal in its second judgment found on the facts that there had been cooperation between the inspectors and other agencies, but it concluded, with reference to English and not Convention law, that such cooperation was not unlawful.

92. The applicants highlighted the relevance of the Court's judgment in *Condron v. the United Kingdom* (no. 35718/97, ECHR 2000-V) to their complaint under this head. They stated that, unlike the Condrons, they were denied the protection of pre-trial safeguards which the Court referred to as “particularly important” (*loc. cit.*, § 60). In this connection, they reminded the Court that they were obliged under law to answer the inspectors' questions under pain of sanction and in the absence of any warning about the arrangements which the inspectors had worked out with the prosecuting authorities or the use which might be made of the replies. The applicants reiterated their view that the criminal proceedings, contemplated as from 12 January 1987, would never have taken place if they had been afforded the due process protection to which they were entitled under Article 6 of the Convention. Furthermore, notwithstanding the fact that the Condrons benefited from a range of procedural safeguards at the pre-trial stage, the Court found that there had been a violation of Article 6 § 1 of the Convention in that the trial judge's failure to give an adequate direction to the jury could not be cured on appeal since the Court of Appeal was

concerned about the impact of the flawed direction on the safety of the Condrons' convictions rather than on the distinct question of fairness. In the applicants' submission, if the Court was unanimous in finding that the Condrons' rights were violated, it must follow that their rights have also been violated, given the absence of any of the "particularly important safeguards" identified by the Court in its judgment in that case.

(b) The Government

93. The Government maintained that this same argument was also advanced by Mr Saunders before the Convention institutions in his application. Furthermore, this complaint was addressed in detail by the Court of Appeal and rejected. It was also rejected by the Court in its judgment in the Saunders case (judgment cited above, p. 2068, § 80).

94. The Government, in addition, disputed the applicants' reliance on the report of the House of Commons Select Committee. They argued that, following a wide-ranging inquiry into the investigative powers of the DTI inspectors, including the rights of the defence, the Select Committee had concluded that there was no need to recommend any major changes to the current system. In particular, it was not recommended that the investigation of the inspectors should be brought to an end once it became apparent that offences might have been committed or that the inspectors should be precluded from passing on materials gathered in the course of the investigation to the prosecuting authorities. In the Government's submission, it was significant that the Court of Appeal had not found it necessary to refer to the report when establishing as fact in the applicants' case that there had been no abuse or improper collusion between the inspectors and the prosecuting authorities.

95. As to the applicants' reliance on the Court's *Condron* judgment, the Government observed that the applicants were not required to cooperate with the police and the allegation of improper collusion was rejected by the Court of Appeal on the facts. The applicants were required to answer the inspectors' questions and use was made of their answers in the subsequent criminal proceedings. That fact led the Government to concede that Article 6 § 1 had been breached to that extent.

2. The Court's assessment

96. The Court observes that the applicants' allegation of improper collusion between the DTI inspectors and the prosecuting authorities is based on their reconstruction of the events which took place between December 1986 and January 1987. The applicants' account of the significance of those events for the fairness of their trial is drawn from materials which, they maintain, only fully came into their possession in the months preceding the second set of proceedings before the Court of Appeal. The Government, however, place a different interpretation on the events at

issue and draw attention to the Court of Appeal's careful analysis of the applicants' allegation and its ultimate rejection of any factual basis for it.

97. The Court observes that, when faced with a dispute over facts, it must turn in the first place to the facts as found by the domestic authorities. It recalls in this connection that it is not within its province to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, for example, the Edwards judgment cited above, pp. 34-35, § 34).

98. The Court cannot overlook the fact that the applicants invoked this allegation before the Court of Appeal following the Secretary of State's decision to refer the case back for review. That allegation was carefully considered but ultimately rejected by the Court of Appeal on the facts (see paragraph 61 above). The court found:

“We have carefully considered the effect of the events of November 1986 to October 1987 in the light of all the documents. We conclude that to allow the inspectors to continue their inquiry and to bring in the police only in May 1987 was a proper course subject to two essentials:

(1) That the inspectors were left to conduct their inquiries and interviews independently without instruction, briefing or prompting by the prosecuting authority. We are quite satisfied that the inspectors themselves made that clear and abided by it. Counsel also laid down those ground rules correctly and they were observed ...

(2) That the interviews were conducted fairly and unobjectionably. It was not suggested to the trial judge or before us that the inspectors could be criticised on this score. These were carefully structured sessions of proper length in suitable conditions. The appellants, experienced business men of high intelligence, were each represented either by counsel (usually Queen's Counsel) or a senior solicitor. The questions were put scrupulously fairly and the Code laid down in the Pergamon case ... was observed.”

99. The Court, for its part, must give due weight to this finding, reached as it was after lengthy adversarial argument and in the light of all the materials assembled by the applicants' lawyers in support of their case. On the basis of its own careful examination of these materials, the Court does not consider that the Court of Appeal's assessment of the evidence or establishment of the facts can be impeached on the ground that they were manifestly unreasonable or in any other way arbitrary.

100. The applicants place particular emphasis on the fact that the Court of Appeal reached its conclusion with reference to the tolerance shown by domestic law to the alleged collusion in the sector at issue and failed to consider the information exchanges between the inspectors and other agencies from the perspective of the procedural fairness safeguards enshrined in Article 6 of the Convention. On this point, the applicants are correct since the Court of Appeal did not have regard to the infringement of the applicants' right not to incriminate themselves which resulted from the use made by the prosecution of information which domestic law compelled

them to provide on pain of sanction. However, the applicants are not correct in their assertion that a legal requirement for an individual to give information demanded by an administrative body necessarily infringes Article 6 of the Convention.

The Court considers that whether or not information obtained under compulsory powers by such a body violates the right to a fair hearing must be seen from the standpoint of the use made of that information at the trial. It is the applicants' view that, at the interview stage, the inspectors were in effect determining a "criminal charge" within the meaning of Article 6 § 1 and on that account the guarantees laid down in Article 6 should have been applied to them. The Court does not accept that submission and refers in this connection to the nature and purpose of investigations conducted by DTI inspectors. It observes that, in its judgment in the case of *Fayed v. the United Kingdom*, the Court held that the functions performed by the inspectors appointed under section 432(2) of the Companies Act 1985 were essentially investigative in nature and that they did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative (judgment of 21 September 1994, Series A no. 294-B, p. 47, § 61). As stated in that case, a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6 § 1 would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities (*ibid.*, p. 48, § 62). It is to be further observed that the Court in its *Saunders* judgment impliedly confirmed this approach (judgment cited above, p. 2064, § 67).

101. The Court reiterates its view that the central issue raised by the applicants' complaint is the use made at their trial of the evidence which they were obliged under law to give to the inspectors. The Court has found that particular grievance substantiated on the merits and it considers that the applicants' claim that Article 6 guarantees should have attached already at the stage of the proceedings before the inspectors does not in any way alter that conclusion. Although the third applicant has specifically pleaded that in the absence of the transcripts a prosecution could never have been mounted against him, and the other applicants also consider this true of their cases, the Court cannot speculate as to the other means which the prosecuting authorities could have deployed in order to put them on trial. In any event, Article 6 of the Convention does not guarantee an applicant the right not to be prosecuted. It guarantees him the right to a fair procedure in the determination of the charges brought against him. The Court, for the reasons stated, has concluded that the applicants did not enjoy a fair procedure.

102. In the light of the above considerations, the Court finds that there has been no violation of Article 6 § 1 of the Convention as regards the

alleged improper collusion between the DTI inspectors and the prosecuting authorities.

C. Alleged non-disclosure of materials of relevance to the applicants' defence

103. The applicants averred that the prosecution deliberately withheld materials of relevance to their defence and thus denied them a fair procedure in the determination of the charges brought against them.

104. The Government maintained that the applicants' complaint did not give rise to a breach of Article 6 § 1.

1. The parties' submissions on the issue of non-disclosure

(a) The applicants

105. The applicants stated that three years elapsed from the date when they first became aware of materials which had not been disclosed before or during their trial and the date when final disclosure was actually made. It took another two years before the authorities granted them authorisation to use the materials for the purposes of the Convention proceedings. The resistance of the authorities to disclosure illustrated their concern about the applicants' being apprised about the impermissible degree of cooperation between the agencies in bringing them to trial.

106. The refusal to disclose the materials on grounds of public interest immunity or legal professional privilege took no account of the rights of the defence. The applicants stated in this connection that the trial judge in the *voir dire* proceedings did not see the documents in respect of which the prosecution claimed immunity and accordingly never assessed whether the content of the documents was of such a nature that their non-disclosure outweighed the interests of justice. In consequence, their right to an adversarial procedure had been severely impaired. Furthermore, in its second judgment the Court of Appeal did not address this issue from the angle of the fairness requirements under Article 6 of the Convention since it did not focus on the stage when the applicants were actually charged and entitled to the procedural safeguards inherent in the Convention notion of "fairness".

107. The applicants further stressed that it was central to their defence against the allegations of dishonesty that their actions were consistent with normal stock market practice. They contended that the third applicant had applied on 20 November 1989 to obtain evidence in this respect from the City Panel on Takeovers and Mergers. Despite the prosecution's claim that it was protected by public interest immunity, the trial judge ordered the evidence to be made available to the defence with reference to the Attorney-

General's Guidelines on Disclosure. However, there was much more relevant material in the prosecution's possession which should have been disclosed before or at the trial, including materials on the operation of the share indemnity system in the context of other takeovers. That material only came to light when it was disclosed for the purposes of the second Guinness trial. The Court of Appeal ruled in their favour that that material should also have been disclosed to the applicants. Regrettably, the applicants stated, it also found that this procedural irregularity occasioned no prejudice to them. However, in view of their submissions on the impermissible degree of cooperation between the inspectors and other agencies, including with respect to the use of the transcripts of their interviews, it had to be concluded that the proceedings looked at as a whole were unfair.

108. In the applicants' submission, the unfairness of their trial was further compounded by the fact that the authorities also failed to disclose that the inspectors' investigation after 12 January 1987 had been deliberately transformed into a procedure involving the determination of criminal charges against the applicants. They argued that they should have been put on notice that their legal situation had changed in order to enable them to adapt their conduct accordingly in the light of the procedural requirements of both Articles 5 and 6 of the Convention.

109. The applicants further recalled that in *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II) the Court ruled that the procedure before the Court of Appeal in that case was not sufficient to remedy the unfairness caused at those applicants' trial by the absence of any scrutiny of information withheld by the trial judge on grounds of public interest immunity. The applicants considered that the facts of their case were strikingly similar. At trial, the prosecution decided upon the scope of the claim to public interest immunity and the prosecution also decided more generally on the scope of disclosure of the other material. Its decisions on these matters were not open to review at trial and they remained unchallengeable on appeal to the Court of Appeal. Even after the withheld material was referred to in the second Guinness trial, it was not disclosed to the applicants until years later, and only then despite interminable prevarication by the authorities. The disclosure, when it came, was piecemeal and delayed. When the matter came back before the Court of Appeal it could only rely on the transcripts of the trial proceedings to make its *ex post facto* assessment of issues which would have been viewed differently by the trial judge and the jury.

110. The applicants reminded the Court that, as with the issue of improper collusion, Mr Saunders had never complained about the impact of non-disclosure on the fairness of his trial in his application to the Convention institutions.

(b) The Government

111. The Government stressed that this complaint too was raised before the Court of Appeal in the applicants' second appeal as well as before the European Court of Human Rights in the Saunders case. The complaint was rejected at both instances. As to the Court of Appeal proceedings, the Government averred that these were adequate to cure any defects in the fairness of the applicants' trial which might have occurred as a result of non-disclosure of material prior to that trial. They stressed that the documents at issue were provided to the applicants prior to the 1995 Court of Appeal hearing, were the subject of detailed submissions by them and were considered in detail by the Court of Appeal. Furthermore, the Court of Appeal plainly did inquire into the issue of fairness since it examined the allegations made by the applicants and in a detailed, reasoned judgment rejected them on the basis of findings of fact that (a) there had been no abuse or improper collusion and (b), in relation to City takeover practice documents, that non-disclosure occasioned no prejudice to the applicants. In these circumstances, the question of the safety of the applicants' conviction under domestic law and the issue of fairness within the meaning of Article 6 of the Convention could be properly assimilated. In the Government's conclusion, and for the reasons just given, the Court's judgment in *Rowe and Davis*, like that of *Condron* (both cited above), does not assist the applicants' case under Article 6.

2. The Court's assessment

112. As to the applicants' general submission that non-disclosure had a damaging effect on their right to an adversarial procedure, the Court recalls that it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67; and *Rowe and Davis* cited above, § 60). In addition Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the *Edwards* judgment cited above, p. 35, § 36, and *Rowe and Davis* cited above, § 60).

113. The Court observes that the applicants essentially complain that the prosecution should have made available to them, firstly, materials which confirmed their view that there had been improper collusion between the DTI inspectors and other agencies and, secondly, materials which only

emerged during the second Guinness trial relating to takeover practices in the City of London (see paragraph 53 above).

114. The Court observes that all of the materials at issue were disclosed to the applicants before the start of the Court of Appeal proceedings. The applicants had a full opportunity to persuade the Court of Appeal that their convictions were unsafe on account of the prosecution's failure to disclose materials which may have assisted their defence. The Court of Appeal extensively reviewed the materials at issue and considered the possible prejudice which their non-disclosure might have had on the fairness of their trial.

115. As regards the documents which the applicants rely on in support of their allegation of improper collusion, the Court recalls that the Court of Appeal stated:

“In any event, having seen all the documents, we have ... reached the conclusion that there was no abuse of process or improper collusion.”

The Court has studied the various materials which were released to the applicants in the period before the second set of proceedings in the Court of Appeal. However, they do not alter its earlier view that the cooperation between the inspectors and other agencies did not infringe their right to a fair trial under Article 6 and that the essence of this complaint relates to the fairness of allowing the prosecution to make use of the transcripts of the evidence which they gave to the inspectors.

116. The Court notes that, as regards the materials on City of London takeover practices, the Court of Appeal observed:

“In the case of all four appellants, whilst we have held that the undisclosed material should have been disclosed, we are satisfied that the procedural irregularity which occurred as a result of non-disclosure in fact occasioned no prejudice to them. The verdicts of the jury would inevitably have been the same had disclosure been made.”

117. In the Court's opinion, the particular defect identified by the Court of Appeal was remedied by the subsequent and extensive review of the issue conducted by the Court of Appeal in the reference proceedings (see, in this respect, the *Adolf v. Austria* judgment of 26 March 1982, Series A no. 49, pp. 17-19, §§ 38-41; *mutatis mutandis*, the *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 19, § 33; and the *Edwards* judgment cited above, p. 35, § 39).

118. The Court observes that the applicants' case is to be distinguished from the circumstances underlying *Rowe and Davis*, in which the Court found that the prosecution's failure to lay evidence before the trial judge to permit him to rule on the question of disclosure deprived the latter applicants of a fair trial (*loc. cit.*, § 66). It notes in this connection that, and in contrast to the position in *Rowe and Davis*, the present applicants had received all the materials which had not been disclosed to them by the stage of the second set of appeal proceedings and the Court of Appeal was able to

consider the impact of the new material on the safety of the conviction in the light of detailed argument from their defence lawyers. The Court recalls that, in accordance with its decision on the scope of the case, it is not open to the applicants, with reference to their arguments on non-disclosure, to impugn the fairness of the proceedings from the standpoint of their inability to summon witnesses in their defence (see paragraphs 75-76 above). However, the fact that this possibility was open to them but not taken up must also weigh in the balance when assessing whether the second set of appeal proceedings were capable of curing any prejudice which the applicants may have suffered on account of the prosecution's failure to disclose documents to them.

119. It follows that there has been no violation of Article 6 § 1 of the Convention under this head of complaint.

D. Alleged unreasonableness of the length of the criminal proceedings

120. The applicants maintained that the criminal proceedings against them lasted eight years and ten months, which must be considered an unreasonable length of time and therefore a breach of Article 6 § 1 of the Convention.

121. The Government disputed the applicant's calculation of the period to be considered and maintained that there had been no breach of the reasonable-time requirement in the circumstances of the case.

1. The parties' submissions

(a) The applicants

122. In the applicants' submission, they were subject to a criminal charge as of 12 January 1987 since on that date a decision was taken to use the evidence gathered by the DTI inspectors in the course of the interviews for the purposes of prosecuting them. The proceedings ended with the judgment of the Court of Appeal of 27 November 1995 arising out of the Secretary of State's reference.

123. The applicants insisted that the time which elapsed between the date of the delivery of the first judgment of the Court of Appeal in May 1991 and the date of the Secretary of State's decision to refer their case back to the Court of Appeal on 22 December 1994 had to be taken into account, since this procedure had to be invoked on account of the fact that the prosecution had deliberately withheld materials of assistance to the defence. The resistance of the authorities to disclosing the materials had been maintained in the phase ultimately leading to the referral decision and had inevitably delayed the taking of that decision. The Court of Appeal in its

second judgment ruled that the materials should have been disclosed to the defence before their trial. In the applicants' submission, this showed that the delay in the proceedings had to be attributed to the authorities. They further criticised the length of the eleven-month period taken by the Court of Appeal to consider the parties' arguments and deliver its second judgment.

(b) The Government

124. The Government replied that the second and third applicants had raised this complaint only with respect to the time taken by the Secretary of State to refer their case back to the Court of Appeal. However, neither of the applicants had taken any steps under domestic law to require the Secretary of State to expedite the taking of his decision. The Government submitted that it would have been open to the applicants to seek an order of mandamus in this connection.

125. In an alternative submission, the Government maintained that the second and third applicants were not charged earlier than 13 October 1987 and 23 March 1988 respectively, although they conceded that since the third applicant had been arrested in the United States on 30 September 1987 this latter date could be construed as the earliest date when he was charged. Furthermore, the total period of some three years and eight months which elapsed between the date of charge and the judgment of the Court of Appeal in May 1991 upholding their conviction could not be regarded as unreasonable in length. The Government invited the Court to have regard to the complexity of the case, as exemplified in the fact that the first judgment of the Court of Appeal ran to eighty-seven pages.

126. The Government stressed that, when assessing the reasonableness of the length of the criminal proceedings, no account should be taken of the proceedings after the Court of Appeal's judgment in May 1991, since what followed was the result of the exercise of a wholly exceptional and discretionary remedy. In the alternative, they pleaded that the period between May 1991 and the date of the applicants' requests for a reference to be made (January 1993 as regards the third applicant; February 1993 as regards the second applicant; and June 1993 as regards the first applicant) should be excluded, given that no proceedings took place during that period. It was inevitable that the decision of the Secretary of State to refer the case back to the Court of Appeal in December 1994 was marked by delay given that the Serious Fraud Office had to investigate the allegations which the applicants had made in respect of the withholding of evidence from the defence. In addition, the length of the period between the date of the reference of the whole case back to the Court of Appeal and the delivery of the Court of Appeal's second judgment on 27 November 1995 was explained in terms of the complexity of the issues before the court.

127. In the Government's view, even if the events surrounding the reference and the delivery of the Court of Appeal's second judgment were to

be taken into account, the length of the proceedings viewed as a whole, and having particular regard to the complexity of the case, did not exceed a reasonable time.

2. The Court's assessment

(a) The period to be taken into consideration

128. The Court must ascertain the period to be considered for assessing whether or not the criminal charges against the applicants were determined within a reasonable time. It notes that the parties dispute the manner of calculating the length of this period.

129. The Court notes that the applicants include in their calculation of the relevant period the time between the close of the Court of Appeal proceedings (16 May 1991) and the date of the Home Secretary's decision to refer their cases back to the Court of Appeal (22 December 1994).

130. The Court does not accept that this period should feature in the assessment of the relevant time-frame. It observes that the applicants activated the reference procedure under section 17(1)(a) of the Criminal Appeal Act 1968 after they had become aware that materials favourable to their defence had not been disclosed by the prosecution at their trial. The applicants put this date at 3 August 1992. Irrespective of the impact which that consideration may have on the applicants' view of the beginning of the period relied on, the Court cannot accept that that period was in any way characterised by the determination of criminal charges against them. During the major part of that period the Secretary of State was assembling evidence to assist him in the exercise of his discretion as to whether or not to refer the applicants' case back to the Court of Appeal.

In the Court's opinion, the period ran from the date of the Secretary of State's decision to refer the case back (22 December 1994). It ended with the date of delivery of the Court of Appeal's second judgment (27 November 1995). For that reason, the Court considers that it is not necessary to pronounce on the Government's claim that the second and third applicants failed to exhaust domestic remedies in respect of their complaint (see paragraph 124 above).

131. Nor for the reasons given earlier can the Court accept that time should be taken to run as from the date of the applicants' interviews with the inspectors. It reiterates that in criminal matters the "reasonable time" requirement in Article 6 § 1 begins to run as soon as a person is "charged": this may occur on a date prior to the case coming before the trial court, such as the date of the arrest, the date when the person concerned was officially notified that he was to be prosecuted or when the preliminary investigation was opened. The term "charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a

definition that also corresponds to the test whether the situation of the suspect has been “substantially affected” (see the *Hozee v. the Netherlands* judgment of 22 May 1998, *Reports* 1998-III, p. 1100, § 43). The Court confirms in this context its view that the inspectors were not engaged in the determination of criminal charges against the applicants. It further recalls that it has rejected the applicants' submissions that the inspectors were acting in collusion with the authorities in an attempt to lay the basis of their subsequent prosecution. For these reasons, the Court considers that time should be taken to run for the purposes of calculating the relevant period as from the date of the laying of charges against the first and second applicants and the date of arrest of the third applicant, namely: 8 October 1987, 13 October 1987 and 30 September 1987 (see paragraphs 24, 25 and 20 above).

132. Having regard to the above considerations, the Court concludes that the length of the period at issue began on the last-mentioned dates and ended with the delivery of the Court of Appeal's second judgment on 25 November 1995, to the exclusion of the period between 16 May 1991 and 24 December 1994 for the reasons stated earlier. The proceedings thus lasted about four and a half years in total.

(b) Reasonableness of the length of the proceedings

133. The Court will assess the reasonableness of the length of the proceedings in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicants and of the relevant authorities. On the latter point, what is at stake for the applicants has also to be taken into account (see, among other authorities, the *Philis v. Greece* (no. 2) judgment of 27 June 1997, *Reports* 1997-IV, p. 1083, § 35, and the *Portington v. Greece* judgment of 23 September 1998, *Reports* 1998-VI, p. 2630, § 21).

(i) Complexity of the case

134. The Court observes that the criminal proceedings were of undoubted complexity. The applicants were each charged with multiple offences arising out of an alleged unlawful and highly complicated share-support operation. The applicants' trial lasted seventy-five days, during which time the jury heard ten days of speeches by counsel and a five-day summing-up by the trial judge. The trial itself was prefaced by a lengthy trial on the *voir dire* in the course of which the applicants sought to have the transcripts of their interviews with the inspectors ruled inadmissible. As a further example of the case's complexity, it is to be observed that the Court of Appeal's second judgment delivered on 27 December 1995 ran to 113 pages and followed a ten-day hearing.

(ii) Conduct of the applicants

135. The Court considers that there is no period of delay which can be attributed to the applicants.

(iii) Conduct of the authorities

136. The Court does not consider either that there is any period of delay for which the authorities can be held responsible, it being recalled that the period between the applicants' request for a referral of their case back to the Court of Appeal and the date of the referral decision is not included in the period to be assessed.

137. In the Court's opinion, the applicants stood trial relatively soon after it had been decided to lay charges against them. As noted earlier, the length of the trial is to be explained in terms of the complexity of the case against the applicants, all of whom pleaded not guilty and exercised their right not to testify. Furthermore, the time taken for the Court of Appeal to hear and decide on their appeal cannot be considered unreasonable from the standpoint of the requirement of Article 6 § 1. In the Court's opinion, the period of around three years and eight months between the dates when the applicants were charged and the date of the Court of Appeal's first judgment cannot be considered unreasonable in the circumstances.

As to the period between the date of the reference back to the Court of Appeal and the date of the latter's final judgment, it cannot be said either that this period, lasting approximately eleven months, was excessive in the circumstances.

138. Having regard to these considerations, the Court concludes that the criminal charges against the applicants were determined within a reasonable time.

Accordingly, there has been no breach of the reasonable-time requirement contained in Article 6 § 1 of the Convention as regards the length of the criminal proceedings at issue.

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

139. The applicants further averred that the facts of the case disclosed a breach of Article 6 § 2 of the Convention, which stipulates:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

140. In the applicants' submission, the use of evidence obtained by the DTI inspectors was contrary to the presumption of innocence guaranteed by Article 6 § 2 of the Convention. They contended that this principle reflected the requirement in English law that the prosecution must prove a criminal case beyond reasonable doubt and that the principle of the presumption of

innocence operates to allow a person not to answer questions and an accused to remain silent without adverse inference being drawn from that fact.

141. The Government considered that the applicants' allegations added nothing to their earlier complaint concerning the use made by the prosecution of the transcripts of their evidence to the inspectors.

142. The Court considers that the applicants' submissions amount to a restatement of their arguments under Article 6 § 1 in regard to the use made by the prosecution of the transcripts and for that reason their complaint under this head does not give rise to any separate issue.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

144. The applicants did not submit any details of their claims other than stating that they sought compensation for non-pecuniary damage. In the applicants' submission, any damage suffered could only properly be quantified with the benefit of the Court's guidance on the scope of its admissibility decision and in the context of a hearing on the general issue of just satisfaction.

145. The Government stated that the applicants had not submitted any particulars of their claims under this head. Accordingly, no award should be made in the applicants' favour. In the alternative, the Government proposed that any claims which might be submitted should be rejected on the basis of the Court's reasoning in its Saunders judgment.

146. The Court notes that it has found a violation of the applicants' right to a fair hearing as regards the use made by the prosecution of the transcripts of their evidence to the inspectors. It has found no violation of Article 6 of the Convention on any of the other grounds invoked by the applicants. It cannot speculate as to whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution.

It therefore considers that no causal connection has been established between any pecuniary damage which might be claimed by the applicants and the Court's finding of a violation on the above-mentioned ground.

147. As to a prospective claim by the applicants for non-pecuniary damage, the Court considers that, in the circumstances of the case, the finding of a violation constitutes sufficient just satisfaction in respect of any such claim.

B. Costs and expenses

148. The applicants highlighted the complexity of the domestic and Convention proceedings and its impact on the calculation of the amount claimed under this head. They stated that the authorities of the respondent State, by delaying the disclosure of materials, had contributed considerably to the length of the proceedings and, in consequence, to the costs and expenses which they had to incur to defend their interests. In the applicants' submission, the following should be recoverable: the costs of the proceedings before the Convention institutions in so far as they relate to complaints which were declared admissible and in respect of which a violation has been found on the merits; the costs of the 1995 Court of Appeal proceedings; the costs of seeking the reference to the Court of Appeal, having regard to the fact that this was forced on the applicants by the unexplained refusal of the authorities of the respondent State to disclose materials which would have assisted their defence case; costs of earlier appeals; pre-trial and trial costs; fines imposed and the contribution to the costs of the prosecution; costs of the inspectors' investigation.

149. The applicants reiterated their view that the complexity of the claim argued in favour of holding a hearing on the matter.

150. The Government accepted in principle that an award of legal costs might be appropriate in the event of a finding of a violation. However, they maintained that any such award should be confined to legal costs incurred in the Convention proceedings and which can be shown to have been actually and necessarily incurred and to be reasonable as to quantum. As to the last-mentioned criterion, the Government opined that the presentation of the applicants' cases had been "carried out with what appears to be something bordering on profligacy".

151. The Court stresses that it has found a violation of Article 6 of the Convention only as regards the use made by the prosecution at the applicants' trial of the evidence which they gave to the DTI inspectors under statutory compulsion. It considers that only those costs and expenses which are reasonable as to quantum and which have been actually and necessarily incurred in order to seek through the domestic legal system redress of the aforesaid violation and to have the same established by the Convention institutions are recoverable under Article 41. All other heads of claim are disallowed.

152. In the circumstances of the case, the Court considers that the question of the application of Article 41 as regards costs and expenses as

described above (see paragraph 148) is not yet ready for decision. It is therefore necessary to reserve the matter, taking into account the possibility of an agreement between the applicants and the respondent State (Rule 75 §§ 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the use made by the prosecution at the applicants' trial of the transcripts of their interviews with the DTI inspectors;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the alleged improper collusion between the DTI inspectors and the prosecuting authorities;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the alleged non-disclosure of materials by the prosecution;
4. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the length of the criminal proceedings against the applicants;
5. *Holds* that the applicants' complaint under Article 6 § 2 of the Convention regarding the use made by the prosecution at their trial of the transcripts of their interviews with the DTI inspectors gives rise to no separate issue;
6. *Dismisses* the applicants' claims in respect of any pecuniary damage sustained;
7. *Holds* that a finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;
8. *Holds* that the question of the application of Article 41 of the Convention as regards reimbursement of costs and expenses incurred in respect of the specific violation found by the Court is not ready for decision; accordingly,
 - (a) *reserves* the said question in that respect;
 - (b) *invites* the applicants to submit, within the forthcoming two months, their written observations thereon;
 - (c) *invites* the Government to submit their written comments on the applicants' claim within two months of receipt of the applicants'

observations and, in particular, to notify the Court of any agreement reached between them and the applicants;

(d) *reserves* the further procedure and *delegates* to the President of the Court power to fix the same if need be.

Done in English, and notified in writing on 19 September 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President