**[2003–04 Gib LR 224]**

## FINANCIAL SERVICES COMMISSIONER v. R. (Application of A Gibraltar Company, X, Y and Z, other respondents)

COURT OF APPEAL (Glidewell, P., Staughton and Clough JJ.A.): September 19th, 2003

*Financial Services—Financial Services Commissioner—assistance to foreign regulatory authority—if true purpose of Financial Services Commissioner passing information to foreign regulatory authority is to assist it, irrelevant that foreign authority will pass information to examining magistrate for criminal investigation with procedural safeguards for criminal investigations thereby bypassed*

*Financial Services—Financial Services Commissioner—confidentiality of information—initial presumption of confidentiality of information obtained by Commissioner at request of foreign regulatory authority—competing interests concerning disclosure then to be balanced but confidentiality should be starting point—wrong to start with intention to assist foreign authority by disclosure*

The respondent brought an action in the Supreme Court seeking (a) an order quashing a decision of the appellant; (b) a declaration that information obtained by the appellant was not obtained in the course of carrying out his functions and/or it would be unlawful to re-disclose the information to the party concerned; and (c) an order directing the return of the information whence it was obtained.

Two parties (*X* and *Y*), living in a different European country, were the subject of investigations being conducted by a foreign regulatory authority and by a magistrate of that country, in respect of illegal share transactions. Key to the investigations were two transfers of money involving the respondent company and two Gibraltar banks. The foreign regulatory authority requested the assistance of the appellant to obtain information from the first Gibraltar bank regarding any transactions and relationships between it and *X*, *Y* and *Z* (a customer of *X* and *Y*).

The appellant served notices under s.33 of the Financial Services Ordinance in order to obtain any relevant information. Once he had obtained the information, he made the decision to pass it on to the foreign regulatory authority under s.58(2)(d) of the Ordinance. Meanwhile, the magistrate requested the same information from the Attorney-General in

respect of the criminal investigations. This request was rejected on the ground that it did not satisfy the requirements of the Ordinance.

The respondent then brought the present proceedings. The Supreme Court (Schofield, C.J.) gave judgment in favour of the respondent, (a) quashing the appellant's decision to pass the information to the foreign authority; (b) ordering that the appellant reject the request from the foreign authority; (c) making a declaration that the appellant should not pass any of the relevant information to the foreign authority; and (d) making a mandatory order that the appellant should seek the permission of the court before considering or responding to any request from any agency involving any of the respective information. He did not order that the documents/information should be returned. The proceedings in the Supreme Court are reported at 2003–04 Gib LR 59.

On appeal, the appellant submitted that (a) by stating, in correspondence with the respondent sent months before the decision was made, that he was sensitive to balancing the need to preserve confidentiality with the need to comply with the request from the foreign authority, it should be assumed that he had confidentiality in mind from then onwards, and the Supreme Court had therefore been wrong to quash his decision to pass the information on to the foreign authority on the ground that he had misinterpreted s.58(2) and applied the wrong tests; (b) the true purpose of the decision to pass the information on to the foreign authority was to assist that authority, and the fact that it would probably then be passed on to the examining magistrate of that other country for use in criminal investigations, and hence avoid the procedural safeguards in place for such investigations, was simply a consequence of and not the true purpose behind the decision, and the Supreme Court had therefore been wrong to express the view that the investigations being conducted were primarily of a criminal nature; and (c) what it intended to send to the foreign authority was information, and information was not "property" within the meaning of s.1(c) of the Constitution, as determined by s.2 of the Interpretation and General Clauses Ordinance and the case law, so that the respondent was not therefore entitled to the protection of s.1(c) of the Constitution, which gave the right to protection of the privacy of his "property," and not simply information.

The respondent submitted in reply that (a) the appellant had approached his decision in the wrong way by starting from the standpoint that he should assist the foreign authority and then looking for any reasons not to—whereas he should have instead started with the presumption that the information was to be regarded as confidential and then considered if this should be overridden for any reason—and the court had therefore been correct to quash his decision; (b) the transmission of the information to the foreign authority would effectively bypass the procedural safeguards in place for criminal investigations, and would not fulfil the requirement that it should appear to the appellant to be "necessary"; (c) it had a right to protection from the deprivation of property under s.1(c) of the Constitution, as the information obtained was

from an office of its director with whom it partly shared it, hence the information was its property; and (d) by stating that he had considered the matter in full, it should be inferred that this meant that the appellant had taken the European Convention on Human Rights into account in exercising his discretion, and he had misdirected himself about it.

**Held,** allowing the appeal in part:

(1) The appellant had not approached the decision-making process in the correct manner as required by s.58 of the Financial Services Ordinance. The Supreme Court had therefore been correct to quash the appellant's decision on the ground that he had applied the wrong tests and failed to consider properly or at all some of the matters he was required by the section to consider, namely, the requirement of confidentiality and the requirement that disclosure might only be made if it appeared to the defendant to be "necessary," with the term "necessary" best paraphrased as being "really needed." His starting point should have been the duty of confidentiality, but instead it seemed that he had started from the standpoint of assisting the foreign regulatory authority and then looked for reasons not to do so (para. 53; para. 60; para. 66).

(2) Nevertheless, the appellant had used his powers under s.58(2) of the Ordinance for their true and primary purpose, namely to assist the foreign regulatory authority, and did not take into account any irrelevant consideration. The order that the appellant should reject the request from the foreign authority and the declaration that he should not pass on any of the information should therefore both be set aside. The fact that the examining magistrate in the other country would probably have the information passed on to him by the foreign authority, and hence avoid the procedural safeguards in place for criminal investigations, did not alter this as it was merely a consequence and was not the true purpose of the appellant's decision—and there was nothing in s.58(2) to suggest that if his true and primary purpose was to assist the foreign regulatory authority, he must decide not to comply with the request if he knew that the information was likely to be passed on to the examining magistrate for the purpose of the criminal investigation (paras. 83–84; para. 89; para. 92).

(3) The respondent was not entitled to the protection of the privacy of his property under s.1(c) of the Constitution, as information did not come within the definition of "property," as determined by reference to s.2 of the Interpretation and General Clauses Ordinance and case law, and it was correct to use these sources in determining the scope of the meaning of "property." In any case, it was an unconvincing argument that if the information were indeed "property" it was the property of the respondent, simply because it shared an office with its director, from whom the appellant had obtained the information (paras. 48–51).

(4) It should not be assumed that the appellant considered the details of the European Convention on Human Rights without his expressly saying

that he had done so, simply on the basis that he stated that he had considered the arguments made out by the respondent. The appellant made the decision on the basis of the various arguments of the respondent, but it could not be presumed that he took into account in detail each of these arguments and rejected them. The cross-appeal based on this should therefore be dismissed (para. 40).

**Cases cited:**

(1) *An inquiry under the Companies Securities (Insider Dealing) Act 1985*, *Re*, [1988] 1 A.C. 660; [1988] 1 All E.R. 203; [1988] B.C.L.C. 153; [1988] BCC 35, followed.

(2) *Gard* v. *Commrs. of Sewers (City of London)* (1885), 28 Ch. D. 486, considered.

(3) *Hanks* v. *Minister of Housing & Local Govt.*, [1963] 1 Q.B. 999; [1963] 1 All E.R. 47; (1963), 127 J.P. 78; 61 L.G.R. 76; 106 Sol. Jo. 1032, followed.

(4) *Mayor, &c., of Westminster* v. *London & N.W. Ry. Co.*, [1905] A.C. 426, considered.

(5) *Municipal Council of Sydney* v. *Campbell*, [1925] A.C. 338, distinguished.

(6) *Oxford* v. *Moss* (1979), 68 Cr. App. R. 183, followed.

(7) *R.* v. *Home Secy., ex p. Launder (No. 2)*, [1997] 1 W.L.R. 839; [1997] 3 All E.R. 961; (1997), 94(24) L.S.G. 33; 147 New L.J. 793, considered.

(8) *R.* v. *Inner London Education Auth., ex p. Westminster City Council*, [1986] 1 W.L.R. 28; [1986] 1 All E.R. 19; (1986), 83 L.S.G. 359; 130 Sol. Jo. 51; 84 L.G.R. 120, considered.

(9) *Rent Tribunal* v. *Aidasani*, 2001–02 Gib LR 21, followed.

(10) *Schiller* v. *Att.-Gen.*, 1999–00 Gib LR 9, followed.

(11) *Thauerer* v. *Att.-Gen.*, 1999–00 Gib LR 551, followed.

**Legislation construed:**

Court of Appeal Rules (1984 Edition), r.59(1): The relevant terms of this paragraph are set out at para. 34.

Evidence Ordinance (1984 Edition), s.9: The relevant terms of this section are set out at para. 29.

s.10: The relevant terms of this section are set out at para. 29.

s.11: The relevant terms of this section are set out at para. 29.

s.12: The relevant terms of this section are set out at para. 29.

Financial Services Commission Ordinance, 1989, s.8(2): The relevant terms of this sub-section are set out at para. 2.

Financial Services Ordinance, 1989, s.32: The relevant terms of this section are set out at para. 3.

s.33: The relevant terms of this section are set out at para. 3.

s.58: The relevant terms of this section are set out at para. 4.

Civil Procedure Rules (S.I. 1998/3132), r.39.2(3):
"A hearing, or any part of it, may be in private if—
(a) publicity would defeat the object of the hearing;
. . .
(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality . . ."
r.54.19(2)(b): The relevant terms of this sub-paragraph are set out at para. 22.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.1: The relevant terms of this section are set out at para. 41.
s.7: The relevant terms of this section are set out at para. 42.
s.8: The relevant terms of this section are set out at para. 40.
s.15: The relevant terms of this section are set out at para. 43.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6: The relevant terms of this article are set out at para. 15.
art. 8: The relevant terms of this article are set out at para. 15.

*R. Gordon, Q.C.*, *G. Davies* and *D. Feetham* for the appellant.
*P. Gardner, Q.C.* and *R.M. Vasquez* for the respondent.
*C. Greenwood, Q.C.* and *A. Christodoulides* for *X* and *Y*.
*T. Ward* for *Z*.

1 **GLIDEWELL, P.:**

**Preliminary**

We heard this appeal in private, having decided to do so under the Civil Procedure Rules, r.39.2(3)(a) and (c). This judgment, however, is being given in public, but in order to preserve the anonymity of persons and bodies concerned, other than the official bodies, we are referring to them by pseudonyms, being those which Schofield, C.J. adopted in his judgment.

**The legislation**

2 On January 10th and 17th, 1991, respectively, there came into force two Ordinances passed by the House of Assembly of Gibraltar, namely, the Financial Services Commission Ordinance and the Financial Services Ordinance. The Financial Services Commission Ordinance established a Financial Services Commission and gave power to the Governor to appoint a Financial Services Commissioner. The Commission, which consists of the Commissioner as Chairman and seven other persons, is given extensive duties for the supervision of the conduct of financial

services in Gibraltar. The Commissioner is not merely the Chairman but is the Executive Officer of the Commission, and is charged with carrying out such functions and exercising such powers (s.8(2) of the Financial Services Commission Ordinance)—

> "as are from time to time conferred upon him by this or any other Ordinance or regulation or are delegated to him by the Commission. In particular he shall supervise institutions licensed to provide any financial services with a view to ensuring that such supervision complies with any applicable Community obligations and, where these obligations apply, establish and implement standards which match those required by legislation and supervisory practice governing the provision of financial services within the United Kingdom."

3 The Financial Services Ordinance (which I shall call "the Ordinance") contains, amongst other provisions, a part dealing with the licensing of investment business. We are concerned particularly with s.33, which comes in Part V of the Ordinance, and s.58. Section 33, so far as is relevant, provides:

> "(1) The Authority may require a relevant person—
>
> (a) to attend before the Authority, or before a person duly appointed by the Authority in that behalf (an 'appointed person') at a specified time and place, and to answer questions and otherwise furnish information appearing to the Authority or to the appointed person to be relevant to any investment business or controlled activity carried on by that person;
>
> (b) to furnish the Authority or an appointed person on any occasion or at specified times or intervals, with such information, books or papers as the Authority or the appointed person may reasonably require about any specified matter relating to an investment business or to a controlled activity, being if the Authority or the appointed person so requires, information verified in a specified manner."

"[A] relevant person" is defined in s.32, and the definition includes a licensee. "The Authority" is the Financial Services Commissioner, whom from now on I shall call "the Commissioner."

4 It is necessary to set out s.58 in full. Under the heading "Confidentiality," it provides:

> "(1) Save as may be provided by any other Ordinance, any information from which an individual or body can be identified

which is acquired by the Authority in the course of carrying out its functions (whether under this or any other Ordinance) shall be regarded as confidential by the Authority and by its members, officers and servants.

(2) Save as may be provided by any other Ordinance, no such information as is referred to in subsection (1) shall be disclosed, without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Authority to be necessary—

(a) to enable the Authority to carry out any of its statutory functions; or

(b) in the interests of the prevention or detection of crime; or

(c) in connection with the discharge of any international obligation to which Gibraltar is subject; or

(d) to assist, in the interests of the public, any authority which appears to the Authority to exercise in a place outside Gibraltar functions corresponding to those of the Authority; or

(e) to comply with the directions of the Supreme Court:

Provided that the Authority shall not disclose information received by virtue of the provisions of Council Directive 92/30/EEC unless it is satisfied that to do so would not contravene the provisions of Article 12 of Council Directive 77/780/EEC."

**History**

5 I gratefully adopt the summary contained in the first six paragraphs of the Chief Justice's judgment, which I repeat *verbatim*, but with the paragraphs re-numbered and relevant dates added.

**The request**

6 *X*, *Y* and *Z* live in another European country. *X* and *Y*, former traders of a foreign bank, are the subject of investigations being conducted by a foreign regulatory authority ("R.A.") and by a magistrate in that other European country, in respect of suspected violations of that country's Stock Exchange and Securities Trading Act and Criminal Code relating to the prohibition of "illegal business conduct and market manipulation." Investigations revealed that *X* and *Y* were responsible for their customer *Z* and his London-based company ("the London-based company"). In the course of investigations, two transfers of money attracted the attention of the investigators. The first [made on April 17th, 1996] was from an

account of the Gibraltar company ("the claimant") with a bank in Amsterdam, to an account of the first Gibraltar Bank ("Gibbank I") with a bank in Geneva. The second transfer was [made on June 9th, 1996] from an account of the claimant with the same bank in Amsterdam to an account of Gibbank I with the second Gibraltar Bank ("Gibbank II"). According to private notes confiscated from *Z*, these transfers were made for the benefit of *X* and *Y* and the suspicion is that the transfers were payments in respect of profits in illegal share transactions. As a result the R.A. requested the assistance of the Gibraltar Financial Services Commissioner ("the Commissioner") to obtain information from Gibbank I as to:

(a) the relationship between *X*, *Y* and *Z* and Gibbank I; and

(b) transactions between the claimant and *Z* and *X* and *Y*.

7 This request was sent on November 10th, 2000. On November 14th, 2000, the Commissioner replied to the request by sending the R.A. copies of certain public information. The letter also requested further information about an individual who had acted as a member of the board of Gibbank I. Furthermore the Commissioner asked whether the R.A. was aware of an unrelated investigation by the UK Financial Services Authority into the London-based company and *Z* as "this will assist us in determining the extent of our investigations and enquiries and perhaps establish the overall degree of supervisory co-operation that may be needed in this matter." The letter stated finally that the Commissioner was preparing formal notices requiring information to be provided and that he would revert to the R.A. when he had more information.

**The notices**

8 On November 15th, 2000, the Commissioner served notices ("the notices") under s.33 of the Financial Services Ordinance 1989 ("the Ordinance") on—

(a) the first company regulated under the Ordinance ("Regco I");

(b) the second company regulated under the Ordinance ("Regco II");

(c) Gibbank II; and

(d) Gibbank I.

9 All four companies are licensees under the Ordinance. Regco I had been the director and manager of the claimant at the time of the two transfers being investigated. Regco II replaced Regco I as director and manager of the claimant in December 1997. The notices sent to Regco I and Regco II were in the same terms. They declared that it had been brought to the attention of the Financial Services Commission ("the

Commission) that the claimant (and another company to which these proceedings do not apply) had been involved in a number of transactions being investigated by the R.A. in "a non-public investigation relating to illegal business conduct and market manipulation." The notices required Regco I and Regco II to supply copies of all information and records of the claimant in their possession including correspondence, file notes and statutory books. Additionally, the notices said that if Regco I and Regco II had any knowledge of, *inter alia*, the London-based company, *Z*, *Y* and *X*, the notice applied to any information or records which they had on them.

10 The notice to Gibbank II referred to Gibbank I's account with the bank referred to in the R.A. request and stated that it had been brought to the attention of the Commission that the account may have been used in a number of transactions being investigated by the R.A. "in a non-public investigation relating to illegal business conduct and market manipulation." The notice required Gibbank II to supply copies of all records and details of transactions, including payment instructions of the account. In addition the notice was stated to apply to any information or records which Gibbank II may have about the claimant, the London-based company, *Z*, *X* or *Y*.

11 The notice to Gibbank I set out the background to the request as in the notices to Regco I and Regco II. It required Gibbank I to inform the Commission if, *inter alia*, the claimant, the London-based company, *Z*, *X* or *Y*, or any of them, had accounts with Gibbank I or had used Gibbank I for any transaction. If so, Gibbank I was required to supply copies of all statements and records concerning the accounts and transactions. The notice also required Gibbank I to inform the Commission of further matters concerning *Z*. Further, Gibbank I was asked to supply copies of all records and details of the two transactions referred to in the request from the R.A.

**The responses**

12 In due course, all four bodies on whom the notices had been served provided information to the Commissioner, and Gibbank I and Regco II provided documents. In their replies and subsequent correspondence, both Gibbank I and Regco II raised the issue whether it was proper for the information supplied to the Commissioner, in response to his notices given under s.33, to be passed to the R.A.

13 Some of the information and documents supplied, related, or may perhaps be related, to the two transfers of money from the account of the Gibraltar company with the bank in Amsterdam to which I have referred in para. 6 above.

14 On December 21st, 2000, to adopt again the Chief Justice's phrase, the Gibraltar company "entered the fray" by a letter of that date from its solicitors Messrs. Triay & Triay. The letter said:

> "Any documents and information, therefore, that has been obtained by you pursuant to these s.33 notices in relation to the company has been, in our view, obtained *ultra vires* your powers under this section. In the circumstances, we consider that s.58(2) of the Financial Services Ordinance does not empower you to make disclosure of these documents and this information to any third party. We would therefore ask you not to make any such disclosures, including, without limitation, any disclosures to the (R.A.) and to confirm that no such disclosures have been made to date."

The Commissioner replied by a letter of the following day, saying that he had not at that stage passed any information to the R.A., and he would confirm that he would not do so "pending full consideration of the matters you have raised."

15 On February 16th, 2001, Messrs. Triay & Triay wrote a 17-page letter to the Commissioner. Put shortly, the letter repeated the point that delivery of any of the documents or information, obtained by the Commissioner under s.33, to the R.A. would be a breach of ss. 33 and 58 of the Ordinance. It also argued that it would be a breach of the fundamental rights which the Gibraltar company enjoyed under ss. 1, 7 and 8 of the Gibraltar Constitution, which are reflected in arts. 6 and 8 of the European Convention on Human Rights, namely the rights to "a fair and public hearing" and to "respect for [one's] private and family life, [one's] home and [one's] correspondence." The last paragraph of the letter read:

> "We should appreciate your advice as to (i) the basis upon which you have determined that the [R.A.'s] request is reasonable; (ii) what information (if any) you propose to deliver to the [R.A.]; (iii) your confirmation that you will allow access to that material, together with any material arising from your investigation which you propose not to provide to the [R.A.], and the reasons for the resulting distinction; and (iv) whether you intend to impose, or the [R.A.] have offered, any stipulations or limitations as to the use of such information."

**The decision**

16 Despite the objections made on behalf of the Gibraltar company, the Commissioner decided to pass the information disclosed to him by Regco II and Gibbank I to the R.A. This decision was communicated in a letter dated June 11th, 2001 from the Commissioner's solicitors, Messrs. Isola & Isola, to Messrs. Triay & Triay, which read as follows:

"***Re: Notices addressed to [Regco II] and [Gibbank I] under section 33 of the Financial Services Ordinance***

We have been instructed by the [Commissioner] in respect of the above captioned matter. As you know, the Commissioner is the relevant authority for the purposes of the Financial Services Ordinance.

We refer to your letter of February 16th, 2001. All the arguments you raised therein together with the advice of junior counsel here in Gibraltar and all the relevant documentation, were provided to Gabriel Moss, Q.C., in England in order to allow him to advise the Commissioner as to whether he had acted lawfully in the exercise of his powers under s.33 of the Ordinance and whether the passing on of the information to the [R.A.] would infringe any of your clients' fundamental human rights or whether it would be otherwise unlawful.

Our clients have now received the advice from leading counsel and he has advised that there is no real substance in the points that you make in that letter. The Commissioner has received similar advice from junior counsel here in Gibraltar. Leading counsel has also advised that the Commissioner can and should pass the disclosed information to the [R.A.] under s.58 of the Ordinance.

The Commissioner has given your clients, through you, an opportunity to persuade him otherwise and in the circumstances the Commissioner feels that there is no conceivable reason why he should not accede to the request made by the [R.A.]. On the contrary, balancing the need to maintain the good reputation of Gibraltar as a finance centre with the points made by your clients in your letter of February 16th, 2001, it is clearly in the public interest that it should disclose the information on this occasion. This does not establish any form of precedent for the future and the Commissioner will carefully consider any future cases on their individual merits as and when they arise.

In the circumstances we give you 14 days' notice from the date of receipt of this letter that the Commissioner will pass the information on to the [R.A.]."

17 It will be seen that the question—what information the Commissioner intended to deliver to the R.A.—was not answered in that letter. The Chief Justice noted (2003–04 Gib LR 59, at para. 17) that—

"the claimant, the interested parties and, indeed, the court proceeded on the mistaken understanding that the Commissioner intended to transmit to the R.A. all the information he had received as a result of the notices."

18 In a letter dated June 13th, 2001, Messrs. Triay & Triay said that they were instructed to apply for judicial review of the Commissioner's decision.

19 In a reply dated June 26th, 2001, Messrs. Isola & Isola set out, over 10 pages, what are described as "the reasons for the Commission's decision." It will be necessary to refer later to some parts of this letter, but for the moment I note only that the whole letter was written on the mistaken basis that the decision had been made by the Commission, not by the Commissioner, this despite the fact that the heading of the letter is "Re: Commissioner's power of investigation under the Financial Services Ordinance." I can only assume that the writer of the letter made the error at the outset of his composition of it, which was repeated throughout and was not corrected before he signed it.

**The proceedings**

20 On July 24th, 2001 the Gibraltar company instituted proceedings for judicial review of the Commissioner's decision. The remedy sought was:

> "(a) a quashing order in respect of the decision; and
>
> (b) a declaration that the information obtained by the Commission, in the purported exercise of the powers under s.33 of the Financial Services Ordinance, was not obtained in the course of carrying out its functions and/or that it would be unlawful for the information to be disclosed to the [R.A.] or another agency; and
>
> (c) an order directing the return of the information whence it was obtained, together with costs."

The claim form also sought disclosure of information and materials referred to in an accompanying witness statement of Mr. Robert Vasquez, of Messrs. Triay & Triay. The claim form was accompanied by a detailed statement of grounds. The form named six companies, including Gibbank I and II, and *X*, *Y* and *Z* as interested parties. In due course, *X*, *Y* and *Z* were joined as parties to the proceedings on their application.

21 The hearing before Schofield, C.J. (2003–04 Gib LR 59), commenced on December 9th, 2002 and concluded on December 13th, 2002. I shall refer later to what happened on the third day of the hearing, December 11th, 2002.

22 On March 19th, 2003 the Chief Justice gave judgment in favour of the claimant, the Gibraltar company. He then made orders, and granted a declaration, in the following terms:

> "(a) A quashing order in respect of the decision to pass the information and material disclosed to the defendant by Regco II and Gibbank I to the [R.A.], or to any other agency;

(b) An order, pursuant to CPR, r.54.19(2)(b), that the defendant ['reconsider the matter and reach a decision in accordance with the judgment of the court,' *i.e.*] reject the request from the [R.A.];

(c) A declaration that the defendant shall not pass any information or material (including any non-public information) about, or attributed or relating to the claimant or any of the interested parties or otherwise, obtained from Regco I, Regco II, Gibbank I or Gibbank II, or from their servants or agents, arising from, given as a result of, or following service of the notices to the [R.A.] or any other agency;

(d) A mandatory order under r.54.19(2)(b) that the defendant shall seek the permission of the court, on notice to the claimant and the interested parties, before the defendant considers or responds to any request from any agency which involves information or material (including any non-public information) about, or attributed or relating to the claimant or any of the interested parties or otherwise, obtained from Regco I, Regco II, Gibbank I or Gibbank II, or from their servants or agents, arising from, given as a result of, or following service of the notices . . ."

He did not order that the documents/information should be returned. It is against that decision, and these orders and declaration, that the Commissioner now appeals.

**Costs orders**

23 Following his judgment on the substantive application, the Chief Justice made orders for costs. The Commissioner has also appealed against these orders. The costs appeals will be pursued whatever the result of the present appeal, but obviously our decision on the present appeal will be of major importance in relation to the costs appeals. At the outset, therefore, the parties, in agreement, invited us to order that we should not hear the costs appeal until we have given judgment in this present appeal. That order we made. This judgment is therefore only concerned with the appeal against the judgment on substantive issues.

**Further history**

24 Before coming to the reasons given by the Chief Justice for quashing the Commissioner's decision, I must briefly recite another part of the history of the matter and refer to further Gibraltar legislation.

25 On June 22nd, 2001, *i.e.* after the Commissioner had made his decision and received the letter from Triay & Triay telling him that they had instructions to apply for judicial review, the Commissioner wrote a letter to the R.A. telling him of the impending challenge to his decision. At the end of this letter the Commissioner said:

> "It is important therefore that, before we embark on the next stage, we are sure that you still need this information and that it cannot be obtained through less 'challengeable' routes, *e.g.* through the use of lines of communication applicable to criminal investigations. It occurs to us that the case may verge on fraud rather than market manipulation."

26 By a letter dated June 27th, 2001, an examining magistrate in the same country as the R.A. wrote to the Attorney-General of Gibraltar, seeking judicial assistance in the matter of a criminal investigation in his country concerning *X*, *Y* and *Z*. The letter said that these three persons were accused of unlawful business management, possibly embezzlement and money laundering, all contrary to the penal code of that country. The letter referred, amongst other matters, to the two transfers of money from the account of the Gibraltar company with a bank in Amsterdam (see para. 6 above). The letter sought answers to questions some of which related to these transfers.

27 On July 4th, 2001, in answer to the letter of June 22nd from the Commissioner, the R.A. said:

> "If the examining magistrate's office . . . will receive the information from the Attorney-General, we subsequently will get the information from the examining magistrate's office . . . Having said that, it must be stated that both requests for information are based upon different legal provisions and procedures, and are treated by different authorities (according to their respective legal provisions) in [this country] and Gibraltar. With regard to our administrative procedure, we have to uphold our request for administrative assistance with you as the competent supervisory authority."

28 The Attorney-General concluded that the examining magistrate's letter of request did not satisfy the necessary pre-conditions, but a further such request, which was considered by the Attorney-General to be "in actionable form," was received by him on October 23rd, 2001. At January 22nd, 2002, no formal application to the court in relation to that request had been made. There is no evidence before us as to whether such an application has yet been made.

29 An application for international judicial assistance comes within Part II of the Evidence Ordinance 1948, as amended. Read together with s.12 (which provides that "sections 9 to 11 shall have [the same] effect in relation to . . . criminal proceedings as they have . . . for . . . civil proceedings"), ss. 9, 10 and 11 of that Ordinance provide as follows:

> "**Application to court for assistance in obtaining evidence for civil proceedings in the other court.**
>
> 9. Where an application is made to the court for an order for evidence to be obtained in Gibraltar and the court is satisfied—

(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction in a country or territory outside Gibraltar; and

(b) that the evidence to which the application relates is to be obtained for the purposes of [criminal] proceedings which . . . have been instituted before the requesting court . . . the court shall have the powers conferred on it by the following provisions of this Ordinance.

**Power of court to give assistance.**

10.(1) Subject to the provisions of this section, the court shall have power, on any such application as is mentioned in section 9 by order to make such provision for obtaining evidence in Gibraltar as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) but subject to the provisions of this section, an order under this section may, in particular, make provision—

(a) for the examination of witnesses, either orally or in writing;

(b) for the production of documents . . .

. . .

(4) An order under this section shall not require a person—

(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power.

. . .

**Privilege of witnesses.**

11.(1) A person shall not be compelled, by virtue of an order under section 10, to give any evidence which he could not be compelled to give—

(a) in [criminal] proceedings in Gibraltar; or

(b) subject to subsection (2), in [criminal] proceedings in the country or territory in which the requesting court exercises jurisdiction."

I need not at present read the remaining provisions of s.11. As will be seen, these provisions are relevant to part of the submissions made both before the Chief Justice and in this court.

**Matters not now in issue**

30 Some of the matters argued at the hearing before the Chief Justice are not in issue before us, as a result of his judgment. In the order in which he dealt with them in his judgment, these are as follows:

(a) The Gibraltar company is entitled to the protection of the Constitution although it is a limited company and not a natural person (2003–04 Gib LR 59, at para. 21).

(b) The notices were issued within, and not outside, the powers granted to the Commissioner by s.33 of the Ordinance (*ibid.*, at para. 34).

(c) The R.A. has regulatory functions similar to, and significantly overlapping those of, the Commissioner (*ibid.*, at para. 40).

(d) The exercise of the Commissioner's powers, including those under s.58, takes place within Gibraltar, and is therefore not extra-territorial (*ibid.*, at para. 46).

**The Chief Justice's conclusion**

31 With the exception of one paragraph in the judgment, it is necessary to set his conclusion out in full, using his paragraph numbers. It reads as follows:

"69 The right to privacy is not absolute. It may be subject to competing considerations such as the need for regulation of the financial services industry and the need for regulators in different jurisdictions to share information in the detection of money laundering of the proceeds of crime. As was stated by Mr. Moss in his submissions, the financial services industry is critical to the prosperity and well-being of the people of Gibraltar and the Commissioner exercises his powers in the interests of the people of Gibraltar. There is a very powerful interest in the exercise of these powers in a swift and effective manner. It is critical to the interests of Gibraltar that it should not be suspected of being involved in or failing to detect the money laundering of the proceeds of crime or wrongdoing in other countries. On the other hand, there is an equally powerful interest that the Commissioner exercises his powers in a balanced manner. It is as much in the interests of the

financial services industry that proper regard is paid to an investor's right to privacy and confidentiality. A balance must be struck between the need to regulate to ensure that the wrong type of investor does not operate in, and is not drawn to, the jurisdiction and the need to protect privacy and confidentiality so that the right type of investor is not driven away. These considerations are provided for in our constitutional and statutory framework. I have to decide whether, in finding that the balance fell on the side of releasing information to the R.A., the Commissioner, on the material before him, could reasonably conclude that the interference with the right to privacy of the claimant and the interested parties was justifiable.

. . .

71 I consider that the important point is that the Commissioner should have started his considerations with a presumption in favour of the preservation of confidentiality. Section 58 of the Ordinance requires him to respect the principle of confidentiality. For the principle of non-disclosure to be overridden, the disclosure must appear to the Commissioner to be 'necessary' (see s.58(2)). In addition, the Commissioner's power under s.58(2) must be exercised with the constitutional right to privacy in mind.

72 What concerns me is that nowhere in the decision, or the subsequent correspondence in which his solicitors give the reasons for the decision, does the Commissioner refer to the test of necessity. It is not until we reach the hearing of this application, in his witness statement setting out the information which he intends to pass on to the R.A., that the Commissioner demonstrates that he had in mind the necessity test contained in s.58(2). Whilst the Commissioner has said he was sensitive to the need to balance the need to preserve confidentiality with the need to co-operate with overseas authorities, he has not shown that he started his considerations from the standpoint of the constitutional right to privacy, or the statutory right to confidentiality, and was moved to disclosure by a counter-balancing competing public interest. Rather the tenor of his reasoning appears from the correspondence to start from the standpoint of a duty to assist a foreign regulatory authority. Indeed in the letter communicating the decision, it is stated that the Commissioner 'feels that there is no conceivable reason why he should not accede to the request made by the authorities of [the foreign country].' That is a far cry from applying the test laid down in s.58(2). In correspondence the Commissioner speaks of s.58(2) providing 'gateways' of disclosure as exceptions to the principle of confidentiality. The Commissioner should be on guard to ensure that these 'gateways' are not used as escape routes.

73 But what convinces me that the Commissioner has made a decision which cannot be justified is his reaction to the request from the magistrate. This request and the request from the R.A., he maintains, are wholly separate and are subject to different statutory regimes. The Ordinance provides a different 'gateway of assistance' to the Evidence Ordinance and two different bodies are dealing with each request in Gibraltar and in the other European country.

74 This stance totally ignores the practical effect of the decision which will be to bypass the safeguards afforded to the targets of a criminal investigation. In any criminal investigation involving members of the financial services industry, there is likely to be a regulatory element, as is clearly the case here. When one looks at the request of the R.A. and of the magistrate it is obvious that the investigations being conducted are primarily of a criminal nature. In those circumstances the regulator has a duty to ensure that his powers are not used as a means of circumventing the accepted safeguards afforded to those who are suspected of committing criminal offences. That is precisely what would happen in this case. The decision involves the passing of information to the R.A. which would then be obliged to pass that information on to the very magistrate whose request for assistance has yet to be processed by our Attorney-General and, if appropriate, considered judicially by the Supreme Court. It cannot possibly be a proper use of the discretion of the Commissioner effectively to bypass the safeguards afforded to the interested parties by the Evidence Ordinance by use of an exception to his general duty of confidentiality. It cannot possibly be necessary in the interests of the public for him to do so.

75 Nor do I consider that the Commissioner has paid sufficient regard to the fact that the decision not only involves the transfer of confidential material to the R.A. but that inevitably that material will be passed on possibly not only within the other European country but also to other jurisdictions. Once the disclosure is made, the Commission has no control over what use is made of it.

76 In my judgment I must make an order quashing the decision and make a declaration that it would be unlawful for the information to be re-disclosed to the R.A. or any other agency. In view of my finding that the information was properly obtained by the Commissioner in the pursuit of his regulatory duties, I do not make the declaration sought that the information was not obtained in the course of carrying out his functions or an order directing the return of the information."

32 The judge's conclusion in paras. 71 and 72 of his judgment, that the Commissioner had not applied the criteria in s.58(2) correctly, of itself

justified his order that the decision should be quashed. If this had been the full extent of his order, it would have been open to the Commissioner to make his decision afresh if he thought it appropriate to do so. The further order, that the Commissioner should not disclose the information obtained under s.33 to the R.A. or any other agency without the leave of the court, must, in my view, have been based on the judge's conclusion in his paras. 74 and 75 that it would not have been a proper exercise by the Commissioner of his discretion to transmit that information to the R.A., because by doing so he would bypass the safeguards contained in the Evidence Ordinance.

**Issues**

33 The Chief Justice's judgment raised the following issues, all of which are subject to this appeal. They are:

(a) Was the Commissioner's decision invalid because either—

(i) he misinterpreted s.58(2), applied the wrong criteria, and failed to consider properly, or at all, some relevant matter ("the s.58(2) issue"); or

(ii) he failed properly to take into account the Gibraltar company's right to privacy under the Constitution of Gibraltar ("the constitutional issue")?

(b) Was the Commissioner's decision unlawful because it bypassed, or took no proper account of, the safeguards contained in the Evidence Ordinance, and no account of the fact that the information might be used in criminal proceedings ("the examining magistrate issues")?

34 I shall consider each of these issues in turn, although not in the order in which I have set them out. There is, however, a fourth issue raised by Mr. Gardner for the Gibraltar company which relates to the European Convention on Human Rights ("the E.C.H.R. issue"). There is no notice of cross-appeal, but Mr. Gardner argues that he is entitled to make submissions on this issue without such notice by virtue of r.59(1) of the Court of Appeal Rules, which states that "it shall not ordinarily be necessary for a respondent to give notice of appeal." Mr. Gordon, for the Commissioner, does not object to his doing so, and we therefore heard the argument, without deciding whether a notice of cross-appeal should strictly have been given. I shall consider this issue first.

**The E.C.H.R. issue**

35 Mr. Gardner's argument on this issue is based on the decision of the House of Lords in *R.* v. *Home Secy., ex p. Launder (No. 2)* (7). In that case, the Government of Hong Kong, while it was still a British colony,

sought the extradition of Mr. Launder to face trial on charges of corruption. The Home Secretary agreed to consider evidence about the intentions of the Chinese Government after the transfer of sovereignty. Mr. Launder's counsel argued that, although the provisions of the European Convention were not then in force in the United Kingdom (the Human Rights Act being not then in force), the matters which the Home Secretary was considering related to the appellant's human rights under the Convention. The Home Secretary was therefore under a duty to take the provisions of the Convention into account and interpret them correctly. As a general proposition, the House of Lords agreed with this submission, but decided that the Home Secretary had not erred. Lord Hope, in a speech with which all the other members of the House agreed, said ([1997] 1 W.L.R. at 868):

> "If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that Mr. Vaughan directed his argument."

36 Mr. Gardner submits that, in the present case, the Commissioner took the provisions of the European Convention of Human Rights into account in reaching his decision, but misdirected himself about it.

37 The status of the European Convention of Human Rights in, and its relationship to, the law of Gibraltar has been established by two decisions of this court, namely *Schiller* v. *Att.-Gen.* (10) and *Thauerer* v. *Att.-Gen.* (11). These decisions make it clear that the Convention is not incorporated into the law of Gibraltar. In *Thauerer*, Staughton, J.A. said (1999–00 Gib LR 551, at paras. 17–18):

> "17 However, although the Human Rights Convention is not part of the law of Gibraltar, it may have some influence. When the United Kingdom subscribed to the Convention, in the early 1950s, it did so on its own behalf and also on behalf of dependencies, including Gibraltar. We were told that if Gibraltar does not observe the Convention, the United Kingdom is in breach of its international obligations, and liable to be brought before the European Court of Human Rights. It may perhaps follow that legislation since enacted for Gibraltar, whether by Order in Council or Ordinance, is presumed to accord with the Convention if that is a possible interpretation: compare *R.* v. *Home Secy., ex p. Brind* ([1991] 1 A.C. at 748, *per* Lord Bridge of Harwich), and *Rantzen* v. *Mirror Group Newsps. (1986) Ltd.* ([1994] Q.B. 670) . . .

18 The alternative argument is that when a court in Gibraltar is exercising a discretion, it must do so in accordance with the law pronounced by the European Court of Human Rights."

38 Mr. Gardner's argument is that the Commissioner in this case did take the European Convention of Human Rights into account in exercising his discretion, but failed to do so correctly. We have therefore had to consider this as a question of fact upon the documents.

39 Clearly the decision of June 11th, 2001, set out at para. 16 above, made no specific reference to the Convention. Mr. Gardner's argument is, however, that the long letter of February 16th, 2001, from Messrs. Triay & Triay, referred to the fundamental rights which the Gibraltar company enjoyed under ss. 1, 7 and 8 of the Gibraltar Constitution, "which are reflected in Articles 6 and 8 of the European Convention of Human Rights." When the decision letter said that Mr. Gabriel Moss, Q.C., when advising the Commissioner, had said that there was no real substance in the points made in Messrs. Triay & Triay's letter, it must be inferred that he, and thus the Commissioner, were taking the Convention into account.

40 I regard this argument as specious. A decision made following the receipt of a long letter containing a series of arguments why the decision should not be made, or should be made differently, cannot be read as if the decision-maker were saying that he took into account in detail each of those arguments, and rejected it. Moreover, although the later letter of June 26th, 2001, from Messrs. Isola & Isola, purporting to set out "the reasons for the Commission's decision" did refer to several decisions of the European Court of Human Rights, it did so in relation to the right to a "fair hearing" under s.8 of the Gibraltar Constitution, which is not an issue in this appeal. I would therefore reject Mr. Gardner's argument on this issue.

**The constitutional issue**

41 In order to consider this issue, it is necessary to set out certain provisions of the Gibraltar Constitution Order 1969 ("the Constitution"). The relevant provisions are contained in ch. 1, which is headed "Protection of Fundamental Rights and Freedoms of the Individual." They are as follows:

"1. It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—

. . .

(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

42 Section 6 is concerned with the second half of s.1(1)(c), *i.e.* deprivation of property without compensation, which is not here in issue. Section 7 relates to the first half of s.1(1)(c), *i.e.* the right of the individual to protection of his home or other property. It provides:

"(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision . . ."

There follows a list of the subject-matter of such laws which justify what would otherwise be a breach of s.7(1). It has not been argued that any of this applies here.

43 Section 15 reads as follows:

"(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of the preceding subsection, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled."

44 In *Rent Tribunal* v. *Aidasani* (9) it was argued that s.1 of the Constitution was declaratory only. This court rejected that submission and held (2001–02 Gib LR 21, at para. 84) that s.1 "is not merely declaratory, but sets out rights which are enforceable whether or not they are specified in more detail in later sections."

45 The judgment in *Aidasani* then continued (*ibid.*, at paras. 85–89):

> "85 This leaves the question, what is the nature of the rights granted by s.1? The words 'It is hereby recognised and declared that in Gibraltar there have existed . . . each and all of the following human rights and fundamental freedoms . . .' are clearly intended, in our view, to set out the common law as it was before the Constitution came into force.
>
> 86 The section, however, then provides that those rights and freedoms 'shall continue to exist . . . subject to respect for the rights and freedoms of others and for the public interest . . .' Having identified '(c) the right of the individual to protection . . . from deprivation of property without compensation' the section continues—
>
> > 'and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the . . . public interest.'
>
> . . .
>
> 88 To return to Lord Templeman's words in *Société United Docks* ([1985] A.C. at 599 and 600) and adapt the numbering to the Gibraltar Constitution, s.1 is an enacting section. In other words, the right of the individual to protection from deprivation of property without compensation is enshrined in the Constitution by the Gibraltar Constitution Order 1969, but subject to the limitations contained in s.1, including 'respect for' and not prejudicing the public interest. The common law rights and the limitations on those rights are enacted in the Constitution.
>
> 89 However, even if that were wrong, the alternative effect of s.1 is that the rights referred to in that section, which had previously been part of the common law, continue as common law rights 'subject to respect for the rights and freedoms of others and for the public interest.' For present purposes, this interpretation of s.1 would produce the same effect as if the rights and limitations were enacted."

46 Mr. Gardner submits that his client had a right to privacy of his property under s.1 of the Constitution, a right wider than the rights set out in s.7. He argues that the Gibraltar company and its director, Regco II, from whom the Commissioner obtained some of the documents and information under s.33 of the Ordinance, share a registered office. The

documents and information obtained from Regco II were therefore the property of the Gibraltar company.

47 Mr. Gordon's contrary argument can be summarized briefly as follows:

(a) what is intended to be sent to the R.A. under s.58(2) is information;

(b) information is not "property" within the meaning of s.1(c) of the Constitution; and

(c) this information, obtained by the Commissioner partly from Regco II and partly from Gibbank I and II, was not the property of the Gibraltar company.

48 Are we entitled, when interpreting the meaning of the word "property" in s.1 of the Constitution, to seek guidance from the Interpretation and General Clauses Ordinance? The Chief Justice decided that it was not permissible to do so (see 2003–04 Gib LR 59, at para. 44). However, another passage in the judgment of this court in *Aidasani* (9) is of assistance here (2001–02 Gib LR 21, at paras. 67–68):

> "67 Section 2 of the Interpretation and General Clauses Ordinance is in the following terms:
>
> > '"[P]roperty" includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property as above defined . . .'
>
> 68 The Chief Justice referred to this provision in his judgment and concluded that the right to receive rent from the premises was 'property' within the definition. We are satisfied that the Chief Justice was correct in reaching this conclusion."

This court has therefore decided this question in the affirmative.

49 Moreover, in *Oxford* v. *Moss* (6), the Queen's Bench Divisional Court was concerned with the same question, though in a different context. The defendant had taken a proof paper for an examination he was about to sit, read it and returned it to its proper place after he had absorbed the information. He was charged with theft. The definition of theft in the Theft Act 1968 includes "other intangible property." The court concluded that the confidential information which the defendant had obtained was not "property" within the definition.

50 "Information" is not within the compendious definition of property in s.2 of the Interpretation and General Clauses Ordinance. For that reason, and following *Oxford* v. *Moss*, I am satisfied that the information

which the Commissioner decided to send to the R.A. was not "property" within s.1, or indeed s.7, of the Constitution. Mr. Gardner's argument on this issue must therefore also fail.

51 I should also add for the sake of completeness that I find Mr. Gardner's argument that if the information were "property," it was the property of the Gibraltar company because it shared a registered office with its director, most unconvincing and indeed unattractive.

52 I wish also to observe, without making a firm decision about it, that the concept of "privacy" is probably not one which applies to information, though it will in most cases apply to any document in which the information is obtained. The concept which does apply to information is "confidentiality" which is, of course, the subject-matter of s.58. However, it is not necessary to pursue this question.

**The s.58(2) issue**

53 I now turn to the first of the two main issues in this appeal, namely, was the Chief Justice correct in quashing the Commissioner's decision on the grounds that he apparently misinterpreted s.58(2), applied the wrong tests, and failed to consider properly or at all some of the matters he was required by the section to consider, namely, the requirement of confidentiality in s.58(1) and the requirement that disclosure may only be made if it appears to the Commissioner to be necessary? For ease of reference, I set out again the relevant words of s.58, substituting references to the Commissioner and the R.A. where appropriate:

> "(1) Save as may be provided by any other Ordinance, any information from which an individual or body can be identified which is acquired by the [Commissioner] in the course of carrying out [his] functions . . . shall be regarded as confidential by the [Commissioner] . . .
>
> (2) . . . [N]o such information as is referred to in subsection (1) shall be disclosed, without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the [Commissioner] to be necessary—
>
> . . .
>
> (d) to assist, in the interests of the public, [the R.A.]."

54 We heard submissions as to the meaning of the word "necessary," and the phrase to which it is attached. As to the meaning, "necessary" is of course an ordinary English word, and it must be given its ordinary meaning, having regard to the context in which it is used. I note that in s.33(1)(b) the phrase "may reasonably require" is used, so "necessary"

must, on ordinary principles of construction, mean something different from that. In my judgment, in the context of s.58(2), the most helpful suggestion is that of Lord Griffiths in *Re an inquiry under the Companies Securities (Insider Dealing) Act 1985* (1), where he said ([1988] 1 A.C. at 704): "The nearest paraphrase I can suggest is 'really needed.'" As to the phrase to which "necessary" attaches, I agree with Mr. Greenwood that, on the proper construction of s.58(2)(d), it attaches to the words "to assist . . . [the R.A.]."

55 Counsel also addressed us on the question whether the phrase "in the interests of the public" means "in the interests of the public of Gibraltar," or whether it has some wider meaning. In my view, appearing as it does in an Ordinance in force in Gibraltar, the phrase relates to the interests of the public of Gibraltar. This is an issue which appears to have concerned the Commissioner greatly, and is thus one to which Mr. Gordon and his instructing solicitors have devoted a great deal of effort, including a largely unsuccessful attempt to persuade us to accept a new statement of evidence from Mr. Killick, the present Commissioner, who has succeeded Mr. Fuggle, who was the Commissioner who made the decision the subject of these proceedings. In my view, this effort was largely wasted, because the Chief Justice made his view clear where he said (2003–04 Gib LR 59, at para. 69):

> "the financial services industry is critical to the prosperity and well-being of the people of Gibraltar and the Commissioner exercises his powers in the interests of the people of Gibraltar. There is a very powerful interest in the exercise of these powers in a swift and effective manner. It is critical to the interests of Gibraltar that it should not be suspected of being involved in or failing to detect the money laundering of the proceeds of crime or wrongdoing in other countries."

56 This neatly encapsulates the point, and has not been challenged. When, or if, he had interpreted s.58 correctly, the Commissioner should have reached his decision whether or not to transmit some or all of the disclosed information to the R.A. by reminding himself, firstly, that the information was to be regarded by him as confidential, and then by considering the tests set out in s.58(2). I consider that logically he should have asked himself the following questions:

(a) Is the R.A. an authority which appears to me to exercise functions similar to my own? It is now accepted that the Commissioner could properly answer this question "Yes."

(b) Is disclosure of the information necessary to assist the R.A.?

(c) If so, is it in the interests of the public that I should disclose it to the R.A.?

57 If the Commissioner had said in terms that this, or something like it, was the process he had followed in reaching his decision, it would have been difficult to fault that decision. It is accepted that, on the questions of necessity and public interest, the decision is one for the judgment of the Commissioner, which can only be challenged on the ground that he had taken into account some other irrelevant consideration or that it be shown that his decision was wholly irrational. If the Commissioner had had available to him (as I suspect he did not) a copy of the useful document circulated in the English Civil Service some years ago, *The Judge Over Your Shoulder: Judicial Review of Administrative Decisions* (1987), it may be that he would have expressed himself in something like the terms set out above.

58 Mr. Gordon argues, in effect, that though he did not express himself in this way, we should conclude that these were the issues to which the Commissioner had regard in reaching his decision. He points out that in a letter from the Commissioner to Messrs. Triay & Triay, written on January 30th, 2001, 4½ months before the decision, he said: "The Authority is sensitive to the need to balance the need to preserve confidentiality with the need to comply with reasonable requests from [the R.A.]." Thus it must be assumed he had confidentiality in mind from then onwards.

59 I cannot accept Mr. Gordon's submission on this issue. It is trite law that the court should not interpret a decision-letter of this kind by the sort of process applicable to the construction of a statute. Nevertheless, if the court is to conclude that a decision-maker has taken all the necessary matters into account, there must be material in the decision-letter, or closely related documents, to show that he has done so. If there is not, the court runs the risk of constructing the decision for the decision-maker from the material available.

60 The point which stands out from the decision-letter is the use of the phrase: "There is no conceivable reason why he should not accede to the request made by the [R.A.]." This appears to suggest that the Commissioner has approached his decision from the wrong end of the process by asking himself: "Are there any good reasons why I should not disclose the information?" At the least, the reference to "no conceivable reason" appears to omit any consideration of confidentiality. Coupled with the lack of any reference in the decision-letter, or the subsequent letter purporting to give reasons, to necessity, I conclude that we cannot say that the Commissioner approached or went through his decision-making process correctly.

61 Two other matters on which Mr. Gardner addressed us are not determinative, but they point in the same direction as the conclusion which I have reached in the last paragraph. The first is the extraordinary fact that the letter purporting to give reasons, of June 26th, 2001, referred

throughout to "the Commission" as the decision-maker. This letter was, no doubt, drafted by one or other of the lawyers advising the Commissioner, but not only did its author make a basic mistake, but none of the legal team checked or corrected it.

62 The second point requires another brief reference to the history of the proceedings. In the last paragraph of their long letter of February 16th, 2001, Messrs. Triay & Triay asked the Commissioner, amongst other questions, "What information, (if any) [do] you propose to deliver to the [R.A.]?" That question was not answered at the time and the Commissioner's decision-letter of June 11th, 2001 said that:

> "Leading counsel has already advised that the Commissioner can and should pass the disclosed information to the [R.A.] under s.58 of the Financial Services Ordinance."

That can only have been understood, and indeed was understood by the Gibraltar company and other interested parties, to mean "all the disclosed information." Nevertheless, Messrs. Triay & Triay continued to ask the same question, and continued to receive no answer.

63 That remained the situation until the third day of the hearing before the Chief Justice, *i.e.* December 11th, 2002. On that day, for the first time, counsel then acting for the Commissioner said that his client did not intend to send all the material to the R.A., and had indeed made a selection of what he considered should be sent. The Chief Justice properly ordered that Mr. Fuggle should make a witness statement about this matter, which he did the same day. In it he said:

> "3. Such disclosure would of course be limited to such information as was relevant to the [R.A.'s] enquiry.
>
> 4. It would also be limited to such disclosure of such information as was necessary to disclose in the interests of the public within s.58(2)(d).
>
> 5. At the time the decision was made, [the Commissioner] had in mind that such disclosure would undoubtedly involve the following documents, on the basis that they fell within the above criteria . . ."

There followed a list of documents identified by number, and then continued:

> "6. No list of documents to be disclosed was drawn up at the time because of the stay agreed and the proposed judicial review application.
>
> 7. If the [Commissioner] is successful in relation to the judicial review application, these documents remain the only documents which are proposed to be disclosed."

64 Mr. Gordon, on instructions, gave us in reply a further explanation of the reasons why Mr. Fuggle did not say what information he intended to disclose, or indeed that he had made a selection, until the third day of the judicial review proceedings. Even with the benefit of that explanation, which is not supported by a witness statement, I cannot understand why Mr. Fuggle waited 18 months before giving this information. It was clearly material to the Gibraltar company and other interested parties. I am sceptical about the accuracy of Mr. Fuggle's statement that he had made a selection at the time the decision was made, but if he indeed had, I cannot understand why he did not disclose from the start at least that he had done so.

65 Neither of these matters is, of itself, determinative of the question whether the Commissioner made his decision properly, but both of them tend to support the unfortunate impression that at times he did not know what he was supposed to be doing.

66 What the Chief Justice said in his judgment (2003–04 Gib LR 59, at paras. 71–72), quoted at para. 31 above, was, except for his reference to the constitutional right to privacy, in my judgment both apt and accurate. I would therefore dismiss the appeal on this issue, and uphold the Chief Justice's order that the Commissioner's decision should be quashed.

**The examining magistrate**

67 This brings me to the second main issue in this appeal. This issue can be expressed as follows: did the fact that the R.A. would probably pass on information supplied to it by the Commissioner to the examining magistrate in its country mean that the decision to supply the information to the R.A. was a misuse of the Commissioner's powers, because it effectively bypassed the safeguards contained in the Evidence Ordinance, or was irrational? Moreover, if the Attorney-General of Gibraltar could obtain the information for the examining magistrate by an application to the court under the Evidence Ordinance, was the use of the Commissioner's powers under s.58(2) not necessary?

68 No doubt it will frequently be the case that, where a regulatory authority is considering whether a person involved in the financial market has breached the rules governing the conduct of such business, and thus is not a fit and proper person to be permitted to operate in the market, the conduct which may lead to this conclusion will also be under investigation by the person responsible for criminal prosecutions in order to decide whether to charge that person with criminal offences. The investigations by the R.A. on the one hand, and the examining magistrate (or in England and Gibraltar, the police) will frequently overlap. How far it will be proper for one authority in a country to pass information it receives in the course of its investigation to the other authority in that country is a

difficult question, which must primarily be answered according to the law of the country in which the two authorities operate.

69 It is a fundamental principle of administrative law that if a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. The application of this principle is relatively straightforward in a case in which it is clear that the power has been exercised solely for the different, or as it is sometimes called the "ulterior" purpose. An early example was *Gard* v. *Commrs. of Sewers (City of London)* (2), where a local authority acquired property under powers entitling it to do so to widen the street, whereas in reality it intended to sell the property at a profit.

70 When, however, the power granted is used for its ostensible purpose, but also in order to achieve another purpose, how does the principle apply? This is a more difficult situation, which has been productive of a volume of litigation. Mr. Greenwood has referred us to a decision of my own in 1984, sitting to hear cases in what was then the Crown Office List in the Queen's Bench Division, namely *R.* v. *Inner London Education Auth., ex p. Westminster City Council* (8). The decision is not, of course, binding on this court, but it contains some citations from authorities and text books which I propose to adopt in the present case. The substance of my decision is accurately set out in the headnote in *The Weekly Law Reports* as follows ([1986] 1 W.L.R. at 29):

> "*Held*, allowing the application, that where a local authority resolved to expend ratepayers' money in order to achieve two purposes, one of which was within its powers and the other of which was not, its decision was lawful only if the intra vires purpose was the dominant reason for the resolution; that although one of the purposes of the decision to conduct a publicity campaign and to approve a budget therefor was the giving of information it also had the purpose of seeking to persuade members of the public to a view identical with that of the authority itself and that was a, if not the, major purpose of the decision; that, accordingly, in making its decision the authority had taken into account an irrelevant consideration, that of persuasion, and the decision was invalid . . ."

71 Perhaps the leading case on this issue is *Mayor, &c., of Westminster* v. *London and N.W. Ry. Co.* (4). I summarized that decision in the following way ([1986] 1 W.L.R. at 48):

> "I was referred to the following authorities. (i) *Westminster Corporation v. London and North Western Railway Co.* [1905] A.C. 426. Westminster Corporation had power to provide public lavatories under the Public Health (London) Act 1891, section 44. They constructed public lavatories underground, under the centre of

the south end of Whitehall. The lavatories were approached from each side of the street by a subway, which could also be used as a pedestrian subway for people who wished to cross the street and not to use the lavatories. The London and North Western Railway Co., who owned the land at the East end of the subway, challenged the construction of the lavatories and subway, alleging that the main purpose of the Corporation was to construct a pedestrian subway which did not fall within the powers of the Act. The Court of Appeal found for the railway company. By a majority, the House of Lords allowed the appeal, but did so upon the facts, i.e., by holding that the Court of Appeal had drawn a wrong inference from the affidavits and documents before the court. In his speech, the Earl of Halsbury L.C. said, at p. 428:

> 'I quite agree that if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the legislature for one purpose could not be used for another.'

Lord Macnaghten said, at p. 433:

> 'I entirely agree with Joyce J. [at first instance] that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom.'

This suggests that a test for answering the question is, if the authorised purpose is the primary purpose, the resolution is within the power."

The course which that litigation had followed shows that the answer to the question is not easy.

72 I pass over *Municipal Council of Sydney* v. *Campbell* (5), to which I referred in the *Inner London Education Authority* case (8), because it was really a sole ulterior object case. I then quoted a passage from the judgment of Megaw, J. in *Hanks* v. *Minister of Housing & Local Govt.* (3), as follows ([1986] 1 W.L.R. at 49):

> "I confess that I think confusion can arise from the multiplicity of words which have been used in this case as suggested criteria for the testing of the validity of the exercise of a statutory power. The words used have included 'objects,' 'purposes,' 'motives,' 'motivation,' 'reasons,' 'ground' and 'considerations.' In the end, it seems to me, the simplest and clearest way to state the matter is by reference to 'considerations.' A 'consideration,' I apprehend, is something which one takes into account as a factor in arriving at a decision."

73 I then said (*ibid.*, at 50):

"I have considered also the views of the authors of text books on this. Professor Wade in *Administrative Law*, 5th ed. (1982), under the heading 'Duality of Purpose' says, at p. 388:

> 'Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers.'

Professor Evans, in *de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), p. 329, comforts me by describing the general problem of plurality of purpose as 'a legal porcupine which bristles with difficulties as soon as it is touched.' He distils from the decisions of the courts five different tests upon which reliance has been placed at one time or another, including, at pp. 330–332:

> '(1) What was the *true purpose* for which the power was exercised? If the actor has in truth used his power for the purpose for which it was conferred, it is immaterial that he was thus enabled to achieve a subsidiary object. (5) Was any of the purposes pursued an unauthorised purpose? If so, and if the unauthorised purpose has materially influenced the actor's conduct, the power has been invalidly exercised because irrelevant considerations have been taken into account.'"

74 The editions from which I then quoted have, of course, now been superseded, but I note that the current edition of *de Smith*'s textbook, edited by Lord Woolf & Professor Jowell (*Judicial Review of Administrative Action*, 5th ed. (1995)), contains a passage in almost identical language to the earlier edition, and I shall be surprised if Professor Wade does not do so also. As I did 19 years ago, I propose to adopt the test proposed by Megaw, J., and the two tests from *de Smith*.

75 That application involves reference to the evidence. The request by the R.A. to the Commissioner for assistance, dated November 10th, 2000, started as follows:

"The [R.A.] requests the assistance of [the Commission] with reference to a market surveyance investigation . . .

This non-public investigation involved the presumed violation of [an] article of the . . . Act on Stock Exchanges and Securities Trading (S.E.S.T.A.) regarding the assurance of proper business conduct by two former traders of a bank [*X* and *Y*]; both are currently working with other security dealers [in this country] as

> well as the presumed violation of [two articles] of [our criminal code] concerning the prohibition of illegal business conduct and market manipulation by the above-mentioned traders. In the course of this investigation, two transfers to accounts of [Gibbank I] have attracted our attention."

The letter then set out in some detail the matters which the R.A. was investigating, and the information it already had. This was followed by a long section of the letter, extending over one and a half A4 pages, headed "Legal provision relating to the subject-matter of the request." The first paragraph under this heading read:

> "The R.A. is [an] agency independent from [our] government. According to . . . the Banking Act . . . the R.A. is the supervisory body of the banking system, the investment funds, the securities and derivatives exchanges and the securities dealers, the disclosure of qualified shareholdings in listed companies and the regulation of public take-over offers. In this respect, the R.A. enforces the Banking Act, the S.E.S.T.A. and the Investment Funds Act."

76 Most of the remainder of this section of the letter described the functions of the R.A. in detail, making it clear that these related to the regulation and management of financial markets and persons working in them, including of course licensed securities dealers. There were two sentences which said:

> "Furthermore, if the R.A. becomes aware of any criminal acts, it shall forthwith notify the competent authorities for criminal prosecution. The R.A. and the competent authorities for criminal prosecution are under a duty to provide mutual legal assistance . . ."

77 It is apparent, on the face of this letter, that the expressed purpose of the R.A. was to seek information from the Commissioner for its own supervisory and regulatory purposes, while making it clear that if any information it received disclosed any criminal acts, it was obliged to notify the examining magistrate. For the purposes of this appeal we should assume that this was quite likely to happen.

78 In a letter dated November 29th, 2000, the R.A. referred to another person being formally interviewed by the examining magistrate. Presumably the information referred to in that letter had been passed by the examining magistrate to the R.A. They did not refer to either *X* or *Y*.

79 These were the only references in the correspondence between the Commissioner and the R.A. to information being passed to the examining magistrate, or indeed by him, before the Commissioner's decision-letter of June 11th, 2001. That letter was, of course, immediately followed by the letter of June 13th, 2001 from Messrs. Triay & Triay saying that they were instructed to apply for judicial review.

80 On June 22nd, 2001, the Commissioner wrote to the R.A. a letter in which, in its penultimate paragraph, he said:

> "It is important therefore that, before we embark on the next stage, we are sure that you still need this information and that it cannot be obtained through less 'challengeable' routes, *e.g.* through the use of lines of communication applicable to criminal investigations. It occurs to us that the case may verge on fraud rather than market manipulation."

No doubt the Commissioner was concerned about the cost of, and the delay caused by, judicial review proceedings, and this shows that he had in mind the possibility of a request under the Evidence Act as a possible way of providing the information.

81 The R.A. replied in a letter dated July 4th, 2001, in which he said:

> "The information we requested from your Commission remains a pivotal element for the outcome of our administrative procedures and we still hope very much that you will assist us.
>
> . . .
>
> We can inform you, that with a letter of June 27th, 2001, the examining magistrate's office . . . (which is the competent penal authority that investigates this matter parallel to the administrative investigation carried out by the [R.A.]) requested judicial assistance in the matter of a criminal investigation from the Attorney-General in Gibraltar (the request covers the same background and approximately the same questions). If the examining magistrate's office . . . will receive the information from the Attorney-General, we subsequently will get the information from the examining magistrate's office . . . Having said that, it must be stated, that both requests for information are based upon different legal provisions and procedures and are treated by different authorities (according to their respective legal provisions) [in our country] and Gibraltar. With regard to our administrative procedure we have to uphold our request for administrative assistance with you as the competent supervisory authority."

82 It will be seen that this letter made two points. Firstly, the examining magistrate had made the request to the Attorney-General in Gibraltar; this was the request which was eventually decided by the Attorney-General not to be in proper form. Secondly, it reiterated that the R.A.'s investigation was a different procedure and that despite the examining magistrate's request to the Attorney-General, the R.A. repeated his own request for information which he regarded as pivotal for the outcome of his own administrative procedures.

83 Mr. Gordon points out that the propriety of the Commissioner's decision must be judged as at the date when he made it, June 11th, 2001. In other words, it is for us to decide what he took into account or failed to take into account at that date. In my view, this submission is correct, but even if we should consider also the information in the R.A.'s letter of June 22nd, 2001, including the fact that the examining magistrate had made the request for assistance to the Attorney-General of Gibraltar, it still leaves to be answered the question, what was the true or primary purpose for which the Commissioner decided to use his powers under s.58(2)? If it was for supplying information to the R.A. in order to assist him in exercising his own functions then, even though it was likely that he might pass the information to the examining magistrate, that was not a relevant consideration.

84 In my judgment, that was the position in this case. On the correspondence, I consider that the Commissioner used his powers under s.58(2) for their true and primary purpose, and did not take into account any irrelevant consideration in this respect. In this respect, I disagree with the sentence in the Chief Justice's judgment where he said (2003–04 Gib LR 59, at para. 74): "When one looks at the request of the R.A. and of the magistrate it is obvious that the investigations being conducted are primarily of a criminal nature."

85 This brings me to consideration of the provisions of the Evidence Ordinance. The argument for the respondents is that the transmission of information to the R.A., under s.58(2), would effectively bypass the safeguards contained in the Evidence Ordinance, and would not fulfil the requirement that it should appear to the Commissioner to be necessary.

86 The second part of this argument is that it would not be necessary to use these powers because the information could be obtained by the application of the Evidence Ordinance. My conclusion that the Commissioner's decision to transmit the information to the R.A. for the true and primary purpose, namely, to assist the R.A., of itself answers this argument. If the Commissioner were using his powers to assist the R.A., it was appropriate for him to conclude, in his discretion, that it was necessary to transmit the information to the R.A. for that purpose.

87 The submission relating to the "safeguards" in the Evidence Ordinance requires a little more detailed examination. Mr. Greenwood, for Messrs. *X* and *Y*, points out that the three main differences between the procedure in the Evidence Ordinance and that in s.58(2) of the Financial Services Ordinance are:

(i) The Evidence Ordinance procedure only operates when criminal proceedings have "been instituted" (s.12(1)(a)). The s.58(2) procedure covers the passing of information for the purposes of investigation.

(ii) Under the Evidence Ordinance, unlike s.58(2), the request must be for specified documents (s.10(4)(b)).

(iii) An application under the Evidence Ordinance is made to the Supreme Court. An application under the Financial Services Ordinance is made to the Commissioner.

88 Whether or not these differences are properly to be described as "safeguards," they arise out of, and to an extent highlight, the difference between the subject-matter of the provisions in the two Ordinances. The Evidence Ordinance was passed in 1948. Part II of the Ordinance is concerned with obtaining evidence for use in other jurisdictions. With one minor amendment, it has remained unaltered for 55 years. It lays down a procedure by which the court may order the giving of oral evidence, by the examination of witnesses, and the production of documents for use in both civil and criminal proceedings in foreign jurisdictions. In the case of criminal proceedings, they must already have been instituted. The purpose is to render it unnecessary for a witness to travel to a foreign country, in order to give evidence and produce documents in a court there.

89 Sections 33 and 58(2) of the Financial Services Ordinance are concerned with the obtaining of information for use in a financial investigation by the Commissioner in Gibraltar, or by a R.A. in a foreign country. It provides expressly in s.58(2)(b), that the information obtained under s.33 may be disclosed by the Commissioner "in the interests of the prevention or detection of crime." Counsel are agreed, in my view correctly, that this relates to crime in Gibraltar, and entitles the Commissioner to disclose the information to the Gibraltar Police who investigate crime. Section 58(2)(d) does not empower the Commissioner to disclose information to a foreign criminal investigatory body, such as the examining magistrate. But in my view, construing the section as a whole, there is nothing in it which can properly be read as providing that, even if the true and primary purpose of the Commissioner in transmitting the information was to assist the R.A., he must decide not to comply with the R.A.'s request if he knows that the information is likely to be passed on to the examining magistrate.

90 The fact that it is the Commissioner, not the court, who is given the task of deciding whether to disclose information under s.58(2), is the result of a deliberate decision by the legislature in 1989.

91 I therefore reject the submissions made by both counsel for the Gibraltar company and for Messrs. *X* and *Y* of this issue. I respectfully disagree with the views expressed by the Chief Justice (2003–04 Gib LR 59, at para. 74). It follows that I agree with counsel for the appellant on this issue. If I had not already decided that the appeal should be dismissed on the first main issue, I would be in favour of allowing it on this issue.

92 What effect does this decision have on the Chief Justice's order? I think it is clear that he granted the order at para. (b) and the declaration set out in para. (c) of his order, as a result of the view he expressed in para. 74. I would therefore set aside this order and declaration. The mandatory order referred to in para. (d) of the order is perhaps more arguable. We should hear brief submissions as to what we should order in respect of it.

93 For the reasons set out earlier, I would dismiss the appeal on the s.58(2) issue, and allow it on the examining magistrate issue.

94 **STAUGHTON** and **CLOUGH, JJ.A.** concurred.

*Appeal allowed in part.*

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