British Steel Corporation v. Granada Television Limited[1]

Stephen Beaglehole*

May a journalist withhold from a court the identity of his source of information? That was the question in the case which is the subject of this paper. Here Stephen Beaglehole examines the use by the English courts of a form of discovery to require Granada Television to disclose the identity of its sources of information for a programme on the British Steel Corporation.

I. INTRODUCTION

On 30 July 1980 the House of Lords decided that the television company Granada Television Limited (Granada) was not entitled to its claim of immunity, based on the public interest, to keep one of its sources of information confidential.[2] That source was a present or past employee of the British Steel Corporation (the B.S.C.), a nationalised industry. Granada had received from this source 250 confidential B.S.C. documents, many of which were marked "secret" or "confidential".[3] These documents were high level internal memos and reports, relating to financial and commercial facts which the B.S.C. did not wish to be made public, along with other matters concerned with productivity and industrial relations. They further revealed that part of the reason for the B.S.C.'s immense losses was mismanagement, and that there was significant government intervention taking place.

The documents were used to form the basis of a television programme which was broadcast on Monday, 4 February 1980, and entitled "The Steel Papers". Both the High Court and the Court of Appeal (unanimously) found in favour of the B.S.C., requiring Granada to disclose the source of information. In all, nine

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1 [1980] 3 W.L.R. 774 (H.C.); 797 (C.A.); 818 (H.L.).

2 The decision applies to all forms of the newsmedia: ibid. 791, per Sir Robert Megarry; ibid. 805, per Lord Denning M.R.; ibid. 847, per Lord Fraser.

3 No definition was given for these terms in the case. They were documents which the B.S.C. had no intention of publishing, being reports and memos circulating at the most senior level of management within the corporation. Their high degree of sensitivity was clearly illustrated when they were published.

judges heard the case, but only Lord Salmon decided that the public interest in protecting Granada's source was paramount to the interest of the B.S.C. in discovering the identity of their (ex-) employee.

A. *The Facts*

In January 1980, Britain was in the middle of a prolonged strike in the steel industry. The "World in Action" section of Granada was preparing a report on it. On 27 January, Granada received the 250 documents from a source within the B.S.C., 27 of which were used in the programme which was broadcast the following Monday. Included in the programme was an interview with the Chairman of the B.S.C., who had been notified the day before that Granada had the documents.

A writ and notice of motion was issued two days later by the B.S.C.[4] On 28 February, Granada, by agreement, handed the documents over to the B.S.C. However, the documents were found to have been "mutilated",[5] and any reference to the identity of the source was missing. As a result the B.S.C. claimed an order that a bill of discovery be executed against Granada for an affidavit setting out the name of the source. Granada refused to comply. This was the only ground on which the B.S.C. relied. As Sir Robert Megarry stated: "The essential facts in this motion are relatively simple, though I cannot say the same for the law".[6]

B. *The Reaction*

There was a vehement reaction to all three decisions. The decision in the House of Lords[7]

> . . . demonstrated, regrettably not for the first time in recent years, that they [the Law Lords] have little understanding of the way society operates in reality. Their personal detachment from society — except for the society of the law — has led to their divorce from the realities of the democratic system.

Granada, meanwhile, said it would take the case to the European Commis-

4 The B.S.C. has originally claimed an injunction against further breaches of confidence and copyright; an order for delivery up of the document and copies thereof; and an inquiry as to damages, and an account of profits. These claims were dropped after delivery of the documents.

5 This was the rather emotive term used by the judges to describe the removal of corners, which had identifying numbers, from the documents. Most judges considered it was a gross interference with B.S.C's property rights, and that it constituted an obstruction of justice: supra n.1, 816, per Watkins L.J. It is submitted that Granada were justified in eliminating the identifying marks, as otherwise a journalist's right to keep his source secret would be prejudged. A return of the documents had been ordered.

6 Supra n.1, 780. *The Times,* London, United Kingdom, 18 August 1980, p.2: In the event the B.S.C. discontinued pursuing Granada because they discovered by their own research who the source was. The person was no longer an employee of the corporation. It is interesting to note that Granada were unable to comply with the order to supply the name of the informant, as only a free-lance researcher had the information. And indeed the B.S.C. accepted "that Granada has supplied such information as it is able to do in order to comply with the orders made against it".

7 *The Times,* London, United Kingdom, 31 July 1980, p.15.

sion on Human Rights;[8] and the Freedom of the Press (Protection of Sources) Bill[9] was introduced in the House of Commons on 9 May, following the Court of Appeal decision.

C. *The Approach*

This note will examine the judgments in the case. The B.S.C. used a bill of discovery, seeking to compel Granada to disclose the identity of their source. This was the only basis of the B.S.C.'s action, and if they had failed to establish it, Granada would have won the case. Granada put up two defences. After demonstrating that a bill of discovery had never been used against the newsmedia before, their principal defence was that the newsmedia had been treated as being in a special position by the courts. This was evidenced, inter alia, by the so-called "newspaper rule", the cases on privilege, and a statute. Thereby they were entitled to immunity based on the public interest. This was available at the discretion of the judge.

Granada's second defence was that to disclose the source would result in self-incrimination. This defence was secondary, and was dismissed by all the judges who considered it.[10]

Finally, the consequences of the bill of discovery's equitable nature will be examined.

II. CHANCERY BILL OF DISCOVERY

A. *Introduction*

This method of discovery has rarely been used.[11] It is an equitable remedy which permits the discovery of essential information for the commencement of an action. That information is usually the name of the person to be sued. The bill is used where A wishes to take action against a party who he claims has infringed his rights, but he does not know who that party is. However B knows, but he will not reveal the name because, he claims, to do so would be detrimental to his own interests. As a result, A institutes discovery against B for that information.

8 Ibid. 4 August 1980, p.1. The relevant article of the European Convention on Human Rights and Fundamental Freedoms is no. 10. It is cast in broad terms and covers the freedom of expression. It includes the "right to receive and impart information". (see infra n.182).

9 Ibid. 10 May 1980, p.8.

10 The defence was described as "far-fetched" (supra n.1, 853, per Lord Fraser), while Lord Salmon was "surprised that it was argued on behalf of Granada" (supra n.1, 846). Lord Denning stood alone in holding that the defence was not available to a corporation (supra n.1, 802). The principle criticism of the defence was that Granada had admitted all its part in the events, and so the risk of prosecution for handling stolen goods, and conspiracy to steal and defraud, would not be increased by the disclosure of the informant's name (supra n.1, 785, 813, 816-7, 827, 829, 846, 853, 854).

11 Its source appears to have been in the Civil Law, and in particular Justinian's Digest, X, Tit. 4. "[I]t is stated that in order to bring a noxal action the prospective plaintiff is entitled to identify the owner of the guilty slave, and is entitled to a view of the entire body of slaves for this purpose": "Finding out who to sue", P. Prescott (1973) 89 L.Q.R. 482.

"At the very least the person possessing the information [B] would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information".[12] A has to satisfy the court that he cannot obtain the information from another source;[13] that he has "a real grievance" against the unknown party;[14] and that that party has committed a wrongdoing.

Most of the authorities for this action are old. The first case of interest is *Moodalay* v. *Morton*.[15] The plaintiff had obtained an East India Company franchise to supply Madras with tobacco for ten years. But Moodalay alleged that a second franchise had been wrongfully granted. He wanted to know whether the persons who had granted the second franchise were acting as servants of the company. If they were, then the plaintiffs intended to sue the company. Although he was after information other than names,[16] the plaintiff could not commence the action unless the bill of discovery was granted. It was.

In *Orr* v. *Diaper*,[17] the plaintiffs were cotton and thread manufacturers. They discovered that the defendants were innocently shipping the same type of products, but of inferior quality, which bore the forged labels of the plaintiffs. The plaintiffs sought the names of the consignors, to proceed against them. Apparently, at this stage of the action's development, the plaintiff had to show that he could take an action against the defendant for his part in the wrongdoing,[18] probably to ensure that the defendant was more than a "mere witness".[19] The order was granted because, "it would be a denial of justice if means could not be found . . . to assist the plaintiffs".[20]

The most important development was the House of Lords decision in *Norwich*

12 *Norwich Pharmacal* v. *Customs and Excise* [1974] A.C. 133, 178.

13 Ibid. 199.

14 Supra n.1, 826, per Lord Wilberforce.

15 (1785) 1 Bro. CC 469; 28 E.R. 1245.

16 Supra n.12, 185.

17 (1876) 4 Ch.D.92.

18 Whether this was a requirement is not absolutely certain. The shippers in *Orr* v. *Diaper* were innocent of the unknown party's alleged wrongdoing. At the most, Orr could have had an injunction against Diaper, but that would ordinarily be true. In *Norwich* (supra n.12), Lord Cross (195) and Viscount Dilhorne (185) stated that the plaintiffs could have had an action for the injury suffered. Lord Cross (196) goes on to cite the case of *Post* v. *Toledo* 11 N.E.Rep. 540 (1887) which itself cited *Orr* v. *Diaper* for the proposition that discovery may be had for the purpose of ascertaining the persons against whom the plaintiff may bring a suit, even although he does not allege he has an action against, or intends to sue, the persons who are the defendants in the dicovery proceedings. As Lord Kilbrandon concludes at page 204, the state of the reports does not make it clear whether the plaintiffs alleged they had a cause of action, or whether they intended to sue the defendants.

19 A "mere witness" is one who is an "outsider" or "volunteer" or "bystander"; he is outside the action, or relation of the parties: supra n.12, 181.

20 *Orr* v. *Diaper* (1876) 4 Ch.D. 92, 96.

Pharmacal v. *Customs and Excise.*[21] The plaintiffs held an exclusive patent to a chemical, and they discovered that unknown parties were importing the chemical. The defendants were required by law[22] to deal with all such imports on arrival, and had a list of the importers' names. To protect their patent, the plaintiffs sought discovery against the defendants for the names of the importers. On the basis of *Orr* v. *Diaper,* the court held[23] that the statute did not require the defendants to withhold the information; that the documents were neither secret nor confidential, but ordinary commercial documents which were not privileged;[24] that disclosure would be unlikely to hamper the performance of their duties; and that honest importers would not resent disclosure. In finding for the appellants, the House officially extended the action to cases where there was no possible action[25] against the immediate defendant:[26]

> . . . 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 wrongdoer.

Finally, in *R.C.A. Corporation* v. *Reddingtons Rare Records,*[27] the plaintiffs sought an injunction against the defendants to prevent them selling "pirated" copies of the plaintiff's records, and further, they requested a bill of discovery against the defendants for the name of the source of these copies which were

21 Supra n.12. In New Zealand the bill of discovery was recently considered in *Lascelles* v. *Wellington Newspapers Limited* [1981] 1 N.Z.L.R. 440. The defendant to a defamation action sought discovery against a non-party (Broadcasting Corporation of New Zealand) of a television programme, its transcript, and other documents, records and recordings. One of the defendant's grounds for application was a bill of discovery. However, Davison C.J. held that discovery could not be granted because, as one of the requirements laid down in *Norwich Pharmacal,* the defendants were not after the identity of a wrongdoer, but merely seeking to bolster their plea of qualified privilege (447). The Chief Justice considered, obiter, that if they had pleaded the defence of justification, the defendants might have succeeded in their application (448). It is submitted that even if they had pleaded justification, the defendants would have failed because they would still not be after the identity of a wrongdoer. And, further, the Broadcasting Corporation would still not be a defendant to an action instituted by the defendants in the present action. If the wish is to obtain the evidence, the issue of a subpoena duces tecum is sufficient (448). There has been no New Zealand case dealing with journalists' immunity, other than those under the newspaper rule: *Isbey* v. *NZBC* (No. 2) [1975] N.Z.L.R. 237; *Brill* v. *Television Service One* [1976] 1 N.Z.L.R. 683; *Broadcasting Corporation of New Zealand* v. *AHI Ltd.* [1980] 1 N.Z.L.R. 163.

22 Customs and Excise Act 1952 (U.K.).

23 Supra n.12, 175, 182, 189-190, 198-199, 207.

24 There was some difference of opinion in the court as to whether the documents were confidential. Lord Reid considered that they were not (175); Viscount Dilhorne was uncertain — at first he thought that they were not (188), but then he concluded they were certainly not "highly confidential" (189); Lord Cross concurred with Viscount Dilhorne (198); while Lord Kilbrandon concluded that public policy did not require that they be kept confidential (207).

25 However, supra n.18, Norwich must surely have been able to obtain an injunction against the Customs to prevent further imports: per Lord Kilbrandon, 201.

26 Supra n.12, 175 per Lord Reid. It is illogical to make the success of the action dependent upon the possibility of an action against the defendant (195); per Lord Cross of Chelsea

27 [1974] 1 W.L.R. 1445.

infringing their copyright. The bill was granted on the authority of the *Norwich* case.

B. *High Court*

Whether the bill was appropriate on the facts of the case was not argued before the Vice-Chancellor.[28] Its applicability appears to have been accepted by Granada, who relied on the defences of immunity and self-incrimination. It was not until the House of Lords that Granada argued that the bill could not be applied to the newsmedia.

C. *Court of Appeal*

Granada challenged the bill, arguing that it was limited to cases in which the injured party wanted to actually sue the wrongdoer; and that the B.S.C. had not made it clear that it would be doing so.[29] This was rejected as an unnecessary requirement. The remedy would be granted if it enabled justice to do done.[30] There is some support for this in the *Norwich case*,[31] but it is contrary to previous authority.[32] Lord Denning held that the bill would only be used in exceptional circumstances, where there was an insufficient remedy against the wrongdoer.[33]

Lord Justice Templeman held that the B.S.C. had established wrongdoing on the part of its employee, which could not be justified. It did not reveal misconduct by the B.S.C. which there was a public interest in disclosing.[34] Further, the B.S.C. would be denied justice unless discovery was granted,[35] and it was therefore necessary. Granada claimed that the B.S.C. abandoned a sufficient remedy against them in damages. But the Lord Justice held that damages were "irrelevant and plainly inadequate",[36] as the B.S.C. staff were inhibited from free and frank discussions, and innocent employees were under suspicion. Also the B.S.C. wished to prevent further wrongdoing. Lord Justice Watkins did not discuss the bill, but assumed that it applied.

D. *House of Lords*

The majority in the House held that the bill clearly applied. They considered that the test in *Norwich* was more easily satisfied on these facts, because Granada did not get mixed up "through no fault of their own".[37] Granada obtained the information in the knowledge that they were secret documents belonging to the B.S.C. While in *Norwich* the defendants were innocent of the importers' illegal

28 Supra n.1, 781-782.
29 Supra n.1, 802, per Lord Denning; supra n.1, 807, per Templeman L.J.
30 The bill applies "whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice": supra n.1, 807, per Templeman L.J.
31 Supra n.12, 173, 178.
32 See II, D., 2.
33 Supra n.1, 805.
34 Supra n.1, 806-807: *Initial Services* v. *Putterill* [1968] 1 Q.B. 396.
35 Supra n.1, 807.
36 Idem.
37 Supra n.1, 824, per Lord Wilberforce.

activities. Lord Wilberforce concluded that it would only be in rare circumstances "that the aggrieved person would have, and could demonstrate, a real interest in suing the source".[38]

The dissenting judge, Lord Salmon, distinguished the test from the *Norwich* case on two bases: first on the facts — "it is plain . . . that the Customs have no similarity to the press",[39] so the case was of no assistance to the B.S.C.; secondly — "[t]he Customs by giving [Norwich] Pharmacal the names of the importers could not be doing anything which could prejudice themselves or the public",[40] and that was not so here.

1. *Bill of discovery never been used against journalists*

Granada argued that a bill of discovery never had been, and never should be, used against a newspaper. For support they cited two cases where a bill of discovery might have been used, but was not. In *Prince Albert* v. *Strange*,[41] copies of etchings made by Prince Albert were stolen. They were to be published, along with a catalogue of works by Queen Victoria, without their consent. An action to restrain their publication was sought for and obtained. In *Abernethy* v. *Hutchinson*,[42] a student at a medical school sent his notes of a surgeon's lectures for publishing. The surgeon obtained an injunction to prevent further publication. In neither case was a bill of discovery used in the proceedings, or mentioned by the judges.[43]

Lord Fraser described this as Granada's "more formidable reason [why] discovery has never been used against the press in this way",[44] even although leaks of information have often occurred. Lord Wilberforce explained the absence of the bill in these cases on the basis that it was the right to restrain publication on which they were decided: "[n]o further investigation of the precise means of abstraction was called for or would have served any purpose."[45] This is despite Lord Eldon being reported in *Abernethy* as saying that he had no right to compel the defendants to disclose the source of information.[46]

It is submitted that the bill would have served a purpose in those cases. In *Prince Albert,* where the confidence existed between the Prince and the publisher, why should he be satisfied with suing the immediate defendant? Surely it would have been vital to know who within the royal household was responsible for taking the prints, so that there would be no atmosphere of suspicion. And in *Abernethy,* the surgeon knew that the pupil was still attending his class, and there might be a similar feeling of suspicion. In both cases there would be "a real interest in suing

38 Ibid. 826.
39 Ibid. 843.
40 Ibid. 844.
41 (1849) 1 H. & Tw. 1; 47 E.R. 1302. This case was recently used in *Attorney-General* v. *Jonathan Cape Ltd.* [1976] Q.B. 752, as a basis to justify the court's power to protect confidential Cabinet documents from disclosure.
42 (1825) 1 H. & Tw. 28; 47 E.R. 1313.
43 These two cases were not referred to in this context in the High Court or the Court of Appeal in *British Steel.*
44 Supra n.1, 850.
45 Supra n.1, 825; 850, Lord Fraser concurring.
46 Ibid. 824, per Lord Wilberforce; 850, per Lord Fraser.

the source".[47] These cases are an indication therefore that the bill might not be available against newspapers.[47a]

Granada also relied on s.19 of the Newspaper Stamp Act 1836 to show that a bill of discovery could not be used against newspapers. This enabled a bill of discovery to be filed in order to discover the name of the printer, publisher or proprietor of a newspaper, or of any matters relating to the printing or publishing of a newspaper for a defamation action. This they argued was evidence that a bill was not available against a newspaper, as specific legisltion was necessary to create an exception. However, Lord Wilberforce argued that the statute supported (presumably in general) the right to file a bill, and that the purpose of the section was to remove the privilege against self-incrimination.[48] For this, it is submitted rather tenuous, interpretation his Lordship cited *Hillman's Airways Ltd.* v. *S.A. d'Editions Aéronautiques Internationales*.[49] But, du Parcq J. stated in that case that, on the contrary, the right under the old Act was an exception under the general rule of not allowing such interrogatories.[50]

In the conclusion, Lords Wilberforce and Fraser acknowledged that "[t]he cases are indecisive and only support an argument *a silentio*".[51] Lord Fraser stated that the absence of use "while certainly striking, can readily be explained otherwise than on the ground that discovery was not available as a remedy".[52] Further, Lord Wilberforce hesitated to press his opinion that the statute was dealing with self-incrimination saying that "the statute seems to have been passed for a different purpose".[53]

It is submitted that Granada more correctly stated the position, when it argued that the cases and the Act can be ". . . taken to reflect an opinio juris that no such proceedings could be brought".[54] The Act is making an exception to the general rule, on the authority of du Parcq J. In both of the cases there were good reasons for discovery; and Lord Eldon in *Abernethy* actually stated that he could not compel the disclosure of the defendant's source of information. This appears to be clear support for Granada's argument that discovery could not be used against a newspaper.

2. *Inappropriateness of the bill of discovery*

There is further support for Granada's arguments in the judgments in this case, and in the case law. Firstly, the information in question in the previous cases was

47 Ibid. 826, per Lord Wilberforce.
47a See Part II.D.2.
48 Ibid. 825.
49 [1934] 2 K.B. 356. All that was said was that the Judicature Act of 1873 left the right under the 1836 Act unaffected, but altered the form and procedure by which the right might be enforced.
50 Ibid. 360: "It is true that the Courts do not as a rule allow interrogatories to be asked to enable persons to carry on actions against some one else, but Parliament has provided that that general rule shall not apply in this particular instance".
51 Supra n.1, 826, per Lord Wilberforce.
52 Ibid. 850.
53 Ibid. 826.
54 Ibid. 824.

not confidential. In *Moodalay,* a franchise had been granted and would be on the company's books. In *Orr* v. *Diaper,* the names of the consignors were on contracts and in registers belonging to the shipping firm, which had not been given in secrecy. In *Norwich,* the names of the importers were not confidential,[55] because they were on ordinary commercial documents to which many people would have had access. In contrast, the identity of the informant in *British Steel* was known to only one person,[56] and the documents were given in the confidence that his identity would not be revealed. Secondly, Lord Salmon points out that in *Norwich* the defendants, by revealing the names of the importers, could be doing nothing "which could prejudice themselves or the public".[57] Lord Cross stated that, inter alia, the court had to consider "whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant".[58] Further, Lord Kilbrandon stated in *Norwich* that the[59]

> right [claimed] is not truly opposed to any interest of the defendants . . . If he is successful, the defendants will not be losers, except insofar as they may have been put to a little clerical trouble.

The underlying point in these statements is that discovery will have no detrimental effect on the defendants. In *Moodalay,* the defendant's monopoly operations would not be affected by disclosure — there might merely be a court case. In both *Orr* v. *Diaper* and *Norwich* the defendants would hardly lose by the exposure of those involved in illegal activities. Indeed they would wish to avoid being the agents of law-breakers. The customs officers in *Norwich,* and in *A. Crompton Ltd* v. *Customs and Excise*[60], have the legal right to obtain the information conferred on them by statute. So the information would not dry up. However, Granada could be seriously affected by such disclosure. There is no empirical evidence on what the effect of disclosure would be. But it is at least certain that newspapers and television will not feel the same degree of freedom they thought they had. As a result the public may well be denied access to news which originates in similar circumstances to those which existed in this case. Even if such information were to continue to be published, the *British Steel* case has set a precedent which might lead to an indefinite injunction on publication of such material for continual offending. It is submitted that an indirect censorship may result, which clearly illustrates that this case is very much concerned with the freedom of the press.

Thirdly, the previous cases required an intention by the plaintiff to commence a court action against the unknown party, once his name had been revealed.[61] In *Cardale* v. *Watkins,* it was stated that "a Court of Equity does not compel discovery for the mere gratification of curiosity, but in aid of some other proceeding

55 Supra n.24.
56 *The Times,* London, United Kingdom, 6 August 1980, p.1.
57 Supra n.1, 844.
58 Supra n.12, 199.
59 Supra n.12, 203.
60 [1974] A.C. 405.
61 It was stated obiter in *Norwich* that once discovery was granted, it was not necessary for the plaintiff to take legal action: 173, 178. However, it was stated in *Moodalay* that "it is sufficient that a foundation for an action has been laid" (supra n.15).

either pending or intended, and that there must be allegations to that effect."[62] Lords Wilberforce and Fraser[63] stated that it was sufficient if the B.S.C. had a cause of action against the unknown party. The B.S.C. could take extra-judicial action instead.[64] This is an extensive development, as *Cardale* had required that proceedings must be intended or pending. The purpose was to check that the redress taken is lawful, and that it does not infringe the informant's rights.

Fourthly, the preceding cases on bills of discovery were situations where the plaintiff and the unknown party were direct competitors in commercial enterprises. The activities of the unknown parties were directly affecting the plaintiffs' trading operations. In *Moodalay* both parties were dealing in tobacco, and one was in illegal competition with the other. In *Orr* v. *Diaper,* both parties were producing thread, and one was using the other's trademark; while in *Norwich* the plaintiff's rights to the exclusive production of the chemical were being threatened by illegal competition. In *British Steel,* their production and sales were not being threatened by the illegal activities of a competitor.[65]

Finally, unlike all the previous cases, the plaintiff had it within its capabilities to discover who the unknown party was. The B.S.C. knew that he was its employee or ex-employee, and that the documents were seen by only a small number of people, because of their sensitive nature. In the end, the B.S.C. was able to discover his identity through its own detective work.

3. *A related action*

In some recent case law, a *Norwich*-type order has been incorporated into another form of discovery: the so-called *Anton Piller* order. The order derives its name from the 1976 case of *Anton Piller KG* v. *Manufacturing Processes Ltd.*[66] The order is usually granted ex parte when it is essential that the plaintiff obtain certain documents for his case, and those documents are in the possession of the defendant. The order will be granted to enter the defendants' premises where, if the defendant were forewarned, there would be a grave danger that the vital evidence would be destroyed, or hidden, or taken beyond the jurisdiction, so defeating justice. And where the inspection would do no real harm to the defendant or his case.[67] It will be granted only exceptionally.

Although that statement of the law as it stands is not a *Norwich* order, its ambit was extended in the case of *EMI Ltd* v. *Sarwar and Haidar.*[68] The plaintiffs in that case sought to stop the illegal sale of copies of their sound recordings which infringed their copyright. They sought an *Anton Piller* order

62 (1820) 5 Madd. 18; 56 E.R. 801.
63 Supra n.1, 826, 851.
64 For example, dismissal, reprimand, deprivation of pension.
65 The only case which does not fit into this pattern is the U.S. case of *Post* v. *Toledo* (supra n.18), where discovery was sought against a company's officers to identify the shareholders, who were the plaintiffs' debtors. They were, therefore, not in direct commercial competition. But the debtors were interfering in the plaintiffs' business by not paying the money owed.
66 [1976] 1 Ch. 55 (C.A.).
67 Ibid. 61.
68 [1977] F.S.R. 146 (C.A.).

against one of the retailers of the recordings. But further, they asked for an order that the retailers give them a list of the names and addresses of those responsible for supplying the recordings to the retailers. No reference was made to the *Norwich* case, and the second limb of the request was granted, but as a "legimate extension"[69] of an *Anton Piller* order.

This decision was followed by the case of *Loose* v. *Williamson,*[70] where all that was sought was a bill of discovery, but the plaintiffs based their claim on both *Norwich Pharmacal* and *EMI Ltd.* Goulding J. based his grant of the order on *Norwich,* but also referred to *EMI Ltd* to justify the order because of the dangers to which the subject matter in question were exposed, even although the fish were not evidence.

The importance of this development is two-fold. Firstly, the *Anton Piller* cases in which a *Norwich*-type order has been raised are where the plaintiff and the unknown party were in the same business; one threatening the other's commercial interests.[71] In *EMI Ltd,* the unknown party was selling copies of the plaintiffs' recordings. In *Loose,* the unknown party was fishing in tidal areas over which the plaintiff had a shellfish fishery lease. This is consistent with the competition aspect of the bill of discovery cases. Secondly, an *Anton Piller* order is only granted where it will do no real harm to the defendant. This is consistent with the dicta in *Norwich* about discovery being detrimental to the defendant. Granada will very likely suffer from the order of disclosure.

Because of the small number of cases in this area, the appropriate circumstances for a bill of discovery have not been clearly defined. The new development in *EMI Ltd* may have an important effect in the case law, although its relationship with *Norwich* was neither recognised nor discussed in either *Loose* or *British Steel.*[72] An *Anton Piller* order does not require the search for an unknown party; but the order may coincide with a *Norwich* order where the documents in question had the name of the unknown party, and those documents were at risk. It seems probable, however, that the two orders share the same genealogy. The *Norwich* order appears to have initially entered English law, through the Chancery courts, from the Civil Law *actio ad exhibendum,* by means of which property and documents could be obtained for inspection.[73] That is characteristic of the *Anton Piller* order as well.

III. JOURNALISTS' IMMUNITY AND THEIR SPECIAL POSITION

A. *Introduction*

To support its argument, Granada sought to show that journalists were entitled to immunity from withholding the identity of their informants. Firstly,

69 Ibid. 147.

70 [1978] 1 W.L.R. 639.

71 *Rank Film Distributors* v. *Video Information Centre* [1981] 2 W.L.R. 668, 671, has restricted the use of the order to infringements of patents, trade marks and copyright. These are the typical competition situations.

72 The development of the *Anton Piller* order has been the work of Lord Denning. He sat in the court in the decision on *Anton Piller* itself, *EMI Ltd.* (supra n.68) and also *Rank Film Distributors* (supra n.71). There, even although *Norwich* was cited in argument, the Master of the Rolls re-affirmed his decision in *EMI Ltd.*

73 Supra n.11.

it argued that the courts had a discretion to grant that immunity in the particular circumstances. Secondly, that the case law evidenced something of a presumption in favour of journalists which recognised their special position. This was particularly evident in the so-called "newspaper rule", and the dicta in the case law.

B. *Privilege or Discretion*

1. *Introduction*

The case law on a journalist's immunity from disclosing his source is relatively recent. Throughout, it is necessary to draw the distinction between an absolute privilege,[74] which entitles a witness to refuse to answer a relevant and admissable question as of right; and a discretion in the court to permit a witness not to answer the question where the public interest is better served by the information being kept secret.

74 In English law the only professional evidential privilege is that accorded by the Common Law to the lawyer-client relationship. In addition there is the privilege against self-incrimination, the privilege to statements made without prejudice, and the privilege of a witness who is not a party who cannot be compelled to produce the title deeds to his property.
In New Zealand, the *Evidence Amendment Act (No. 2)* 1980 created a statutory discretion in the court to excuse a witness from giving any evidence (s.35). The section requires a court, where the supply of information or production of it would be a breach of confidence, to determine whether or not the public interest in having the evidence disclosed to the court is outweighed by the public interest in preserving the confidence, and the encouragement of free communication between the parties. And at the same time the court must have regard to:
(a) the likely significance of the evidence to resolving the issues in the case;
(b) the nature of the confidence and the special relationship between the parties; and
(c) the likely effect of the disclosure on the confidant or any other person.
The wording of the section indicates that those factors which weighed heavily with the House of Lords (the actions which Granada took after receiving the documents) are not relevant considerations under the section. It is submitted that the wording of the section would be more favourable to the B.S.C. than the House of Lords' approach. Because of the special nature of the relationship, and the B.S.C's ability to take alternative action against Granada, Granada would be more likely to succeed. The issues raised by s.35 are discussed in Mathieson ed., *Supplement* No. 1 to Cross on Evidence (N.Z. ed. Butterworths, Wellington, 1980) pp. 46-49.
In the United States, over half of the state legislatures have enacted what are termed 'Shield Laws', which accord a testamentary evidential privilege to journalists in varying degrees. The result of the many cases in this area depend substantially on whether the proceedings are criminal or civil. If they are criminal proceedings, the 'Shield Law' may conflict with the sixth amendment to the Federal Constitution which grants to the accused, inter alia, the right to have compulsory process for obtaining witnesses: cf. *In Re Farber* 394 A.2d. 330 (1978) (criminal) and *Forest Hills Utility Company* v. *City of Heath* 302 N.E. 2d. 593 (1973) (civil). Where there is no 'shield law', the facts are examined on a case-by-case basis: cf. *Garland* v. *Torre* 259 F.2d. 545 (2d. Cir. 1958) and *Carey* v. *Hume* 492 F.2d. 631 (1974). It should be mentioned for completeness that the first amendment guaranteeing freedom of the press has been held not to establish a specific privilege for a journalist to withhold his source's name (*Branzburg* v. *Hayes* 408 U.S. 665 (1972), 667). Finally, the fourteenth amendment requires that no state shall deprive any person of life, liberty or property, without due process of law.

The first case is *McGuinness* v. *Attorney-General for Victoria.*[75] The editor of a newspaper refused to reveal the source of information which alleged that members of the Victorian Parliament had received bribes. This editor claimed an absolute privilege, but the court held that there was no rule of evidence under which an editor or a journalist could so protect the name of a source.[76] The High Court of Australia went to the opposite extreme in making no mention of a discretion in the court, leading to the conclusion that in no circumstances was immunity available.

In the English cases of *Attorney-General* v. *Clough,*[77] and *Attorney-General* v. *Mulholland*[78] (the 1963 cases), three journalists refused to disclose their sources of information. They were considered relevant[79] to the proceedings of an inquiry into the activities of a spy in the Admiralty. As in the earlier case, an absolute privilege was claimed, "without ever being under any obligation" to disclose their sources.[80] Although this claim was rejected,[81] the court held that it had what was described by Donovan L.J. as a "residual discretion".[82] Thus, even after a question was found to be relevant, and a proper and necessary or useful question to be put,[83] a judge might conclude that public policy required in the circumstances of the particular case that the claim to privilege be recognised.[84] This was described as weighing the conflicting interests involved.[85] However, Donovan L.J. considered that the discretion did not operate in *Mulholland* "where the ultimate matter at stake is the safety of the community".[86] In both the cases, the judges noted the journalist's special position.[87]

For the first time, in the Australian case of *Re Buchanan,*[88] the journalist did not argue for an absolute privilege, but in favour of an "elastic discretion",[89] to be exercised in his favour. The court held that the question asked was relevant and proper, and therefore the journalist had to answer. However, they incorrectly stated that it had never been suggested that there was any discretion in the trial

75 (1940) 63 C.L.R. 73
76 Or any basis on which to extend the "newspaper rule" to the trial of the action: Ibid. 104.
77 [1963] 1 Q.B. 773.
78 [1963] 2 Q.B. 477.
79 Supra n.77, 785; Ibid. 488, 489. The journalists had written, inter alia, that "It was the sponsorship of two high-ranking officials which led to Vassal [the spy] avoiding the strictest part of the Admiralty's security vetting".
80 Supra n.77, 789; supra n 78, 489.
81 Supra n.77, 789; supra n.78, 489, 492.
82 Supra n.78, 492.
83 Ibid. 490, 492.
84 Supra n.77, 788; Idem. "In the rest of a vast area, it must be for the court to ascertain what public policy demands": 788, per Lord Parker C.J.
85 Supra n.78, 490.
86 Ibid. 493.
87 Lord Parker C.J. in *Clough* stated that "the press has received very special consideration by these courts" (789), and that he had "great sympathy with the press" (790). Lord Denning M.R. in *Mulholland* stated the journalist "can expose wrongdoing and neglect of duty which would otherwise go unremedied" (489).
88 (1964) 65 S.R. (N.S.W.) 9.
89 Ibid. 10.

judge beyond determining the relevancy of the question.[90] Such a discretion was clearly stated to exist in the English cases.

That discretion was re-affirmed in the English Law Reform Committee Report.[91] It decided that outside the limited number of absolute privileges, the judge had a wide discretion to permit a witness to refuse to disclose information "where it would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed."[92]

Although it was not a case dealing with journalists, *D.* v. *N.S.P.C.C.*[93] stated that in exercising such a discretion the court must look at where the public interest lies.[94] In that case a privilege was granted to N.S.P.C.C. informers, "by a legitimate extension of a known category of exemption".[95]

It was no longer a wide discretion, but now involved the balancing of the public interest in the free flow of information, against the public interest in the administration of justice.

2. *High Court*

Granada did not claim a privilege. It argued that the court had a discretionary power,[96] and that in the public interest journalists should not normally have to disclose their sources. Following the decision in *D.* v. *N.S.P.C.C.* Granada claimed that the public interest and public policy favoured the protection of their sources over the interests of obtaining justice.[97] Relying heavily on *D.* v. *N.S.P.C.C.*, the Vice-Chancellor found: (a) That there was no "recognised public interest,"[98] which was defined as "of serious concern and benefit to the public",[99] in the protection of sources; (b) That there was no basis on which to establish one, by extension and analogy to police and N.S.P.C.C. informants, because of a news-

90 Ibid. 11.

91 *Law Reform Committee Sixteenth Report: Privilege in Civil Proceedings* (1967: Cmnd 3472).

92 Ibid. para. 1.

93 [1978] A.C. 171.

94 Ibid. 246: "The sole touchstone is the public interest . . . . the question to be determined is whether it is clearly demonstrated that in the particular case the public interest would nevertheless be better served by excluding evidence despite its relevance"; per Lord Edmund-Davies.

95 Ibid. 228.

96 Sir Robert Megarry initially questioned the existence of the discretionary power, but finally accpted that it existed: supra n.1, 789. This discretion was reaffirmed in *Senior* v. *Holdsworth* [1976] Q.B. 23.

97 The claim was: (787) 1. There is a recognised discretion in the courts to exclude relevant evidence, or to obstain from requiring the disclosure of evidence (by way of discovery or interrogatories), which should be exercised when considerations of a recognised public interest and policy, in the circumstances of the particular case, outweigh the interests of the party desiring the evidence to be given or disclosed. 2. The categories of public interest are not closed; and the courts will refuse to order disclosure where disclosure would be in breach of some ethical or social value and, on balance, that interest is best served by refusing to order disclosure.
This was based on the Law Reform Report, and *D* v.*NSPCC* [1978] A.C. 171.

98 Supra n.1, 791.

99 Ibid. 790.

paper's commercial considerations, and because it has no duty to act in the public interest.[100] The test was, "there must be something in the nature of a compelling demand for the services in question in order that the life of the community may be carried on in a civilised manner";[101] (c) And that even if there were a recognised public interest it would not defeat the B.S.C.'s claim. Otherwise there would be a denial of justice.[102]

By requiring a "recognised public interest", the judge took a step beyond merely looking at the public interest, and thereby took a narrower view than the other judges in the case. It is submitted that there is in any case a recognised public interest, otherwise it would be to ignore that the flow of information from sources is "of serious concern and benefit to the public", supplying the public with information as they do. Further, the test of establishing a new public interest would be satisfied, because the life of the community in a democratic society requires the free flow of information, so that it may be carried on in "a civilised manner".

3. *Court of Appeal*

In this court, the fact that the court had a discretion was undisputed, and automatically accepted. Further, all three judges favoured the protection of sources in principle, and examined the circumstances in which the grant of immunity would be withheld.

It is clear from their judgments that the judges considered that the public interest was very strongly in favour of Granada. Lord Denning was the strongest advocate, stating that, in the exercise of the discretion "newspapers should not in general be compelled to disclose their sources of information".[103] Following the argument in the High Court, Templeman L.J. referred to the "recognised public interest",[104] while Watkins L.J. preferred to describe it as a "public interest immunity",[105] which more accurately describes the claim of the appellants.

In common, the judges favoured the granting of immunity to journalists in most cases, but that such immunity was not absolute.[106] They based this decision on the 1963 cases.[107] This was the opposite to the more rigid approach of the Vice-Chancellor, which required tests to determine whether there was a recognised public interest. These tests were not adopted in the Court of Appeal. It would appear that in most cases the court would have been willing to grant the immunity. Whether their discretion shifted against the journalist was determined by whether the journalist had broken the law. Lord Justice Templeman stated that he would

100 Ibid. 792, 793.
101 Ibid. 794.
102 Ibid. 795.
103 Ibid. 804; 811, per Templeman L.J.; 813, per Watkins L.J.
104 Ibid. 811: "there is a recognised public interest in the immunity of the media from disclosing their sources and that immunity must apply not only in libel actions and other actions directed to obtaining an injunction, damages or other direct relief from the media but also to actions directed solely to the discovery of a wrongdoer".
105 Ibid. 813: This is the new term for Crown privilege.
106 Ibid. 804, 805, 810, 814.
107 Lord Denning also discussed some United States cases: ibid. 803-4.

deny immunity if the journalist knowingly broke the law, civil or criminal, following his source doing so.[108] Watkins L.J. would not grant immunity under any circumstances if the journalist had committed a crime with his source; and he would only excuse a civil wrong using confidential information, if it exposed iniquity.[109]

This approach to immunity makes the discretion virtually ineffective, as much of the information will have been obtained through a breach of confidence, which is a civil wrong, therefore disentitling the journalist to immunity.

Lord Denning's test would deny immunity if a journalist did not act with a due sense of responsibility.[110] This wide test could deny immunity even when the journalist had not broken the law. The first point to note about the test is that when considering what is responsible, Lord Denning discusses such things as the conduct of the interview with the B.S.C. Chairman. Apart from the fact that the Chairman himself was satisfied with the interview, such a consideration is of minimal importance given the facts which Granada were presenting. Secondly, unlike his colleagues, Lord Denning was applying his test, which would disentitle the source to protection, solely to the newspaper. He was not so much concerned with the decision to use the information "as the way they went about it".[111] With the result that the test would jeopardise the source of information which was considered to be of great importance. This test was described by the New Zealand Court of Appeal as illogical.[112] Lord Salmon said of it in the House of Lords, "[i]f, as I believe, Granada obviously gave the information in the public interest, I cannot think how they went about it could oblige them to disclose their source of information to the B.S.C.".[113]

Further, his test would have resulted in immunity for the journalists in the 1963 cases, one of which he heard. They had not acted irresponsibly, yet the public interest fell on the side of the tribunal. A final example will illustrate the problems with the criteria set by all three judges. A journalist might be involved with his source in the removal of documents from a leading aid organisation, which showed that ninety percent of their funds were being used to purchase arms. The removal of the documents would be illegal and fail Watkins and Templeman L.JJ's tests. Lord Denning would deny immunity because the documents were xeroxed and cut up. Yet, surely, the public interest would be with the media.

4. *House of Lords*

The majority in the House considered that the freedom of the press was not an issue in the case. Consequently once they had decided that the name of the informant was relevant and admissable, there was little in the public interest to persuade against disclosure.

108 Ibid. 812.
109 Ibid. 814.
110 Ibid. 805: Lord Denning considered that such a case would be exceptional.
111 Idem.
112 *B.C.N.Z.* v. *A.H.I.* [1980] 1 N.Z.L.R. 163, 167, per Woodhouse J: "That does not seem logical or right".
113 Supra n.1, 842.

In parts of the decisions, the distinction between a privilege and the exercise of a discretion in the journalist's favour became blurred. Lord Fraser recognised that Granada were not arguing for a privilege. "Their argument was directed to the more limited proposition that disclosure either could not, as a matter of law, or should not, in the exercise of judicial discretion, be ordered in the present proceedings".[114]

It is respectfully submitted that the other members of the majority misinterpreted the 1963 cases. The journalists there had argued that they were entitled to an absolute privilege, which was rightly rejected. Lord Wilberforce is correct when he states that "[n]o such claim has ever been allowed in our courts".[115] However, in the present case, Granada were arguing that the newsmedia had been treated as being in a special position because of the public interest in the free flow of information, and the dicta in the previous English cases. In short, there was a presumption in their favour. Lord Salmon put it strongly:[116]

> The immunity of the press to reveal its sources of information save in exceptional circumstances is in the public interest, and has been so accepted by the courts for so long that I consider it wrong now to sweep this immunity away.

So, Viscount Dilhorne, with respect, was incorrect when he stated that Granada was claiming that the media "cannot lawfully be ordered to state the source of any information that comes into their possession".[117] He concludes that such claims have been rejected. He is correct in that. But it was not what Granada was arguing.[118] Lord Salmon's formulation is similar to the Court of Appeal's, who were unable to decide the same way as Lord Salmon because of the tests they formulated.

Lord Wilberforce rejected Lord Salmon's formulation of Granada's case.[119] Although he acknowledged that the court had a discretion, he differed with Lord Salmon on whether the previous cases were exceptions. He described the authorities as coming "down firmly against immunity for the press or for journalists".[120] Lord Salmon categorised the 1963 cases as exceptions, because the information was necessary "in order to protect the security of the state".[121] His Lordship's support for their exceptional nature is compelling. Firstly, these are the only two English cases which have required a journalist to disclose his source. Secondly, in

114 Ibid. 847.
115 Ibid. 822.
116 Ibid. 846; see also supra n.104, per Watkins L.J.
117 Supra n.1, 829.
118 Ibid. 832-833. He mistakenly considered that the journalist's claims in the 1963 cases were "similar" to Granada's. However, Granada was not arguing for an absolute privilege.
119 Ibid. 823.
120 Idem.
121 Supra n.1, 841; 846: Lord Salmon stated that the security of the State might not be the only circumstances which could be described as exceptional. The Australian cases are not referred to in this context by Lord Salmon. In *McGuinness*, it could be argued that bribery of members of Parliament was a threat to the integrity of democracy in Victoria. *Buchanan* was a defamation action, and more difficult to reconcile as a special circumstance. The court did however misinterpret the 1963 cases, in respect of the discretion.

Mulholland, Lord Justice Donovan emphasized the exceptional nature of the case, stating that "where the ultimate matter at stake is the safety of the community",[122] the exercise of a residual discretion does not arise. He concludes that the immunity is based on those two authorities, and "the principle of justice that the public shall not be unreasonably deprived by a free press of information of great public importance".[123]

These arguments are persuasive, but perhaps also circumstancial. As Lord Wilberforce points out there is no case the other way,[124] and so the 1963 cases can be interpreted as examples of the rule that newspapers are not in a special position, and that the security question was co-incidental. However this fails to acknowledge the statements in the 1963 cases in favour of the important public interest concerned. Also, there are no cases where a special position has been acknowledged, and disclosure has been denied.

Given the statements in favour of the press's special position in the 1963 cases[125] and the Court of Appeal in *British Steel,*[126] along with the exceptional nature of the 1963 cases, it is submitted that there was evidence of a favourable judicial attitude to the newsmedia being accorded a special position in principle. Even if that had been accepted by the House of Lords, as it was by the Court of Appeal, it still remained open that the balance of interests would fall in favour of the plaintiff. However, the Court of Appeal's tests set a much lower standard, than Lord Salmon was indicating, on which to grant disclosure. The Court of Appeal did not discuss the exceptional nature of the 1963 cases, but supported the view that journalists were in principle immune from being required to disclose their source of information. The test of "responsibility" laid down by Lord Denning was criticised by Lord Salmon. He thought that the way Granada used the information should not "oblige them to disclose their source of information to B.S.C."[127]

The argument put forward by Granada was novel, because they were not arguing for an absolute privilege, as had been done in the previous cases. The distinction was not made clear at many points in the judgments. It is an important point because much of the previous dicta was strictly irrelevant, in that it was rebutting the argument for an absolute privilege.

Lord Salmon did not have to determine whether these facts showed "exceptional circumstances" because he had concluded that discovery was not available. What was exceptional to Lord Salmon, for example state security, was something extreme in nature. However, Lord Denning considered that an "exceptional case" would be determined by "responsibility", and something significantly less than state security would suffice to make a case exceptional. Whether the circumstances are exceptional will be considered in Part V.

122 Supra n.78, 493; referred to in *British Steel,* 842, per Lord Salmon.
123 Supra n.1, 845.
124 Ibid. 823.
125 Supra n.77, 789, 792; supra n.78, 489.
126 Supra n.1, 805, per Lord Denning: "There may be exceptional cases, in which, on balancing the various interests, the court decides that the name should be disclosed".
127 Ibid. 842; but he also applied the test, and concluded that Granada had acted responsibly.

C. *The Newspaper Rule*

1. *Introduction*

The so-called "newspaper rule" provides that in defamation actions[128] against newspapers, interrogatories directed to discover the source of the information are not permitted at the interlocutory stage of the proceedings, where fair comment or privilege is pleaded as a defence.[129]

One of the reasons for the rule is agreed to be "that a newspaper stood in such a position that it was not desirable on grounds of public interest that the name of a newspaper's informant should be disclosed".[130] Granada used this line of authority, in conjunction with its arguments over the discretion, to show that the newsmedia had been treated as a special case. And that this was based on the public interest in the non-disclosure of a source of information. In using the authority to argue for the non-application of the bill of discovery, Granada was not arguing that the rule directly applied to this case.

2. *High Court*

While acknowledging that one of the bases for the rule was the public interest, Sir Robert Megarry maintained that it was discretionary. Therefore he did not consider it to be persuasive evidence of a "recognised public interest", which his reasoning required him to isolate. Even although the cases do discuss the possibility of special circumstances, no case has in fact been decided on the basis of it. Indeed in *B.C.N.Z.* v. *A.H.I.*[128] it was held to be a rule of law, and not subject to a discretion. It is submitted that the court took too narrow a view, because no case of special circumstances has ever arisen on which to withhold the rule.[131] Further, one of the rule's bases is the public interest in non-disclosure.

3. *Court of Appeal*

After stating that the rule exists in libel actions, Lord Denning appears to recognise that its public interest basis extends in principle beyond the limitations of the rule. He states that "the court has never in any of our cases compelled a newspaper to disclose the name of its informant",[132] except in the 1963 cases where the public interest in compelling disclosure was paramount. As those were not defamation cases this supports Granada's contention that newspapers have a special position, of which the newspaper rule is evidence.

128 And slander of goods, *B.C.N.Z.* v. *A.H.I.* [1980] 1 N.Z.L.R. 163.

129 There is now a rule of court similar to this one for all defendants: R.S.C., Or.82, r.6. In New Zealand it is rule 159 of the Code of Civil Procedure.

130 *Adam* v. *Fisher* (1914) 30 T.L.R. 288 (C.A.). The second reason was that "it might be assumed that the object of getting the name of the informant of a newspaper was to sue the informant, which was plainly improper"; per Buckley L.J. It might normally be improper to sue the informant at the trial stage also.

131 In *South Suburban* v. *Oram* [1937] 2 K.B. 690, the rule was denied to the author of a letter to a newspaper. However, the rule was not available ab initio, and the case is distinguishable on the basis that the writer was not an employee of the newspaper.

132 Supra n.1, 803.

Lord Justice Templeman held that the newspaper rule was evidence of a public interest "in upholding the claim of the media to immunity from disclosing their sources of information",[133] and that this was supported by the cases on privilege as well. Lord Justice Watkins recognised the newsmedia's special position, and saw the rule as an exception in that it was not subject to the discretion of the court. It is mandatory.

4. *House of Lords*

None of the Law Lords discussed the rule in the context in which it was put forward by Granada. The majority were against a general proposition of immunity, so they considered that the newspaper rule was an exception, rather than evidence of the newsmedia's special position. Their approach was a narrow one in that they looked at where it applied, but not at its underlying basis and principle. Viscount Dilhorne emphasised the rule's narrow application, concluding that it was of no assistance to Granada;[134] thereby missing the thrust of their argument. Although Lord Fraser recognised that Granada's argument was that the rule is part of "[t]he claim of the press to be in a special position",[135] he does not discuss the principle behind the rule, but instead the rule's uncertain aspects.

Lord Wilberforce decided that the rule was limited in its application to libel cases, and could not be applied in breach of confidence cases.[136] Even although he maintained that the rule should not be applied in such a case as the present because the weightier claim will normally be against the employee,[137] he later states that it will only be in exceptional circumstances "that the aggrieved person would have, and could demonstrate, a real interest in suing the source".[138] It was argued that the rule was only concerned with the limitations of discovery, and not a principle of privilege. But this, it is submitted, is incorrect because one of its bases is the public interest in protection of the source, which goes to a privilege, and not the practical limitations of discovery.

Lord Salmon argued for extending the rule to the present case, on the basis of *B.C.N.Z.* v. *A.H.I.*, where the newspaper rule was extended to slander of goods.[139] Woodhouse J. had stated that the rule "is not really concerned with the form of litigation but with supporting a proper flow of information".[140] However, that extension was only within the area of defamation. That was not as wide an extension as Lord Salmon wished to make.[141]

133 Ibid. 809.

134 Ibid. 831.

135 Ibid. 848.

136 Ibid. 825.

137 Ibid. 825.

138 Ibid. 826.

139 Supra n.128.

140 Idem.

141 He further states that B.S.C. did not continue with the libel action because of the rule, and that to grant discovery would enable them to get around it (840). However, even if the libel action had gone ahead, the rule would not have prevented disclosure at the trial.

Granada's argument, which was not really discussed by the House, was the rule's evidence of their special position. The argument was persuasive because one of the reasons given for the rule, taken from the case of *Adam* v. *Fisher,*[142] was that disclosure of the informant's identity was contrary to the public interest.

The argument for immunity was based on the special recognition it was claimed had been given to the press by the courts. Granada pointed to the dicta in the privilege cases, and the exceptional nature of the English cases, for support. They further cited the public interest basis of the "newspaper rule" cases. This support is compelling, especially in the English cases. In view of the dicta there, it is submitted that the approach of the High Court and the majority in the House of Lords was too restrictive.

IV. EQUITABLE NATURE OF THE REMEDY

A. *Introduction*

An unusual aspect of the case was that there were apparently two differing judicial discretions involved. However, too great an emphasis should not be put on the distinction, as only the Vice-Chancellor[143] in the High Court, and Lord Wilberforce[144] in the House of Lords discussed it. The discretion concerned with the journalist's immunity involved the balancing of two public interests: the free flow of information to the public, and the administration of justice. The resolution of that discretion determines whether the journalists are entitled to immunity.

The other discretion arises out of the nature of the remedy. Being an equitable remedy, the bill of discovery is discretionary. But this is a wide discretion and not limited to "weighing matters of public interest and policy".[145] Instead, "all the relevant factors of the case",[146] and "all proper questions which may affect the exercise of the discretion"[147] have to be considered. This is what Lord Wilberforce described as "the final and critical part",[148] because the decision here determined the conclusion of the case, even though the bill of discovery was prima facie held to apply.

It determined the conclusion because the judges had found that the journalists were not entitled to immunity. If immunity had been granted to Granada, the exercise of the equitable discretion would have been unnecessary as the B.S.C. would not have been able to obtain a remedy against Granada. While it is clear that the majority in the House of Lords would not have found an immunity if they had exercised discretions separately, it seems that the Court of Appeal might have found an immunity to exist if they had balanced the public interests separately rather than with all the relevant factors. This illustrates the difficulty of distinguishing the two discretions. In the event, all the judges considered all the relevant factors in the exercise of the wider equitable discretion, including the consideration of the public interests.

142 Supra n.130.
143 Supra n.1, 790, 795.
144 Ibid. 827.
145 Ibid. 790, per Sir Robert Megarry.
146 Idem.
147 Ibid. 795, per Sir Robert Megarry
148 Ibid. 827.

B. *Decision*

The High Court concluded that in the exercise of this discretion, the B.S.C.'s case was stronger. Two points weighed heavily with the judges of the three courts. Firstly, the informant's allegedly illegal act in passing the documents to Granada.

The Court of Appeal described the act as "quite inexcusable",[149] and a breach of confidence which was a wrongdoing.[150] In the House of Lords, the majority considered that the informant was guilty of wrongdoing and probably theft.[151] However, Lord Salmon disagreed and held that the documents were probably given to the informant, that there was no evidence that the copies were stolen,[152] and that wrongdoing was not established.[153] Further, the majority of the judges objected to Granada using "the fruits of wrongdoing".[154] This point was sufficient for the Court of Appeal, excepting Lord Denning, to find in favour of the B.S.C., as there was a civil wrong without the compensating factor of "iniquity" on B.S.C.'s part.[155] For Lord Denning the "mutilation"[156] of the documents, and the matters surrounding the interview of the B.S.C. Chairman, were sufficient to deny Granada immunity. He considered that such matters were sufficiently irresponsible to negate his earlier discussion of the freedom of the press.[157]

Secondly, and this was the factor which weighed most heavily in the House of Lords, that to deny the B.S.C. the remedy would be a denial of justice.[158] There would be an unpleasant atmosphere at the B.S.C. headquarters where the informant was possibly still working. Further the B.S.C. had done nothing to justify the source's, and Granada's, actions which had grievously wronged the corporation. All this could not be rectified by granting damages against Granada.[159] They would be "irrelevant and plainly inadequate".[160]

149 Ibid. 798, per Lord Denning M.R.
150 Ibid. 806, per Templeman L.J.
151 Ibid. 819, per Lord Wilberforce; 828, per Viscount Dilhorne; 847, per Lord Fraser.
152 Ibid. 836-837.
153 Ibid. 843.
154 Ibid. 795, per Sir Robert Megarry.
155 If the disclosure reveals "iniquity" then that would justify the act of an informant. "Iniquity" was defined in *Initial Services* v. *Putterill* [1968] 1 Q.B. 396. as misconduct, which may not be as serious as a crime or fraud, and it was further stated that the misconduct should be "of such a nature that it ought in the public interest to be disclosed to others". Also in the later case of *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760, 764, it was stated that "[i]f the image . . . fostered was not a true image, it is in the public interest that it should be corrected". This line of authority was either not considered by the judges, or was considered inapplicable (supra n.1, 795, 806-7, 822, 829, 843, 851). It is submitted that there is misconduct here; something in the public interest which ought to be disclosed. Further the image that B.S.C. and the government were projecting was clearly not accurate, as there was significant government intervention, and the low productivity was not totally the responsibility of the employees, but of management as well. Lord Salmon described the loss of hundreds of millions of pounds as more than misconduct (supra n.1, 843), yet he did not think that the *Initial Services* rule applied.
156 Supra n.5; Granada's conduct was "deplorable" and "disgraceful": 805.
157 Supra n.1, 805-806.
158 Ibid. 827, per Lord Wilberforce; 835, per Viscount Dilhorne; 854, per Lord Russell.
159 Ibid. 795, per Sir Robert Megarry; 807, per Templeman L.J.
160 Idem; 850, per Lord Fraser.

Granada's argument was that to grant discovery would be detrimental to the freedom of the press. The freedom of the press covers three uninhibited rights: the right to gather information; the right to editorial process; and the right to publish to the public. We are concerned with the first of these. However the majority in the House of Lords decided that the freedom of the press was not an issue in this case. Lord Wilberforce narrowly defined freedom of the press as pre-censorship, and that therefore the issue did not relate to the case, "even at its periphery";[161] while Lord Russell stated that there was not even "a marginal connection".[162] However Lord Salmon considered that it was relevant, as "one of the pillars of freedom".[163]

If the result of granting discovery is that there are fewer sources prepared to come forward, then that constitutes an indirect pre-censorship, as it is necessary to have a free flow of information. However, despite protestations to the contrary, the majority did recognise the freedom of the press issue, because the concensus was that the free flow of information had to be balanced against the public interest in confidentiality.[164]

In conjunction with the free flow question, the judges discussed a question which was at the core of this case: whether in fact the sources would dry up if discovery were granted, and affect the freedom of the press. Watkins L.J. considered that journalists would become "undesirably circumspect", and sources would be inhibited.[165] Templeman L.J. stated "[t]here will always be informants who, for good reason or bad, confide in the media".[166] Lords Wilberforce[167] and Russell[168] considered that an obstruction of the flow of information might result, while Lord Salmon was sure that "the public would be deprived of being informed of many matters of great public importance".[169] Viscount Dilhorne disagreed because it had not taken place in 1963,[170] but cited no support or proof. Despite this argument by the majority of the judges, they did not find the argument convincing enough to find in favour of Granada.

V. CONCLUSION

The B.S.C.'s sole claim was based on the bill of discovery. The authorities on the bill, while not actually excluding its use against the newsmedia, point to the relevant circumstances for its application. That is, non-confidential information in the commercial field, where there has been unfair competition or indeed illegal activities. That situation is quite different to the facts of the *British Steel* case. This is supported by the related *Anton Piller* order cases.

161 Ibid. 821.
162 Ibid. 853.
163 Ibid. 836.
164 Ibid. 827, per Lord Wilberforce; 829, per Viscount Dilhorne; 852, per Lord Fraser.
165 Ibid. 814.
166 Ibid. 811.
167 Ibid. 826.
168 Ibid. 854.
169 Ibid. 836.
170 Ibid. 835-836.

The Law Lords were determined that press freedom was not an issue in the case. It is submitted that this position was untenable, and the later discussion by their Lordships on the free flow of information and the "chilling affect"[171] on leaks was a recognition of this. The public interest was the free flow of information, and more particularly, the public's right to know of the operation of the B.S.C. This public interest was recognised in the cases on the newspaper rule, and the dicta in the English privilege cases.

In the High Court, the Vice-Chancellor took a narrow approach by applying tests which required a high standard of public interest. Not high enough, it is submitted, to exclude Granada's claim of the public interest. The judges of the Court of Appeal were in agreement with Granada's arguments about the journalist's special position. But, they imposed tests for the use of their discretion which were either illogical or too stringent.[172] As in the Court of Appeal, their Lordships emphasised the actions Granada took after receiving the documents. Lord Salmon stood alone in the House of Lords in recognising the importance of the freedom of the press. In effect, the majority of the judges considered the protection of sources ranked in the balance as of less importance than allowing the B.S.C. to discover who their offending employee was.

Further, the facts were not "exceptional", as they were in the English privilege cases. However, Lord Denning considered that they were.

The issue in this case is, "[t]o what extent will the obligation to give testimony identifying confidential sources when required in the administration of justice deprive the public of information important to the citizens' ability to govern themselves?"[173] Granada revealed that the great losses which the B.S.C. was making was partly a result of mismanagement, and not just workers' low productivity. In addition there was significant government intervention taking place, which the government had been denying.[174] The loss was of taxpayers' money, and so there was substantial public interest in the reasons for that. It was also important that the image which the government and the corporation were projecting of their relationship was false.

It was argued that an adequate flow of information on the B.S.C. was provided in section 5 of the Iron and Steel Act 1975, which requires that an annual report be presented to the Secretary of State. But, as Lord Salmon states, internal company reports cannot be called for, as is the case with a company with shareholders, and as a result there are no significant safeguards.[175] Further, in the revelation of government intervention, section 5(5) makes it possible to withhold information about the directions given by the Secretary of State to the Corporation if "(b) the Secretary of State accepts that it is contrary to the commercial interests of

171 *DNC* v. *McCord* 356 F. Supp. 1394 (1973).
172 Supra n.112.
173 "The Supreme Court — Foreword" (1980) 94 Har. L. Rev. 50.
174 The allegations went further. When the source was discovered through the B.S.C's own research, he charged that a 3 percent increase was offered to the B.S.C. employees to provoke a national steel strike, which was "deliberately engineered by the management to speed up plant closures": *The Times,* London, United Kingdom, 3 November 1980, p.2.
175 Supra n.1, 837.

the Corporation to do so." Scrutiny by the Treasury and the Public Accounts Committee are inadequate to protect the public interest.[176]

In the recent case of *Waugh* v. *British Rail Board*,[177] it was stated that a public corporation had a duty, "while taking all proper steps to protect its revenues, to place all the facts before the public".[178] However, in *Burmah Oil* v. *Bank of England*,[179] the use of large sums of public money, being put at risk to save the plaintiff from financial collapse, was considered a matter of great political importance. A privilege was granted to the information.

In comparison, the High Court of Australia in *The Commonwealth* v. *John Fairfax Ltd.*[180] was concerned with the disclosure of secret government documents on Australian defence and foreign policy. These were potentially considerably more damaging than the information disclosed in *British Steel*[181]:

> It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise Government administration.

The way in which the informant or the newsmedia had acted was of small concern when compared with the free flow of information. Those matters of conduct which weighed so heavily with the English courts are over-shadowed by the principle of a free press and the free flow of information in the public interest.

No mention was made of the European Convention on Human Rights and Fundamental Freedoms, to which the United Kingdom is a party. Article 10[182]

176 See generally, L. Chapman, *Your Disobedient Servant* (Penguin, 1979). Although he discussed a government department, the author's theme is as relevant to public sector industries. He notes the absence of public accountability for expenditure, management and policy formation, and the ignorance by the public of the way in which their money is being expended in the public sector. "Almost every pressure on management within the civil service, and probably within the rest of the public sector, is a pressure to spend more and more. The reason for this is that positive pressure to save can only come fom those who would benefit from such savings, that is, the taxpayers, who have no organised voice [52] . . . . The decision to forbid the use of secrecy to conceal inefficiency or administrative error in the U.S.A. was based on sure and certain knowledge of the dangers that secrecy can bring in its train [166]".

177 [1980] A.C. 521.

178 Ibid. 531.

179 [1980] A.C. 1090.

180 (1980). As yet unreported.

181 Ibid. 7, Per Mason J.

182 Article 10(1) provides that the right to the freedom of expression includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority". Article 10(2) provides that the freedoms "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society". Before a case were to be presented to the Commission for deliberation, it would be necessary to determine if the protection of sources was within the ambit of the freedom. The European Court of Human Rights can overturn a decision of the House of Lords. This was done for the first time in the *Sunday Times* case (1979) 2 E.H.R.R. 245. But before a case may be brought, the appellant must exhaust the court of the national jurisdiction first.

guarantees the freedom of expression. Although the Convention is not a part of domestic law, the Court of Appeal has stated "that when anyone is considering a problem concerning human rights, we should seek to solve it in the light of the Convention and in conformity with it".[183] Further, where the law is unclear, and one of the rights protected by the Convention is in issue, the case "should be resolved so as to give effect to, or at the very least so as not to derogate from the rights recognised by . . . the European Convention."[184] In a recent English case in the European court it was held that Article 10 did not involve "a choice between two conflicting principles [as the House of Lords in *British Steel* saw it], but . . . a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."[185]

The decision by the House of Lords is a significant setback for press freedom. A state corporation was responsible for the loss of large amounts of public money. The government was telling the public, incorrectly, that it was not intervening in the corporation's operations. The public interest in the case lay with Granada. This decision will be a 'Charter for Wrongdoing'.[186] It was restrictive and clearly against the public interest, and will create a new and inhibiting framework within which the journalist operates. In the end, discovery of an unfaithful employee was considered to be of more importance than the free flow of information.

183 *R* v. *Home Secretary, Ex p. Bhajan Singh* [1976] 1 Q.B. 198, 207, per Lord Denning M.R.
184 *R* v. *Home Secretary, Ex p. Phansopkar* [1976] 1 Q.B. 606, 626, per Lord Justice Scarman.
185 *Sunday Times case* (1979) 2 E.H.R.R. 245, quoted in P. J. Duffy, "The Sunday Times Case" (1980) 5 Human Rights Review 37.
186 *The Times,* London, United Kingdom, 31 July 1980, p.15.