

BRITISH VIRGIN ISLANDS
IN THE COURT OF APPEAL
CIVIL APPEAL NO.2 OF 1994
BETWEEN:

ARAWAK TRUST COMPANY LIMITED

Appellant

and

MICHAEL HOLDEN

(The Inspector of Banks and Trust Companies)

Respondent

Before: The Rt. Hon. Sir Vincent Floissac	Chief Justice
The Hon. Mr. C. M. Dennis Byron	Justice of Appeal
The Hon. Mr. Satrohan Singh	Justice of Appeal

Appearances: Mr. Charles Flint for the Appellant

1994: June 22, 23 & 24;

September 19

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The appellant is a Trust Company which is licensed as such under the Virgin Islands Banks & Trust Companies Act No. 9 of 1990 (the Act) and which manages the affairs of several business companies registered in the British Virgin Islands. The respondent is the Inspector of Banks and Trust Companies appointed as such under section 15 of the Act.

On 1st November 1993, the respondent obtained a search warrant authorising him to search the appellant's premises for documents relating to eight companies managed by the appellant. On the same day, the respondent executed the warrant and took possession of some of these documents. On the following day, the respondent returned the documents to the appellant. Whereupon the appellant sought and obtained leave to apply for- judicial review of the respondent's actions. On 13th December 1993 and pending the judicial review, the appellant filed an originating summons whereunder he applied for the following relief(inter alia):-

"1. Declarations that:

(1).....

(2) at all material times the Defendant has been under a statutory duty under section 24 of the Act not to disclose to any person not directly charged with the Supervision of licensees under the Act any information relating to the affairs of companies managed by the Plaintiff acquired by the Defendant in the performance of his functions;

(3) insofar as the Defendant has disclosed information relating to the affairs of companies managed by the Plaintiff acquired by the Defendant in the performance or purported performance of his functions to any other person not directly charged with the supervision of licensees under the Act the Defendant has acted unlawfully and in breach of his duties under the Act.....

4. An order that the Defendant do disclose by affidavit served on the Plaintiff solicitors:

(i) whether between 1st and 5th November 1993, he disclosed whether in writing or orally, any confidential information relating to the affairs of companies managed by the Plaintiff to any other person;

·(ii) the identity of any persons to whom such confidential information was disclosed;

(iii) the nature of such confidential information disclosed; identifying the company to which such information related;

exhibiting to such affidavit all documents in his possession containing such confidential information or containing or evidencing its disclosure to any other person."

The originating summons was supported by four affidavits which David Raworth (one of the appellant's directors) swore on 3rd,,and 6th November 1993 and on 7th and 13th December 1993 respectively. In his first affidavit, Raworth deposed that the respondent had informed him that the respondent had obtained the search warrant at the request of Touche Ross who are joint liquidators of BCCI (the Bank of Credit and Commerce International S.A.). In paragraph 6 of that affidavit Raworth stated:

"During the course of the meeting on 2nd November the Inspector made threats to send documentation which he had taken from the Intended Plaintiff's premises to Messrs Touche Ross, an international firm of accountants. I am informed by the Inspector that he obtained the search warrant in this case and took the documents from the Intended Plaintiff's premises pursuant to a written request from Messrs Touche Ross although I have not been afforded the opportunity of seeing the request. I also believe that the request concerns a civil suit which Messrs Touche Ross as liquidators of BCCI S.A. have issued outside this jurisdiction against various individuals although I have not been given details by the Inspector. The Inspector has stated to me that the documents seized from the Intended Plaintiff's premises which are corporate records and correspondence in respect of eight companies incorporated under the International Business Companies Ordinance 1984 and for which the Intended Plaintiff acts as registered agents may be material to the civil action."

In paragraph 12 of his third affidavit, Raworth deposed as follows:

"I am advised that the Inspector's lawyers voluntarily gave an undertaking on 5th November not to disclose at a hearing (against an undertaking by my lawyers to preserve the documentation in question) and the undertaking was extended on 9th November until further order. However, I am advised that the Inspector has refused to give any kind of undertaking in respect of disclosure during the period between his inspection of the files on the evening of 1st November and the first hearing herein on 5th November. Indeed, I am advised that the Inspector has refused to give any information regarding disclosure to third parties or lack of disclosure during this period. In the absence of such an undertaking I can only infer that the Inspector did make disclosure of confidential information contained in the documents during this period."

In reply to the appellant's first and second affidavits, the respondent **swore** an affidavit on 17th November 1993. In paragraphs 5, 21 & 22 of that affidavit, the respondent deposed as follows:

"5. In October 1993 I received a letter dated 6 October 1993, signed by Mr Stephen John Ackers, Joint-Liquidator of the Bank of Credit and Commerce International SA (In Liquidation) {hereafter referred to as "BCCI") which referred to worldwide criminal and civil proceedings against Shiek Khalid Salem Bin Mahfouz ("Mahfouz") and National Commercial Bank of Saudi Arabia (NCB). This letter sought the assistance of the British Virgin Islands authorities with

respect to information concerning eight companies which were registered in the British Virgin Islands by the Plaintiff. The liquidators of BCCI had reason to believe that these eight companies may be implicated in the movements of funds pursuant to an alleged fraud by Mahfouz and NCB on BCCI and Credit and Commerce American Holdings NV.....

21. In the discussion that followed I advised the nature of my enquiry and my findings to date which in essence firmly indicated that companies registered by the plaintiff, and to which the plaintiff acted as Corporate Secretary, may have been involved in dealings with parties related to BCCI and fraudulently obtained funds, which affair is currently subject to world wide civil and criminal proceedings.....

22. I categorically reject Mr. Raworth's statement in his affidavits that I spoke only of a civil suit or that the request was from a private civil litigant in the United Kingdom. I made it abundantly clear that this matter concerned Mahfouz and the BCCI scandal, and that proceedings were criminal as well as civil."

The respondent however refrained from admitting or denying that he had disclosed to anyone any information obtained as a result of the execution of the search warrant. Instead, he elected to resist the appellant's application for disclosure. He claimed and relied on public interest immunity and privilege against self-incrimination.

By judgment dated 14th January, 1994, Georges J. denied the claim to public interest immunity. The learned judge however upheld the claim to privilege against self-incrimination and on that ground dismissed the appellant's application for disclosure. The appellant is dissatisfied with the judgment and has appealed against it. The respondent in turn has filed a notice under R.S.C. Order 64 rule 8 contending that the judgment should be affirmed on the additional ground of public interest immunity.

Accordingly, the issues in this appeal are (1) whether suspicion of breach of the statutory duty imposed by section 24 of the Act is by itself a ground for an order for disclosure of the information demanded in paragraph 4 of the originating summons (2) whether the respondent is entitled to public interest immunity from disclosure of the said information and (3) whether the respondent is entitled to the benefit of the privilege against self-incrimination for the purpose of resisting the disclosure.

(1) Suspicion of breach

Section 24(1) of the Act provides as follows:

"Except for the purpose of the performance or exercise of his duties or functions under this Act or when lawfully required to do so by the

Court or under the provisions of any other law, neither the Inspector nor any person acting under his authority shall disclose any information relating to any application under the provisions of this Act, or to the affairs of a licensee or of a company managed by a licensee, which he has acquired in the performance or exercise of such duties or functions."

Subsection (1) of section 24 of the Act is patently ambivalent. It imposes a statutory duty upon the Inspector to refrain from disclosing the information referred to in the subsection. That statutory duty of course engenders a correlative statutory right in favour of licensees and companies with respect to non-disclosure. But the subsection simultaneously confers upon the Inspector a statutory right to disclose the information "for the purpose of the performance or exercise of his duties and functions." The Inspector's statutory duty and the licensee's correlative statutory right are circumscribed by the Inspector's statutory right. The limits of the

Inspector's statutory duty and the licensee's correlative right must therefore be determined by reference to the scope of the Inspector's duties and functions for the accommodation of the performance or exercise of which the Inspector's statutory right is granted. Those duties and functions are prescribed in section 15 (read in the light of the long title) of the Act.

The long title to the Act describes the Act as "An Act to provide for the

licensing and control of banking business and trust business and related matters." Section 15 of the Act provides as follows:

"(1) The Governor shall appoint a public officer to be known as the Inspector of Banks and Trust Companies for the purpose of ensuring the proper administration of this Act.

(2) The functions of the Inspector are-

(a) to maintain a general review of banking and trust company practice in the Virgin Islands;

(b) where he thinks fit or when required by the Governor, to examine by way of the receipt of regular returns or in such other manner as he thinks fit the affairs or business of any licensee carrying on business within or outside the Virgin Islands for the purpose of satisfying himself that all provisions of this Act are being complied with and that the licensee is in a sound financial position and is carrying on its business in a satisfying manner, and to report to the Governor the results of such examination;

(c) to assist in the investigation of any contravention of the laws of the Virgin Islands that he has reasonable grounds to believe has or *may* have been committed by a licensee or by any of its directors or officers;

(d) to examine accounts and audited annual accounts forwarded to him under section 17 and to report his findings to the Governor; and

(e) to examine, and make recommendations to the Governor with respect to, applications for licenses.

(3) In the performance of his functions under this Act and subject to the provisions of section 24, the Inspector may at all reasonable times

(a) have access to the books, records, vouchers, documents, cash and securities of any licensee;

(b) request any information, matter or thing from any person whom he has reasonable grounds to believe is carrying on banking business or trust business in the Virgin Islands in contravention of section 3; and

(c) demand of the authorised agent of the licensee any reasonable information or explanation for the purpose of enabling the Inspector to perform his functions under the Act.

(4) For the purpose of subsection (3), the Inspector shall have access to the name or title of an account of a depositor or a licensee or to the settler, name or title of a trust, only under the authority of any order of the court made on the ground that there is no other way of obtaining the information required by him.

(5) The Inspector, with the written approval of the Governor, may authorise in writing any other person to assist him in the performance of his functions under this Act.

(6) The Inspector *may*, if it appears to him that there is reasonable ground for suspecting that there is a contravention of this Act or that a contravention is likely, apply to a court for an order authorising him to take such action as he considers necessary in the interest of the depositors, the beneficiaries of any trust, or other creditors and to preserve any assets of the bank or trust company that is the subject of the order."

The functions specified in section 15(2) and therein assigned to the Inspector and the specific powers conferred upon the Inspector by section 15(3) are manifestly extensive. Those functions and powers are in fact mere illustrations of the Inspector's comprehensive control of the banking and trust businesses in the Virgin Islands and are intended to be performed or exercised for the purpose of fulfilling the legislative intention expressed in the long title to the Act.

To enable the Inspector to perform and exercise his statutory duties and functions and in particular the examinational function prescribed by section 15(2)

(b) and the investigatory function prescribed by section 15(2)(c), section 24 of the Act has conferred upon the Inspector a statutory right of disclosure. That statutory right is necessarily generous and exclusive. When exercised for the purpose for which it is intended, it operates to exclude the Inspector's statutory duty and the licensee's correlative statutory right with respect to non-disclosure. Consequently, a breach by the Inspector of his statutory duty under section 24 of the Act can only arise in a case where the Inspector has disclosed information beyond the purview of his statutory right of disclosure or for a purpose extraneous to the performance or exercise of his wide statutory duties and functions.

In the present case, the purported cause of action is a suspicion of breach by the respondent of his statutory duty under section 24 of the Act. The appellant relies on the respondent to disclose the information demanded in the originating summons in the hope that the appellant will thereby transmute his suspicion into fact. The question therefore arises as to whether disclosure can be ordered in those circumstances and for such a purpose.

In **Air Canada v Secretary of State** {No.2} (1983) 1 AER 910 at 916, Lord

Fraser said:

"The most that can usefully be said is that, in order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be 'deprived of the means of proper presentation' of his case: see *Glasgow Corp v Central Land Board* 1956 SC(HL) 1 at 18 per Lord Radcliffe. It will be plain that that formulation has been mainly derived from the speech of Lord Edmund-Davies in the *Burmah Oil* case [1979] 3 All E R 700 at 721, [1980] AC 1090 at 1129 and from the opinion of McNeill in *Williams v Home Office* [1981] 1 All ER 1151 at 1154. It assumes, of course, that the party seeking disclosure has already shown in his pleadings that he has a cause of action, and that he has some material to support it. Otherwise he would merely be 'fishing'."

Here, no "material" has been supplied in support of a legitimate cause of action. The only reasonable inference which may be drawn from the facts stated in Raworth's affidavits is that the respondent may have disclosed the confidential information to Touche Ross in their capacity as liquidators of BCCI. If the respondent did in fact disclose the confidential information to Touche Ross for the purposes indicated in paragraphs 5 & 21 of the respondent's affidavit (which the appellant is unable to refute), the respondent evidently did so for the purpose of the performance of his statutory examinational and investigatory functions. In that case, the disclosure fell within the wide ambit of the respondent's statutory right of disclosure and beyond the confines of the respondent's statutory duty and the appellant's correlative right with respect to non-disclosure.

In my judgment, disclosure of the information demanded in paragraph 4 of the originating summons should not be ordered merely on the basis of a suspicion of breach of a statutory duty and at a stage of the proceedings when the proven facts lend greater probability to the exercise of a statutory right to disclose the information than to the breach of a converse statutory duty to refrain from disclosure. An order for disclosure in these circumstances would amount to a judicial licence to embark on a fishing expedition which is not the intended purpose of such an order.

• (2) Public **interest** Immunity

It is now well established that a claim to public interest immunity from disclosure of documents or information under discovery or interrogatories is determined by balancing two conflicting public interests. The first is the public interest which demands disclosure on the ground that non-disclosure will frustrate or do harm to the administration of justice. The second is the public interest which demands non-disclosure on the ground that disclosure will do harm to the nation or the public service. The success of the claim to public interest immunity depends on whether the harm which will be done by disclosure outweighs or is greater than the harm which will be done by non-disclosure.

In **Rogers v Secretary of State for the Home Department** [1973] AC 388 at 406, Lord Pearson succinctly expressed the balancing exercise in these words:

"The Court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings."

The public interest on which the appellant relies is a public interest in the administration of justice in the broad sense. That public interest was introduced in the House of Lords in **X Ltd v Morgan-Grampian Ltd** (1990) 2 AER 1. There, the House was required to interpret the words "in the interests of justice" appearing in section 10 of the Contempt of Court Act 1981 which gives the court a judicial discretion to require a party to disclose the source of information contained in a publication for which he is responsible. Lord Bridge said (at p 9):

"It is, in my opinion 'in the interest of justice', in the sense in which this phrase is used in s 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."

Although the House concluded that that public interest prevailed in the particular circumstances of that case, Lord Bridge said (at p 9):

"It will not be sufficient, per se, for a party seeking disclosure of a source protected by s 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."

This dictum predicates that the party demanding disclosure has shown that he has a legal right or that a legal wrong to him is threatened and that without disclosure demanded, he will be unable to exercise the legal right or to avert the threatened legal wrong. In **X Ltd's Case**, the plaintiffs applied for an order requiring the defendants to disclose the source of confidential information which was evidently derived from the plaintiffs' stolen business plan and which the defendants had innocently obtained from the thief or tortfeasor. Disclosure was ordered on the ground (inter alia) of the defendants' involvement in the tortfeasor's tortious acts. Lord Bridge applied the dictum of Lord Reid in **Norwich Pharmacal Co v Customs & Excise Comrs** (1974) AC 133 at 175 where Lord Reid said:

"[The authorities] seem to me to point to a very reasonable principle that 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 concluded (at p 6) as follows:

"Just as the commissioners in the Norwich case were, in Lord Reid's phrase, 'mixed up' in the tortious acts of others from the moment they received the infringing goods tortiously imported, so the defendants here were 'mixed up' in the tortious acts of the source from the moment that Mr Goodwin in the course of his employment by the publishers received the confidential information tortiously disclosed. The argument against jurisdiction wholly fails."

In the present case, the appellant has not proved that he has any legal right C\ to exercise or any legal wrong to avert. To the extent to which the appellant relies on a legal right b way of a statutory right to non-disclosure, that legal or statutory

right is negated by the respondent's statutory right of disclosure. To the extent to which the appellant relies on a threatened legal wrong, no evidence has been adduced of any complicity on the part of the respondent and Touche Ross in any tortious activities against the appellant. For these reasons, the appellant is not entitled to invoke the public interest in the administration of justice in the broad sense.

By contrast, the respondent is entitled to invoke a rival public interest. That public interest is a public interest of the nation or the public service that departments and organs of central and municipal governments, the police force and statutory boards, authorities and entities should be in positions adequately, efficiently and effectively to perform their statutory and public duties, functions and responsibilities. This means that information essential to such performance should be transmissible with immunity from disclosure of its source and destination and without fear or danger of harassment, intimidation or involvement in litigation.

In **Rogers v Secretary of State for the Home Department** (supra), Lord Reid said (at p 401):

"I do not think that "the public service" should be construed narrowly. Here the question is whether the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties. If it is, then we are enabling the will of Parliament to be carried out."

In **D v NSPCC** (1977) 1 AER 589 at 597, Lord Diplock said:

"I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government. In *Conway v Rimmer* the public interest to be protected was the effective functioning of a county police force; in *Re D(infants)* the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded out children. In the instant case the public interest to be protected is the effective functioning of an organisation authorised under an Act of Parliament to bring legal proceedings for the welfare of children."

In **Makanjuola v Commissioner of Police** (1992) 3 AER 617 AT 622, Lord Donaldson M.R. said:

"The underlying public interest asserted was (one infers) in the

maintenance of an honourable, disciplined, law-abiding and uncorrupt police force. The protection of that public interest required that allegations of improper or criminal conduct by police officers should be investigated and appropriate action taken. To that end it was necessary that members of the public or other police officers should be encouraged to give any relevant information they had to the appropriate authority without fear of harassment, intimidation or use of any statement in any other proceedings. It was therefore desirable in the public interest that statements made to the appropriate authority investigating a complaint against a police officer should not be liable to be produced or disclosed or referred to in any proceedings save disciplinary or criminal proceedings officially brought against the police officer in question. To hold otherwise would frustrate the statutory purpose of an investigation under the Act."

In the present case, the statutory purpose with which we are concerned is the control of the banking and trust businesses in the Virgin Islands. Such control is necessary in the public interest in the preservation of the local and international integrity and reputation of these businesses. The respondent's statutory examination and investigatory functions constitute an integral part of that control.

The effective performance of these examination and investigatory functions must necessarily involve the Inspector's communication and exchange of information to and with persons who can assist him in his examinations and investigations. It is manifestly in the public interest of the nation and the public service that the Inspector should be able to impart and exchange such information in the performance of those functions and should be able to do so without fear or danger of involving himself or the supplier or recipient of the information in any undesired litigation or interrogation. In the present case, the harm which will be done to the nation and the public service by compulsory juridical disclosure of such information

and of the identities of the suppliers or recipients thereof is greater than the harm which may be done to the administration of justice by non-disclosure. For this reason, I would hold that in this case, the public interest which demands non disclosure in the interest of the nation or the public service overrides the public interest which demands disclosure in the interest of the administration of justice. In my judgment, the learned judge should have affirmed the respondent's claim to public interest immunity from disclosure of the information demanded in paragraph 4 of the originating summons.

(3) Self-incrimination

In civil proceedings and for the purpose of resisting or impugning an order of the Court for disclosure of documents or information under discovery or interrogatories or for the purpose of depriving an applicant of his right to such order, a party (the respondent) may invoke his common law privilege against self incrimination and his concomitant right to silence. The respondent is entitled to rely on that privilege and concomitant right (1) where there is a real or

substantial danger that the documents sought or required to be disclosed, produced or inspected under discovery or the facts or information sought or required to be supplied under interrogatories will be used in evidence in criminal proceedings against the respondent or his or her spouse and where the respondent is not adequately protected from such danger either by statute or by an order of the Court or by an undertaking by the prosecution or by other means and (2) where no statute expressly or by necessary implication denies the respondent the benefit of that privilege and concomitant right.

In **Rank Film Ltd v Video Information Centre** (1982) A C 380 at 446, Lord Fraser said:

"The privilege itself is well established in English law. It is impliedly recognised by section 14 (1) of the Civil Evidence Act 1968, and authority for its existence is to be found in *Triplex Safety Glass Co. Ltd. v Lancegaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395 and *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 2)* [1978]

A.C. 547."

In **Istel Ltd v Tully** (1993) AC 45 at 67, Lord Lowry said:

"What one needs to recognise, as my noble and learned friends have done, is that the privilege against self-incrimination must prevail, unless it has been modified or abrogated by statute. And, even if one can see that the reasons which caused the principle to be adopted provide no *logical* justification for such an immunity as the privilege against producing incriminating documents which came into existence before any dispute arose, that immunity holds sway."

I

If the respondent has disclosed information contrary to section 24(1) of the Act, he has committed an offence under section 24 (3) which provides that:

"Any person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding \$2,500 or to imprisonment for a term not exceeding one year or both."

For this reason and in the absence of adequate protection against incrimination, the respondent should be entitled to resist disclosure of the information demanded and to do so by invoking his privilege against self incrimination. Counsel for the appellant however submits that the respondent cannot rely on the privilege because there is no real or substantial danger that the respondent will be prosecuted and that the information disclosed will be used in criminal proceedings against the respondent. Counsel contends in effect that any such danger has been eliminated by the fact that the respondent claims to have acted throughout on the advice of the Attorney General and by the fact that the Attorney General (who is also the Director of Public Prosecutions) represented the respondent in the proceedings in the High Court. In paragraph 30 of his Skeleton Arguments, Counsel opines as follows:

"If there was any reasonable likelihood that the Attorney General might be minded to bring a prosecution against the Inspector on the basis of the contents of his affidavit, then the Court should have enquired of the Attorney General whether the Crown would indeed prosecute the Inspector if his affidavit disclosed a breach of section 24 of the Act. The Attorney General could have given an undertaking not to make use of the affidavit for this purpose. By this means the learned judge should have ensured that the Inspector was protected against any risk of being prejudiced by being required to swear an affidavit."

In **Istel Ltd v Tully** (supra), the House of Lords refused to allow the defendant to rely on his privilege against self-incrimination because the House considered that the defendant was adequately protected by a letter from the Crown Prosecution Service and by an order of the Court. Here, there is no such protection. In any case, I am mindful of certain observations of Lord Fraser and

Lord Wilberforce in **Rank Film Ltd v Video Information Centre** (supra). There, Lord Fraser said (at p 446):

"The appellants do not dispute the existence of a privilege against compulsory self-incrimination by discovery or by answering interrogatories. But their counsel presented a powerful argument to the effect that the privilege ought not to be upheld in its simple form, to the serious prejudice of the appellants, when the object of the privilege could be attained in a way that would not prejudice the interests of parties such as the appellants. It could be attained, according to the argument, by compelling the discovery and answers, while relying on a restriction, express or implied, against the use of information thereby disclosed in any prosecution of the party making the discovery.

At one stage, the argument seemed to depend on the possibility that the court which ordered the discovery might place an express restriction on the use of any information disclosed. In my opinion, any argument on that basis must be rejected. A restriction by the court making the order would, no doubt, be effective to bind the party who obtained the order, but it can hardly be suggested that it would be effective to prevent a prosecutor in the public interest from using, or an English criminal court (a fortiori a Scottish criminal court if a conspiracy were prosecuted in Scotland) from admitting the information in evidence at a trial. All evidence which is relevant is prima facie admissible in a criminal trial, although the trial judge has a discretion to exclude evidence which, though admissible, has been obtained by unfair

means from the accused after commission of the offence: *Reg. v. Sang*

[1980] A.C. 402. But it is obvious that a person who has to rely on an exercise of judicial discretion is in a less secure position than one who, by relying on the privilege, can avoid providing the information in the first place."

Lord Wilberforce said (at p 443):

"Moreover, whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart

from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: it is not only a possible but probably the intended result. The party from whom disclosure **is asked** is entitled, on established law, to be protected from these consequences."

In the present case, we do not know what and how much information the respondent has disclosed and to whom he has disclosed such information. In his enthusiasm in his investigations and examinations, the Inspector may have

exceeded his statutory right of disclosure. In that case, the disclosure demanded "may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character". In these circumstances, the respondent has elected to invoke his privilege against self-incrimination. In the absence of a protective court order or undertaking by the prosecution, the respondent should not be denied that privilege.

I would therefore affirm the learned judge's decision on the grounds that (1) the appellant is not entitled to disclosure of the information demanded. (2) the respondent is entitled to claim public interest immunity from such disclosure and [3) the respondent is entitled to resist such disclosure by relying on his privilege against self-incrimination. I would accordingly dismiss the appeal with costs to the respondent.

SIR VINCENT FLOISSAC

I concur.

C.M. DENNIS BYRON

JUSTICE OF APPEAL

I concur.

SATROHAN SINGH

JUSTICE OF APPEAL