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

COURT (CHAMBER)

CASE OF SAUNDERS v. UNITED KINGDOM

(Application no. 19187/91)

JUDGMENT

STRASBOURG

17 December 1996

In the case of Saunders v. United Kingdom[1],

The European Court of Human Rights, sitting, in pursuance of Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

MM. R. BERNHARDT, *President*,
THÓR VILHJÁLMSSON,
F. GÖLCÜKLÜ,
L.-E. PETTITI,
B. WALSH,
A. SPIELMANN,
J. DE MEYER,
N. VALTICOS,
S.K. MARTENS,
Mme E. PALM,
MM. R. PEKKANEN,
A.N. LOIZOU,
J.M. MORENILLA,
Sir John FREELAND,
MM. L. WILDHABER,
G. MIFSUD BONNICI,
J. MAKARCZYK,
D. GOTCHEV,
B. REPIK,
P. KURIS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 23 February, 22 April and 29 November 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the United

[1] The case is numbered 43/1994/490/572. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

Kingdom of Great Britain and Northern Ireland ("the Government") on 9 and 13 September 1994 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 19187/91) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Mr Ernest Saunders, a British citizen, on 20 July 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr J.M. Morenilla, Mr J. Makarczyk, Mr B. Repik and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr N. Valticos, substitute judge, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1). Mr Bernhardt succeeded Mr Ryssdal as President of the Chamber.

4. As President of the Chamber (Rule 21 para. 5), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 16 February 1995 and the Government's memorial on 27 February 1995.

5. On 22 March 1995 the President of the Chamber granted permission to Liberty, pursuant to Rule 37 para. 2, to submit written comments on specified aspects of the case. These were received on 31 July 1995. The Government submitted a reply on 3 October.

6. On 28 April 1995 the Chamber, after considering written submissions from the applicant and the Government, granted a request by the Government to adjourn the hearing pending a decision of the Court of Appeal to which the applicant's case had been referred by the Secretary of State (see paragraph 39 below). Following the decision of the Court of Appeal on 27 November 1995 the applicant submitted a further memorial

on 3 January 1996. The Government's memorial in reply was received on 23 January.

7. On 25 January 1996 the President refused a request under Rule 37 para. 2 made on behalf of three of the applicant's co-accused to file written comments on the case.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 February 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr M. EATON, Deputy Legal Adviser, Foreign and Commonwealth Office, *Agent*,
Mr S. KENTRIDGE QC,
Ms E. GLOSTER QC,
Mr J. EADIE, Barrister-at-Law, *Counsel*,
Ms T. DUNSTAN, Department of Trade and Industry,
Mr J. GARDNER, Department of Trade and Industry,
Ms R. QUICK, Department of Trade and Industry,
Mr G. DICKINSON, Serious Fraud Office,
Mr L. LEIGH, London School of Economics, *Advisers*;

- for the Commission

Mr N. BRATZA, *Delegate*;

- for the applicant

Mr M. BELOFF QC,
Mr M. HUNT, Barrister-at-Law, *Counsel*,
Mr P. WILLIAMS, Solicitor,
Mr G. DEVLIN,
Ms L. DEVLIN, *Advisers*.

The Court heard addresses by Mr Bratza, Mr Beloff and Mr Kentridge and also replies to its questions.

9. Following deliberations on 23 February 1996 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

10. By virtue of Rule 51 para. 2 (a) and (b), the President and the Vice-President of the Court (Mr Ryssdal and Mr Bernhardt) as well as the other members and the substitute judges (namely, Mr B. Walsh, Mr J. De Meyer, Mr S.K. Martens and Mr D. Gotchev) of the original Chamber are members of the Grand Chamber.

Since Mr Ryssdal had been unable to take part (see paragraph 3 above), the names of the additional eight judges were drawn by lot by the Vice-President, in the presence of a member of the registry, on 1 March 1996, namely, Mr L.-E. Pettiti, Mr R. Macdonald, Mr A. Spielmann, Mrs E. Palm, Mr R. Pekkanen, Mr A.N. Loizou, Mr L. Wildhaber and Mr G.

Mifsud Bonnici (Rule 51 para. 2 (c)). Subsequently, Mr Macdonald was unable to take part in the further consideration of the case.

11. On 6 March 1996 the Government requested permission to file further brief observations in writing, which request was granted by the President of the Grand Chamber on 19 March 1996. These observations were submitted on 4 April and the Delegate's and the applicant's comments in reply were received on 18 April.

12. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicant, the Grand Chamber decided on 22 April 1996 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rules 26 and 38, taken together with Rule 51 para. 6).

13. On 8 August 1996 the President admitted to the file an article submitted by the Government.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Factual background leading to the appointment of inspectors

14. The applicant had become a director and chief executive of Guinness PLC ("Guinness") in 1981.

15. 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 take-over battle resulted in victory for Guinness. Guinness's offer to 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.

16. The substantial increase in the quoted Guinness share price during the bid was 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. Supporters were offered secret indemnities against any losses they might incur, and, in some cases, also large success fees, if the Guinness bid was successful. Such inducements were unlawful (1) because they were not disclosed to the market under the City Code on Take-overs and Mergers and (2) because

they were paid out of Guinness's own moneys 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.

17. Supporters who had purchased shares under the unlawful share-support operation were indemnified and rewarded. In addition, some of those who had helped find supporters were rewarded by the payment of large fees. These too came from Guinness funds. 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.

18. Allegations and rumours of misconduct during the course of the bid led the Secretary of State for Trade and Industry to appoint inspectors some months after the events pursuant to sections 432 and 442 of the 1985 Act (see paragraphs 45 and 46 below). The inspectors were empowered to investigate the affairs of Guinness.

B. The inspectors' investigation

19. 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.

20. On 12 January 1987, the inspectors informed the Department of Trade and Industry ("the DTI") that there was concrete evidence of criminal offences having been committed. On the same date the DTI contacted Mr John Wood of the Director of Public Prosecutions' office ("the 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 ("the CPS") which had come into being in September 1986.

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

22. 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.

23. On 30 January 1987, a meeting was held attended by the inspectors, the solicitor to and other officials of the DTI, Mr John Wood and a representative from the CPS. Amongst other matters, potential accused were identified - including the applicant – 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.

24. On 5 February 1987 Mr John 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.

25. 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. He was accompanied by his legal representatives throughout these interviews.

C. The criminal proceedings

26. 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.

27. The applicant was subsequently charged with numerous offences relating to the illegal share-support operation and, together with his co-defendants, was arraigned before the Crown Court on 27 April 1989.

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.

28. 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 one of the applicant's co-defendants, Mr Parnes, to rule the DTI transcripts inadmissible. Mr Parnes 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.

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, the witnesses were under a duty to answer such questions and the answers were admissible in criminal proceedings. He rejected Mr Parnes'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.

29. From 22 to 24 January 1990 the court held a further voir dire following the application of the applicant to rule inadmissible the DTI transcripts concerning the eighth and ninth interviews 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 the applicant's alleged ill-health at the time and on the fact that the two interviews in question had taken place 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, exercise his discretion pursuant to section 78 to exclude the evidence from the two above-mentioned interviews which had taken place after the applicant had been charged on the grounds that his attendance could not be said to be 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.

1. The applicant's trial

30. The applicant was tried together with three co-defendants. The trial 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. The applicant faced fifteen counts including, inter alia, eight counts of false accounting contrary to section 17 (1) b of the Theft Act 1968 and two counts of theft and several counts of conspiracy.

In the course of his trial the applicant, who was the only accused to give evidence (days 63-82) - after the reading of the transcripts (see paragraph 31 below) - testified that he knew nothing about the giving of indemnities or the paying of success fees and that he had not been consulted on such matters. He asserted that he had been guilty of no wrongdoing. The Crown relied heavily on the evidence of Mr Roux (Guinness's finance director) who had been granted immunity from prosecution. It also referred to the statements made by the applicant in the course of interviews to the DTI inspectors.

31. The transcripts of the interviews were read to the jury by the prosecution over a three-day period during the trial (days 45-47). They were used in order to establish the state of the applicant's knowledge and to refute evidence given by the applicant to the jury.

For example, counsel for the prosecution used passages from the interviews to demonstrate that Mr Saunders had been aware, inter alia, of the payment to Mr W., who had been allegedly involved in the share-support operation, of more than £5 million, before the inspectors had

shown him an invoice for the payment of the money to Mr W. In his answers to the inspectors Mr Saunders had stated that he had agreed on the payment to Mr W. of £5 million as an appropriate success fee. When the inspectors showed him the invoice for the payment of this money to a company (MAC) used by Mr W. to receive fees for work done, he replied that he had not seen the invoice before but had deduced that it related to his agreement to pay Mr W. £5 million.

In his opening speech to the jury, counsel for the prosecution stated as follows:

> "Mr Saunders also told [DTI] inspectors why the [£5 million] had been paid. He said that Mr [W.] had performed invaluable service during the bid for Distillers and that Mr [W.] had persuaded him that £5 million was an appropriate fee as a reward. Mr Saunders accepted that there was no documentation to support his decision to pay Mr [W.] £5 million. Mr Saunders admitted to the [inspectors] that he knew that MAC was a company used by Mr [W.] and his associates to receive money."

During the trial Mr Saunders testified that he did not know that the money had been paid to Mr W. prior to being shown the invoice by the inspectors. In his cross-examination of the applicant, counsel for the prosecution referred to the above answers in the transcripts to contradict Mr Saunders's testimony. In his closing speech to the jury he stated:

> "But Mr Saunders's ... evidence to the inspectors make it clear that he knew perfectly well ... that Mr [W.] had been paid. You will remember those passages in his ... interviews where he knew all about this payment before he was shown the invoice."

32. Reference was also made to the interview transcripts by counsel for the co-accused [Mr R.] in an attempt to demonstrate that Mr Saunders was not telling the truth. In his answers to the inspectors Mr Saunders had repeatedly stated that he did not recall any conversations with Mr R. concerning the purchase of shares in Guinness or about indemnities against loss in the event of such purchase. However, a letter written by Mr R. to another person stating that such conversations had taken place and generally implicating Mr Saunders in the share-support operation had been previously published in the press.

During cross-examination of Mr Saunders, counsel for Mr R. suggested that Mr Saunders's answers to the inspectors on this point were not believable, that he had "lost his nerve" before them and that this explained his replies that he could not recollect the conversations with Mr R. taking place. He repeatedly asked why Mr Saunders did not take the opportunity to tell the inspectors that Mr R.'s accusations in the published letter were a "pack of lies" instead of replying as he did.

33. 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.

34. On 22 August 1990 the applicant was convicted of twelve counts in respect of conspiracy, false accounting and theft. He received an overall prison sentence of five years.

2. Ruling on "abuse of process" claims

35. 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 in order that the inspectors could use their powers to obtain confessions.

36. 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. 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 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.

37. 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.

3. The applicant's appeal

38. 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 weight to be allowed to the evidence given by Mr Roux, the finance director of Guinness who had been afforded 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 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 one count and quashed that conviction. It reduced his sentence to two and a half years' imprisonment.

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

39. On 22 December 1994 the Home Secretary referred the applicant's case and that of his co-defendants to the Court of Appeal pursuant to section 17 (1) of the Criminal Appeal Act 1968. He did so on the basis of applications by the applicant's co-defendants - but not the applicant himself - who submitted that the prosecution had failed to disclose certain documents at their trial.

40. At the appeal the applicant argued, inter alia, that the use at the trial of answers given to the DTI inspectors automatically rendered the criminal proceedings unfair.

The court rejected this argument, pointing 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.

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

41. 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 ..."

42. In relation to the argument that the difference between the Companies Act and the Criminal Justice Act regimes (see paragraphs 48 and 54 below) was anomalous the court stated:

> "... 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."

43. 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 businessmen 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."

44. Finally, 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 applicant. It 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 applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Appointment of inspectors

45. 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))

46. 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

47. 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 Sachs LJ at 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."

48. 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."

49. 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 inquire 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 court."

50. 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

51. Section 76 of the Police and Criminal Evidence Act 1984 (PACE) provides as relevant:

"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 ..."

52. Section 78 provides as relevant:

"1. 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."

53. 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".

54. 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)).

PROCEEDINGS BEFORE THE COMMISSION

55. The applicant lodged his application (no. 19187/91) with the Commission on 20 July 1988. He complained that the use at his trial of statements made by him to the DTI inspectors under their compulsory powers deprived him of a fair hearing in violation of Article 6 para. 1 of the Convention (art. 6-1).

56. On 7 December 1993 the Commission declared the applicant's complaint admissible. In its report of 10 May 1994 it expressed the opinion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1) (fourteen votes to one).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[3]

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-VI), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

57. The applicant submitted that the use of the transcripts at the trial was a breach of Article 6 para. 1 (art. 6-1) and that, to the extent that the delay in starting the police investigation was motivated by a desire to obtain those transcripts, the manner of obtaining the evidence was also in violation of this provision (art. 6-1).

58. The Government contended that the mere fact of compulsion could not and did not render the proceedings unfair. Further, that if it was concluded that any of Mr Saunders's answers could properly be described as self-incriminating, it would still be necessary to assess whether the extremely limited use in fact made of those answers rendered the criminal proceedings unfair. In their submission it did not.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

59. The applicant contended that he was denied a fair trial in breach of Article 6 para. 1 of the Convention (art. 6-1) which, in so far as relevant, states:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

The Commission found that there had been such a violation, although this was contested by the Government.

A. The right not to incriminate oneself

1. The arguments of those appearing before the Court

a) The applicant

60. The applicant complained of the fact that statements made by him under compulsion to the inspectors appointed by the Department of Trade and Industry (DTI) (see paragraph 18 above) during their investigation were admitted as evidence against him at his subsequent criminal trial (see paragraphs 30-33 above).

He maintained that implicit in the right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1), as the Court had recognised in its judgments in

Funke v. France (25 February 1993, Series A no. 256-A, p. 22, para. 44) and John Murray v. the United Kingdom (8 February 1996, Reports of Judgments and Decisions 1996-I, p. 49, para. 45), was the right of an individual not to be compelled to contribute incriminating evidence to be used in a prosecution against him. This principle was closely linked to the presumption of innocence which was expressly guaranteed by Article 6 para. 2 of the Convention (art. 6-2) and had been recognised by the Court of Justice of the European Communities (Orkem v. Commission, Case 374/87 [1989] European Court Reports 3283) and by the Constitutional Court of South Africa (Ferreira v. Levin and Others, judgment of 6 December 1995) amongst others. It should apply equally to all defendants regardless of the nature of the allegations against them or their level of education and intelligence. It followed that the use made by the prosecution of the transcripts of interviews with the inspectors in subsequent criminal proceedings was contrary to Article 6 (art. 6).

61. Furthermore, the applicant argued that this use of the transcripts was particularly unfair in his case since, in the words of the Court of Appeal, they "formed a significant part of the prosecution case". Three days were spent reading extracts from his interviews with the inspectors to the jury before Mr Saunders decided that he ought to give evidence to explain and expand upon this material. As a result, he was subjected to intensive cross-examination concerning alleged inconsistencies between his oral testimony at trial and his responses to the inspectors' questions, to which the trial judge drew attention in his summing-up to the jury. The prosecution's task was thus facilitated when it was able to contrast its own evidence with Mr Saunders's more specific denials in his interviews.

b) The Government

62. The Government submitted that only statements which are self-incriminating can fall within the privilege against self-incrimination. However, exculpatory answers or answers which, if true, are consistent with or would serve to confirm the defence of an accused cannot be properly characterised as self-incriminating. In their submission, neither the applicant nor the Commission had identified at any stage a single answer given by the applicant to the DTI inspectors which was self-incriminating. There cannot be derived from the privilege against self-incrimination a further right not to be confronted with evidence that requires the accused, in order successfully to rebut it, to give evidence himself. That, in effect, was what the applicant was claiming when he alleged that the admission of the transcript "compelled" him to give evidence.

The Government accepted that a defendant in a criminal trial cannot be compelled by the prosecution or by the court to appear as a witness at his own trial or to answer questions put to him in the dock, and that an infringement of this principle would be likely to result in a defendant not

having a fair hearing. However, the privilege against self-incrimination was not absolute or immutable. Other jurisdictions (Norway, Canada, Australia, New Zealand and the United States of America) permit the compulsory taking of statements during investigation into corporate and financial frauds and their subsequent use in a criminal trial in order to confront the accused's and witnesses' oral testimony. Nor does it follow from an acceptance of the privilege that the prosecution is never to be permitted to use in evidence self-incriminating statements, documents or other evidence obtained as a result of the exercise of compulsory powers. Examples of such permitted use include the prosecution's right to obtain documents pursuant to search warrants or samples of breath, blood or urine.

63. In the Government's submission it would be wrong to draw from the Court's Funke judgment (referred to at paragraph 60 above) a broad statement of principle concerning the "right to silence", since the nature of that right was not defined in the judgment. There can be no absolute rule implicit in Article 6 (art. 6) that any use of statements obtained under compulsion automatically rendered criminal proceedings unfair. In this respect it was necessary to have regard to all the facts of the case including the many procedural safeguards inherent in the system. For example, at the stage of the inspectors' inquiry, injustice was prevented by the facts that the inspectors were independent and subject to judicial supervision and that the person questioned was entitled to be legally represented before them and provided with a transcript of his responses which he could correct or expand. Moreover, during the course of any subsequent criminal trial, a defendant who had provided answers to the inspectors under compulsion was protected by the judge's powers to exclude such evidence; admissions which might be unreliable or might have been obtained by oppressive means had to be excluded and there was a discretion to exclude other evidence if its admission would have an adverse effect on the fairness of the proceedings (see paragraphs 51-52 above).

64. The Government further emphasised that, whilst the interests of the individual should not be overlooked, there was also a public interest in the honest conduct of companies and in the effective prosecution of those involved in complex corporate fraud. This latter interest required both that those under suspicion should be compelled to respond to the questions of inspectors and that the prosecuting authorities should be able to rely in any subsequent criminal trial on the responses elicited. In this respect a distinction could properly be drawn between corporate fraud and other types of crime, since devices such as complex corporate structures, nominee companies, complicated financial transactions and false accounting records could be used to conceal fraudulent misappropriation of corporate funds or personal responsibility for such misconduct. Frequently the documentary evidence relating to such transactions would be insufficient for a prosecution or incomprehensible without the explanations of the individuals

concerned. Furthermore, it had to be remembered that the kind of person questioned by the inspectors was likely to be a sophisticated businessman with access to expert legal advice, who had moreover chosen to take advantage of the benefits afforded by limited liability and separate corporate personality.

c) The Commission

65. The Commission considered that the privilege against self-incrimination formed an important element in safeguarding individuals from oppression and coercion, was linked to the principle of the presumption of innocence and should apply equally to all types of accused, including those alleged to have committed complex corporate frauds. In the instant case, the incriminating material, which the applicant was compelled to provide, furnished a not insignificant part of the evidence against him at the trial, since it contained admissions which must have exerted additional pressure on him to take the witness stand. The use of this evidence was therefore oppressive and substantially impaired Mr Saunders's ability to defend himself against the criminal charges he faced, thereby depriving him of a fair trial.

At the hearing before the Court, the Delegate stressed that even steadfast denials of guilt in answer to incriminating questions can be highly incriminating and very damaging to a defendant. This was so in the present case as the answers were used against him both in the opening and closing speeches and in cross-examination to establish that the answers given to the inspectors could not be believed and that the applicant was dishonest.

d) Amicus curiae

66. Liberty, with reference to various international human rights treaties and the law existing in a number of Contracting Parties, requested the Court to find that Article 6 (art. 6) prevents self-incriminating evidence from being obtained from an individual under threat of judicial sanction and from being admissible in criminal proceedings.

2. The Court's assessment

67. The Court first observes that the applicant's complaint is confined to the use of the statements obtained by the DTI inspectors during the criminal proceedings against him. While an administrative investigation is capable of involving the determination of a "criminal charge" in the light of the Court's case-law concerning the autonomous meaning of this concept, it has not been suggested in the pleadings before the Court that Article 6 para. 1 (art. 6-1) was applicable to the proceedings conducted by the inspectors or that these proceedings themselves involved the determination of a criminal charge within the meaning of that provision (art. 6-1) (see, inter alia, the

Deweer v. Belgium judgment of 27 February 1980, Series A no. 35, pp. 21-24, paras. 42-47). In this respect the Court recalls its judgment in Fayed v. the United Kingdom where it held that the functions performed by the inspectors 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, para. 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 para. 1 (art. 6-1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities (ibid., p. 48, para. 62).

Accordingly the Court's sole concern in the present case is with the use made of the relevant statements at the applicant's criminal trial.

68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6) (see the above-mentioned John Murray judgment, p. 49, para. 45, and the above-mentioned Funke judgment, p. 22, para. 44). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).

69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

In the present case the Court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right. This question must be examined by the Court in the light of all the

circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6 para. 1 (art. 6-1) of which the right not to incriminate oneself is a constituent element.

70. It has not been disputed by the Government that the applicant was subject to legal compulsion to give evidence to the inspectors. He was obliged under sections 434 and 436 of the Companies Act 1985 (see paragraphs 48-49 above) to answer the questions put to him by the inspectors in the course of nine lengthy interviews of which seven were admissible as evidence at his trial. A refusal by the applicant to answer the questions put to him could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two years (see paragraph 50 above) and it was no defence to such refusal that the questions were of an incriminating nature (see paragraph 28 above).

However, the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self-incriminating and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence. In their submission only statements which are self-incriminating could fall within the privilege against self-incrimination.

71. The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him (see paragraph 31 above). In any event, bearing in mind the concept of fairness in Article 6 (art. 6), the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.

72. In this regard, the Court observes that part of the transcript of answers given by the applicant was read to the jury by counsel for the prosecution over a three-day period despite objections by the applicant. The fact that such extensive use was made of the interviews strongly suggests that the prosecution must have believed that the reading of the transcripts assisted their case in establishing the applicant's dishonesty. This

interpretation of the intended impact of the material is supported by the remarks made by the trial judge in the course of the voir dire concerning the eighth and ninth interviews to the effect that each of the applicant's statements was capable of being a "confession" for the purposes of section 82 (1) of the Police and Criminal Evidence Act 1984 (see paragraph 53 above). Similarly, the Court of Appeal considered that the interviews formed "a significant part" of the prosecution's case against the applicant (see paragraph 40 above). Moreover, there were clearly instances where the statements were used by the prosecution to incriminating effect in order to establish the applicant's knowledge of payments to persons involved in the share-support operation and to call into question his honesty (see paragraph 31 above). They were also used by counsel for the applicant's co-accused to cast doubt on the applicant's version of events (see paragraph 32 above).

In sum, the evidence available to the Court supports the claim that the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant.

73. Both the applicant and the Commission maintained that the admissions contained in the interviews must have exerted additional pressure on the applicant to give testimony during the trial rather than to exercise his right to remain silent. However, it was the Government's view that the applicant chose to give evidence because of the damaging effect of the testimony of the chief witness for the prosecution, Mr Roux.

Although it cannot be excluded that one of the reasons which affected this decision was the extensive use made by the prosecution of the interviews, the Court finds it unnecessary to speculate on the reasons why the applicant chose to give evidence at his trial.

74. Nor does the Court find it necessary, having regard to the above assessment as to the use of the interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.

It does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under

compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.

75. It follows from the above analysis and from the fact that section 434 (5) of the Companies Act 1985 authorises, as noted by both the trial judge and the Court of Appeal, the subsequent use in criminal proceedings of statements obtained by the inspectors that the various procedural safeguards to which reference has been made by the respondent Government (see paragraph 63 above) cannot provide a defence in the present case since they did not operate to prevent the use of the statements in the subsequent criminal proceedings.

76. Accordingly, there has been an infringement in the present case of the right not to incriminate oneself.

B. Alleged misuse of powers by the prosecuting authorities

77. The applicant also complained that the prosecuting authorities had deliberately delayed the institution of the police investigation to enable the inspectors to gather evidence under their special powers. He referred to the meeting on 30 January 1987 between the inspectors and representatives of the Crown Prosecution Service (see paragraph 23 above), which preceded the formal initiation of the police investigation by some three months (see paragraph 26 above). In addition, documents disclosed for the purposes of the most recent appeal (see paragraphs 39-44 above) showed that, in the words of the Court of Appeal, "all concerned were conscious that the inspectors had greater powers than the police when conducting their interviews and it was clearly hoped that the inspectors would elicit answers ... which could be used in evidence at trial".

He reasoned that the fact that the Court of Appeal had found that there had been no abuse of process should not be decisive, since the domestic court could not apply the Convention and had been bound by English law to conclude that the use made at trial of the transcripts of the interviews with the inspectors had not been unfair.

78. The Government emphasised that the applicant had already argued this issue before the Court of Appeal without success (see paragraph 43 above) and that in raising it again in Strasbourg he was attempting to use the Court as a fourth instance, contrary to the established jurisprudence of the Court.

79. The Commission found it unnecessary to consider this head of complaint in view of its finding that the applicant had been denied a fair trial by reason of the use made of the transcripts during his trial.

80. In the light of the above finding of an infringement of the right not to incriminate oneself, the Court considers it unnecessary to examine the applicant's allegations on this point. It notes, however, the findings of the Court of Appeal that the inspectors had conducted their inquiries independently without briefing or prompting by the prosecuting authorities and that there had been no improper or unfair collusion between them (see paragraph 43 above).

C. Conclusion

81. In conclusion the applicant was deprived of a fair hearing in violation of Article 6 para. 1 of the Convention (art. 6-1).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

82. The applicant sought just satisfaction under Article 50 of the Convention (art. 50), which reads as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

83. The applicant submitted that the prosecution case against him would have been in serious difficulties but for the evidence introduced at his trial, in violation of Article 6 (art. 6). He thus claimed pecuniary loss amounting to £3,668,181.37. This claim was made up of sums in respect of loss of earnings up to May 1995, travelling and subsistence expenses, fees paid to solicitors (Payne Hicks Beach) relating to the interviews before the inspectors and to solicitors (Landau and Landau) in respect of, inter alia, the criminal proceedings.

At the hearing before the Court, however, the applicant accepted that "true compensation" would be a finding in his favour by the Court and the resulting vindication of his good name.

84. The Government submitted that the applicant's claim for pecuniary loss was excessive. In particular, they pointed out that Mr Saunders had not criticised the investigation by the inspectors itself, but had nonetheless sought reimbursement for his legal costs in connection with it. With regard

to his claim for loss of earnings, they submitted that he was dismissed by Guinness following the company's own investigation into the conduct of the take-over. Moreover, he had been in receipt of a pension from Guinness of £74,000 per annum since his dismissal, in addition to which, since May 1993, he had earned approximately £125,000 net per annum as a business consultant.

85. The Delegate of the Commission emphasised that in finding a breach of Article 6 para. 1 (art. 6-1) the Commission could not be taken to have made any suggestion as to the likely outcome of Mr Saunders's trial had the transcripts not been admitted in evidence.

86. The Court observes that the finding of a breach in the present case concerned the criminal proceedings against the applicant and not the proceedings before the inspectors about which no complaint was made. Moreover, it cannot speculate as to the question whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution (see, mutatis mutandis, the John Murray judgment cited above at paragraph 68, p. 52, para. 56) and, like the Commission, underlines that the finding of a breach of the Convention is not to be taken to carry any implication as regards that question.

It therefore considers that no causal connection has been established between the losses claimed by the applicant and the Court's finding of a violation.

2. Non-pecuniary damage

87. The applicant sought non-pecuniary damages of £1 million to compensate him for the denial of his right to a fair trial and the resulting anxiety, anguish and imprisonment.

88. The Government submitted that no award should be made under this head.

89. The Court considers that, in the circumstances of the case, the finding of a violation constitutes sufficient just satisfaction in respect of any non-pecuniary damage sustained.

B. Costs and expenses

90. The applicant claimed a total of £336,460.75 by way of costs and expenses in connection with the Strasbourg proceedings. This was composed of (1) £82,284.50 in respect of counsel's fees; (2) £42,241.25 in respect of solicitors' fees and (3) £211,935 concerning the fees of the applicant's advisers, Mr and Mrs Devlin.

91. The Government considered that the amounts claimed under this head were excessive. In particular they submitted that no award should be made in respect of the fees of Mr and Mrs Devlin since the applicant could

have effectively presented his case in Strasbourg with the assistance only from experienced solicitors and leading and junior counsel.

92. The Delegate of the Commission had no comments to make on the amounts claimed.

93. The Court is not satisfied that the amounts claimed by the applicant were necessarily incurred or reasonable as to quantum. Deciding on an equitable basis, it awards £75,000 under this head.

C. Default interest

94. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by sixteen votes to four that there has been a violation of Article 6 para. 1 of the Convention (art. 6-1);

2. Holds unanimously that the finding of a violation constitutes sufficient just satisfaction in respect of any non-pecuniary damage sustained;

3. Holds unanimously
   (a) that the respondent State is to pay the applicant, within three months, £75,000 (seventy-five thousand pounds sterling) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 December 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Walsh;

(b) concurring opinion of Mr De Meyer;

(c) concurring opinion of Mr Morenilla;

(d) concurring opinion of Mr Repik;

(e) concurring opinion of Mr Pettiti;

(f) dissenting opinion of Mr Valticos, joined by Mr Gölcüklü;

(g) dissenting opinion of Mr Martens, joined by Mr Kuris.

R. B.
H. P.

CONCURRING OPINION OF JUDGE WALSH

I fully agree with the judgment of the majority save for the reservation set out in the last paragraph below.

The fact is that the trial of the applicant must be regarded as being contrary to Article 6 para. 1 of the Convention (art. 6-1) because it was unfair inasmuch as some of the evidence upon which his conviction was based was obtained by self-incrimination on the part of the applicant and that the self-incrimination was not the result of the unfettered exercise of his own will and the Court regards as a fundamental right of an accused person that he must not be obliged or compelled to incriminate himself. Persons are always free to incriminate themselves if in doing so they are exercising their own will; but that is essentially different from a person being compelled in any criminal case to be a witness against himself. The process by which the present applicant was brought to that situation was the exercise of a particular power exercised under current English legislation by inspectors who in the words of an English court were exercising inquisitorial powers given them by law as distinct from administering justice. It is important to bear in mind that this case does not concern only a rule of evidence but is concerned with the existence of the fundamental right against compulsory self-incrimination, which is recognised by this Court as a fundamental right. This privilege against self-incrimination is probably most widely known by those who follow and study United States jurisprudence as one of the most widely known and debated of the guarantees of personal liberty in the Bill of Rights of the United States Constitution, being one of the rights incorporated in the Fifth Amendment of the United States Constitution. The right to the protection against compulsory self-incrimination is not simply a right to refuse to testify in a court but must also apply to bodies endowed by the law with inquisitorial powers; and the right to refuse to answer questions which may open an incriminating line of inquiry. The seeds of this privilege were planted in the thirteenth century in English common law when the English ecclesiastical courts began to administer what was called the "oath ex officio" to suspected heretics. The practice which involved questioning a suspect who had sworn to tell the truth was in its day quite revolutionary because it replaced the method of determining guilt by the procedure known as trial by ordeal and the oath of compurgation. Trial by ordeal was not the use of torture to produce confessions but the ordeal was the trial itself and the outcome determined guilt or innocence. The oath of compurgation involved the recitation by a suspect of a ritual oath of innocence. If he stumbled in the recitation of the oath it was taken to be a mark of God’s judgment of his guilt. Unfortunately the new system, namely the oath ex officio, was abused by the various ecclesiastical courts in their zealous search for heresy. It could be administered without any regard as to whether there was a probable cause to think the accused was guilty and therefore

was regarded as a very useful medium of an untrammelled investigation into the life of the accused. By the sixteenth and seventeenth centuries in England the oath ex officio was employed even by the Court of Star Chamber to detect those who dared to criticise the King. Opposition to the oath became so widespread that there gradually emerged the common law doctrine that a man had a privilege to refuse to testify against himself, not simply in respect of the special kind of procedures already referred to, but also through evolution of the common law, as a principle to be upheld in ordinary criminal trials also. The principle was that "a man could not be made the deluded instrument of his own conviction". In the American colonies the privilege was espoused with special fervour because of the interrogation abuses by colonial governors and before the American War of Independence it had already been adopted in seven different States in their own constitutions or bills of rights. Particularly it imposed useful restrictions upon the powers of colonial governors to question persons suspected of violating English commercial law as has been pointed out, especially those which regulated trade restrictions including smuggling, which was a popular activity. Privilege against obligatory self-incrimination was available to a witness in general investigation by an executive or Legislative commission because it acted as a very useful brake on an untrammelled power of investigation of some such bodies. It also ensured that fair trials could not be circumvented by the use of investigating bodies instead of by a trial in court. In effect, the categories of governmental investigation in which this privilege plays an especially important role are general investigations by executive agencies or such like bodies and the questioning of a suspect by the police and State agencies prior to criminal trials. So far as the investigators were concerned it was very early recognised that the privilege against self-incrimination would be of very little use or value if a man could be compelled to tell all to the authorities before a trial. In my opinion the privileged avoidance of self-incrimination extends further than answers which themselves will support a conviction. It must logically embrace all answers which would furnish a link in the chain of evidence needed to prosecute a conviction. It is sufficient to sustain the privilege where it is evident from the implications of the questions and the setting in which they are asked that a responsive answer to the question or an explanation as to why it cannot be answered could also be dangerous because injurious disclosure could result. The question of privilege against self-incrimination has been much debated in decisions of the Supreme Court of the United States and indeed in other superior courts in the United States of America. What is significant in the context of the present case is that, like many other provisions of the United States Bill of Rights, to a large extent the privilege against self-incrimination originated from the English common law as it applied in the American colonies before independence. It is worth recalling that in the travaux préparatoires of the European Convention the

British representatives strongly made the point that English common law already offered as many safeguards for the protection of fundamental rights as did civil-law jurisdictions. In the United States it was possible by the existence of the constitutional Bill of Rights to guarantee the continuation of the protections and privileges borrowed from English common law in a way which could not be achieved in England without the adoption there of similar constitutional provisions. Other common law countries also safeguarded certain common law rights by incorporating them into their written constitutions as indeed did my own country in the Constitution of Ireland.

I should add that my vote on the question under Article 50 (art. 50) should not be taken as an acceptance that issues do not arise, in the light of the Court's finding, as to whether the applicant should be awarded some compensation by the national authorities for the time during which he was deprived of his personal liberty as a result of his conviction. However, it is to be borne in mind that in recent years courts in the United Kingdom have in several cases awarded compensation or damages to persons whose convictions were reversed because they had been obtained by the use or non-use of certain evidential material at the trial, whose use or non-use, as the case may be, was sufficient to establish that the verdict at the trial was unsafe and should not be allowed. They may again be asked to do so in the present case. It is moreover to be noted that in English statute law there are various Acts which prohibit the compulsory disclosure of offences or alternatively prevent such evidence being used as part of the prosecution, in cases as varied as bankruptcy, wrongful conversion, corruption and illegal practices, destruction of wills and the stealing of documents to title, etc. The present statutory provisions which have given rise to the instant case are a post-Convention constitutional departure from common law in England but also from the principles disclosed in the various statutes referred to.

CONCURRING OPINION OF JUDGE DE MEYER

Though concurring in the result of this judgment, I have serious reservations concerning the Court's reasoning in paragraph 67, which seems to imply that the proceedings conducted by the DTI inspectors under the Companies Act 1985 can be separated from those involving "the determination of a criminal charge"[1].

It is explicitly stated in section 434 (5) of the Act that "an answer given by a person to a question put to him in the exercise of powers conferred by [that] section ... may be used in evidence against him"[2]. Therefrom it clearly results that for prosecution purposes there is no real or practical difference between information so obtained by the inspectors and information obtained by members of the police or of the judiciary in the course of a criminal procedure stricto sensu. In the system of the Act concerned, each of these categories of information is part of the evidence to be considered in the determination of the criminal charge, and thus the "administrative" or "preparatory investigation"[3] performed by the inspectors is in fact a part of the criminal procedure. Therefore the right to silence and the right not to incriminate oneself must also apply to that preliminary investigation. These rights were, in the first place, disregarded in the 1985 Act itself, since its section 434 makes it an obligation to answer the questions of the inspectors[4] and its section 436 provides for the punishment of those refusing to answer them[5].

[1] See paragraph 67 of the judgment.
[2] See paragraph 48 of the judgment.
[3] See paragraph 67 of the judgment.
[4] See paragraph 48 of the judgment.
[5] See paragraphs 49 and 50 of the judgment.

CONCURRING OPINION OF JUDGE MORENILLA

I share the conclusion of the majority that the applicant was denied a right to a fair trial on account of the fact that his right not to incriminate himself was infringed.

However, in reaching this conclusion, the majority should not have sought to ascertain the use, extensive or otherwise, which was made of the applicant's statements during the criminal trial. I cannot subscribe to such an approach. For me, the mere fact that the applicant's statements had been obtained under compulsion and were considered by the prosecution to be incriminating and thus capable of reinforcing their case are sufficient reasons per se to have excluded the statements at the trial. The applicant was compelled to make the statements in the proceedings before the DTI inspectors. Had he refused to testify in the administrative proceedings he would have exposed himself to the sanctions under section 436 of the Companies Act 1985 (see paragraph 49 of the judgment). He was thus under statutory compulsion to contribute actively to the preparation of the case which was subsequently brought against him. In such circumstances, it is my opinion that there is no scope for examining either the weight to be attached to the incriminating material so furnished or the use made of it at the trial. The very fact that such statements were admitted in evidence against him undermined the very essence of the applicant's right not to incriminate himself, a right which the majority have properly considered to be at the heart of a fair trial (see paragraph 68 of the judgment).

The majority refer at paragraph 67 of the judgment to the Court's earlier judgment in Fayed v. the United Kingdom (21 September 1994, Series A no. 294-B) where it is stated that the purpose of investigations such as the one at issue "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". I should like to stress that this conclusion must be treated with particular caution, especially as regards prosecutions. While agreeing with the majority that statements made under compulsion by an individual during such investigations may be used as the basis for action by, inter alia, the prosecution, I would emphasise that this does not mean that they may be admitted as evidence against that individual in any subsequent criminal proceedings.

CONCURRING OPINION OF JUDGE REPIK

(Translation)

Whilst I concur in the Court's finding that there has been a violation of Article 6 para. 1 (art. 6-1), I am unable to agree with the wording of the first sub-paragraph of paragraph 67 of the judgment inasmuch as it implies that Article 6 para. 1 of the Convention (art. 6-1) does not apply to the proceedings conducted by the DTI inspectors.

In the context of the judgment, that passage appears to be superfluous. That issue was not raised by the parties (see paragraph 67 of the judgment, first sentence of the first sub-paragraph) and the Court stated that its sole concern was "the use made of the relevant statements at the applicant's criminal trial" (paragraph 67 of the judgment, second sub-paragraph). If the passage concerned was merely superfluous, the matter could be left there and disregarded on the principle superfluum non nocet.

However, the Court appears to have decided the issue, although confining itself to a summary reference to the Deweer v. Belgium and Fayed v. the United Kingdom judgments (27 February 1980, Series A no. 35, and 21 September 1994, Series A no. 294-B), without taking account of the fact that the issue to be decided differs from the ones that arose in those two cases and without putting forward any argument apt to support its position. The question was not whether the inspectors were empowered to determine a criminal charge. The question of the applicability of Article 6 para. 1 (art. 6-1) in the criminal sphere is not the same as in the civil sphere considered in the Fayed judgment. It is quite unnecessary for the inspectors to have any decision-making powers; it suffices that they have investigative

powers in respect of a criminal charge. It is not so rare, in particular in the financial sector, for administrative bodies to be vested with powers at the pre-trial stage of criminal proceedings. Admittedly, under domestic law, the proceedings before the inspectors did not form part of the criminal proceedings, but the issue was whether or not they concerned a criminal charge within the autonomous meaning of that expression in Article 6 (art. 6). In the instant case, it is not clear that the answer to that question is no, if the following circumstances are taken into consideration:

(i) by 12 January 1987 at the latest, the inspectors were in possession of concrete evidence that criminal offences had been committed (see paragraph 20 of the judgment);

(ii) as early as 30 January 1987 the applicant was identified as one of the persons suspected of having committed those offences (see paragraph 23 of the judgment);

(iii) at the conference on 25 February 1987 attended by members of the Crown Prosecution Service, it was noted that police inquiries were justified since a fraud had clearly been committed. However, it was decided to delay

commencing the inquiry because the police, unlike the inspectors, had little prospect of obtaining useful evidence from the potential defendants (see Annex A to the further memorial of the Government, received at the registry on 22 January 1996).

In their separate opinions Judges De Meyer and Martens have taken a wholly contrary view on the question of the applicability of Article 6 (art. 6) to the proceedings before the inspectors.

As the Court ventured to determine that question - although it was not necessary for its decision - it ought to have given a reasoned answer and not merely made do with a bare reference to the Fayed judgment.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I agree with the opinion of Mr Repik.

However, I consider that, as regards the effect of the inspectors' investigation on the proceedings, account must be taken of the categories of investigation and the impact of the information obtained on the proceedings themselves.

DISSENTING OPINION OF JUDGE VALTICOS, JOINED BY JUDGE GÖLCÜKLÜ

(Translation)

In the evolution of criminal procedure since the time when confession was the decisive form of evidence and interrogation, indeed inquisitorial procedure in general, was the preferred means of obtaining it - and when, as a result, the term "the question" had eventually come to be synonymous with "torture" - we have reached the other extreme, that is the right not to incriminate oneself at all. However, there may be disagreement about the scope of this principle.

As the Court says, the Government submitted that the right not to incriminate oneself was neither absolute nor immutable and that this applied in particular to investigations of commercial and financial fraud, which were especially complex. It might be thought that where someone exercises the right to remain silent and relies on the right not to incriminate himself this could give rise to suspicion, although admittedly it would not be a kind of implicit confession. But that is not the issue here.

What is in issue is that inspectors acting pursuant to the Companies Act 1985 asked Mr Saunders questions which he was obliged to answer or be convicted of contempt of court and sentenced to a term of imprisonment. The Government submitted, however, that none of the statements made at the time incriminated Mr Saunders. But they might have done or they might have been used in another case.

However, a sense of proportion must be kept and some account taken of priorities. In his dissenting opinion Judge Martens makes that point very persuasively, and I agree with him. Seeking to elevate to the status of an absolute rule the right of persons suspected of criminal offences, including serious crimes, not to incriminate themselves and not to answer any question which might incriminate them would mean in many cases that society was left completely defenceless in the face of ever more complex activities in a commercial and financial world that has reached an unprecedented level of sophistication. Defence of the innocent must not result in impunity for the guilty. In the dilemma on this point, which has been commented on, often in exaggerated terms, since ancient times, there is room for reasonable middle courses. In this field, as in many others, a proper sense of proportion must be the guiding rule.

In conclusion, I do not consider that there has been a violation of Article 6 para. 1 (art. 6-1) in this case.

DISSENTING OPINION OF JUDGE MARTENS JOINED BY JUDGE KURIS

I - INTRODUCTION

- A -

1. I have found it impossible to convince myself that in this case the United Kingdom has violated Mr Saunders's rights under Article 6 of the Convention (art. 6). Nor has the Court's judgment so persuaded me.

2. What is at stake is a knotty, but important question relating to a topic which is not only very controversial but also appears prone to arousing rather strong emotions.

Assume that the "right to silence" and the "privilege against self-incrimination" are not absolute (see paragraphs 7 - 12 below) but - like other rights implied in Article 6 (art. 6) - allow for limitations; assume, further, that such limitations cannot be taken into account unless they are in accordance with the law, pursue a legitimate aim and are proportionate to that aim[1]; then the question becomes: Are these requirements fulfilled in the present case?

3. Unlike the majority, I have come to the conclusion that this question is to be answered in the affirmative. In order to elucidate that opinion I find it necessary to start with some general considerations with respect to both immunities in issue.

- B -

4. In its judgment of 8 February 1996 in the case of John Murray v. the United Kingdom (Reports of Judgments and Decisions 1996-I, p. 49, para. 45) the Court has proclaimed that the notion of a fair procedure under Article 6 of the Convention (art. 6) comprises two immunities: the "right to remain silent" and the "privilege against self-incrimination".

The wording of this paragraph in the John Murray judgment - especially if compared to that in paragraph 44 of the Funke v. France judgment of 25 February 1993 (Series A no. 256-A, p. 22, para. 44) - clearly suggests that, in the Court's opinion, two separate immunities are involved. From a conceptual point of view it would, however, seem obvious that the privilege against self-incrimination (= roughly speaking, the right not to be obliged to

[1] See the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, para. 57; and my concurring opinion in the De Geouffre de la Pradelle v. France judgment of 16 December 1992, Series A no. 253-B.

produce evidence against oneself) is the broader right, which encompasses the right to silence (= roughly speaking, the right not to answer questions).

The present judgment makes it less certain that the Court really makes a distinction. I will come back to that aspect of the present judgment later on (see paragraph 12 below). Here it suffices to note that in my opinion two separate, but related, rights are involved, of which the privilege against self-incrimination, as I have just indicated, is the broader one.

5. In paragraph 45 of the John Murray judgment the Court further noted that these rights are not specifically mentioned in Article 6 (art. 6). Of course it was, moreover, aware of the fact that the Universal Declaration ignores both rights and that the International Covenant on Civil and Political Rights only contains "the right not to be compelled to testify against himself or to confess guilt" (Article 14 para. 3 (g)). It nevertheless felt entitled to hold as indicated in paragraph 4 above on the ground that these two immunities "are generally recognised international standards". Thus it furnished, albeit subsequently, both some motivation for and clarification of a similar finding in paragraph 44 of the above-mentioned Funke judgment, a finding which has been widely criticised as being unmotivated and unclear.

6. In paragraph 45 of the John Murray judgment the Court even ventured to go into the difficult and highly controversial question of the rationale of these two immunities. It said that:

> "By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (art. 6)."

- C -

7. In the John Murray case I belonged to the majority. As the Court noted, what was at stake in that case was whether these two immunities were absolute. I was - and I still am - convinced that this question was rightly answered in the negative. Consequently, I found it neither necessary nor opportune to express my disagreement in respect of the Court's observation that these two immunities "lie at the heart of the notion of fair procedure". I now do: I feel that this high-strung qualification - which is repeated in paragraph 68 of the present judgment - is somewhat exaggerating the weight of both rights, more particularly that of the privilege against self-incrimination.

8. I think that, historically, both rights must be seen as the very negation of the old, inquisitorial notion that a confession is an indispensable condition for conviction and therefore must, if need be, be extorted. These immunities thus served the purpose of preventing suspects from being

subjected to improper[2] physical or psychological pressure. I accept that both rights - and more especially the right to remain silent - still serve this purpose. Also today it remains necessary to protect suspects under custodial police questioning against such pressure.

I also accept that since there is a not negligible chance that statements made under pressure may be unreliable, the rationale of the immunities under discussion comprises - as the Court put it – the avoidance of miscarriages of justice.

Furthermore, I accept that there is a certain link between these immunities and the presumptio innocentiae as enshrined in Article 6 para. 2 (art. 6-2) in so far as they allow an accused not only to keep silent during police interrogation but also to refuse to answer questions of investigating or trial judges as well as to give evidence himself[3].

9. However, these rationales hardly justify the Court's qualification of these two immunities as lying "at the heart of the notion of fair procedure". I therefore suspect that other, not explicitly mentioned, rationales have contributed to that qualification.

In this context I note that legal writers and courts have frequently accepted a further rationale[4]. Its formulations vary, but they all essentially boil down to the proposition that respect for human dignity and autonomy requires that every suspect should be completely free to decide which attitude he will adopt with respect to the criminal charges against him. On this view it would be improper, because incompatible with such respect, to compel an accused to cooperate in whatever way in bringing about his own conviction. This rationale often seems to be the main justification for the broader privilege against self-incrimination.

The present judgment strongly suggests that the Court now has embraced this view. A first argument for this interpretation is that in the second sentence of paragraph 68 it repeats the rationale given in John Murray (see paragraph 6 above) but - by prefacing its quotation by the words "inter alia" - underlines that this is only part of the rationale of the two immunities. A

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[2] Term taken from paragraphs 45 and 46 of the John Murray judgment previously cited; if the Court's terminology in that judgment implies, as I think it does, that not every form of compulsion violates these rights, I agree; if, however, it implies that every form of compulsion is "improper" - which is a possible reading, the more so since it squares with the rationale to be discussed in paragraph 10 below – I disagree also on this point.

[3] See paragraph 47 of the above-mentioned John Murray judgment.

[4] I pass over - as in my view defective - such "rationales" as that these immunities prevent a suspect from being subjected to "cruel choices", or that it is unethical to compel somebody to collaborate in bringing about his own doom. Such "rationales" cannot justify the immunities under discussion since they obviously presuppose that the suspect is guilty, for an innocent suspect would not be subjected to such choices nor bring about his own ruin by answering questions truthfully! Innocent suspects are, therefore, not treated cruelly or unethically, whilst guilty suspects should not complain that society does not allow them to escape conviction by refusing to answer questions or otherwise hiding evidence.

second and still more telling argument is the stress laid, both in the last sentence of paragraph 68 and in paragraph 69, on the will of the accused: the Court now underlines that the privilege against self-incrimination is primarily concerned "with respecting the will of an accused person". That comes very near to the rationale outlined above which allies both immunities to respect due to human dignity and autonomy.

10. I do not, of course, deny that there is an element of truth in this view, but I am inclined to think that its weight should not be exaggerated. "Human dignity and autonomy" have an absolute ring, but in our modern societies it must remain possible to protect the community against forms of crime, the effective combating of which makes it imperious to compel (specific categories of) suspects to cooperate in bringing about their own conviction. I believe that especially the broader privilege against self-incrimination may be restricted by law in order to protect legitimate interests of the community. In my opinion it is, in principle, open to the national law to compel (specific categories of) suspects by threat of punishment to contribute passively or actively to the creation of evidence, even decisive evidence, against themselves. Suspects may be compelled to allow or even to cooperate in the taking of fingerprints, in the taking of blood for alcohol tests, in the taking of bodily samples for DNA tests or to blow in a breathalyser in order to ascertain whether they are drunken drivers. In all such and similar cases national legislatures are, in my opinion, in principle free to decide that the general interest in bringing about the truth and in bringing culprits to justice shall take precedence over the privilege against self-incrimination[5].

11. I fear that the impugned qualification of both immunities (as lying "at the heart of the notion of fair procedure") as well as the newly advanced rationale tying them to respecting "human dignity" imply that, in the Court's opinion, the privilege against self-incrimination is far more absolute than it is in my view.

But for paragraph 69 of the present judgment - to be discussed in paragraph 12 below - I would have added that this difference of appreciation might also be illustrated by the above-mentioned Funke judgment. What was at stake in that case was not so much the right to remain silent as the privilege against self-incrimination, for Funke refused to hand over (possibly) incriminating documents. The Commission had, in my opinion rightly, concluded that the legitimate interests of the community overrode the privilege[6], but the Court curtly refused to follow, which strongly suggests that in its opinion there was no room for a balancing exercise at all. It is worth while noting that the reasoning subsequently given in the John

[5] It remains, of course, for the European Court of Human Rights to control whether the restrictions of the privilege are in accordance with the law, pursue a legitimate aim and are proportionate to that aim - see paragraph 2 above.
[6] Loc. cit., pp. 33 et seq., paras. 63-65.

Murray judgment, namely its reliance on generally recognised international standards[7], does certainly not justify this decision: both under the Fifth Amendment to the United States Constitution[8] and under the case-law of the Court of Justice of the European Communities[9] there is a right to remain silent, but in principle not a right to refuse to hand over documents, let alone an absolute right to do so.

12. It is, however, at least open to doubt whether the Court in paragraph 69 of its present judgment has not - implicitly, without saying so openly, let alone without adducing cogent reasons for doing so - overruled Funke and essentially converted to the more restricted doctrine adopted inter alia by the Court of Justice of the European Communities. In this context it is significant that paragraph 69 refers to how the privilege against self-incrimination is understood "in the legal systems of the Contracting States and elsewhere". What is more important is that, whilst the first sentence of paragraph 69 seems to amalgamate the privilege against self-incrimination with the right to remain silent, the second sentence seems to imply that - contrary to Funke - the privilege does not comprise the power to refuse to hand over incriminating documents nor that to prevent the use of such documents, obtained under compulsion, in criminal proceedings.

I confess that I fail to see any other possible construction of paragraph 69 so that I presume that the above interpretation is correct. On that assumption two points should be made.

The first is that the merging of the conceptually broader right not to incriminate oneself with the right to remain silent reduces the scope of protection afforded to suspects. In my understanding of the privilege against

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[7] See paragraph 5 above.

[8] There is only a valid Fifth Amendment claim if, due to the particular facts and circumstances of the case, the "act of producing" is both "testimonial" and "incriminating". To be noted: when a custodian of a collective entity produces the corporate records and documents his act does not constitute testimonial self-incrimination; he is, however, protected from condemning himself by his own oral testimony. In the context of my dissent in the present case it is of interest to note one of the Supreme Court's arguments for this restrictive doctrine:
"We note further that recognising a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute `white-collar crime', one of the most serious problems confronting the law-enforcement authorities. `The greater portion of evidence in wrongdoing by an organisation or its representatives is usually found in the official records and documents of that organisation. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and State laws would be impossible.' ... If custodians could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organisations." (Braswell v. US 487 US 99 (1988)).

[9] See its Orkem/Commission judgment of 18 October 1989 (374/87 [1989] ECR I-3343 et seq.) and its Otto/Postbank judgment of 10 November 1993 (C-60/92 [1993] ECR I-5683 et seq.).

self-incrimination the Court retains the power to control national legislation and practice (see paragraph 10 above), which it has forfeited under its present doctrine.

The second point is that it is - to put it mildly - open to grave doubt whether the distinction made between the licence to use in criminal proceedings material which has "an existence independent from the will of the suspect" and the prohibition of such use of material which has been obtained "in defiance of his will" is a sound one. Why should a suspect be free from coercion to make incriminating statements but not free from coercion to cooperate to furnish incriminating data? The Court's newly adopted rationale does not justify the distinction since in both cases the will of the suspect is not respected in that he is forced to bring about his own conviction. Moreover, the yardstick proposed is not without problems: can it really be said that the results of a breathalyser test to which a person suspected of driving under the influence has been compelled have an existence independent of the will of the suspect? And what about a PIN code or a password into a cryptographic system which are hidden in the suspect's memory?

In sum: I cannot accept the new doctrine. I stick to the notion of the privilege against self-incrimination and the right to remain silent being two separate, albeit related, immunities which allow for limitations.

II - FURTHER DELINEATING THE ISSUE

- A -

13. It is high time, after these introductory remarks of a general nature, that I turn to the case at hand.

In doing so a first point to make is that it is of the utmost importance to keep in mind that in this case two stages should be clearly and carefully distinguished: at a first stage Mr Saunders had to appear before the inspectors of the Department of Trade and Industry (DTI) and only at a second stage did he have to face trial.

14. It is important to carefully distinguish both stages since Article 6 (art. 6) applies to the second stage only. The reason is that during the first stage Mr Saunders was not yet "`charged with a criminal offence', within the autonomous meaning of this expression in Article 6 (art. 6)"[10].

Although, strictly speaking, paragraph 67 of the Court's judgment only reminds us that neither Mr Saunders nor the Commission have alleged otherwise, its wording and especially the reference to the Deweer

[10] See the above-mentioned Funke judgment, p. 22, para. 44.

judgment[11] make it clear that a majority within the majority subscribes to this proposition.

15. Why was Mr Saunders not yet "charged" during this first stage? Simply because he had not yet received an "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence"[12].

Admittedly, a charge "may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect"[13]. It might, therefore, be argued that the inquiry before the DTI inspectors was a form of such "other measures" which: (1) in view of the purpose of the inquiry and the circumstances of the case, carried the implication that Mr Saunders, who was a director of Guinness at the time of the bidding, was suspected of having committed a criminal offence and (2) was affecting his situation of suspect as substantially as if a criminal investigation had been ordered against him.

There is, however, no merit in this argument since, just as there is no "charge" if the "official notification" is not given by "the competent authorities" - that is, by the competent prosecuting authorities -, so there is no "charge" if the "other measures" do not emanate from the competent prosecuting authorities. It is common ground, however, that the inquiry before the DTI inspectors – apart from being, essentially, investigative[14] - did not emanate from nor was taken over by the prosecuting authorities[15] (15).

16. It follows, firstly, that the fact that Mr Saunders was not entitled during this first stage to refuse to answer incriminating questions did not give rise to any violation of his rights under Article 6 (art. 6), especially not the right to remain silent or the privilege against self-incrimination.

Secondly, it follows that the essential issue in the present case is whether, where someone has made incriminating statements in the context of an inquiry during which he is obliged to answer any and all questions on pain

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[11] See note 15 below.

[12] See the Corigliano v. Italy judgment of 10 December 1982, Series A no. 57, p. 13, para. 34.

[13] Ibid.

[14] See the Court's judgment of 21 September 1994 in the case of Fayed v. the United Kingdom, Series A no. 294-B, pp. 47 et seq., paras. 61 and 62. See also paragraph 47 of the present judgment.

[15] See the Court's judgment of 27 February 1980 in the case of Deweer v. Belgium, Series A no. 35. In that case there was no official notification of impending prosecution. There was an inspection which was not performed within the context of the repression of crime. Nevertheless, as from a certain moment, the inspection got to a point that Deweer was deemed to be "charged" and that was when the procureur du Roi - the prosecuting authority par excellence – offered Deweer a means to avoid prosecution (see paragraph 46 in conjunction with paragraph 43). Similarly: application no. 4517/70, report of the Commission, Decisions and Reports 2, p. 21, paras. 68-72.

of fine or imprisonment, it would be compatible with the right to silence and the privilege against self-incrimination to allow the use of these statements as evidence against him at his trial[16] (16).

- B -

17. As already indicated in paragraph 2 above this is an important issue.

Our modern societies are "information societies", also in the sense that all of us, government agencies as well as citizens, to a large extent depend on various kinds of information, notably on information provided by (other) citizens. This applies in particular to government agencies: countless administrative decisions – whether imposing a duty or granting a favour - are based on such information. Information which simply cannot always be verified beforehand. One must, therefore, be able to rely on the veracity of such information. However, the old virtue of truthfulness has largely disappeared from modern morals. We have become "calculating citizens", putting our own interests above those of the community. No wonder that fraud in multiple forms is the bane of our societies: fraud in the field of taxes[17] and social security, fraud in the field of governmental subventions, fraud in the environmental sphere (illegal disposal of dangerous waste), fraud in the sphere of the arms trade and drugs (money laundering), fraud in the corporate sphere which may imply any species of the other frauds just mentioned. Frauds that are all the more tempting since our computerised world with its manifold cryptographic devices makes it much easier to effectively hide them[18].

It is generally accepted, therefore, that the mere threat of penal and other sanctions does not suffice, but that regular random as well as special proactive audits, inspections and investigations by highly specialised agencies are indispensable for effectively combating such frauds. The auditors not only need expert knowledge, they also cannot do without "appropriate special powers"[19]. That normally includes not only the right to

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[16] So far I am in agreement with the Court: see paragraph 67 of its judgment.

[17] See Aronowitz, Laagland and Paulides, Value-Added Tax Fraud in the European Union (Kugler Publications, Amsterdam, 1996) and the addendum thereto, which on a comparative basis gives data on the methods of combating this kind of fraud in the Netherlands, Belgium, the UK and Germany.

[18] "These shadow-accounts were maintained in special files, shielded by an impressive battery of passwords, software `bombs' and other defence mechanisms, and in theory at least could not be accessed through the main computer." Salman Rushdie, The Moor's Last Sigh. The committee which elaborated Recommendation No. R (95) 13 – see following note - noted "the expanding misuse by offenders of new telecommunication technologies and facilities, including cryptography".

[19] Term borrowed from Committee of Ministers Recommendation No. R (95) 13 concerning problems of criminal procedural law connected with information technology. See on this recommendation: P. Csonka, Computer Law and Security Report 1996 (vol.12),

inspect correspondence and files, to verify books and accounts, but also to require a certain degree of active cooperation[20] by those under investigation, to be informed of passwords and other secret information, to secure the handing over of documents and replies to questions. Normally, such rights are enforceable by threat of punishment.

Hence - and because, obviously, such audits may imperceptibly evolve into a criminal investigation - there is an inherent conflict with the right to silence and the privilege against self-incrimination.

18. This conflict may be solved in various ways and I think that we should realise that, even in a given legal system, different solutions may coexist.

Legislatures whose starting-point for such audits is the idea that ascertaining the truth is the weightier interest and, consequently, deny those under investigation the right to silence and the privilege against self-incrimination by making it an offence not to answer questions or otherwise to refuse cooperation, have several options concerning the use in evidence of the material thus acquired in subsequent criminal proceedings against those who have been under investigation. Sometimes it is provided that such material cannot be used in evidence at all; sometimes, that such material may only be used in evidence in case of a prosecution for perjury; sometimes it may also be used when a person who has been under investigation, in criminal proceedings against him, gives evidence which is incompatible with the material in question; sometimes the material may be used in evidence unless the trial court finds that under the circumstances such use would be unfair. The present case is an example of the latter type of solution: whilst subsections (1) and (3) of section 434 of the 1985 Act[21] leave no doubt that this provision concerns the type of investigation discussed in paragraph 16 above, subsection (5) of that provision explicitly allows the use in evidence of answers given to the DTI inspectors.

19. It follows that the main issue in the present case is whether subsection (5) of section 434 of the 1985 Act is incompatible per se with the right to silence or the privilege against self-incrimination. In view of what I have said in paragraph 17 above on audits it is difficult to deny that this issue is of general importance. The more so since holding that

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pp. 37 et seq. The introductory paragraph of this very helpful article shows that the problem has been studied within the framework of the OECD, the EU and the UN: the relevant reports and recommendations are quoted.

[20] See Chapter III of the appendix to Recommendation No. R (95) 13 referred to in the previous note. Paragraph 10 of that chapter stipulates that "the investigating authorities should have the power to order persons who have data in a computer system under their control to provide all necessary information to enable access to a computer system and the data therein". Paragraph 10 refers to the obligation to cooperate in a criminal procedure "subject to legal privileges or protection". I quote it here since it demonstrates the necessity of a specific duty of cooperation with regard to modern technology.

[21] See paragraph 48 of the Court's judgment.

subsection (5) of section 434 of the 1985 Act is incompatible per se with the right to silence or the privilege against self-incrimination may, as a matter of inherent logic, entail that (since no use may be made of the answers of those who have been under investigation by DTI inspectors) the very same prohibition affects facts discovered in consequence of such answers, such as the existence of a foreign bank account or of a secret file!

III - DECIDING THE ISSUE(S)

20. In trying to decide the main issue my starting-point is that I accept that the United Kingdom legislature - which in such matters should be allowed a certain margin of appreciation - could reasonably conclude that, where there are serious rumours of fraudulent management, the public interest of protecting society against such fraud demands that the truth comes out and that this justifies the system of inquiry as set up under the 1985 Act, a system under which officers and agents of the investigated company are obliged to cooperate with the DTI inspectors as laid down in section 434 of that Act, without enjoying the immunities under discussion.

21. A first point to make is that subsection (5) of section 434 of the 1985 Act presupposes that the answers are incriminating: it allows their use in evidence "against him".

A second point to make is that, although at first blush it may appear that what is at stake is not the right to silence, but rather the privilege against self-incrimination, further analysis suggests that both rights are equally implied: on this view what is in issue is whether it is permissible to use in evidence answers obtained in an investigation in respect of which the legislator has deliberately set aside both the right to silence and the privilege against self-incrimination (see paragraphs 17 and 18 above and the text of sections 434 and 436 of the 1985 Act).

22. I confess that I have hesitated somewhat in deciding the main issue. However, in the end I have come to the conclusion that I had not been persuaded that subsection (5) of section 434 of the 1985 Act is incompatible per se with the right to silence or the - broader - privilege against self-incrimination. It is only fair to say that in this decision the serious consequences of the latter view indicated at the end of paragraph 19 above have played their part.

As already indicated in paragraphs 7 to 12 above, I see neither right as absolute and I therefore fundamentally disagree with the sweeping statement in paragraph 74 of the Court’s judgment according to which: "The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings."

I accept that at the trial of a driver accused of driving when intoxicated the outcome of a breathalyser test to which he has been compelled may be

used in evidence against him, although it was obtained as a result of the legislature's setting aside the privilege against self-incrimination. Why, then, should it per se be inadmissible to use in evidence statements obtained as a result of a similar setting aside both of the right to silence and the privilege against self-incrimination?

As far as the rationale for these immunities is to provide the accused with protection against improper compulsion by the authorities and, thereby, to contribute to avoiding miscarriages of justice, their rationale does not require to hold that subsection (5) of section 434 of the 1985 Act is inadmissible per se: the impartiality of the DTI inspectors who merely seek to establish the truth, their professional qualities - generally speaking senior barristers and accountants -, the procedure before them, based as it is on natural justice under control of the courts, and, finally, the circumstance that those under investigation are given advance notice in writing of what is required of them and may be accompanied by their lawyers[22], seem to offer sufficient guarantees against improper physical or psychological pressure, whilst the power of the trial judge under section 78 of the Police and Criminal Evidence Act 1984 (PACE)[23] constitutes a further guarantee against unfairness arising from the inquisitorial nature of their inquiry as well as against any residual danger of miscarriage of justice.

Nor does the argument as to "human dignity and autonomy" compel one to conclude that the use in evidence of the answers given in the inquiry is per se inadmissible. As I have already indicated, this rationale is also to be relativised (see paragraph 10 above) and there is special justification for doing so in the present context. After all, under the hypothesis we are discussing, the answers are "incriminating" (see paragraph 21 above). That means that they to a certain extent disclose both the offence and its perpetrator. The question therefore comes down to asking whether that disclosure may be used when trying to bring that perpetrator to justice. Would it not be stretching the respect for his human dignity and autonomy - or, in the terminology of the Court, the respect for his will - too far to hold that the mere fact that he has made these "disclosing" statements in the context of an inquiry during which he enjoyed neither immunity necessarily results in making any and all use of such answers in evidence against him inadmissible per se?

I think that this question should at any rate be answered in the affirmative as making any and all use of such answers in evidence inadmissible per se would imply that there is a good chance that - although to a certain extent it had already been disclosed that he was the perpetrator - he would nevertheless go unpunished which - as I am prepared to accept[24] - in

[22] See paragraphs 42 and 43 of the Court's judgment.
[23] See paragraph of the Court's judgment.

practice would be the effect in a good many of these complicated fraud cases. I find it rather difficult to accept that once the result of the investigation is that such frauds are exposed, the right to silence and the privilege against self-incrimination should, nevertheless, make it to all practical purposes impossible that those whose responsibility is to a certain extent already disclosed are brought to justice and punished. This would lead to undermining the deterrent function of the criminal law in an area where it is particularly needed (see paragraph 17 above) and, furthermore, seriously offend the public's sense of justice.

23. There is one further argument against the admissibility of legislation of the present type that must be discussed separately since it apparently impressed the Commission and, accordingly, has been - successfully[25] - urged by counsel for the applicant in his pleadings before the Court.

24. I recall that we are discussing a two-tier type legislation, characterised by (1) establishing investigation proceedings in which those under investigation are obliged to cooperate with the investigators and to answer their questions without enjoying the two immunities under discussion (the first tier) and (2) making it, moreover, possible that answers obtained in those investigation proceedings be used in evidence at a subsequent trial against someone who has been under investigation (the second tier). The overall justification of this type of legislation is to protect the public against serious forms of fraud. That public interest justifies, firstly, setting aside the immunities under discussion in the first tier (the investigation stage) and, secondly, using the answers in the second tier (the trial stage) in order to make sure that, where the first tier has disclosed a perpetrator, that perpetrator gets his punishment in the second tier. Seen from the latter's viewpoint, however, the whole process nullifies the right to silence and the privilege against self-incrimination.

The argument to be discussed claims that if a two-tier process, which amounts to nullifying these immunities for the sake of protecting the public against serious forms of fraud, is to be condoned, such a two-tier process must also be accepted if on similar arguments – that is: on the argument that public interest in being protected against robbery, violence, murder, etc., outweighs these very same immunities - it is established in respect of ordinary crimes. Which would, obviously, be the end of the two immunities under discussion.

25. The argument is flawed in that it disregards a difference between the various forms of serious fraud and such ordinary crimes as robbery, violence and murder which in the present context is essential: in ordinary crime cases discovery of the crime nearly always precedes the investigation

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[24] I recall that Mr Saunders submitted that the prosecution case against him would have been in serious difficulties but for the use of the interview transcripts (see paragraph 83 of the Court's judgment).

[25] See the second sub-paragraph of paragraph 74 of the Court's judgment.

which, consequently, as a rule merely aims at establishing "who did it"; whilst in fraud cases the investigation generally has as its first and main purpose to establish whether or not a crime has been committed at all. This difference is essential since it explains why investigations into ordinary crimes as a rule come within the ambit of Article 6 (art. 6), whilst investigations in the field of possible fraud do not: those who are targeted by investigations of the former type as a rule ipso facto become "charged with a criminal offence" within the autonomous meaning of this expression in Article 6 (art. 6), whilst those who are under an investigation into possible fraud do not, and, therefore, may, without violation of Article 6 (art. 6), be denied the privileges under discussion in the first tier.

As to the second tier, where a charge has been brought so that Article 6 (art. 6) ipso facto applies always, there are sound arguments for distinguishing corporate fraud from other species of crime. First, there are important typological differences between the often well bred, highly sophisticated corporate wrongdoer and other criminals and, secondly, there is the essential feature which these forms of fraud share and sets them apart from other species of crime, namely that generally they are only detectable after an investigation of the type referred in paragraph 17 above and, moreover, may only be successfully prosecuted when the results of that investigation may be used in evidence against the wrongdoer (see paragraph 22 above).

For these reasons the argument fails. So does a similar objection from the applicant which puts the same argument in the form of alleged discrimination between "corporate criminals" who are deprived of the two immunities under discussion and "ordinary criminals" who enjoy them. The differences just mentioned imply that the cases are not similar, whilst the argument moreover fails to take into account the essential difference between the very urbane proceedings before the DTI inspectors and custodial police questioning.

26. My conclusion that subsection (5) of section 434 of the 1985 Act is not incompatible per se with the two immunities does not, of course, exempt me from examining whether under the specific circumstances of the case the use of the applicant’s answers to the DTI inspectors was nevertheless unfair. This is what the Government called the "factual issue".

In this respect I recall: (1) that under section 78 of PACE[26] it was for the trial judge to see to it that use of these answers did not have "such an adverse effect on the fairness of the proceedings that the court ought not to admit it"; (2) that the trial judge held two extensive voir dires on the subject at the end of which he gave rulings which demonstrated preparedness to use his powers under the provision as well as sensitivity for the interests of the defence - inter alia by excluding the evidence from the eighth and ninth

[26] See paragraph 52 of the Court's judgment.

interviews[27]; and (3) that the trial judge, in his summing-up - which was qualified by the Court of Appeal as "in the main a masterly exposition"[28] -, compared and contrasted what the applicant had said in court with his answers to the DTI inspectors, thereby demonstrating that he did not consider such use unfair[29]).

Apparently, Mr Saunders has not been able to persuade the Court of Appeal that the trial judge has been remiss in guarding the fairness of the proceedings. Nor have I been so persuaded.

In paragraph 72 the Court attaches much weight to the fact that at a certain stage of the trial - days 45 to 47 - the transcripts of the interviews[30] were read to the jury. I recall, however, that right from the beginning of the trial Mr Saunders's defence was essentially that, whatever fraud had taken place, he was innocent because ignorant. He maintained that he knew nothing about giving of indemnities or the paying of success fees and that he had not been consulted on such matters. The transcripts made it possible to refute this defence and were used to do so[31].

I therefore find that - whatever is the exact meaning of the Court of Appeal's rather approximate remark that the interviews "formed a significant part of the prosecution case"[32] (32) - Mr Saunders's answers to the DTI inspectors were only used in evidence against him, essentially, in order to demonstrate that the evidence which he had chosen to give at his trial was not reliable in that it was incompatible on certain points with those answers. I do not consider that to have been an unfair use of those answers.

27. For the above reasons I have voted against finding a violation of the applicant's rights under Article 6 (art. 6).

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[27] See paragraphs 28 and 29 of the Court's judgment.
[28] See paragraph 38 of the Court's judgment.
[29] See paragraph 33 of the Court's judgment.
[30] In paragraph 72 the Court says "part of the transcript", but paragraph 31 clearly implies that the complete transcripts were read which makes it understandable that the reading took three days. That the transcripts were read in full is the more probable since reading only parts could have been unfair towards the defence. However, if one accepts - as I do - that the transcripts were read in full, this reading can hardly be styled as "such extensive use".
[31] See paragraph 31 of the Court's judgment. I fail to understand why the Court, in paragraph 72 of its judgment seems to find it material that the prosecution "must have believed that the reading of the transcripts assisted their case in establishing the applicant's dishonesty". Of course they did and, as the outcome of the trial shows, rightly so. But what has that to do with the issue whether that reading made the trial unfair? Does the Court suggest that the prosecution had improper motives? Is that why it furthermore tries to base an argument on the prosecution's wish to avail itself also of the transcripts of the eighth and ninth interview, although in paragraph 29 of its judgment it has established that these transcripts had been ruled out by the trial judge? These uncertainties make the Court's reasoning on this important issue, which at any rate seems rather the more unpersuasive.
[32] See paragraphs 40 and 72 of the Court's judgment.