AS TO THE ADMISSIBILITY OF

Application No. 19187/91
by Ernest SAUNDERS
against the United Kingdom

The European Commission of Human Rights sitting in private on 7 December 1993 the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
E. BUSUTTIL
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
B. MARXER
G.B. REFFI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY

Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 July 1991 by Ernest Saunders against the United Kingdom and registered on 11 December 1991 under file No. 19187/91;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 31 August 1992 to communicate the application;

- the observations submitted by the respondent Government on 12 January 1993 and the observations in reply submitted by the applicant on 25 January 1993;

- the further written observations of the Government on 29 September 1993 and the applicant's observations in reply dated 19 November 1993;

- the parties' submissions at the oral hearing on 7 December 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1935 and resident in London. He was represented before the Commission by Mr. Paul Williams, Solicitor, Messrs. Vernor, Miles and Noble, London.

The facts of the present case, as submitted by the parties, may be summarised as follows.

A. The particular circumstances of the case

On 1 October 1981, the applicant was appointed Managing Director of Guinness PLC (his title later being changed to Chief Executive Officer).

On 2 December 1985, Argyll PLC, a large Scottish company, announced a bid to take over Distillers PLC, which manufactured and distributed alcoholic drinks. Distillers PLC sought help from Guinness in resisting the bid. In January 1986, Guinness announced a counter-bid. There was a series of further increased offers from Argyll and Guinness. On 18 April 1986, the shareholders of Distillers accepted the bid made by Guinness.

On 9 May 1986, the applicant was appointed Deputy Chairman of Guinness. On 11 September 1986, the applicant was appointed Chairman.

On 28 November 1986, the Department of Trade and Industry (the DTI) appointed Inspectors to enquire into the Guinness acquisition of Distillers under sections 432 and 442 of the Companies Act 1985. The enquiry, which commenced on 1 December 1986, involved investigation into the allegations that Guinness had offered secret indemnities and success fees to certain purchasers of Guinness stock. The alleged effect of those purchases was artificially to inflate or maintain the Guinness share price, with the intention of inducing Distillers shareholders to assent to the Guinness bid.

On 12 January 1987, the DTI Inspectors notified the Secretary of State of matters which they thought should be brought to their attention. A note dated 13 January 1987 from the DTI Solicitor recorded the existence of certain evidence in the hands of the Inspectors indicating the possibility that criminal offences had been committed.

On 12 January 1987, the DTI contacted Mr. John Wood at the Director of Public Prosecutions' office (DPP). It was decided that the proper thing to do was to let the Inspectors carry on with their enquiry and to pass the transcripts on to the DPP.

On 14 January 1987, the applicant was dismissed from Guinness.

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. Thereafter the Inspectors passed on to the Secretary of State transcripts of their hearings and other documentary material which came into their possession.

On 30 January 1987, a meeting was held attended by the Inspectors, the Solicitor and other officials of the DTI, the Deputy Director of Public Prosecutions and a representative from the Crown Prosecution Service.

The DPP 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 applicant was interviewed by the Inspectors on nine occasions: on 10, 11, 20 and 26 February, 4-5 March, 6 May, and 11-12 June 1987. At these interviews the applicant was accompanied by his legal representatives.

On 5 May 1987, the police were formally asked by the DPP's office to carry out an investigation.

On 6 May 1987, the applicant was arrested by the police.

On 7 May 1987, the applicant was charged with three offences concerning the destruction of documents.

On 13 October 1987, the applicant was charged with 37 offences. A further two charges were added on 11 July 1988.

On 21 September 1989, two separate trials were ordered in view of the large number of counts and the number of defendants (7).

From 6 to 16 November 1989, the court held a voir dire following the application of one of the applicant's co-defendants, P., to rule the DTI transcripts inadmissible.

In a ruling given on 21 November 1989, Mr. Justice Henry held that the transcripts were admissible. He found that witnesses before the DTI Inspectors are under a duty to answer all questions even where the answers might incriminate them.

From 22 to 24 January 1990, the court held a voir dire following the application of the applicant to rule inadmissible the DTI transcripts on the basis that they should be excluded as unreliable under section 76 of the Police and Criminal Evidence Act 1984 (PACE) as a result of the applicant's medical condition at the time. Objection was also made to the admissibility of the evidence taken by the Inspectors after the applicant had been charged.

In his ruling of 29 January 1990, Mr. Justice Henry rejected the defence argument as to the applicant's medical condition. He did however exclude the evidence from the two post-charge interviews on the grounds that the applicant's attendance could not be said to be voluntary, and it could not be said to be fair to use material obtained by compulsory interrogation after the commencement of the accusatorial process.

The jury for the applicant's trial was empanelled on 16 February 1990. These proceedings involved the applicant and three co-defendants. The applicant faced 15 counts including, inter alia, eight counts of false accounting contrary to section 17(1)b of the Theft Act 1968, two counts of theft and two counts of conspiracy to contravene section 13(1)(a)i of the Prevention of Fraud (Investments) Act 1958.

During the trial, the prosecution referred to the statements made by the applicant in the course of interviews to the DTI Inspectors in order to establish the state of the applicant's knowledge and to refute evidence given by the applicant to the jury. In his summing-up to the jury, the judge also compared and contrasted what the applicant had said in court with the answers which he had given to the Inspectors.

On 22 August 1990, the applicant was convicted of 12 counts and received an overall prison sentence of 5 years.

In the second set of proceedings concerning the other co-defendants, further challenge was made to the admissibility of the DTI transcripts 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. It was alleged by one of the co-defendants, Mr. Seelig, that there was a deliberate delay in charging the accused in order that the Inspectors could use their powers to obtain confessions. Mr. Seelig also sought in support of this application discovery of documents and correspondence from the DTI, including the minutes of the meeting of 30 January 1987.

In a ruling given on 10 December 1990, the judge refused

discovery of documents alleged to reveal this abuse, finding that there was no prima facie case of abuse by either the Inspectors or the prosecuting authorities. 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 the depositions 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. He concluded rather that proper use had been made of the statutory powers. The judge also refused an application to exclude the evidence of the DTI 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.

On appeal by Mr. Seelig, the Court of Appeal in a judgment dated 2 May 1991 upheld the trial judge's ruling as to the admissibility of the DTI interviews.

The applicant applied for leave to appeal against conviction and sentence. He argued, inter alia, that the trial judge had misdirected the jury as to the meaning and effect of section 151 of the Companies Act 1985, and that he had misdirected the jury as to the weight to be given to the evidence given by R., the finance director of Guinness who had been given immunity from prosecution.

The applicant was granted leave to appeal against conviction. Following a hearing at which the applicant was represented, the Court of Appeal gave its judgment on 16 May 1991. It held that while there were some blemishes and infelicities in the judge's summing-up, it was in the main a masterly exposition, which left the main issue of dishonesty to the jury. It commented that the applicant's counsel had expressed the possibility that he might wish to address the court as to the admissibility of the DTI transcripts. It stated however 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. It went on to reject the applicant's appeal on all but one count: it found that the judge had erred in his direction on count 14 and quashed that conviction. It reduced his sentence to two and a half years' imprisonment.

On 24 July 1991, the House of Lords refused leave to appeal from the Court of Appeal ruling in the Seelig case concerning the admissibility of the DTI transcripts.

B. Relevant domestic law and practice

Appointment of inspectors

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))

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))

The function and powers of inspectors

The function of inspectors is an inquisitorial and not a judicial function. It has been summarised, in a case which has been incorporated as an appendix to the DTI Investigation Handbook, 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." (In re Pergamom Press Ltd [1971] Ch 388 per Sachs LJ at p. 401).

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."

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 sub-section 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."

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 2 years.

COMPLAINTS

The applicant complains that the statements made to the DTI Inspectors were admitted in evidence against him and caused the defence immense damage. He also complains that the judge misdirected the jury as to the law and the evidence and that unfair prejudice was caused to the defence by the judge allowing the prosecution to cross-examine him as to alleged sums diverted into his Swiss bank account. The applicant further submits that there was excessive press coverage of his arrest and trial.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 July 1988 and registered on 11 December 1991.

On 31 August 1992, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 12 January 1993 after two extensions in the time-limit and the applicant's observations in reply were submitted on 25 February 1993.

The Commission decided on 7 May 1993 to invite the parties to make further observations at an oral hearing.

The Government submitted further observations on 29 September 1993. The applicant submitted supplementary observations on 19 November 1993.

The hearing took place on 7 December 1993.

At the hearing, the Government were represented by:

Mrs. Audrey Glover	Agent
Mr. Michael Baker Q.C.	Counsel
Mr. Richard Horwell	Counsel
Mrs. Tessa Dunstan	Adviser, Department of Trade and Industry
Mr. Robert Burns	Adviser, Department of Trade and Industry
Mr. Gordon Dickinson	Adviser, Serious Fraud Office
Mr. John Gardner	Adviser, Department of Trade and Industry

The applicant was represented by:

Mr. Jonathan Caplan Q.C.	Counsel
Mr. Justin Cole	Counsel
Mr. Paul Williams	Solicitor
Mr. George Devlin	Applicant's agent
Ms. Laura Devlin	Agent's assistant and translator

The applicant was also present.

THE LAW

1. The applicant complains of the use at his trial of incriminating statements obtained from him by the DTI Inspectors in exercise of their statutory powers of compulsion. He submits in addition that the prosecuting authorities deliberately delayed the commencement of the police investigation in order that statements incriminating the applicant could be gathered for use in subsequent criminal proceedings. He complains that as a result he was deprived of a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) provides, so far as relevant, as follows:

> "In the determination of his civil rights and obligations or 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..."

The Government submit that insofar as the applicant complains of any deliberate misuse of power by the prosecuting authorities the applicant has failed to exhaust the domestic remedies available to him as required by Article 26 (Art. 26) of the Convention. They submit that the applicant did not make any application to the court in this regard, either by seeking a stay of the proceedings on the ground of abuse of process or by challenging the admissibility of the evidence. From the material submitted by the applicant, he must have been aware at the time of his trial of the possibility of making such a complaint. Furthermore the Government submit that this complaint is in any case manifestly ill-founded.

The applicant submits that he could not have raised the matter at his trial since he did not become aware of the relevant facts concerning the delay until later, namely, when they emerged during or about the time of the second Guinness trial.

The Commission recalls that one of the applicant's co-defendants, Mr. Seelig, made an application to the trial judge for a stay of the proceedings on the grounds that they were an abuse of process and making in that context allegations of improper delay. The trial judge however found in effect that the conduct of the Inspectors and the prosecuting authorities, including the decision to delay the involvement of the police, did not constitute under the statutory

provisions any misuse of power.

The Commission considers however that the allegations of improper conduct by the prosecuting authorities form part of the applicant's substantive complaints concerning the effect on the fairness of his trial of the use of the DTI transcripts by the prosecution. The Commission would therefore find that it is not possible to reject this aspect of the case for non-exhaustion or for any other reason but would join it to the examination of the substantive issues.

As regards the substance of the applicant's complaints, the Commission has taken cognizance of the parties' submissions. The Commission considers that these complaints under Article 6 para. 1 (Art. 6-1) of the Convention raise complex issues of fact and law, the determination of which should depend on the merits. This part of the application must therefore be declared admissible, no other ground for declaring it inadmissible having been established.

2. The applicant has also complained that the trial judge misdirected the jury in his summing-up with regard to the evidence and the law and that the judge caused unfair prejudice to his case by allowing the prosecution to cross-examine him concerning alleged sums diverted into his Swiss bank account.

The Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see eg. No. 458/59, X v Belgium, Dec. 29.3.60, Yearbook 3 pp.222, 236; No. 5258/71, X v Sweden, Dec. 8.2.73, Collection 43 pp.71, 77; No. 7987/77, X v Austria, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The Commission recalls that the applicant appealed to the Court of Appeal in respect of the trial judge's alleged errors. The Court of Appeal found that the judge had erred in his direction to the jury on one count and proceeded to quash that conviction. It found no merit in the other grounds of appeal and paid tribute to the judge's handling of the case. It is not for the Commission to re-assess these factual elements of the case before the domestic courts.

Having examined this aspect of the applicant's complaints, the Commission finds that it does not disclose any appearance of a violation of the provisions of the Convention.

It therefore follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally, the applicant has complained of the press coverage of his trial which he alleges was excessive. He has referred to the matter being raised with the trial judge who considered that it could be left to the good sense of the jury.

The Commission notes that the applicant has not specified in what way he was prejudiced by the press coverage. The mere existence of publicity concerning events which become the subject matter of a trial is not in itself sufficient to cast doubts on the fairness of the proceedings (see eg No. 10857/84, Dec. 15.7.86, D.R. 49 p. 106, at p.144). There is no indication on the facts of this case that the coverage in any way influenced the conduct or outcome of the applicant's trial.

It follows that this complaint fails to disclose any appearance of a violation of the provisions of Convention and must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES INADMISSIBLE the applicant's complaints concerning the presss coverage, the judge's directions to the jury and the cross-examination by the prosecution permitted by the judge;

unanimously

DECLARES ADMISSIBLE the remainder of the application, without prejudging the merits.

Deputy Secretary to the Commission — President of the Commission

(M. de SALVIA) — (C.A. NØRGAARD)