GOODWIN *v.* UNITED KINGDOM
(Freedom of expression, disclosure of journalist's source)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Ryssdal; *Judges* Bernhardt, Viljalmsson, Matscher, Walsh, Russo, Spielman, De Meyer, Valticos, Palm, Bigi, Freeland, Baka, Gotchev, Repik, Jambrek, Kuris, Lohmus)

Application No. 17488/90
27 March 1996

The applicant is a journalist in the United Kingdom who was telephoned on 2 November 1989 by a person who wished to remain anonymous, and who gave the applicant sensitive information regarding the financial status of a company, Tetra. The information appeared to have come from a corporate plan document that had been marked "Strictly Confidential", one copy of which had mysteriously disappeared from Tetra's premises on 1 November 1989. The applicant maintained that he had no reason to believe that the information supplied came from a stolen or confidential document and no theft was ever reported or proved. On 6 and 7 November 1989 the applicant telephoned Tetra, intending to check the information that he had received and to solicit comments from Tetra to assist him in the preparation of an article that he planned to write in *The Engineer* magazine.

On 7 November 1989 Tetra obtained a High Court interim injunction restraining the publishers of *The Engineer* from publishing any information derived from the corporate plan, arguing that the information was so sensitive that its publication could cause very serious damage to Tetra's business, including possible job losses. On 14 November 1989 the High Court ordered, pursuant to section 10 of the Contempt of Court Act 1981, that the applicant divulge the identity of his source, which the applicant refused to do. On 15 November 1989 the applicant and the applicant's employer were joined as defendant parties to the proceedings and on 17 November 1989 the High Court ordered that all persons who had received the corporate plan document should deliver up any copies that remained in their possession. On 22 November 1989 the High Court again ordered that the applicant divulge his source on the grounds that it was "necessary in the interests of justice", within the meaning of section 10 of the Contempt of Court Act 1981, because Tetra could only bring proceedings against the source if it knew the source's identity.

The applicant appealed to the Court of Appeal and to the House of Lords, arguing, *inter alia*, that the public interest in disclosure outweighed the public interest in preserving confidentiality and that, since he had not facilitated any breach of confidence, the disclosure order against him was invalid. Both the Court of Appeal and the House of Lords applied the balancing test and rejected the applicant's arguments. In addition, the House of Lords fined the applicant £5,000 for contempt of court in refusing to comply with the order to disclose his source.

The applicant complained to the Commission that his rights to freedom of expression under Article 10 of the Convention had been violated.

Held:

(1) by 11 votes to 7, that there had been a violation of Article 10 of the Convention;

(2) unanimously that the finding of a violation constitutes adequate satisfaction for the non-pecuniary damage suffered by the applicant;

(3) unanimously that the respondent State pay to the applicant, within three months, £37,595.50 in respect of costs and expenses, less 9,300 FF, together with simple interest at 8 per cent;

(4) unanimously that the remainder of the claim for just satisfaction be dismissed.

1. Was the interference "prescribed by law"?

(a) The relevant national law must be formulated with sufficient precision to enable a person concerned, if need be with appropriate legal advice, to foresee, to a degree that is reasonable in the circumstances, the consequences of a given action. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. [31]

(b) Having regard to two judgments to the House of Lords in this area of law, and bearing in mind that it may be difficult to frame the law in this area with absolute clarity, in this case the law was sufficiently well prescribed. [33–34]

2. Did the interference pursue a legitimate aim?

Protection of Tetra's rights was undoubtedly a legitimate aim. [35]

3. Was the interference "necessary in a democratic society"?

(a) Freedom of expression constitutes one of the essential foundations of democratic society. In particular, if journalists are forced to disclose their sources the role of the press in acting as a public "watchdog" could be seriously undermined because of the chilling effect that such disclosure would have upon the free flow of information. Accordingly, an order to disclose sources cannot be compatible with Article 10 unless there is an overriding requirement in the public interest. [39]

(b) As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. National authorities do possess a margin of appreciation in assessing whether there is a "pressing social need", but that margin is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. [40]

(c) Further, the restriction must be proportionate to the legitimate aim pursued. [40]

(d) The Court's task in exercising its supervisory function is to review, in the light of the case as a whole, whether the reasons adduced by the national authorities to justify interference are in fact "relevant and sufficient". [40]

(e) The order to disclose the applicant's source had to be viewed in the light of the fact that publication of the information had already been successfully enjoined. The injunction adequately protected many of

Tetra's legitimate interests and thus, in so far as the disclosure order merely sought to reinforce the injunction, it was not supported by sufficient reasons under Article 10(2). [42]

(f) Tetra did have further legitimate reasons for wishing disclosure, namely, preventing further dissemination of the confidential information (other than by publication), and terminating the employment of the source. However, the interest of a democratic society in a free press outweighs these residual interests of Tetra. [45]

(g) Notwithstanding the State's margin of appreciation, disclosure of the applicant's source was disproportionate in the circumstances. Thus, the order requiring disclosure and the fine for contempt of court both constitute violations of Article 10. [46]

M. I. Christie, Foreign and Commonwealth Office (Agent), Mr *M. Baker*, Q.C. (Counsel), Mr *M. Collon*, Lord Chancellor's Department (Adviser) for the U.K. Government.
Mrs *G. H. Thune* (Delegate) for the Commission.
Mr *G. Robertson*, Q.C. (Counsel), Mr *G. Bindman*, Solicitor, Mr *R. D. Sack*, Attorney, Mr *A. K. Hilker*, Attorney, Mr *J. Mortimer*, Q.C., (Advisers) for the applicant.

The following cases were referred to in the judgment:

1. JERSILD *v.* DENMARK (A/298): (1994) 19 E.H.R.R. 1.
2. SUNDAY TIMES *v.* UNITED KINGDOM (A/30): (1979) 2 E.H.R.R. 245.
3. SW *v.* UNITED KINGDOM (A/335–B): (1996) 21 E.H.R.R. 363.
4. TOLSTOY MILOSLAVSKY *v.* UNITED KINGDOM (A/316–B): (1995) 20 E.H.R.R. 442.

The following further cases were referred to in the concurring Opinion of Judge De Meyer:

5. OBSERVER AND GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153.

The following further cases were referred to in the Commission's Opinion:

6. HUVIG *v.* FRANCE (A/176–B): (1990) 12 E.H.R.R. 528.
7. KRUSLIN *v.* FRANCE (A/176–A): (1990) 12 E.H.R.R. 547.
8. MALONE *v.* UNITED KINGDOM (A/82): (1984) 7 E.H.R.R. 14.
9. SUNDAY TIMES *v.* UNITED KINGDOM (No. 2) (A/217): (1992) 14 E.H.R.R. 229.
10. App. No. 9228/80, Dec. 16.12.82, D.R. 30 p. 132.
11. App. No. 12090/86, Dec. 4.7.89, unpublished.

The Facts

I. *Particular circumstances of the case*

10. Mr William Goodwin, a British national, is a journalist and lives in London.

11. On 3 August 1989 the applicant joined the staff of *The Engineer*, published by Morgan-Grampian (Publishers) Ltd ("the publishers"), as a trainee journalist. He was employed by Morgan Grampian plc ("the employer").

On 2 November 1989 the applicant was telephoned by a person who, according to the applicant, had previously supplied him with information on the activities of various companies. The source gave him information about Tetra Ltd ("Tetra"), to the effect that the company was in the process of raising a £5 million loan and had financial problems as a result of an expected loss of £2,100,000 for 1989 on a turnover of £20,300,000. The information was unsolicited and was not given in exchange for any payment. It was provided on an unattributable basis. The applicant maintained that he had no reason to believe that the information derived from a stolen or confidential document. On 6 and 7 November 1989, intending to write an article about Tetra, he telephoned the company to check the facts and seek its comments on the information.

The information derived from a draft of Tetra's confidential corporate plan. On 1 November 1989 there had been eight numbered copies of the most recent draft. Five had been in the possession of senior employees of Tetra, one with its accountants, one with a bank and one with an outside consultant. Each had been in a ring binder and was marked "Strictly Confidential". The accountants' file had last been seen at about 3 p.m. on 1 November in a room they had been using at Tetra's premises. The room had been left unattended between 3 p.m. and 4 p.m. and during that period the file had disappeared.

A. *Injunction and orders for disclosure of sources and documents*

12. On 7 November 1989 Hoffmann J. of the High Court of Justice (Chancery Division) granted an application by Tetra of the same date for an *ex parte* interim injunction restraining the publishers of *The Engineer* from publishing any information derived from the corporate plan. The company informed all the national newspapers and relevant journals of the injunction on 16 November.

13. In an affidavit to the High Court dated 8 November 1989, Tetra stated that if the plan were to be made public it could result in a complete loss of confidence in the company on the part of its actual and potential creditors, its customers and in particular its suppliers, with a risk of loss of orders and of a refusal to supply the company with goods and services. This would inevitably lead to problems with Tetra's refinancing negotiations. If the company went into liquidation, there would be approximately 400 redundancies.

14. On 14 November 1989 Hoffmann J., on an application by Tetra, ordered the publishers, under section 10 of the Contempt of Court Act 1981,[1] to disclose by 3 p.m. on 15 November the applicant's notes from the above telephone conversation identifying his source. On the latter date, the publishers having failed to comply with the order, Hoffmann J. granted Tetra leave to join the applicant's employer and the

[1] "the 1981 Act"; see para. 20 below.

applicant himself to the proceedings and gave the defendants until 3 p.m. on the following day to produce the notes.

On 17 November the High Court made a further order to the effect that the applicant represented all persons who had received the plan or information derived from it without authority and that such persons should deliver up any copies of the plan in their possession. The motion was then adjourned for the applicant to bring this order to the attention of his source. However, the applicant declined to do so.

15. On 22 November 1989 Hoffmann J. ordered the applicant to disclose by 3 p.m. on 23 November his notes on the grounds that it was necessary "in the interests of justice", within the meaning of section 10 of the 1981 Act,[2] for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source to recover the document, obtain an injunction preventing further publication or seek damages for the expenses to which it had been put. The judge concluded:

> There is strong prima facie evidence that it has suffered a serious wrong by the theft of its confidential file. There is similar evidence that it would suffer serious commercial damage from the publication of the information in the file during the near future. It is true that the source may not be the person who stole the file. He may have had the information second hand, although this is less likely. In either case, however, he was trying to secure damaging publication of information which he must have known to be sensitive and confidential. According to the respondent, having given him the information he telephoned again a few days later to ask how the article was getting on. The plaintiff wishes to bring proceedings against the source for recovery of the document, an injunction against further publication and damages for the expense to which it has been put. But it cannot obtain any of those remedies because it does not know whom to sue. In the circumstances of this case, in which a remedy against the source is urgently needed, I think that disclosure is necessary in the interests of justice.
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> ... There is no doubt on the evidence that the respondent was an innocent recipient of the information but the NORWICH PHARMACAL case shows that this does not matter. The question is whether he had become mixed up in the wrongdoing ...
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> The respondent has sworn an affidavit expressing the view that the public interest requires publication of the plaintiff's confidential commercial information. Counsel for the respondent says that the plaintiff's previous published results showed it as a prosperous expanding company and therefore the public was entitled to know that it was now experiencing difficulties. I reject this submission. There is nothing to suggest that the information in the draft business plan falsifies anything which has been previously made public or that the plaintiff was under any obligation, whether in law or commercial morality, to make that information available to its customers, suppliers and competitors. On the contrary, it seems to me that business could not function properly if such information could not be kept confidential.

16. On the same date the Court of Appeal rejected an application by the applicant for a stay of execution of the High Court's order, but

[2] See para. 20 below.

substituted an order requiring the applicant either to disclose his notes to Tetra or to deliver them to the Court of Appeal in a sealed envelope with accompanying affidavit. The applicant did not comply with this order.

B. *Appeals to the Court of Appeal and to the House of Lords*

17. On 23 November 1989 the applicant lodged an appeal with the Court of Appeal from Hoffmann J.'s order of 22 November 1989. He argued that disclosure of his notes was not "necessary in the interests of justice" within the meaning of section 10 of the 1981 Act; the public interest in publication outweighed the interest in preserving confidentiality; and, since he had not facilitated any breach of confidence, the disclosure order against him was invalid.

The Court of Appeal dismissed the appeal on 12 December 1989. Lord Donaldson held:

> The existence of someone with access to a highly confidential information belonging to the plaintiffs who was prepared to break his obligations of confidentiality in this way was a permanent threat to the plaintiffs which could only be eliminated by discovering his identity. The injunctions would no doubt be effective to prevent publication in the press, but they certainly would not effectively prevent publication to the plaintiffs' customers or competitors.
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> ...
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> ... I am loath in a judgment given in open court to give a detailed explanation of why this is a case in which, if the full facts were known and the courts had to say that they could give the plaintiffs no assistance, there would, I think, be a significant lessening in public confidence in the administration of justice generally. Suffice it to say that the plaintiffs are *a*, and perhaps *the*, leader in their very important field, which I deliberately do not identify, with national and international customers and competitors. They are faced with a situation which is in part the result of their own success. They have reached a point at which they have to refinance and expand or go under with the loss not only of money, but of a significant number of jobs. This is not the situation in which the court should be or be seen to be impotent in the absence of compelling reasons. The plaintiffs are continuing with their refinancing discussions menaced by the source (or the source's source) ticking away beneath them like a time bomb. Prima facie they are entitled to assistance in identifying, locating and defusing it.
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> That I should have concluded that the disclosure of Mr Goodwin's source is necessary in the interests of justice is not determinative of this appeal. It does, however, mean that I have to undertake a balancing exercise. On the one hand there is the *general* public interest in maintaining the confidentiality of journalistic sources, which is the reason why section 10 was enacted. On the other is, in my judgment, a particular case in which disclosure is necessary in the general interests of the administration of justice. If these two factors stood alone, the case for ordering disclosure would be made out, because the parliamentary intention must be that, other things being equal, the necessity for disclosure on any of the four grounds should prevail. Were it otherwise, there would be no point in having these doorways.
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> But other things would not be equal if, on the particular facts of the case, there was some additional reason for maintaining the confidentiality

> of a journalistic source. It might, for example, have been the case that the information disclosed what, on the authorities, is quaintly called 'iniquity'. Or the plaintiffs might have been a public company whose shareholders were unjustifiably being kept in ignorance of information vital to their making a sensible decision on whether or not to sell their shares. Such a feature would erode the public interest in maintaining the confidentiality of the leaked information and correspondingly enhance the public interest in maintaining the confidentiality of journalistic sources. Equally, on particular facts such as that the identification of the source was necessary in order to support or refute a defence of alibi in a major criminal trial, the necessity for disclosure 'in the interests of justice' might be enhanced and overreach the threshold of the statutory doorway requiring some vastly increased need for the protection of the source if it was to be counterbalanced. Once the [plaintiffs] can get through a doorway, the balancing exercise comes into play.
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> On the facts of this case, nothing is to be added to either side of the equation. The test of the needs of justice is met, but not in superabundance. The general public interest in maintaining the confidentiality of journalistic sources exists, but the facts of this particular case add absolutely nothing to it. No 'iniquity' has been shown. No shareholders have been kept in the dark. Indeed the public has no legitimate interest in the business of the plaintiffs who, although corporate in form, are in truth to be categorised as private individuals. This is in reality a piece of wholly unjustified intrusion into privacy.
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> Accordingly, I am left in no doubt that, notwithstanding the general need to protect journalistic sources, this is a case in which the balance comes down in favour of disclosure. I would dismiss the companies' appeals. I can see no reason in justice for doing otherwise with regard to Mr Goodwin's appeals.

McCowan L.J. stated that the applicant must have been "amazingly naïve" if it had not occurred to him that the source had been at the very least guilty of breach of confidence.

The Court of Appeal granted the applicant leave to appeal to the House of Lords.

18. The House of Lords upheld the Court of Appeal's decision on 4 April 1990, applying the principle expounded by Lord Reid in NORWICH PHARMACAL CO. *v.* CUSTOMS AND EXCISE COMMISSIONERS [1974] Appeal Cases 133, a previous leading case:

> if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

Lord Bridge, in the first of the five separate speeches given in the applicant's case, underlined that in applying section 10 it was necessary to carry out a balancing exercise between the need to protect sources and, *inter alia*, the "interests of justice". He referred to a number of other cases in relation to how the balancing exercise should be conducted[3] and continued:

[3] In particular SECRETARY OF STATE FOR DEFENCE *v.* GUARDIAN NEWSPAPERS LTD [1985] A.C. 339.

... the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another. A question arising under this part of section 10 has not previously come before your Lordships' House for decision. In discussing the section generally Lord Diplock said in SECRETARY OF STATE FOR DEFENCE *v.* GUARDIAN NEWSPAPERS LTD [1985] A.C. 339, 350:

'The exceptions include no reference to "the public interest" generally and I would add that in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law, or, by reason of the extended definition of "court" in section 19 of the Act of 1981 before a tribunal or body exercising the judicial power of the state.'

I agree entirely with the first half of this dictum. To construe 'justice' as the antonym of 'injustice' in section 10 would be far too wide. But to confine it to the 'technical sense of the administration of justice in the course of legal proceedings in a court of law' seems to me, with all respect due to any dictum of the late Lord Diplock, to be too narrow. It is, in my opinion, 'in the interests of justice', in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.

Construing the phrase 'in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, *per se*, for a party seeking disclosure of a source protected by section 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.

Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question of whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating the weight to be attached to the importance of disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale.

It would be foolish to attempt to give a comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example, that his very

livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of illustration only and I emphasise once again that they are in no way intended to be read as a code ...

In the circumstances of the instant case, I have no doubt that [the High Court] and the Court of Appeal were right in finding that the necessity for disclosure of Mr Goodwin's notes in the interests of justice was established. The importance to the plaintiffs of obtaining disclosure lies in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing negotiations are still continuing. This threat ... can only be defused if they can identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to the identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source on the other hand is much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which is not counterbalanced by any legitimate interest which publication of the information was calculated to serve. Disclosure in the interests of justice is, on this view of the balance, clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure is satisfied ...

Lord Templeman added that the applicant should have "recognised that [the information] was both confidential and damaging".

C. *Fine for contempt of court*

19. In the meantime, on 23 November 1989, the applicant had been served with a motion seeking his committal for contempt of court, an offence which was punishable by an unlimited fine or up to two years' imprisonment.[4] On 24 November, at a hearing in the High Court, Counsel for the applicant had conceded that he had been in contempt but the motion was adjourned pending the appeal.

Following the House of Lord's dismissal of the appeal, the High

[4] s.14 of the 1981 Act.

Court, on 10 April 1990, fined the applicant £5,000 for contempt of court.

II. *Relevant domestic law*

20. Section 10 of the Contempt of Court Act 1981 provides:

> No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible; unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

21. Section 14(1) reads:

> In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.

22. In SECRETARY OF STATE FOR DEFENCE *v.* GUARDIAN NEWSPAPERS Lord Diplock considered the expression "interests of justice" in section 10 of the 1981 Act:

> The exceptions include no reference to the 'public interest' generally and I would add that in my view the expression 'justice', and interests of which are entitled to protection, is not used in a general sense as the antonym of 'injustice' but in a technical sense of the administration of justice in the course of legal proceedings in a court of law ...
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> [The expression 'interests of justice'] ... refers to the administration of justice in particular legal proceedings already in existence or, in the type of 'bill of discovery' case ... exemplified by the NORWICH PHARMACAL CO. *v.* CUSTOMS AND EXCISE COMMISSIONERS ... a particular civil action which it is proposed to bring against a wrongdoer whose identity has not yet been ascertained. I find it difficult to envisage a civil action in which section 10 of the [1981] Act would be relevant other than one of defamation or for detention of goods where the goods, as in the instant case and in BRITISH STEEL CORPORATION *v.* GRANADA TELEVISION ... consist of or include documents that have been supplied to the media in breach of confidence.

PROCEEDINGS BEFORE THE COMMISSION

23. In his application[5] of 27 September 1990 to the Commission, the applicant complained that the imposition of a disclosure order requiring him to reveal the identity of a source violated his right to freedom of expression under Article 10 of the Convention.

24. The Commission declared the application admissible on 7 September 1993. In its report of 1 March 1994,[6] the Commission expressed the opinion that there had been a violation of Article 10.[7]

[5] No. 17488/90.
[6] Art. 31.
[7] By 11 votes to 6.

The full text of the Commission's Opinion and of the dissenting Opinion contained in the report follows.

Opinion

A. *Complaint declared admissible*

43.* The Commission has declared admissible the applicant's complaint concerning the imposition of a disclosure order requiring him to reveal the identity of a source.

B. *Point at issue*

44. The issue to be determined is whether there has been a violation of Article 10 of the Convention.

C. *Article 10 of the Convention*

45. Article 10 of the Convention provides as relevant:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

D. *Article 10(1) of the Convention*

46. The applicant submits that the disclosure order made by the High Court and confirmed on appeal requiring him to reveal an anonymous source constituted an interference with his freedom of expression guaranteed by Article 10 of the Convention.

47. The Government does not dispute that the measure constituted such an interference.

48. The Commission finds that the disclosure order has a potential chilling effect on the readiness of people to give information to journalists such as the applicant. It also considers that the order in itself which exerts coercion on the applicant to reveal information which he received on a non-attributable basis constitutes a restriction on his right to freedom of expression. There are circumstances in which a "negative right" is to be implied in Article 10 not to be compelled to give information or to state an opinion.[8] Compulsion to provide

* The paragraph numbering from here to para. 70 in bold is the original numbering of the Commission's Opinion. Then we revert to the numbering of the court's judgment.—Ed.

[8] See *e.g.* No. 9228/80, Dec. 16.12.82, D.R. 30 p. 132 and No. 12090/86, Dec. 4.7.89, unpublished.

information as to a journalist's sources must in particular constitute a restriction in the capacity of a journalist freely to receive and impart information without interference by a public authority.

E. *Article 10(2) of the Convention*

49. Consequently, it must be determined whether the restriction was justified under Article 10(2) of the Convention in particular, whether it is "prescribed by law", pursues one or more of the aims enumerated and is "necessary in a democratic society" for that or those aims.

1. *"Prescribed by law"*

50. This expression has been interpreted by the Court, firstly, as requiring that the interference must have some basis in domestic law and secondly, as referring to the quality of the law.[9]

51. As regards the basis of the restriction in domestic law, the Commission recalls that the disclosure order issued by the High Court was confirmed on appeal by the Court of Appeal and the House of Lords, who were applying the substantive law concerning disclosure in light of the provisions of section 10 of the Contempt of Court Act 1981.

52. As regards the quality of the law, this requires it to be compatible with the rule of law in providing a measure of protection against arbitrary interferences. In this context, it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him.[10]

53. The applicant submits that the law permitting such orders is not formulated with sufficient precision to enable the individual to foresee with reasonable certainty when it will be applied. In particular, he argues that the criterion of the "interests of justice" in section 10 of the 1981 Act is insufficiently certain and renders impossible the task of a journalist in assessing whether or not he can give a source an undertaking not to reveal his identity.

54. The Government argues that the substantive law set out in the NORWICH PHARMACAL case[11] and the terms of section 10 of the 1981 Act were clear and enabled the applicant to foresee, to a reasonable degree, the consequences which the receipt of information from his source and his use of that information might entail.

55. The Commission recalls that in the SUNDAY TIMES case, the Court stated:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given

[9] See *e.g.* KRUSLIN *v.* FRANCE (A/176–A): (1990) 12 E.H.R.R. 547, paras. 26–27 and HUVIG *v.* FRANCE (A/176–B): (1990) 12 E.H.R.R. 528 paras. 54–55.

[10] See *e.g.* SUNDAY TIMES *v.* UNITED KINGDOM (A/30): (1979) 2 E.H.R.R. 245 and MALONE *v.* UNITED KINGDOM (A/82): (1984) 7 E.H.R.R. 14.

[11] See para. 37.

> case. Secondly, a norm cannot be regarded as a 'law', unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[12]

56. The Commission considers that the judgments in this case reveal that there exists a significant body of case law concerning the circumstances in which disclosure orders may be made. The particular privilege afforded to journalists by section 10 of the Contempt of Court Act 1981 is subject to four exceptions which are set out in concise terms without definition. The Commission notes the view of the House of Lords that in each case to which section 10 applies the judge has to engage in a balancing exercise and that it would be foolish to attempt to give a comprehensive definition as to how the balancing exercise should be carried out.

57. The Commission recalls however that the proceedings brought against the applicant involved one of the first cases which considered the scope of the immunity against disclosure given to journalists under section 10 of the 1981 Act in the context of the exception in "the interests of justice". Consequently, there may be some doubt as to whether at the time this area of the law had been developed with sufficient precision as to render it reasonably accessible and foreseeable. The Commission finds it unnecessary however to determine this issue given its conclusion below as to the necessity of the restriction.

2. *Legitimate aim*

58. As regards the purpose of the restriction, the Commission recalls that the House of Lords gave as its reason for its decision that the necessity in "the interests of justice" for the disclosure of the applicant's notes (which revealed the identity of the source) had been established. The Commission notes that the object of the litigation and of the order of disclosure was the protection of the rights of [Tetra] (who was under threat of severe damage to its business), a legitimate aim under Article 10(2).

3. *"Necessary in a democratic society"*

59. The question remains whether the interference was "necessary".

60. The Court has recently summarised the major principles of its

[12] See SUNDAY TIMES *v.* UNITED KINGDOM (A/30): (1979) 2 E.H.R.R. 245, para. 49.

case law on the "necessity" test in Article 10 of the Convention as follows:

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. While it must not overstep the bounds set, *inter alia*, in the 'interests of national security' or for 'maintaining the authority of the judiciary', it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.

(c) The adjective 'necessary', within the meaning of Article 10(2), implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The [Convention organs] are therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(d) The [Convention organs'] task, in exercising [their] supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that [their] supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what [they have] to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.[13]

61. The applicant submits that there was no pressing social need for the disclosure order having regard to the fact that interests of [Tetra] were protected from publication in the press by an injunction. He also argues that it was disproportionate given that [Tetra] had taken no other steps to attempt to trace the missing plan and that they were motivated rather to find and punish the source than to safeguard their business from potential damage.

62. The applicant emphasises that it is of paramount importance that journalists continue to receive from their sources information of interest to the public and that an order of disclosure cannot be justified in light of that consideration unless there is a real threat to national security, it is necessary to prevent a serious crime or concerns information which might lead to the acquittal of an innocent person.

[13] SUNDAY TIMES *v.* UNITED KINGDOM (No. 2) (A/217): (1992) 14 E.H.R.R. 229, para. 50.

The restriction was also disproportionate to the aim since it included the threat of up to two years' imprisonment for contempt of court.

63. The Government contends that an injunction was not sufficient to protect [Tetra] since the courts had found that the source was either malicious or grossly irresponsible, that the plan had been stolen and preventing publication by the media would not prevent disclosure to customers or to competitors. Further they point out that the courts gave full weight to the interests of the media, for example, Hoffmann J. attempted to find a compromise which would have allowed the applicant to maintain the confidentiality of the source by co-operating in passing on to the source the court order requiring him to deliver up the copy of the Corporate Plan. They submit that the interest of protecting journalistic sources cannot always outweigh all other interests. Since the domestic courts gave full and reasoned consideration to the competing interests at stake, their decision that disclosure was necessary in the circumstances of the case falls within the State's margin of appreciation.

64. The Commission considers that protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of "public watchdog" in a democratic society. If journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and, as a consequence, to inform the public about matters of public interest. The right to freedom of expression, as protected by Article 10 of the Convention, which includes the right to receive and impart information, therefore requires that any such compulsion must be limited to exceptional circumstances where vital public or individual interests are at stake. The question is therefore whether such exceptional circumstances existed in the present case.

65. The Commission recalls that [Tetra] sought disclosure of the identity of the source on the ground that it wished to prevent damage to its interests by any further publication of its contents. The House of Lords referred to the risk in dramatic terms, finding that the importance to the company of obtaining disclosure lay in the threat of severe damage to their business, and consequentially to the livelihood of their employees.

66. The Commission notes that an injunction was in effect restraining the publishers of *The Engineer*, the applicant and his employers from publishing any information derived from the Corporate Plan and that all national newspapers and relevant journals were informed of the injunction. It would then have been a contempt of court for any of these to have published that information and none has done so. The risk was that the source might have conveyed the information to customers or to competitors of [Tetra]. There is no evidence that this occurred.

67. The Commission does not find that the allegation that the company risked being wound up, with loss of livelihood to 400

employees if there was any further leak of information, was substantiated before the domestic courts. The Commission is not convinced that the giving of information as to possible losses and the intention of the company to seek further financing would have entailed the dire consequences predicted with regard to confidence of customers, suppliers and financing partners. In this context, the Commission notes that despite the continuing anonymity of the source [Tetra] has apparently suffered none of the harm adverted to in the proceedings in the domestic courts.

68. The Commission considers that the information which the applicant intended to publish is a type commonly found in the business press. While it may have derived from a possible breach of confidence (no theft of the document was reported or proved), it would not be an exaggeration to assume that much of the information provided by the press must be of similar origin.

69. In these circumstances, the Commission cannot find that there existed any exceptional circumstances which would have justified a departure to be made from the fundamental principle that the sources of the press should be protected from disclosure. Consequently, the restrictions which the disclosure order imposed on the applicant cannot reasonably be considered to have been "necessary in a democratic society".

Conclusion

70. The Commission concludes, by 11 votes to 6, that there has been a violation of Article 10 of the Convention.

Dissenting Opinion of Mr S. Trechsel joined by MM C. A. Nørgaard, F. Ermacora, G. Jörundsson, H. G. Schermers and J.-C. Geus

Contrary to the majority, I have come to the conclusion that the facts of the present case do not disclose a violation of Article 10 of the Convention.

I agree that there has been an interference with the applicant's rights under Article 10. This means that I agree with the basic principle that a journalist has a legitimate interest in protecting his sources of information.

However, this legitimate interest may enter into conflict with other legitimate interests such as the protection of private life, economic well-being, national security etc. In my view the majority of the Commission has given too much weight to the interest of a journalist in protecting his sources as an element of freedom of expression. I am of the opinion, having regard to the duties and responsibilities referred to in Article 10, that the protection of a journalist's sources is only justified in cases where the disclosure of confidential information clearly serves a public interest. In cases where, for example, an abuse of

office, corruption or any other perversion of private or public power is in issue, the journalist should not be compelled to disclose his sources.

In the present case the information concerned a corporation which employed approximately 400 persons and was engaged in a delicate financial operation designed to avert its economic collapse. Disclosure of these plans was likely to frustrate the efforts to save [Tetra].

The appearance of a leak in the corporation must be regarded as an extremely important issue for [Tetra]. On the other hand, I fail to see a public interest of any weight in having the kind of secret information in question published.

When weighing the applicant's interests in not disclosing his sources in order to be able to inform the public of confidential matters against the interest of [Tetra] to have the sources disclosed in order to avoid further harm being done, I find that the latter clearly outweighs the former. In my opinion, therefore, the interference with the applicant's freedom of expression could be regarded as necessary for the protection of the rights of others and for preventing the disclosure of information received in confidence.

JUDGMENT

I. *Alleged violation of Article 10 of the Convention*

27. The applicant alleged that the disclosure order requiring him to reveal the identity of his source and the fine imposed upon him for having refused to do so constituted a violation of Article 10 of the Convention, which reads:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

28. It was undisputed that the measures constituted an interference with the applicant's right to freedom of expression as guaranteed by Article 10(1) and the Court sees no reason to hold otherwise. It must therefore examine whether the interference was justified under Article 10(2).

A. *Was the interference "prescribed by law"?*

29. The Court observes that, and this was not disputed, the impugned disclosure order and the fine had a basis in national law,

namely sections 10 and 14 of the 1981 Act.[14] On the other hand, the applicant maintained that as far as the disclosure order was concerned the relevant national law failed to satisfy the foreseeability requirement which flows from the expression "prescribed by law".

30. The Government contested this allegation whereas the Commission did not find it necessary to reach a conclusion on this point.

31. The Court reiterates that, according to its case law, the relevant national law must be formulated with sufficient precision to enable the persons concerned—if need be with appropriate legal advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.[15]

32. The applicant argued that the interests-of-justice exception to the protection of sources under section 10 of the 1981 Act was not sufficiently precise to enable journalists to foresee the circumstances in which such an order could be made against them in order to protect a private company. By applying this provision to the present case, Lord Bridge had completely revised the interpretation given by Lord Diplock in SECRETARY OF STATE FOR DEFENCE *v.* GUARDIAN NEWSPAPERS. The balancing exercise introduced by Lord Bridge amounted to subjective judicial assessment of factors based on retrospective evidence presented by the party seeking to discover the identity of the source.[16] At the time the source provided the information, the journalist could not possibly know whether the party's livelihood depended upon such discovery and could not assess with any degree of certainty the public interest in the information. A journalist would usually be in a position to judge whether the information was acquired by legitimate means or not, but would not be able to predict how the courts would view the matter. The law, as it stood, was no more than a mandate to the judiciary to order journalists to disclose sources if they were "moved" by the complaint of an aggrieved party.

33. The Court recognises that in the area under consideration it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the interests of justice.

Contrary to what is suggested by the applicant, the relevant law did

[14] See paras. 20–21 above.

[15] See, *e.g.* TOLSTOY MILOSLAVSKY *v.* UNITED KINGDOM (A/316–B): (1995) 20 E.H.R.R. 442, para. 37.

[16] See para. 18 above.

not confer an unlimited discretion on the English courts in determining whether an order for disclosure should be made in the interests of justice. Important limitations followed in the first place from the terms of section 10 of the 1981 Act, according to which an order for disclosure could be made if it was "established to the satisfaction of the court that disclosure [was] necessary in the interests of justice".[17]

In addition, at the material time, that is when the applicant received the information from his source, there existed not only an interpretation by Lord Diplock of the interests-of-justice provision in section 10 in the case of SECRETARY OF STATE FOR DEFENCE *v.* GUARDIAN NEWSPAPERS but also a ruling by Lord Reid in NORWICH PHARMACAL CO. *v.* CUSTOMS AND EXCISE COMMISSIONERS (1973), to the effect that a person who through no fault of his own gets mixed up in wrongdoing may come under a duty to disclose the identity of the wrongdoer.[18]

In the Court's view the interpretation of the relevant law made by the House of Lords in the applicant's case did not go beyond what could be reasonably foreseen in the circumstances.[19] Nor does it find any other indication that the law in question did not afford the applicant adequate protection against arbitrary interference.

34. Accordingly, the Court concludes that the impugned measures were "prescribed by law".

B. *Did the interference pursue a legitimate aim?*

35. It was not disputed before the Convention institutions that the aim of the impugned measures was to protect Tetra's rights and that the interference thus pursued a legitimate aim. The government maintained that the measures were also taken for the prevention of crime.

36. The Court, being satisfied that the interference pursued the first of these aims, does not find it necessary to determine whether it also pursued the second.

C. *Was the interference "necessary in a democratic society"?*

37. The applicant and the Commission were of the opinion that Article 10 of the Convention required that any compulsion imposed on a journalist to reveal his source had to be limited to exceptional circumstances where vital public or individual interests were at stake. This test was not satisfied in the present case. The applicant and the Commission invoked the fact that Tetra had already obtained an injunction restraining publication,[20] and that no breach of that injunction had occurred. Since the information in question was of a type commonly found in the business press, they did not consider that

[17] See para. 20 above.
[18] See paras. 15, 18 and 22 above.
[19] See, *mutatis mutandis*, SW *v.* UNITED KINGDOM (A/335–B): (1996) 21 E.H.R.R. 363.
[20] See para. 12 above.

the risk of damage that further publication could cause was substantiated by Tetra, which had suffered none of the harm adverted to.

The applicant added that the information was newsworthy even though it did not reveal matters of vital public interest, such as crime or malfeasance. The information about Tetra's mismanagement, losses and loan-seeking activities was factual, topical and of direct interest to customers and investors in the market for computer software. In any event, the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential. This was not to deny Tetra's entitlement to keep its operations secret, if it could, but to contest that there was a pressing social need for punishing the applicant for refusing to disclose the source of the information which Tetra had been unable to keep secret.

38. The Government contended that the disclosure order was necessary in a democratic society for the protection of "the rights" of Tetra. The function of the domestic courts was both to ascertain facts and, in the light of the facts established, to determine the legal consequences which should flow from them. In the Government's view, the supervisory jurisdiction of the Convention institutions extended only to the latter. These limitations on the Convention review were of importance in the present case, where the national courts had proceeded on the basis that the applicant had received the information from his source in ignorance as to its confidential nature, although, in fact, this was something he ought to have recognised. Moreover, the source was probably the thief of the confidential business plan and had improper motives for divulging the information. In addition, the plaintiffs would suffer serious commercial damage from further publication of the information. These findings by the domestic courts were based upon the evidence which was placed before them.

It was further submitted that there was no significant public interest in the publication of the confidential information received by the applicant. Although there is a general public interest in the free flow of information to journalists, both sources and journalists must recognise that a journalist's express promise of confidentiality or his implicit undertaking of non-attributability may have to yield to a greater public interest. The journalist's privilege should not extend to the protection of a source who has conducted himself *mala fide* or, at least, irresponsibly, in order to enable him to pass on, with impunity, information which has no public importance. The source in the present case had not exercised the responsibility which was called for by Article 10 of the Convention. The information in issue did not possess

a public interest content which justified interference with the rights of a private company such as Tetra.

Although it was true that effective injunctions had been obtained, so long as the thief and the source remained untraced, the plaintiffs were at risk of further dissemination of the information and, consequently, of damage to their business and to the livelihood of their employees. There were no other means by which Tetra's business confidence could have been protected.

In these circumstances, according to the Government, the order requiring the applicant to divulge his source and the further order fining him for his refusal to do so did not amount to a breach of the applicant's rights under Article 10 of the Convention.

39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.[21]

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms.[22] Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under Article 10(2).

40. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established.[23] Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will

[21] See JERSILD *v.* DENMARK (A/298): (1994) 19 E.H.R.R. 1, para. 31.

[22] See, *inter alia*, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7–8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44–34.

[23] See SUNDAY TIMES *v.* UNITED KINGDOM (No. 2) (A/217): (1992) 14 E.H.R.R. 229, para. 50, for a statement of the major principles governing the "necessity" test.

weigh heavily in the balance in determining, as must be done under Article 10(2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.

The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

41. In the instant case, as appears from Lord Bridge's speech in the House of Lords, Tetra was granted an order for source disclosure primarily on the grounds of the threat of severe damage to their business, and consequently to the livelihood of their employees, which would arise from disclosure of the information in their corporate plan while their refinancing negotiations were still continuing.[24] This threat, "ticking away beneath them like a time bomb", as Lord Donaldson put it in the Court of Appeal,[25] could only be defused, Lord Bridge considered, if they could identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put the company in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source, Lord Bridge concluded, was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest in publication of the information.[26]

42. In the Court's view, the justifications for the impugned disclosure order in the present case have to be seen in the broader context of the *ex parte* interim injunction which had earlier been granted to the company, restraining not only the applicant himself but also the publishers of *The Engineer* from publishing any information derived from the plan. That injunction had been notified to all the national newspapers and relevant journals.[27] The purpose of the disclosure order was to a very large extent the same as that already being achieved by the injunction, namely to prevent dissemination of the confidential information contained in the plan. There was no doubt, according to Lord Donaldson in the Court of Appeal, that the injunction was effective in stopping dissemination of the confidential information by the press.[28] Tetra's creditors, customers, suppliers and competitors would not therefore come to learn of the information through the press. A vital component of the threat of damage to the company had

[24] See para. 18 above.
[25] See para. 17 above.
[26] See para. 18 above.
[27] See para. 12 above.
[28] See para. 17 above.

thus already largely been neutralised by the injunction. This being so, in the Court's opinion, in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of Article 10(2) of the Convention.

43. What remains to be ascertained by the Court is whether the further purposes served by the disclosure order provided sufficient justification.

44. In this respect it is true, as Lord Donaldson put it, that the injunction "would not effectively prevent publication to [Tetra's] customers or competitors" directly by the applicant journalist's source (or that source's source).[29] Unless aware of the identity of the source, Tetra would not be in a position to stop such further dissemination of the contents of the plan, notably by bringing proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage.

It also had a legitimate reason as a commercial enterprise in unmasking a disloyal employee or collaborator who might have continuing access to its premises in order to terminate his or her association with the company.

45. These are undoubtedly relevant reasons. However, as also recognised by the national courts, it will not be sufficient, *per se*, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure.[30] In that connection, the Court would recall that the considerations to be taken into account by the Convention institutions for their review under Article 10(2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press.[31] On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest.

46. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on the applicant

[29] See para. 17 above.
[30] See para. 18 above.
[31] See paras. 39 and 40 above.

journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of Article 10(2), for the protection of Tetra's rights under English law, notwithstanding the margin of appreciation available to the national authorities.

Accordingly, the Court concludes that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10.

II. *Application of Article 50 of the Convention*

47. Mr William Goodwin sought just satisfaction under Article 50 of the Convention, which reads:

> 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. *Non-pecuniary damage*

48. The applicant claimed £15,000 for non-pecuniary damage, on account of mental anguish, shock, dismay and anxiety which he felt as a result of the proceedings against him. For five months he was in constant peril of being sent to prison for up to two years as a punishment for obeying his conscience and for living up to his ethical obligations as a journalist. He still has to live with a criminal record since his crime of contempt of court would not be expunged by a finding of breach by the Court. He had been the subject of harassment by court process servers and his employers so as to comply with a court order against themselves, all of which was added to the pressure exerted on him by the threat of dismissal if he did not disclose the identify of his source.

49. The Government objected to the applicant's claim on the ground that the alleged adverse consequences stemmed from the fact that he was defying and disobeying the law. Even if he considered it a bad law, he should have obeyed the order to provide the information to the court in a sealed envelope, or, at the very least, he should have recognised his duty to obey the disclosure order when he lost his case in the House of Lords. Had he done so, the Government would have found it difficult to resist a claim for compensation for any adverse consequences.

50. The Court is not persuaded by the Government's arguments. What matters under Article 50 is whether the facts found to constitute a violation have resulted in non-pecuniary damage. In the present case,

the Court finds it established that there was a causal link between the anxiety and distress suffered by the applicant and the breach found of the Convention. However, in the circumstances of the case, the Court considers that this finding constitutes adequate just satisfaction in respect of the damage claimed under this head.

B. *Costs and expenses*

51. The applicant further sought reimbursement of costs and expenses totalling £49,500, in respect of the following items specified in his memorial to the Court of 1 March 1995:

(a) £19,500 for Counsel's fees for drafting the application to the Commission and written observations to the latter and the Court and for preparing and presenting the case before both the Commission and the Court;
(b) £30,000 for work by the applicant's solicitors in connection with the proceedings before the Commission and the Court.

To the above amounts should be added any applicable value added tax (VAT).

52. The Government, by letter of 11 April 1995, invited the applicant to provide a detailed breakdown of the costs.

53. In a letter of 25 July 1995 the applicant stated that the solicitors' work before the Commission and Court amounted to a total of 136 hours at, on average, £250 per hour for a senior partner and £150 per hour for an assistant solicitor.

54. On 30 August 1995, the Government submitted their comments on the breakdown provided by the applicant. Without prejudice to the Court's decision regarding the belatedness of the applicant's claim, they stated that they considered that the £19,500 sought in respect of Counsel was unreasonably high and that £16,000 would be reasonable.

As to solicitors' fees, the Government regarded the rates and the number of hours claimed as excessive. In their view 110 hours at an average rate of £160 per hour for a senior partner and £100 per hour for an assistant solicitor would be reasonable.

According to the Government's calculations, it would be reasonable to indemnify the applicant £37,595.50 (VAT included) for costs.

55. By letter of 1 September 1995, the applicant stressed that the number of hours and the hourly rates claimed were reasonable. He conceded that if the Court found in his favour, it could properly in its discretion award the amounts indicated by the Government. He stated that he would be prepared to settle for a total figure midway between the total figures contended for by the two parties.

56. The Court considers the sum conceded by the Government to be adequate in the circumstances of the present case. The Court therefore awards the applicant £37,595.50 (VAT included) for legal costs and expenses, less the 9,300 FF already paid in legal aid by the Council of Europe in respect of legal fees.

C. *Default interest*

57. 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 cent per annum.

For these reasons, THE COURT

1. *Holds* by 11 votes to 7 that there has been a violation of Article 10 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes adequate satisfaction for the non-pecuniary damage suffered by the applicant;
3. *Holds* unanimously:
   (a) that the respondent State is to pay to the applicant, within three months, in respect of costs and expenses £37,595.50 (thirty-seven thousand, five hundred and ninety-five pounds sterling and fifty pence) less 9,300 FF (nine thousand, three hundred French francs) to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (b) that simple interest at an annual rate of 8 per cent shall be payable from the expiry of the abovementioned three months until settlement;
4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

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

(a) joint dissenting opinion of Mr Ryssdal, Mr Bernhardt, Mr Thór Vilhjálmsson, Mr Matscher, Mr Walsh, Sir John Freeland and Mr Baka;
(b) separate dissenting opinion of Mr Walsh;
(c) concurring opinion of Mr De Meyer.

Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, Matscher, Walsh, Sir John Freeland and Baka

1. We are unable to agree that, as the majority conclude in paragraph 46 of the judgment, "both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10".

2. We of course fully accept that, as is recalled in paragraph 39 of the judgment, freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. We likewise agree that, as the paragraph goes on to say, "Protection of journalistic sources is one of

the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". It follows that an order for source disclosure cannot be compatible with Article 10 of the Convention unless it is justified under paragraph 2 of that Article.

3. Where we part company with the majority is in the assessment of whether, in the circumstances of the present case, such a justification existed—whether, in particular, the test of necessity in a democratic society should be regarded as having been satisfied.

4. As regards the test in domestic law, section 10 of the Contempt of Court Act 1981 clearly gives statutory force to a presumption against disclosure of sources. It provides[32] that no court may require disclosure "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

5. As explained by Lord Bridge in the House of Lords in the applicant's case, this statutory restriction operates unless the party seeking disclosure can satisfy the court that "disclosure is necessary" in the interests of one of the four matters of public concern that are listed in the section. In asking himself the question whether disclosure of the source of some particular information is necessary to serve one of the interests in question, the judge has to engage in a balancing exercise: he must start "with the assumptions, first, that the protection of sources is itself a matter of high public importance, secondly, that nothing less than necessary will suffice to override it, thirdly, that the necessity can only arise out of concern for another matter of high public importance, being one of the four interests listed in the section". Dealing with the way in which the judge should determine necessity where, as here, the relevant interests are those of justice, Lord Bridge said that it would never be enough for a party seeking disclosure of a source protected by the section to show merely that he will be unable without disclosure to exercise a legal right or avert a threatened legal wrong. "The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

6. Given that, as the judgment accepts, the protection of Tetra's rights by way of the "interests-of-justice" exception amounts to the pursuit of a legitimate aim under Article 10(2), the domestic law test of

[32] See para. 20 of the judgment above.

necessity strikingly resembles that required by the Convention. The domestic courts at three levels, on the basis of all the evidence which was before them, concluded that disclosure was necessary in the interests of justice. Factors which Lord Bridge stressed, in support of his conclusion that the judge at first instance and the Court of Appeal were right in finding that the necessity for disclosure in the interests of justice was established, were the following. First, the importance of Tetra of obtaining disclosure lay in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing operations were still continuing. This threat could only be defused if they could identify the source as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. Secondly, the importance of protecting the source was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest which publication of the information was calculated to serve. In this view of the balance, disclosure in the interests of justice was clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure was satisfied.

7. The judgment, on the other hand, concludes that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim.[33] In reaching this conclusion, the judgment first says (rightly), in paragraph 42, that the justifications for the disclosure order have to be seen in the broader context of the injunction which Tetra had already obtained. That injunction was effective in stopping dissemination of the confidential information by the press, so that a "vital component of the threat of damage to the company had ... already largely been neutralised ...". "This being so", the paragraph continues "... in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 ...".

8. To suggest, however, that the disclosure order may have "merely served to reinforce the injunction" is to misstate the case. As the decisions of the domestic courts explain, the purpose of the disclosure order was to extend the protection of Tetra's rights by closing gaps left by the injunction. The injunction bit upon the press, but it would not effectively prevent publication to Tetra's customers or competitors directly by the applicant's source (or that source's source). Without knowing the identity of the source, Tetra would not be in a position to

[33] See para. 46 above.

stop further dissemination of the contents of the plan by bringing proceedings against him for recovery of the missing document, for an injunction prohibiting further disclosure by him and for damages. Nor would they be able to remove any threat of further harm to their interests from a possible disloyal employee or collaborator who might enjoy continued access to their premises.

9. These further purposes served by the disclosure order are considered in paragraphs 44 and 45 of the judgment. The latter paragraph, after recalling that the considerations to be taken into account by the Convention institutions for their review under Article 10(2) "tip the balance of competing interests in favour of the interest of democratic society in securing a free press", asserts that Tetra's interests in securing the additional measures of protection sought through the disclosure order were insufficient to outweigh the vital public interest in the protection of the applicant's source.

10. No detailed assessment of these interests of Tetra's is, however, undertaken, and in the absence of it there is no satisfactory basis for the balancing exercise which the Court is required to undertake. The domestic courts were, in any event, better placed to evaluate, on the basis of the evidence before them, the strength of those interests, and in our view the conclusion which they reached as to where, in the light of their evaluation, the corresponding balance should be struck was within the margin of appreciation allowed to the national authorities.

11. We therefore conclude that neither the disclosure order nor the fine imposed upon the applicant for his failure to comply with it gave rise to a violation of his right to freedom of expression under Article 10.

Separate Dissenting Opinion of Judge Walsh

1. In his opening address to the Court, Counsel for the applicant stated that his client was "claiming no special privilege by virtue of his profession because journalists are not above the law". Yet it appears to me that the Court in its decision has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons. Should not the ordinary citizen writing a letter to the papers for publication be afforded an equal privilege even though he is not by profession a journalist? To distinguish between the journalist and the ordinary citizen must bring into question the provisions of Article 14 of the Convention.

2. In the present case the applicant did not suffer any denial of expressing himself. Rather has he refused to speak. In consequence a litigant seeking the protection of the law for his interests which were wrongfully injured is left without the remedy the courts had decided he was entitled to. Such a result is certainly a matter of public interest and the applicant has succeeded in frustrating his national courts in their efforts to act in the interests of justice. It is for the national courts to

decide whether or not the document in question was stolen. Yet the applicant claims that because he does not believe it was stolen he can justify his refusal to comply with the court order made in his case. His attitude and his words give the impression that he would comply if he believed the document in question had been stolen. He is thus setting up his personal belief as to truth of a fact which is exclusively within the domain of the national courts to decide as a justification for not obeying the order of the courts simply because he does not agree with the judicial findings of fact.

3. It does not appear to me that anything in the Convention permits a litigant to set up his own belief as to the facts against the finding of fact made by the competent courts and thereby seek to justify a refusal to be bound by such judicial finding of fact. To permit him to do so simply because he is a journalist by profession is to submit the judicial process to the subjective assessment of one of the litigants and to surrender to that litigant the sole decision as to the moral justification for refusing to obey the court order in consequence of which the other litigant is to be denied justice and to suffer damage. Thus there is a breach of a primary rule of natural justice—no man is to be the judge of his own cause.

Concurring Opinion of Judge De Meyer

I fully agree with the Court's conclusion that the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so violated his right to freedom of expression.

I would however observe that so did also, in my view, the earlier injunction against publication of the information,[34] since it was an utterly unacceptable form of prior restraint.[35]

Even if there had not been such an injunction the disclosure order and the ensuing fine would not have been legitimate. The protection of a journalist's source is of such a vital importance for the exercise of his right to freedom of expression that it must, as a matter of course, never be allowed to be infringed upon, save perhaps in very exceptional circumstances, which certainly did not exist in the present case.

[34] See paras. 12 and 42 of the judgment above.

[35] See my partly dissenting judgment on that matter in OBSERVER AND GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153.