**[1999–00 Gib LR 493]**

## WIRELESS OFFICER v. GIBNET LIMITED

COURT OF APPEAL (Neill, P., Clough and Waite, JJ.A.):
February 28th and May 24th, 2000

*Telecommunications—licensing—telephone service—Internet service using land line or satellite link provided by third party not "telephone service" as defined by Public Utility Undertakings Ordinance, s.26 and Schedule 2, requiring Government authorization, since operator not personally conveying signals—PUUO authorization needed for infrared laser link*

*Telecommunications—licensing—wireless telegraphy—applicant's status under Public Utility Undertakings Ordinance irrelevant to Wireless Officer's consideration of licence application under Wireless Telegraphy Ordinance to operate Internet service*

*Telecommunications—licensing—wireless telegraphy—Wireless Officer to ascertain legality overseas of proposed service when considering licence application under Wireless Telegraphy Ordinance—applicant need not first obtain permission from foreign jurisdiction*

*Telecommunications—licensing—wireless telegraphy—conduct of applicant relevant to decision on licence application—unlicensed operation of Internet service may not itself justify refusing licence if no criminal purpose and confusion caused by introduction of new licensing legislation*

*Telecommunications—licensing—compliance with EC law—Directive 97/13/EC confers precise and unconditional rights on persons seeking telecommunications licences and authorizations even though both may be conditional*

The respondent applied for judicial review of decisions by the appellant relating to the licensing of an infrared laser link as part of its Internet service in Gibraltar.

The respondent leased a telephone line to Spain through N Co. and G Co.—the contractors authorized by the Government under ss. 27 and 57 of the Public Utilities Undertakings Ordinance ("the PUUO") to provide, respectively, local and international telephone services—by which to provide an Internet service. Later it obtained a licence through G Co. to

operate its service instead by satellite link. As a back-up system the respondent contracted with a Spanish company to operate an infrared laser link between Gibraltar and Spain. In the meantime, N Co., a 50% Government-owned company, began to operate its own, rival Internet service.

In response to the respondent's enquiry as to whether it required a licence and how to obtain one, the Telecommunications Regulator instructed the respondent to cease operating the link, as it was illegal to do so without a licence. Under the Wireless Telegraphy (Amendment) Ordinance 1997, the definition of wireless telegraphy (the installation or use of apparatus which required a licence under s.5(1) of the Wireless Telegraphy Ordinance ("the WTO")) had been extended to include signals sent by an infrared beam. The respondent was told that there were no transitional provisions in force pending the consideration of its application and that certain details had to be supplied to the Wireless Officer before a licence could be issued. The respondent supplied the details but declined to cease operating.

The Regulator stated that the Government was considering its policy on licensing infrared links, threatened legal action against the respondent if it continued to operate the link, and refused to consider the application for a licence until it confirmed that the link would not be operated. Later the laser equipment was seized from the respondent's premises pursuant to a warrant. Without the link, the respondent was unable to provide the speed of service required to function effectively. Negotiations with the Government failed to resolve the dispute.

The respondent obtained leave to seek judicial review in the form of declarations that (i) the Wireless Officer was obliged to consider and determine the licence application and, in doing so, had to apply the European Directive 97/13/EC on telecommunications licensing, and (ii) the Crown was in breach of its Community law obligations to transpose the Directive into Gibraltar law. It sought damages against the Attorney-General in respect of losses resulting from the seizure of the laser equipment.

The licence was subsequently refused on the grounds that (a) the respondent was not a contractor company authorized under the PUUO to operate a telephone service in Gibraltar; (b) by keeping the equipment connected without a licence and refusing to confirm that it was not in operation, the respondent had conducted itself discreditably; and (c) the respondent had not obtained authorization to be connected to the Spanish telephone network and thus was operating illegally there.

The Supreme Court (Schofield, C.J.) granted the respondent leave on the day of the hearing to amend its application to include a challenge to the Wireless Officer's refusal of the licence. The court (Pizzarello, A.J.) ordered that the Wireless Officer's decision be quashed and the application remitted to him for reconsideration. It found, *inter alia*, that the 1997 Ordinance had come into force immediately, and although the respondent had had no legitimate expectation that transitional provisions

would exist pending a decision on its application, the Wireless Officer should have considered whether to exercise his power under the 1997 Ordinance to introduce such provisions in regulations. The PUUO did not govern the Internet service provided by the respondent prior to the operation of the laser link. The Wireless Officer had acted impartially, but had not considered the licence application quickly enough and had probably wrongly taken into account Government policy. His reasons for rejecting the application were flawed, since (i) the requirements of the PUUO were beyond his remit, (ii) he alone (rather than the respondent) was responsible for ensuring that the grant of a licence did not breach foreign law, and (iii) the respondent's conduct did not by itself justify refusing a licence. No damages were awarded, since there were good reasons why the Directive had not been implemented.

On appeal, the appellant submitted that (a) the Supreme Court should not have given leave to amend the judicial review application, since five days' notice were required of an application for leave to amend unless exceptional circumstances were shown, and the respondents could have sought leave several months before; (b) the court had wrongly found that the PUUO was inapplicable to the respondent, since an Internet service was a "telephone service," as defined in Schedule 2 to the Ordinance and, as the respondent's previous equipment had conveyed signals to N Co. and G Co., it had to be an authorized "contractor company" to do so legally; (c) the legality of the laser link under Spanish law had been raised with the respondent's attorneys some months before the Wireless Officer made his decision, and was a relevant consideration in refusing the licence; (d) respondent's criminal conduct in establishing and persisting in the operation of the unlicensed laser link was a legitimate reason to refuse the licence; and (e) there was no sufficient connection between that illegality and the Wireless Officer's other reasons for his decision, to justify the court's conclusion that they should stand or fall together.

On its cross-appeal against the Wireless Officer and the Attorney-General, the respondent submitted, *inter alia*, that it was entitled to damages in respect of its losses, since (a) the European Directive on telecommunications licensing had direct effect in Gibraltar, and the Government's complete failure to implement it was therefore a serious breach of Community law; (b) the Directive was concerned with the grant of rights to individuals, namely a right to the benefit of a general authorization or to the opportunity to acquire an individual licence upon conditions, if any, the scope of which was limited respectively by arts. 4 and 8 and the annex to the Directive; (c) under art. 7(1), the respondent did not require an individual licence, as it did not require access to radio frequencies to operate its service; and (d) the criteria applied by the Wireless Officer were inconsistent with the permissible conditions under the Directive.

**Held,** dismissing the appeal and allowing the cross-appeal:

(1) The Supreme Court had properly allowed the respondent to amend its application to include a challenge to the refusal. The amendment did

not raise different issues from those already before the judge, since the main issue in the case was the appellant's failure to issue a licence. The amendment had been necessary simply to clarify that (para. 49).

(2) The court had properly concluded that the Wireless Officer's reasons for rejecting the licence application were invalid. The respondent had not required authorization from the Government under the PUUO, s.57 to operate its Internet service prior to the introduction of the laser link. Not only had it never been suggested to the respondent that such authorization was needed, but Internet services, as previously supplied (as opposed to by laser link), also fell outside the Schedule 2 definition of a telephone service, since the respondent had not itself "conveyed" (in the sense of "carried") signals when using the lines leased from N Co. and the satellite link provided by G Co. In any event, since the Wireless Officer's task was to consider the application under the WTO alone, the provisions of the PUUO were immaterial. Moreover, the respondent had had no prior warning that its status under the PUUO was to be relevant to the grant of a licence, having previously been asked to supply only technical details (paras. 52–54).

(3) The court had also correctly found that the legality of the laser link in Spain was a matter for the Wireless Officer to ascertain before granting a licence, and not one on which the respondent was required to give assurances. Furthermore, it had been unfair of the appellant to expect such assurances, since it had not warned the respondent that the matter was material to its application (paras. 55–56).

(4) The court had also rightly held that respondent's conduct in operating without a licence did not justify the later refusal of the licence. Although the respondent had been imprudent in using the link without attempting to resolve the dispute by full discussion, the link had not been operated for a criminal purpose. The confusion caused by the introduction of new legislation was also a mitigating factor. The illegality of the operation had already been addressed by the issue of a summons and the seizure of the equipment. As a Government officer adjudicating upon a licence application in a field in which a partly Government-owned company also operated, the Wireless Officer was required to be scrupulously fair in his treatment of the application. The court had properly held that the three reasons given in his refusal were so linked that the "conduct" reason was invalidated along with the others (paras. 58–60).

(5) Considering the matter afresh, as it was obliged to do, although the Court of Appeal disagreed with the Supreme Court's finding that the respondent had a legitimate expectation that transitional provisions would be in place, it was satisfied that the respondent had been unfairly treated and that the lower court had properly intervened to quash the decision. The appeal would be dismissed (paras. 60–62).

(6) The respondent's cross-appeal succeeded. The Wireless Officer's decision was defective because it had been reached by reference to criteria, *e.g.* the provisions of the PUUO, which were incompatible with the process of liberalization which the Directive aimed to achieve in the field of telecommunications. Those criteria also breached art. 49 of the EC Treaty on the restriction of freedom to provide services generally. It was unnecessary to decide whether the use of an infrared laser link required a licence or merely an authorization (paras. 89–90; paras. 93–94).

(7) The respondent was *prima facie* entitled to damages against the Wireless Officer and Attorney-General for their breach of Community law. The provisions of the Directive concerning the grant of authorizations and licences were clearly intended to confer rights on individuals such as the respondent. Those rights were precise and unconditional in the sense required by Community law even though conditions could be attached to licences. The Directive provided the basic minimum of clarity and certainty, specifying the right to benefit from a general authorization unless a licence was required, and in each case subject only to conditions complying with those set out in the Directive. Furthermore, subject to argument to the contrary, the appellants' breach was sufficiently serious to merit an award of damages, since by failing completely to implement the Directive they had manifestly and gravely disregarded their obligation to transpose it into domestic law. If the respondent could also show a direct causal link between the breach and its losses, it would be entitled to damages (paras. 86–88; para. 90).

(8) The court would order that the proceedings continue as if commenced by writ, that the respondent should serve a statement of claim pleading its case for damages, and that the appellants be given the opportunity to argue why damages should not be awarded. The issue of costs would be decided in due course (paras. 100–103).

**Cases cited:**
(1) *Francovich* v. *Italy (Joined Cases 6/90 and 9/90)*, [1991] E.C.R. I–5357; [1995] I.C.R. 722, applied.
(2) *Marrache (A.S.) & Sons Ltd.* v. *Governor*, 1997–98 Gib LR 63, distinguished.
(3) *R.* v. *Bow St. Metrop. Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)*, [2000] 1 A.C. 119; [1999] 1 All E.R. 577.
(4) *R.* v. *Gaming Bd. for G.B., ex p. Benaim*, [1970] 2 Q.B. 417; [1970] 2 All E.R. 528, applied.
(5) *Three Rivers District Council* v. *Bank of England*, [1999] Lloyd's Rep. Bank. 283; on appeal, [2000] 3 All E.R. 1, applied.

**Legislation construed:**
Public Utility Undertakings Ordinance (as amended by the Public Utility

Undertakings (Amendment) Ordinance, 1990), s.26: The relevant terms of this section are set out at para. 9.
s.27(1): The relevant terms of this sub-section are set out at para. 8.
s.57(1): The relevant terms of this sub-section are set out at para. 8.
Schedule 2, para. 1(1): The relevant terms of this sub-paragraph are set out at para. 9.
para. 1(2): The relevant terms of this sub-paragraph are set out at para. 9.

Wireless Telegraphy Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 5.
s.2, as amended by the Wireless Telegraphy (Amendment) Ordinance 1997: The relevant terms of this section are set out at para. 7.
s.5(1), as amended by the Wireless Telegraphy (Amendment) Ordinance, 1997: The relevant terms of this sub-section are set out at para. 4.
s.5(2A)(d), as added by the Wireless Telegraphy (Amendment) Ordinance, 199: The relevant terms of this paragraph are set out at para. 40.

Council Directive (EEC) No. 13/97 of May 7th, 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services (O.J. 1997 L117/15), art. 1(1): The relevant terms of this paragraph are set out at para. 78.
art. 2(1): The relevant terms of this paragraph are set out at paras. 79 and 85.
art. 3(2): The relevant terms of this paragraph are set out at para. 80.
(3): The relevant terms of this paragraph are set out at para. 80.
art. 4(1): The relevant terms of this paragraph are set out at para. 81.
art. 5(1): The relevant terms of this paragraph are set out at para. 81.
art. 7(1): The relevant terms of this paragraph are set out at para. 82.
art. 9(6): The relevant terms of this paragraph are set out at para. 83.
art. 19: The relevant terms of this article are set out at para. 84.
Annex: The relevant terms of this annex are set out at para. 85.

Treaty Establishing the European Community (Rome, March 25th, 1957; UK Treaty Series 29 (1996)), as amended by the Treaty on European Union (Maastricht, February 7th, 1992; UK Treaty Series 12 (1994)): art. 49: The relevant terms of this article are set out at para. 90.
art. 249: The relevant terms of this article are set out at para. 66.

*R. Anderson* and *J.E. Restano* for the appellant;
*P.J. Isola* and *D. Feetham* for the respondent.

1 **NEILL, P.:** We have dealt with this matter as expeditiously as possible. We thought it right to try to give judgment before we left Gibraltar. Clough, J.A. is not able to be present today, but he has authorized me to say that he agrees with my judgment, which he had an opportunity to consider in draft before he went. At the end of the judgment some matters will remain outstanding and we will ask the

parties to make written submissions by a date to be discussed, in an agreed form if possible, as to the precise terms of the consequential orders which the court should make, including orders for costs.

**Introduction**

2 The three appeals before the court are in proceedings which relate to an application by Gibnet Ltd. ("Gibnet") for a licence to operate an infrared laser link as part of its Internet service in Gibraltar. The laser link is between Gibnet's premises in Portland House in Gibraltar, and premises owned or occupied by Gibnet in La Linea. Before I turn to consider the nature of the proceedings and the scope of the three appeals, however, I propose to say something about the relevant legislation and give an account of the main facts.

**The relevant Gibraltar legislation**

3 Wireless telegraphy in Gibraltar is controlled by the Wireless Telegraphy Ordinance 1951, as amended ("the WTO"). Certain public utilities, including the telephone service, are controlled by the Public Utility Undertakings Ordinance 1950, as amended ("the PUUO").

4 Section 5(1) of the WTO provides as follows:

> "No person shall use in Gibraltar the radio spectrum or establish or use any station for wireless telegraphy or keep, or instal or use apparatus for wireless telegraphy or any apparatus that can be readily made usable for such purpose except under the authority of a licence in that behalf granted by the Wireless Officer . . ."

This provision was subject to certain provisos but these provisos are not relevant in this case.

5 Wireless telegraphy is defined in s.2 of the WTO. Until the beginning of 1998, "wireless telegraphy" meant—

> "the emitting or receiving over paths which are not provided by any material substance constructed or arranged for that purpose, of electro-magnetic energy of a frequency not exceeding three million megacycles a second, being energy which either—
>
> (*a*) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not) or for the actuation or control of machinery or apparatus; or
>
> (*b*) is used in connection with the determination of position, bearing or distance, or for the granting of information as to the presence, absence, position or motion of any object or of any objects of any class,

and references to stations for wireless telegraphy and apparatus for wireless telegraphy or wireless telegraphy apparatus or wireless apparatus shall be construed as references to stations and apparatus for the emitting or receiving of such electro-magnetic energy . . .”

This definition was subject to certain provisos. Proviso (iii) was in these terms:

“Provided that where—

(iii) any apparatus is electrically coupled with that station or apparatus for the purpose of enabling any person to receive any such messages, sound or visual images,

the apparatus so coupled shall be deemed for the purposes of this Ordinance to be apparatus for wireless telegraphy.”

6 It will be seen, therefore, that this definition of wireless telegraphy was apt to cover the emission and reception of signals throughout the radio frequency spectrum, which extends up to 3,000 GHz.

7 By the Wireless Telegraphy (Amendment) Ordinance 1997 (which was passed by the House of Assembly on December 19th, 1997 and came into force on January 5th, 1998), however, the definition of “wireless telegraphy” was amended so that the words in the definition “of a frequency not exceeding three million megacycles a second, being energy” were deleted, and proviso (iii) was amended so as to delete the word “electrically” and to insert after the word “coupled,” the words “by wire, radio, optical or any electro-magnetic means.” The effect of this amendment was to extend the definition of wireless telegraphy to cover every emission or reception of signals throughout the electro-magnetic spectrum. In particular, it included signals sent by means of a beam of light within the infrared spectrum.

8 Part II of the PUUO contains provisions directed specifically to the telephone service. As originally enacted, s.27 of the PUUO authorized the Government in Gibraltar to construct, erect, maintain and carry on a telephone service in Gibraltar. In 1990, however, the PUUO was amended by amendments to s.27(1) and by the insertion of a new s.57, sub.-s. (1) of which empowered the Government, by contract, to “authorise any Company or other body (‘the contractor Company’) to undertake the powers and perform the functions conferred on the Government by . . . Part II of [the] Ordinance.” In its amended form, s.27(1) is now in these terms:

“Subject to section 47 [which relates to the military telephone system] and any exercise of its powers under section 57, the Government may construct, erect, maintain and run any telephone service in Gibraltar and may connect such telephone service either

within or without Gibraltar and any person, not being a person to whom section 47 or section 57 applies, who runs a telephone service in Gibraltar or who runs a telephone service connecting Gibraltar to some other place shall be guilty of an offence."

9 Provisions relating to the interpretation of Part II of the PUUO are contained in s.26 of the Ordinance, which provides that "telephone service, and telephonic communication have the meaning given to them in Schedule 2 to the Ordinance." Schedule 2 provides:

"1. (1) In this Ordinance 'telephone service' means, subject to paragraph 2 below,—

(a) a service for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical, electro-mechanical or optical means, of—

(i) speech, music and other sounds;

(ii) visual images;

(iii) signals serving for the impartation (whether as between persons and persons, things and things or persons and things and including the impartation of data) of any matter otherwise than in the form of sounds or visual images; or

(iv) signals serving for the actuation or control of machinery or apparatus,

and 'telephonic communication' means a communication by any of the means, of any of the matters, specified in this subparagraph . . .

(2) For the purposes of this Ordinance telecommunications apparatus which is situated in Gibraltar and—

(a) is connected to but not comprised in a telephone service; or

(b) is connected to and comprised in a telephone service which extends beyond Gibraltar,

shall be regarded as a telephone service and any person who controls the apparatus shall be regarded as running a telephone service."

10 I shall have to return later to set out the provisions of the principal EC Directive which is concerned with telecommunications. At this stage, however, it will be convenient to give an outline of the main facts of the case.

**The facts**

11 Gibnet was incorporated as a Gibraltar limited company on March 20th, 1995. The founding directors of Gibnet realized that there was scope for the establishment of a local Internet service. For the purpose of providing this service, Gibnet applied for and obtained a leased telephone line to Spain through Gibraltar Nynex Communications Ltd. ("Nynex"). Nynex was incorporated in May 1990 and is responsible for the provision of the local telephone service in Gibraltar under a contract with the Government made in accordance with s.57 of the PUUO. A similar contract in relation to a telephone service outside Gibraltar was made with Gibraltar Telecommunications International Ltd. ("Gibtel"). The Government of Gibraltar has a 50% beneficial interest in Nynex and Gibtel. It is common ground that at that time Nynex itself had no intention of establishing an Internet service.

12 In about 1997 Gibnet entered into an agreement with Gibtel for the right to set up and operate a "very small aperture terminal" ("VSAT") link under the umbrella of the licence owned by Gibtel. This link enabled Gibnet to enhance its service by means of a satellite link.

13 By the beginning of 1997 Nynex had changed its attitude to the provision of an Internet service, and the directors of Gibnet became concerned that Nynex was hampering the efforts of Gibnet and was seeking to compete unfairly. A meeting was therefore arranged between the directors of Gibnet, the Minister for Trade and Industry and Mr. Paul Canessa, the Telecommunications Regulator (Designate). At this meeting Mr. Imossi, one of Gibnet's directors, explained that Gibnet was concerned that Nynex was now going to start providing an Internet service itself and would compete unfairly. He said that Nynex was being difficult with Gibnet. The Minister responded by saying that Gibnet should not suffer unfair disadvantage and explained that telecommunications would be liberalized by the transposition of EC Directives. According to the minutes of the meeting, the discussion then continued as follows:

> "Mr. Imossi agreed to supply [a list of areas where Gibnet felt it was being prejudiced by Nynex], together with copies of correspondence. He confirmed that Gibnet were contracting with Gibtel to provide a VSAT terminal for greater Internet capacity . . .
>
> The Minister confirmed that the industry would be given an opportunity to comment on the draft Telecommunications Ordinance, possibly in a few weeks time, and in the meantime Mr. Canessa would make available copies of the relevant telecoms Directives to Gibnet."

14 On May 5th, 1997 Mr. Canessa wrote to the Managing Director of Nynex, drawing attention to some of the points raised by the represen-

tatives of Gibnet at the meeting on April 1st, and asked him for an explanation. The letter concluded:

> "I shall be grateful for a detailed explanation of the above points in order to satisfy ourselves that GNC [Nynex] are not attempting to hamper the operations of Gibnet in any way prior to GNC's own venture as an Internet service provider."

15 As I have already indicated, I shall return later to consider the EC Directive to which reference was made at the meeting on April 1st, 1997. It is to be noted that at that stage it was contemplated that the Directive would be brought into force in Gibraltar quite soon.

16 Mr. Canessa, who attended the meeting on April 1st, 1997, had been the Telecommunications Regulator (Designate) since June 1993. He had occupied this position pending the establishment of the Telecommunications Regulatory Authority under which he would become the Regulator. From April 1st, 1999 Mr. Canessa became the Wireless Officer under the WTO. It seems that there had been a delay in the setting up of the Telecommunications Regulatory Authority. During the relevant period prior to April 1st, 1999 the Wireless Officer was Mr. Alfred Pizarro. One of the functions of the Wireless Officer is to issue licences under the WTO. It will be seen, however, that the earlier correspondence in 1998 was with Mr. Canessa.

17 During 1997 two companies which were interested in the gaming industry in Gibraltar, Interbingo Ltd. and Interkeno Ltd., began to use a laser link between Gibraltar and La Linea. The Government, however, objected to this use and on November 19th, 1997, Mr. Macano wrote to Mr. Isola from the office of the Financial and Development Secretary to notify him that Interbingo and Interkeno should immediately stop using the laser link, which was described as being "unlicensed," and enter into an agreement with a Gibraltar licensed communications company. It was said that making such an agreement with a Gibraltar company was a prerequisite to the signing of a gaming licence. As a result of this, Interbingo and Interkeno stopped using the link. It was in these circumstances that in November 1997 Gibnet entered into an agreement with a Spanish company in Estepona which enabled it to set up a laser link itself between Gibraltar and La Linea as a back-up system to its existing VSAT link.

18 On January 5th, 1998, however, the WTO was amended in the way I have already described so as to cover the use of an infrared laser for the transmission of signals. The amendment came into force with immediate effect.

19 On February 23rd, 1998 Gibnet's solicitors wrote to Mr. Canessa to inform him that Gibnet had entered into a contract to use an infrared laser

link as a back-up to the existing VSAT link. The specification of the laser link was stated. The letter continued:

> "We would be grateful for your confirmation of whether our clients require a licence to use the same, especially having regard to the fact that they have been using it for some time. On the premise that our clients require a licence to use the same due to the recent amendments to the Wireless Telegraphy Ordinance, we would be grateful if you would inform us of the procedure to obtain such licence and the transitional provisions in force pending the consideration of the same."

20 On February 25th, Mr. Canessa replied. He said that the link as described in the letter required a licence and that it was illegal to operate this link without a licence. Mr. Canessa informed the solicitors that Gibnet should immediately cease operating the link until the licence was granted. Mr. Canessa continued:

> "When I spoke on the telephone two days ago to Mr. Lawrence Isola, representing Gibnet, he confirmed that the company had been operating the infrared link for some time and said he was unaware of the provisions of the Wireless Telegraphy (Amendment) Ordinance, 1997. However, other Gibnet representatives were aware of our concerns with the infrared link which, at the time, was being used by another company. Some months ago, we advised Gibnet not to go down that road. . . . In the meantime, I must stress that the equipment cannot be operated without a licence. If Gibnet persists in using the equipment without a licence, the matter will be referred to the Attorney-General's Chambers."

21 On March 6th, Gibnet's solicitors replied saying that they were taking instructions, and asked Mr. Canessa to inform them of the procedure to obtain a licence and of the transitional provisions in force pending the consideration of the licence. The letter continued: "Finally, you will appreciate that our clients are perfectly entitled to obtain a wireless telegraphy licence in order to use an infrared laser link and in this respect we fully reserve our clients' rights."

22 On March 10th, Mr. Canessa replied. He wrote:

> "In order to apply for a licence under the Wireless Telegraphy Ordinance to operate an infrared laser link, your clients must provide the Wireless Officer with full details of the ownership of the link, its location, maximum radiated power, emissions code and direction of maximum radiation. Additional information may be required by the Wireless Officer in order to complete the technical evaluation and for due diligence purposes generally. Such additional

information may be requested by the Wireless Officer following receipt of the application.

There are no transitional provisions pending an application for such a licence. Your clients should not have been operating in the first place. A licence must be obtained before the commencement of operation."

23 On March 23rd, Gibnet's solicitors wrote, informing Mr. Canessa that Gibnet wished to proceed with the application for a licence and that they wished to co-operate with Mr. Canessa. The letter set out the details of the laser link as requested and also gave some additional information which it was thought might be useful when the application was considered. The letter continued:

"As stated to you in previous correspondence our clients wish to use the equipment as a back-up to their existing VSAT communications link. Our clients have occasionally experienced problems with their VSAT link in the past and you will therefore appreciate that it is imperative for them, as Gibraltar's first Internet provider, to have the ability to resort to a back-up system should their primary link fail.

You will no doubt be aware of the increasing importance of the Internet and its role as part of the telecommunications infrastructure of the Finance Centre. In this respect it would be disastrous for the development of the Finance Centre if the ability to provide reliable and fast Internet access were compromised in any way.

We trust you will find everything in order. However, should you require any further details, please do not hesitate to contact us."

24 There then followed an interval of about a month. On April 27th, Mr. Canessa wrote (apparently in response to a telefax from Gibnet's solicitors asking what the position was with regard to the licence):

"The Government is currently considering the matter regarding the policy on licensing infrared links under the Wireless Telegraphy Ordinance and I will revert to you once the necessary decisions are taken.

In the meantime, please note that there are no transitional provisions pending such a licence and your clients should be advised not to operate such a link."

25 About a week later Mr. Canessa wrote again:

"I am informed by Gibtel that the VSAT terminal which has been operated by Gibnet under Gibtel's operating licence is now back up and running and this has been the case since April 2nd, 1998. I

therefore require your confirmation that the infrared laser link will not be operated pending consideration of your application for a licence.

If your clients operate this link, they will be acting contrary to the provisions of the Wireless Telegraphy Ordinance and I will have no option but to instruct Her Majesty's Attorney-General for Gibraltar to take such action against your clients that he might consider appropriate."

26 A copy of the letter dated May 5th was sent to Mr. Trinidad, Senior Crown Counsel. Copies of some of the previous correspondence had been sent by Mr. Canessa to the office of the Financial and Development Secretary.

27 In the correspondence relating to the laser link in the papers before us there is then a gap of several months. It seems probable, however, from the affidavit evidence, that further correspondence took place during the summer. It is certainly the case that there was correspondence between Gibnet's solicitors and Mr. Peter Hyde, who was acting for the Wireless Officer, relating to a licence for a radio relay system. It was in the context of this second application that Mr. Canessa wrote to Gibnet's solicitors on August 11th, 1998 to say that he was concerned that he had not received a reply to his letter of May 5th and that he would be unable to consider any request for licensing until he received the confirmation requested in that letter, namely that the laser link would not be operated pending consideration of the application for a licence. A copy of this letter also was sent to Mr. Trinidad.

28 It was at this stage that Mr. Pizarro, the Wireless Officer, came on the scene. On September 11th, he wrote to Gibnet, referring to the correspondence between Mr. Canessa and Gibnet, and set out in the letter the provisions of s.5(1) of the WTO. The letter concluded: "I hereby give you notice that within a period of seven days from receipt of this letter you must provide me with proof that the said infrared equipment has not been used and has been removed and disabled for future use."

29 On September 18th, Gibnet's solicitors replied to Mr. Pizarro. They wrote:

"We refer to your letter of September 11th to Gibnet Ltd. and our subsequent telephone conversation.

As explained to you, our clients are surprised by the contents of your letter, given that our clients applied for a licence to operate an infrared link on March 6th, 1998. By a letter dated March 10th, 1998, Mr. Paul Canessa . . . wrote stating that—

'in order to apply for a licence under the Wireless Telegraphy Ordinance to operate an infrared laser link, your clients must

provide the Wireless Officer with full details of the ownership of the link, its location, maximum radiated power, emissions code and direction of maximum radiation.'

These details, together with other additional details, were supplied on March 23rd, 1998. Mr. Paul Canessa eventually wrote on April 27th, 1998 stating that—

'the Government is currently considering the matter regarding the policy on licensing infrared links under the Wireless Telegraph Ordinance and I will revert to you once the necessary decisions are taken.'

To date, Mr. Canessa has not reverted to us or our clients.

In the premises, we are of the opinion that your department is in breach of Directive 97/13/EC of the European Parliament and of the Council of April 10th, 1997 on a common framework for general authorizations and individual licences in the field of telecommunication services.

We hereby put you on notice that any attempt by yourselves to remove the said infrared equipment, which we are instructed is solely in place as a back-up system, will be met by legal action by our clients against your department for breach of the said Directive and any damage that may result to our clients as a result of the non-implementation of the Directives in Gibraltar.

We trust this action will not be necessary and, once again, request that you issue a licence to our clients for operation of the said equipment without any further delay."

30 Following this letter, Mr. Hernandez, an associate in Gibnet's solicitors, had a conversation with Mr. Pizarro. According to the affidavit sworn by Mr. Hernandez on January 7th, 1999, in the course of this conversation, the Wireless Officer agreed that he would not take any action until he had spoken to the Regulator, but he did not seem to be aware that the question of policy on licensing laser links was being considered by the Government.

31 On October 1st, 1998 a Police Sergeant arrived at Gibnet's premises with a search warrant. According to Mr. Hernandez, no warning of this visit had been given. The laser equipment was not removed on that occasion but photographs were taken. On December 11th, 1998 the laser equipment was seized pursuant to a further warrant.

32 On December 14th, 1998, a few days after the seizure, Mr. Peter Isola wrote to the Financial and Development Secretary. In the letter, he said that the removal of the laser link had decimated Gibnet's business in

Gibraltar, as without the link Gibnet was unable to provide the speed which it required to function effectively. The letter continued:

> "I am writing to you to see whether there is any way that in the short term the laser link can be allowed to continue until such time as the matter is argued in court, whether by judicial review or some other means.
>
> We do not understand why the Government should act in this way and I have asked for a meeting with the Chief Minister so that he can be apprised of the economic and employment implications of this matter.
>
> We were assured by Crown Counsel in early October that a summons for the removal of the laser would be issued so that we would have an opportunity to argue our clients' case on the legal issues involved in the interpretation of the licensing Ordinance and on the applicability of the European Union Directive to Gibraltar and, more particularly and relevantly, to the Gibraltar Government.
>
> It is extraordinary that a new law is passed which allows an activity to continue if licensed, that no transitional provisions are introduced and that the Telecom Regulator (Designate) refused to deal with the application and refuses to respond to our letters month after month after month.
>
> Gibnet is at the forefront of Internet technology and is constantly bringing the best to Gibraltar in a way which multinationals with diverse interests are simply not interested or capable of doing."

33 On December 18th, 1998, a meeting took place between Mr. Peter Isola and the Chief Minister. At that meeting Mr. Isola produced and read a paper which had been prepared by the directors of Gibnet, giving the history of Gibnet's Internet operations. According to Mr. Isola, at that meeting the Chief Minister informed him that now that the equipment had been taken away "they could proceed to consider my clients' application." Mr. Canessa was also at this meeting on December 18th. According to his affidavit, he remembers that Mr. Isola was asked whether he was certain that the connection in Spain was legal there and that Mr. Isola had replied that he did not know.

34 On January 14th, 1999 Gibnet filed an application for judicial review and on January 19th, leave was granted by the Chief Justice. At that stage declarations were sought to the effect that the Wireless Officer was under an obligation to consider and determine the application. In addition an order of certiorari was sought to quash the warrants for the seizure of the equipment. It is to be noted that by that stage a summons

had been issued against Gibnet alleging a breach of s.5 of the Wireless Telegraphy Ordinance. The relief sought in the Form 86A also included the following:

> "6. A declaration that in the consideration and determination of the application the [Wireless Officer] is bound to consider and apply the provisions of Directive 97/13/EC . . .
>
> 7. A declaration that the Crown in right of the Gibraltar Government is in breach of its legal obligations under Community law by reason of its non-implementation of the Directive and is under an obligation under Community law to incorporate the provisions of the Directive into Gibraltar law.
>
> . . .
>
> 9. Damages against [the Attorney-General] in respect of damage suffered by [Gibnet] resulting from the seizure of [Gibnet's] equipment on December 11th, 1998 and continuing."

35 On February 16th, 1999 Mr. Isola had a meeting with Mr. Canessa. Mr. Isola inquired about the progress of the licence. Mr. Canessa told him that the decision on whether or not to license the link was being considered by the Wireless Officer and Mr. Canessa, and that a reply was expected to be sent in a couple of days' time. Mr. Canessa said it was for the Wireless Officer, through the United Kingdom, to ensure that the transmission from Gibraltar was legal and also that the connection with the Telefonica network was legal. He also told Mr. Isola that the Chief Minister had asked him to contact Nynex in an effort to work out a financial package for Gibnet. He stressed that the Government did not want to undermine Gibnet or seek its closure.

36 On the day following this meeting, Mr. Pizarro sent a letter to Gibnet's solicitors to inform them that the licence application was refused. This is an important letter, which I shall have to set out almost in full. Mr. Pizarro wrote:

> "I have given careful consideration to your clients' application and regret to inform you that I have decided, in the exercise of my discretion, not to grant your clients the licence for their equipment to provide a telecommunications data link to La Linea.
>
> The reasons for my decision are as follows:
>
> (1) The grant of this licence would contravene the provisions of s.27(1) of [the PUUO], whereby only 'contractor companies' authorized thereunder can run or connect telephone services in Gibraltar. Your client is not an authorized 'contractor company' under that Ordinance.

(2) In any event, I do not consider that your clients should be granted the licence by reason of their conduct in this matter. In particular:

(a) they have operated and kept the relevant equipment connected without the necessary licence;

(b) they have not provided me with the confirmation requested (on a number of occasions) that such equipment was not being used without a licence.

(3) Apart from (1) and (2) above, as the Telecoms Regulator (Designate) recently informed your Mr. Peter Isola Jnr., I would require proof that the operation of the laser link is permitted at the La Linea end and is authorized to be connected to the Spanish telephone network (and thus not operating illegally in Spain). Your clients do not appear to have obtained such permission and this reinforces my view that your clients should not be granted a licence."

37 Meanwhile, following the removal of the laser equipment, Gibnet tried to obtain an alternative supply of band width. The directors of Gibnet considered it unwise to rely on one source of Internet band width because if that failed there was no alternative or back-up. Gibnet therefore decided to approach Nynex but these approaches did not lead to any satisfactory outcome. Gibnet reported the matter to Mr. Canessa and on March 16th, Mr. Canessa wrote to Mr. Imossi, one of the directors of Gibnet, to say that back-up could be provided at a cost of £220,000 a year plus installation and support. Mr. Imossi commented in his affidavit sworn on April 13th, 1999 that the price suggested of £220,000 a year represented the annual turnover of the company. He regarded it as an outrageous price.

**The hearing before Pizzarello, A.J.**

38 The application for judicial review came on for hearing before Pizzarello, A.J. on June 23rd, 1999. At the outset of the hearing, Mr. Isola, for Gibnet, sought leave to make amendments to the Form 86A. Some of these proposed amendments, which had been foreshadowed in an application launched on March 17th, 1999, were not objected to on behalf of the respondents. However, further amendments which involved a challenge of the decision of the Wireless Officer dated February 17th, were opposed. It was argued that the decision of the Wireless Officer post-dated the application for judicial review and therefore could not properly be included. After hearing argument, the court allowed both the agreed and the opposed amendments.

39 Pizzarello, A.J. was referred to an earlier decision of the Chief Justice and the Court of Appeal in one of the *Marrache* cases, but

concluded that these decisions were distinguishable. Indeed, the opposed amendments had been suggested by Pizzarello, A.J. himself for the purposes of clarification. The learned judge said that the question of the Wireless Officer's decision was a matter obviously in issue but that Gibnet should make the necessary amendments to identify precisely what was under attack. He concluded by granting leave to appeal against this ruling. I shall call this the first appeal.

40 The case for Gibnet before Pizzarello, A.J. can be summarized as follows:

(a) Gibnet had been the victim of an injustice. It was a reasonable expectation that the Ordinance would contain transitional provisions. Moreover, the amending Ordinance itself gave the Wireless Officer power to include in any regulations "such transitional provisions as [he] shall reasonably deem fit": see s.5(2A)(d) of the principal Ordinance as amended.

(b) It was clear from the correspondence and the other evidence that the decision had not been reached by the Wireless Officer himself, or certainly not by him alone. Mr. Canessa had played a major part in the decision, as, indeed, had the Chief Minister. Mr. Pizarro should have been at the meeting on December 18th, 1998. Instead it was attended by the Chief Minister and Mr. Canessa.

(c) It was stated by Mr. Canessa in his affidavit that from the outset of its operations Gibnet should have had a licence under the PUUO. This suggestion was based on a misunderstanding of the PUUO. In any event, the first reason based on the PUUO in the letter of February 17th, 1999 was a reason of which Gibnet had had no notice. It was an irrelevant matter for the Wireless Officer to take into account on an application under the WTO and, as Gibnet had had no notice of it, the court should treat it as unfair.

(d) Similarly, the third reason given in the letter of February 17th, namely the reference to the legality of the connection in Spain, was something which had not been mentioned until the day before the letter containing the decision, and in any event, the legality of the communication was a matter for the Gibraltar authorities and not for Gibnet. Here again, the Wireless Officer had acted unfairly.

(e) The second reason given in the letter of February 17th, 1999 related to Gibnet's action in continuing to use the laser link after the amending Ordinance had come into force. But s.3 of the 1997 Ordinance contained a provision for the continuity of law and, in reliance on this section, Gibnet had been entitled to continue to use the laser link until the expiry of its current licence on September 30th, 1998. It was to be noted that no summons was issued before the end of September 1998. In any

event, by refusing a licence on the ground of Gibnet's conduct, the Wireless Officer was punishing Gibnet. This was improper and unfair. Criminal proceedings had been brought against Gibnet by the summons of December 4th, 1998 and, furthermore, by the time the letter was issued on February 17th, 1999, Gibnet had not had any use of the laser link for more than two months.

(f) The EC Directive should have been implemented. The primary objective of this Directive was to allow new operators to gain access to telecommunications. Gibnet was entitled to rely on this non-implementation as the basis of a claim for damages. In any event, the Wireless Officer should have taken the spirit of the Directive into account when making his determination. The decision was flawed for that reason also.

(g) The decision was tainted by bias. Mr. Canessa played a leading role in the decision. It was to be observed that much of his salary was paid by Nynex and Gibtel who had a monopoly in the field of telecommunications. Moreover, the Government has a 50% interest in each of these two companies. It was important to remember that a decision could be tainted by bias if there was a danger of bias. The court was referred to the decision in *R.* v. *Bow St. Metrop. Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)* (3).

41 Counsel for the respondents challenged each of Mr. Isola's assertions. He submitted that the core issue was Gibnet's conduct. Gibnet had knowingly and persistently broken the law, they had not been open with the Wireless Officer and they had misled the court about the fact that they were using the equipment as a back-up. They had acted in an obstructive way when the police went to the premises and this conduct alone more than justified the Wireless Officer's stance. In addition, the conduct of Gibnet was a matter which the court could take into account in considering whether, in the exercise of its own discretion, it should grant any relief. Gibnet had not brought to the court's attention the fact that they had been acting illegally and, in the circumstances, Gibnet did not come to the court with clean hands. In addition, the application for judicial review was not made promptly.

42 Counsel for the respondents further submitted that Gibnet had been in breach of the law since it began its operations in about 1995 because it was not a contractor under the PUUO. This was a factor which the Wireless Officer was entitled to take into account. He was also entitled to take into account the fact that Gibnet had not provided any evidence that the operation of the licence was in accordance with Spanish law. As for the suggestion that Gibnet had some legitimate expectation that there would be transitional provisions, there was no evidence to justify such a suggestion.

43 It was accepted that the EC Directive had not been implemented, but this Directive gave no rights which could be enforced by Gibnet. The provisions of the Directive did not fall within the principle of "direct effect."

44 At the conclusion of the hearing, which extended over about four days, Pizzarello, A.J. reserved his judgment. He delivered his judgment on September 1st, 1999. I mean no disrespect to the judge's detailed and careful judgment if I do no more than attempt to provide a summary of his main findings. I would list these as follows.

(a) The judge rejected Mr. Isola's construction of s.3 of the 1997 Ordinance. He accepted that the Ordinance came into effect forthwith.

(b) He also rejected the suggestion that Gibnet could have had any legitimate expectation that the legislature would insert transitional provisions into the amending Ordinance.

(c) He held that the PUUO did not cover the Internet service provided by Gibnet before the laser link was used. It is to be recorded that in his reply Mr. Isola accepted that the use of the infrared laser did involve the "conveyance" of signals which required a licence under the PUUO.

(d) Notwithstanding his finding that Gibnet had no legitimate expectation as to transitional provisions being inserted by the House of Assembly, the judge held that the Wireless Officer had not properly considered whether or not he should include transitional provisions himself.

(e) He also took the view that the Wireless Officer had not dealt with the application speedily enough.

(f) He considered that there was a real danger that the Wireless Officer had taken Government policy into account.

(g) The judge held that each of the reasons stated in the letter of February 17th, 1999 was fatally flawed. He held that the Wireless Officer had to look at the WTO alone and that his remit was to issue a licence under that Ordinance itself. It was not the duty of the Wireless Officer to have regard to the PUUO in considering an application under the Ordinance for which he was responsible. He took the same view as to the third reason advanced by the Wireless Officer, because it was not for the Wireless Officer to consider the requirements of a foreign Government. He said: "It is he [the Wireless Officer] who has to ensure that international arrangements are not breached by the granting of his licence: he ought not to land that obligation on the shoulders of an applicant."

(h) It is clear that the judge was more troubled by the second reason given by the Wireless Officer, that is, the reason relating to the conduct of

Gibnet. It seems, however, that he concluded that this second reason could not stand on its own and the Wireless Officer's reliance on this second reason was affected by his other reasons, which the judge found were clearly untenable. Later in his judgment the judge said:

> "It is my view that reason 2 advanced by the Wireless Officer is so interlinked with reasons 1 and 3 that it cannot be separated and dealt with independently of the others, and, as I have held that those two are wrong, reason 2 also is untenable. In the second place, it is my view that the matters I have touched on above are sufficiently powerful to undermine the Wireless Officer's decision even if I were to have dealt with the three reasons for refusal as separate and independent matters."

(i) He rejected the allegation that the decision of the Wireless Officer had been tainted by bias. He accepted that both Mr. Pizarro and Mr. Canessa had acted honourably and impartially. Later in his judgment, the judge said that he was not persuaded that there was sufficient material to raise justifiable doubts as to the Wireless Officer's impartiality.

(j) The judge seems to have accepted that there were good reasons why the Directive had not been implemented and held that the claim of damages could not, therefore, be sustained. The only basis for damages would have been a default by the Government in the implementation of the Directive and proof that the Directive gave rise to directly enforceable rights.

45 In conclusion, the judge decided that the decision of the Wireless Officer communicated to the applicant in the letter dated February 17th, 1999 should be quashed and that the application should be remitted to him for reconsideration. The judge refused all other grounds for relief.

**The first appeal**

46 At the outset of the hearing in this court, counsel for the Wireless Officer and the Attorney-General ("the appellants") argued that the judge had erred in granting leave to Gibnet to amend the Form 86A to include an application to quash the decision refusing a licence. The position would have been different had Gibnet applied by means of a separate application for judicial review after the decision letter had been sent and then applied for consolidation of the two applications. In the present case the amendments to which the appellants did not object had been applied for on March 17th, 1999, a month after the decision, and at that time no application was made to amend to include a reference to the refusal.

47 Counsel drew attention to the fact that the rules relating to amendment in judicial review proceedings are strict. If a notice of an application for leave to amend is not given to the other party at least five

clear days before the hearing, the court will be reluctant to exercise its powers save in exceptional circumstances. The circumstances in this case were wholly unexceptional. Counsel also drew our attention to the decision of this court in *A.S. Marrache & Sons Ltd.* v. *Governor* (2). As was pointed out in that case, applications for judicial review, being concerned with procedural propriety, should relate to decisions which have already been reached.

48 At the conclusion of the arguments on this part of the case, the court indicated that it rejected the appellants' submissions and would give its reasons later.

49 In my judgment, the judge was entitled on the facts of this case to allow the amendment. The facts in the *Marrache* case were quite different. In that case, as is apparent from the judgment in the Court of Appeal, Pizzarello, A.J. had been concerned with events in July and August 1996, whereas the proposed amendments related to decisions on matters which might raise quite different issues from those which had been before the judge. In my view, the judge was entitled to conclude that the refusal of the licence was the real question in issue and that an amendment was only necessary to make the position absolutely clear. I, for my part, would certainly not interfere with this exercise of his discretion.

**The main appeal by the appellants**

50 The memorandum of appeal contains 12 grounds relied on by the appellants to show that the judge fell into error. It will be convenient to refer to both the respondents in the court below as the appellants, though strictly speaking the main appeal is brought by the Wireless Officer alone and the Attorney-General is merely added as a respondent to the cross-appeal.

51 As the argument in this court developed, however, it became clear that the substantial issues for determination could be grouped under the following headings:

1. The PUUO issues.

2. The conduct issues.

3. The third reason in the letter of February 17th, 1999, that is, the reason relating to the legality according to Spanish law of the connection in La Linea.

52 Although it was not suggested in the letter dated February 17th, 1999 that Gibnet had been acting illegally from the outset of its operations, this seems to have been the view of Mr. Canessa and the case was argued on the basis that Gibnet had been acting unlawfully

throughout. This argument involved consideration of the wording of the PUUO. It was submitted that the provision of an Internet service fell within the definition of a telephone service in Schedule 2 of the PUUO. It was said that Gibnet was providing a service for the conveyance of data within the definition and that in order for the signals to reach Nynex and Gibtel respectively, they had first to be conveyed by Gibnet.

53 I find this to be a surprising argument. It was never suggested to Gibnet, in the years of operation before there was any question of a laser link, that they required a contract with the Government under s.57 of the PUUO in order to operate legally. Mr. Isola drew attention to the fact that, if this argument were correct, the Government itself, both through Nynex and Gibtel and also in its own use of the Gibnet facilities, was dealing with a company which was carrying on an unlawful activity. Gibnet accepts that a laser link would require a licence because signals and data would be "conveyed" along the beam, but the service which it had provided in earlier years, and still continues to provide, through the lines leased from Nynex and through the satellite link made available by Gibtel did not constitute the conveyance of signals by Gibnet. It seems to me the solution to this conundrum was to be found in attaching a limited meaning to the word "conveyance," so as to restrict it to the operation whereby signals are actually carried. In my view, this is the proper interpretation of the word "conveyance" in this context.

54 However, even if this interpretation of the PUUO is too narrow, I still consider that the judge was entitled to conclude that the first reason given by the Wireless Officer was an invalid reason. His task was to consider an application for a licence under the WTO. Moreover, as I interpret his letter, he was merely stating that if a licence were granted it would in future require a PUUO licence. He was not taking the same point as Mr. Canessa that Gibnet had been operating illegally for several years. I also attach importance to the fact that this first reason was included in the letter of February 17th, 1999 without any prior warning to Gibnet. In the previous March, Gibnet had supplied the particulars which it was asked to supply. They were technical details which clearly fell within the remit of the Wireless Officer.

55 I turn next to the third reason given by the Wireless Officer, namely that Gibnet had not satisfied him that the laser link was legal by Spanish law. On December 18th, 1998, Mr. Isola was asked whether he was certain that the laser link in Spain was legal by Spanish law. Mr. Isola replied that he did not know: see Mr. Canessa's affidavit. It was not, however, until the meeting on February 16th, 1999 that the legality of the Spanish link was referred to in any detail, and it seems that on this occasion, according to Mr. Canessa's note, it was accepted that it was for the Wireless Officer to ensure that the transmission from Gibraltar was

legal. However that may be, I consider that the judge was fully entitled to conclude that it was not for Gibnet to give an assurance about this matter and that this third reason was invalid.

56 In any event, it seems to me that it was unfair to include such a reason in the refusal letter without having issued Gibnet with any proper warning that it was a material factor which the Wireless Officer would take into account. It is necessary to keep in mind throughout this case that the details which Gibnet was asked to supply were those which had been requested in March 1998. These details were of a technical nature, as one would expect. In relation to both the first and third reasons, I have in mind the principle adverted to by Lord Denning, M.R. in *R.* v. *Gaming Bd. for G.B., ex p. Benaim* (4) ([1970] 2 Q.B. at 430).

57 I come, then, to what I have called the conduct issues. As did the judge, I have found these issues the most difficult. Furthermore, it is important to keep in the forefront of one's mind that the court is not acting as an appellate authority but is concerned solely with the propriety of the Wireless Officer's actions.

58 Counsel for the appellants placed great weight on what he characterized as the "criminal" conduct of Gibnet. But the matter has to be seen in context. Gibnet had been advised, wrongly as I believe, that they could continue to rely on the licence granted in the previous year until September 30th, 1998. The laser link was not intended for some criminal enterprise but to provide an important back-up and indeed enhancement of the Internet services which were of vital concern to the community in Gibraltar. In my judgment, it was, at the lowest, imprudent of Gibnet to persist in using the laser link without having a full discussion with Mr. Canessa and the Wireless Officer to try to reach some sensible solution, but the directors of Gibnet were not common criminals and cannot be considered as such.

59 The judge held that Mr. Pizarro and Mr. Canessa were senior officers whom one would expect to act honourably and impartially, and, despite the matters raised by Gibnet in the cross-appeal, I think it would be quite wrong to throw any doubt whatever on their integrity and good faith. But they had a very delicate task to perform. In 1997, Nynex had started its own Internet operation. This operation was clearly in direct competition with Gibnet. Nynex was a company in which the Government held a 50% share. It was therefore incumbent on any officer who had to reach a conclusion on an application for a licence under the WTO to act with the utmost scrupulousness and fairness and to make it clear that he was so acting.

60 There may well be many cases in which the previous conduct of an applicant for a licence will be very relevant. Applicants for gaming

licences or excise licences may be examples. But the "criminal" nature of Gibnet's conduct had already been marked by the issue of a summons. In the context of this particular case, I have come to the conclusion that the judge was justified in thinking that there was a link between the first and third reasons and the second reason which invalidated this reason too. All three reasons reflected the Wireless Officer's view that Gibnet was prepared to pay little attention to the law. I have, however, had to consider the matter afresh because there are certain aspects of the judge's judgment with which, with respect, I do not agree.

61 To give one example, I found it difficult to follow the judge's finding that, in some way, Gibnet had a legitimate expectation that the Wireless Officer would exercise his power to introduce transitional provisions, particularly as, from an early date, Gibnet was told in terms that there were no transitional provisions being introduced.

62 The Wireless Officer had a statutory duty to perform and a court should be very slow to interfere with the exercise by him of his discretion. But on the facts of this case, having considered the evidence and having had the assistance of detailed arguments by counsel, I have come to the conclusion that Gibnet was not treated fairly in the manner in which its application was considered and finally refused, and that the court should intervene so that the matter can be reconsidered.

63 If, however, I had any doubt about the matter, it would be removed by the conclusion to which I have come in regard to the applicability of the EC Directive. I must, therefore, turn to the matters raised in the cross-appeal.

**Cross-appeal**

64 The cross-appeal was brought by Gibnet against both the Wireless Officer and the Attorney-General. For convenience, however, I shall continue to call these two parties the appellants. In the memorandum in support of the cross-appeal, Gibnet set out a number of grounds on which it relied to support the decision of the judge in addition to those relied upon by the judge himself. I do not consider, however, that it is necessary to deal with these alternative grounds individually. I should merely repeat that I consider that, on the evidence, the judge was justified in finding that the case based on bias had not been made out. Furthermore, in my view, this is a finding by the judge which, in any event, it would be difficult, if not impossible, for this court to overturn.

65 The main matter raised in the cross-appeal concerned the Directive 97/13/EC. It is common ground that this Directive has not been incorporated into Gibraltar law and that it should have been incorporated by January 1st, 1998. The central question which arises on the cross-

appeal is whether this non-incorporation gives rise to any rights on which Gibnet can rely.

66 I propose to start by considering the principle of direct effect as it applies to EC Directives. Article 249 of the Treaty of Rome (formerly art. 189) provides that "a Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." This provision as to Directives is to be contrasted with the provision in art. 249 relating to regulations. In the case of a regulation, it is provided that it shall have general application and shall be binding in its entirety and be directly applicable in all Member States.

67 But the European Court of Justice ("the ECJ") has developed the principle of "direct effect" for Directives which achieves a result which is analogous to the provision in art. 249 relating to regulations. The principle of direct effect was considered quite recently by the Court of Appeal in England in *Three Rivers District Council* v. *Bank of England* (5). The decision of the Court of Appeal in that case was reached by a majority, but a summary of the relevant principles was set out, in a form with which neither of the other members of the court appeared to disagree, in the dissenting judgment of Auld, L.J. in which he said ([1999] Lloyd's Rep. Bank. at 348):

> "The European Court has developed a principle of 'direct effect' for directives similar to that of direct applicability expressly provided by Article 189 for regulations. The principle, which is a right to invoke Community law against a member state or its emanation to protect interests for which a directive makes provision, owes its origin to the court's concern to ensure that member states should not be able to deprive individuals of Community law rights derived from a directive, simply by failing to implement or by mis-implementing it . . ."

The judge then referred to two authorities, and continued (*ibid.*):

> "The court has held that a member state may not plead, as against an individual, its own failure properly to implement the directive; Case 8/81 *Becker* v. *Finanzamt Munster-Innenstadt* . . . In that case the court, at paragraph 25, specified two, not necessarily mutually exclusive, purposes for which he could rely upon it:
>
> — first, 'as against any national provision which is incompatible with' it; and
>
> — second, 'insofar as [its] provisions define rights which individuals are able to assert against the State.'

Whichever of the two purposes for which an individual may rely on the directive—defensive or aggressive—the court, in *Becker* at para 5, has stipulated that the provisions upon which he relies must be 'unconditional and sufficiently precise' as to three matters:

— first, the identity of the persons entitled to the right ('the eligible plaintiff point');

— second, the content of the right ('the contents point'); and

— third, the identity of the person against whom the right may be asserted ('the damages point')."

Auld, L.J. then referred to the important decision in *Francovich* v. *Italy* (1) and to other cases. He continued (*ibid.*):

"The European Court from its earliest days has also developed, albeit more slowly, a broader principle of liability in damages to individuals of which, it seems to me, the *Becker* direct effect rule may now be regarded a part. It is a fundamental principle of Community law inherent in the system of the Treaty, including Articles 5 and 189, that national courts must provide remedies to individuals to protect their Community law rights, if necessary by removing national procedural or substantive rules which prevent or impede such remedies."

He referred to a series of cases and continued (*ibid.*):

"A right to damages under the *Francovich* head only exists where:

— first, the obligation giving rise to it is clearly defined on a similar basis to that required to give a directive direct effect, namely so as to confer clearly identifiable rights in the event of its breach;

— second, the breach is 'sufficiently serious' in the sense that the Member State 'manifestly and gravely disregarded the limits on its discretion'; and

— third, there is a direct causal link between the breach of the obligation and the claimed loss."

68 In addition to this passage in the judgment of Auld, L.J., I should refer to a passage in the majority judgment where it was said (*ibid.*, at 326):

"The rights must be 'unconditional and sufficiently precise'. That does not mean that they must be spelled out in exact detail, since a directive does almost by definition leave the choice of form and methods to member states. Mrs Becker succeeded even though the

> Federal Republic had a measure of discretion over such matters as provisions against abusive tax avoidance. But there must be a basic minimum of clarity and certainty."

69 In many cases in this field, the national court or the ECJ, as the case may be, is concerned to enquire whether a Directive has been implemented properly. In the present case, however, we are concerned with a situation where a Directive has not been implemented at all. This feature of the case is relevant if one has to consider whether the breach of the state's obligations is sufficiently serious. As to this, the majority expressed the opinion in the *Three Rivers* case (*ibid*., at 327), that "the total failure by a member state to implement a directive addressed to it will almost invariably, it seems, be regarded as seriously (that is, manifestly and gravely) in breach."

70 It is also helpful to refer to the judgment of the ECJ in the *Francovich* decision itself, where it was said ([1995] I.C.R. at 772):

> "39. Where, as in this case, a member state fails to fulfil its obligation under the third paragraph of article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a Directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
>
> 40. The first of those conditions is that the result prescribed by the Directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the Directive. Finally, the third condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.
>
> 41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

71 Such, then, is the principle of direct effect. As the argument developed in this court, it became apparent that the main contentions of the appellants were directed to what has been identified as "the contents point." In other words, the appellants contended that the reason why Gibnet could not rely on the provisions of the EC Directive was that the "rights" were insufficiently precise and could not be described as unconditional. It is therefore necessary to consider the terms of the Directive with care.

72 One can start by referring to the recitals in the Directive. Recital 1 demonstrates that certain earlier resolutions of the Council had been

concerned with the liberalisation of telecommunications infra-structures and that they had supported "the process of complete liberalisation of telecommunications services and infra-structures by 1 January 1998."

73 I should set out recital 2 in full:

> "Whereas the Commission communication of 25 January 1995 on the consultation on the Green Paper on the liberalization of telecommunications infrastructure and cable television networks has confirmed the need for rules at Community level, in order to ensure that general authorization and individual licensing regimes are based on the principle of proportionality and are open, non-discriminatory and transparent; whereas the Council resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications recognizes as a key factor for this regulatory framework in the Union the establishment, in accordance with the principle of subsidiarity, of common principles for general authorizations and individual licensing regimes in the Member States, based on categories of balanced rights and obligations; whereas those principles should cover all authorizations which are required for the provision of any telecommunications services and for the establishment and/or operation of any infrastructure for the provision of telecommunications services . . ."

74 In recital 3, there is a provision that—

> "market entry should be restricted on the basis only of objective, non-discriminatory, proportionate and transparent selection criteria relating to the availability of scarce resources or on the basis of the implementation by national regulatory authorities of objective, non-discriminatory and transparent award procedures . . ."

75 Recital 5 is in these terms: "Whereas this Directive therefore will make a significant contribution to the entry of new operators into the market, as part of the development of the Information Society . . ."

76 Recitals 9, 10 and 11 are also of importance, though I do not think it is necessary to set them out in full. I should, however, refer to Recitals 12 and 13. Recital 12 is in these terms: "Whereas any fees or charges imposed on undertakings as part of authorization procedures must be based on objective, non-discriminatory and transparent criteria . . ." Recital 13 provides:

> "Whereas the introduction of individual licensing systems should be restricted to limited, pre-defined situations; whereas Member States may limit the number of individual licences for any category of telecommunications services only to the extent required to ensure the efficient use of radio frequencies or for the time necessary to

> make available sufficient numbers in accordance with Community law."

77 Recitals 25 and 26 also are important. Recital 25 refers to the "essential goal of ensuring the development of the internal market in the field of telecommunications and specifically the free provision of telecommunications services and networks throughout the Community . . ." Recital 26 makes clear that the Directive applies to both existing and future authorizations.

78 Article 1 of the Directive explains that the Directive "is concerned with the procedures associated with the granting of authorizations and the conditions attached to such authorizations."

79 Article 2 sets out the definitions of some of the terms used in the Directive. The term "general authorization" is defined in art. 2(1)(a) as meaning:

> ". . . [A]n authorization, regardless of whether it is regulated by a 'class licence' or under general law and whether such regulation requires registration, which does not require the undertaking concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorization . . ."

and "individual licence" means:

> ". . . [A]n authorization which is granted by a national regulatory authority and which gives an undertaking specific rights or which subjects that undertaking's operations to specific obligations supplementing the general authorization where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority . . ."

80 Article 3 sets out the principles governing authorizations. Article 3(2) provides that "authorizations may contain only the conditions listed in the Annex." Article 3(3) is of importance. It provides:

> "Member States shall ensure that telecommunications services and/or telecommunications networks can be provided either without authorization or on the basis of general authorizations, to be supplemented where necessary by rights and obligations requiring an individual assessment of applications and giving rise to one or more individual licences. Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights, in accordance with the provisions of Section III."

81 Section II of the Directive is concerned with general authorizations.

Article 4(1) refers to the conditions which can be attached to general authorizations and provides that the conditions to be attached are limited to those "set out in points 2 and 3 of the Annex." Article 5 contains provisions as to the procedures for general authorizations. Article 5(1) provides that—

> "without prejudice to the provisions of Section III, Member States shall not prevent an undertaking which complies with the applicable conditions attached to a general authorization in accordance with Article 4 from providing the intended telecommunications service and/or telecommunications networks."

82 Section III is concerned with individual licences. Article 7(1) provides that—

> "Member States may issue individual licences for the following purposes only:
>
> (a) to allow the licensee access to radio frequencies or numbers;
>
> (b) to give the licensee particular rights with regard to access to public or private land;
>
> (c) to impose obligations and requirements on the licensee relating to the mandatory provision of publicly available telecommunications services and/or public telecommunications networks, including obligations which require the licensee to provide universal service and other obligations under ONP legislation;
>
> (d) to impose specific obligations, in accordance with Community competition rules, where the licensee has significant market power, as defined in Article 4(3) of the Interconnection Directive in relation to the provision of public telecommunications networks and publicly available telecommunications services."

The appellants draw attention, in particular, to para. (a).

83 Article 8 is concerned with the conditions attached to individual licences and art. 9 with the procedures for the granting of individual licences. It is to be noted that in art. 9(6) it is provided that—

> "Member States refusing to grant or withdrawing, amending or suspending an individual licence shall inform the undertaking concerned of the reasons therefor. Member States shall lay down an appropriate procedure for appealing against such refusals, withdrawals, amendments or suspensions to an institution independent of the national regulatory authority."

84 Article 19 of the Directive is concerned with new services and provides that—

> "where the provision of a telecommunications service is not yet covered by a general authorization and where such a service and/or network cannot be provided without authorization, Member States shall, not later than six weeks after they have received an application, adopt provisional conditions allowing the undertaking to start providing the service or reject the application and inform the undertaking concerned of the reasons therefor."

85 The Annex to the Directive contains the conditions which may be attached to authorizations. It is clear that any conditions which are attached "must be consistent with the competition rules of the Treaty." In addition they have to be "subject to the principle of proportionality." Permissible conditions include conditions "intended to ensure compliance with relevant essential requirements." The term "essential requirements" is defined in art. 2(1)(d) as meaning:

> ". . .[T]he non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security of network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives, as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunication systems and other space-based or terrestrial technical systems. Data protection may include the protection of personal data, the confidentiality of information transmitted or stored, and the protection of privacy."

86 I have set out many of the provisions of the Directive at some length in order to explain what appears to me to be the general objectives of the Directive, to which a purposive construction must be given. It seems clear from the provisions I have specifically referred to and from the Directive as a whole that it is concerned with the grant of rights to individuals. It is noteworthy that reference is made to the entry of new operators into the market: see recital 5 and art. 19.

87 It was argued on behalf of the appellants that Gibnet was not entitled to rely on the Directive because the rights granted were not unconditional and were too vague and general. With respect, this approach seems to me to be based on a misinterpretation of the Directive as a whole. As I understand the Directive, it confers on individuals who wish to operate telecommunications services the right to the benefit of a general

authorization, except in those cases where an individual licence can be granted in accordance with the provisions of Section III. The national authority is entitled to attach conditions to general authorizations and also to attach conditions to individual licences, provided that in either case they comply with the list of conditions set out in the Annex, but the fact that conditions may be attached does not mean that the right to the benefit of the general authorization or (where applicable) an individual licence is not precise and unconditional. To adopt the words of the majority in the *Three Rivers* case ([1999] Lloyd's Rep. Bank. at 326) the Directive provides "a basic minimum of clarity and certainty." It is to be remembered that the Bank Directive of 1977 considered in the *Three Rivers* case provided that Member States could lay down other conditions which credit institutions had to meet before commencing operations other than the minimum requirements contained in the Directive itself: see art. 3 of that Directive.

88 One turns, therefore, to consider the provisions in the Directive and to compare them with the criteria used by the Wireless Officer. The Wireless Officer, of course, had to act in accordance with domestic law, but the decisions of the ECJ make it clear that where a Directive has not been implemented the individual who has direct effect rights can complain if he is treated in a way which is inconsistent with the existence of those rights. Furthermore, provided the breach of Community law is sufficiently serious and there is a direct causal link between the breach and the provable loss, he can claim damages.

89 I have come to the conclusion that the decision of the Wireless Officer which was communicated on February 17th, 1999 was faulty in this further respect. It was reached by reference to criteria which were incompatible with the provisions of the Directive. I can give one example: ss. 27 and 57 of the PUUO are wholly incompatible with the processes of liberalization which the Directive seeks to achieve.

90 As a result, therefore, as it seems to me, the restrictions imposed on Gibnet by the refusal of the licence infringed art. 49 of the Treaty, which contains a general provision that "restrictions on freedom to provide services within the Community shall be prohibited." I also consider that *prima facie* and subject to proof, Gibnet is entitled to *Francovich* damages.

91 At the hearing before us, Gibnet contended that it was entitled to the benefit of a general authorization and did not require an individual licence. The appellants, on the other hand, contended that if the Directive were to be applied, Gibnet would require an individual licence. Reliance was placed on the provisions relating to scarce resources and in particular on art. 7(1), in its reference to "radio frequencies."

92 After the conclusion of the hearing the appellants sought to put further evidence before us as to whether the use of infrared frequencies was the use of a scarce resource and, indeed, whether these frequencies could be treated as radio frequencies for the purpose of the Directive.

93 At 8.30 a.m. on Saturday, February 26th, the court sat to hear a motion by the appellants to admit this evidence. After hearing argument we decided to admit it and also an e-mail received by Gibnet from the Radiocommunications Agency in London. I do not consider that it would be right to express a concluded view on the effect of this new evidence. It suggests that there may be a difference of opinion among experts in the field of telecommunications, and this matter may have to be examined further when the Wireless Officer looks at the application again. If I were to express a provisional view, however, it would be that I would need some convincing that a signal transmitted on an infrared frequency was being transmitted on a radio frequency.

94 However, I regard the point as academic for the purpose of this appeal. Whether Gibnet could rely on a general authorization or whether it required an individual licence, the decision of the Wireless Officer was flawed by being reached by the application of criteria which were incompatible with the Directive.

95 I would therefore dismiss the appeal and allow the cross-appeal for the reasons I have endeavoured to outline.

96 As to the precise form of relief to be granted, I would invite the parties to make written submissions, though it is my present view that further pleadings will be necessary and that the court should direct that the proceedings should continue as though commenced by writ. I would also invite the parties to make written submissions on the issue of costs. So far as possible these submissions should be in an agreed form.

**CLOUGH** and **WAITE, JJ.A.** concurred.

[*May 24th, 2000. After considering written submissions from the parties, the court delivered the following supplemental judgment*:]

97 **NEILL, P.**, delivering the judgment of the court: We gave judgment in this matter on February 28th, 2000. At the conclusion of the judgment we invited the parties to make written submissions as to the form of relief to be granted and as to costs. Written submissions were made on behalf of H.M. Attorney-General for Gibraltar and the Wireless Officer, dated March 17th and 22nd, 2000, and on behalf of Gibnet Ltd., dated March 20th, 2000. It was apparent from these submissions that although some matters were agreed there were substantial differences between the parties as to the appropriate form of order.

98 We have now had an opportunity to consider these submissions and the form of order to be made. The delay in giving this supplemental judgment is regretted, but the jurisprudence in this branch of the law is in a stage of development and the arguments of the parties merited careful study.

99 As has been pointed out on behalf of the respondents to the cross-appeal, it was stated in para. 90 of the President's judgment that "*prima facie* and subject to proof" Gibnet was entitled to *Francovich* (1) damages. These words were intended to convey that the claim to such damages (which had *not* been foreshadowed in the Form 86A), though *prima facie* valid, required to be properly established before any award could be made.

100 We have come to the conclusion that the right course is to order that the proceedings should continue as though commenced by writ and that Gibnet should serve a statement of claim setting out its case. To save time, we have ordered that this pleading should be served by June 30th, 2000, but any extension of this time and the timetable for any further pleadings or other interlocutory orders should be dealt with by the Supreme Court.

101 We have also come to the conclusion that in these further proceedings the Attorney-General will be entitled to raise all proper defences to the claim for damages, including, if so advised, an argument that in the special circumstances the failure to implement the Directive was not a sufficiently "serious" or "grave" breach to found a claim. At the hearing before us the reasons, if any, for the failure were not investigated.

102 We would draw attention to the fact that the House of Lords has now dismissed the appeal in the *Three Rivers* case (5) in so far as the claim under EU law is concerned: see, in particular, the opinions of Lord Hope and Lord Millett.

103 On the question of costs we see no reason to make a partial order.

*Appeal dismissed; cross-appeal allowed.*

[*July 6th, 2000. The appellant was refused leave to appeal against the court's order allowing the respondent's cross-appeal and against its subsequent declaration that the Wireless Officer was bound to consider and apply the EC Directive in his consideration and determination of the licence application. Leave was given to apply to the Privy Council for leave to appeal.*]