[2003–04 Gib LR 59]

R. (Application of A Gibraltar Company) v. FINANCIAL SERVICES COMMISSIONER

SUPREME COURT (Schofield, C.J.): March 19th, 2003

Financial Services—Financial Services Commissioner—assistance to foreign regulatory authority—requirement of Financial Services Ordinance, s.58(2) that foreign authority to be regulatory equivalent of Gibraltar Financial Services Commission satisfied if significant overlap in functions

Constitutional Law—fundamental rights and freedoms—persons entitled to protection—limited company is "person" entitled to protection when context permits (e.g. right to privacy and protection from search under Constitution, s.7) even though not "individual"

Financial Services—Financial Services Commissioner—assistance to foreign regulatory authority—transmission of compulsorily acquired information to foreign authority not prohibited by Constitution

Financial Services—Financial Services Commissioner—confidentiality of information—initial presumption of confidentiality of information obtained—competing interests then to be balanced but confidentiality breached only in exceptional circumstances

Financial Services—Financial Services Commissioner—obtaining of information—"relevant person" from whom information obtained under Financial Services Ordinance, s.33(1) includes customers of bank which

is "relevant person" if conduct of bank not comprehensible without information about activities of customers

The claimant brought an action seeking (a) an order quashing a decision of the defendant; (b) a declaration that information obtained by the defendant 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 claimant company and two Gibraltar banks. The foreign regulatory authority requested the assistance of the defendant 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 defendant 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 grounds that it did not satisfy the requirements of the Ordinance.

The claimant submitted that (a) the notices served by the defendant were *ultra vires* s.33 because the powers under that section were to obtain information from "relevant persons" and the claimant was not a "relevant person"; (b) the provision of information to the foreign regulatory authority was *ultra vires* because s.58(2)(d) required the body, to whom the information was being supplied, to be of regulatory equivalence to the defendant, and this was not the case as the foreign authority was investigating criminal allegations, which fell outside the scope of the defendant's responsibilities; (c) the defendant could not remove compulsorily acquired property from Gibraltar because the Constitution did not give an express power permitting it and this was required; (d) its constitutional right to privacy and protection from search under s.7 of the Constitution was being contravened; and (e) if the information was handed over to the foreign regulatory authority, it could be passed on to a third jurisdiction, with the defendant losing any control over what use was made of it.

X, *Y* and *Z* submitted that the basis of the foreign authority's request for information was in fact the criminal investigations. There was a duty on the foreign authority to relay any information to the magistrate, and this was the reason for its request. If the magistrate's request for information to the Attorney-General was accepted then it was not "necessary" for the defendant to supply the regulatory authority with the information, as it needed to be for him to use the power under s.58. If, however, the magistrate's request were denied, as it had been, then by supplying the

information to him *via* the regulatory authority, this would circumvent the important procedural safeguards in place for criminal investigations.

The defendant submitted, *inter alia*, that (a) the claimant was not legally interested in the case, and was bringing the action to protect *X*, *Y* and *Z*; (b) it did not matter that he did not fulfil an identical role to the foreign regulatory authority as long as there was significant overlap between their duties, which there clearly was; (c) the right to privacy was not absolute, and was in the present case 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, which overrode the claimant's right to privacy; and (d) the human right to privacy did not apply to corporate bodies.

Held, making the following order:

(1) An order would be made quashing the decision of the defendant, and a declaration made that it would be unlawful for the information to be re-disclosed to the foreign regulatory authority or any other agency. The defendant had obtained the information, however, in the course of carrying out his functions and so no order would be made directing the return of the information (para. 76).

(2) The right to privacy, under s.7 of the Constitution, was not an absolute right—it might be subject to competing considerations—but the defendant's starting point, in considering whether the right was in fact subject to competing considerations in the present case, should have been the presumption in favour of the preservation of confidentiality. The defendant stated that he was sensitive to the balance of preserving the right to confidentiality and the competing interest of assisting the foreign regulatory authority, but it was wrong to approach the matter presuming that he should give the assistance requested, as the information disclosed to the defendant was confidential and the right to confidentiality should only be breached in exceptional circumstances. The defendant seemed to ignore the practical effect of the decision—*i.e.* that it would mean that the procedural safeguards in place for criminal investigations would be bypassed by passing on the information. He also did not pay sufficient regard to the fact that, once he had passed on the information, it could be then passed on to further jurisdictions and he would completely lose control of it (para. 69; paras. 71–75).

(3) The claimant's rights to protection of privacy and from search, under s.7 of the Constitution, were engaged. These rights were justiciable and, although the claimant was a limited company, it was entitled to the protection of the Constitution where the context allowed, as was the case here (para. 21; para. 51).

(4) The defendant had been entitled, using the powers under s.33 of the Financial Services Ordinance, to obtain information from the claimant even though the claimant was not a "relevant person" for the purposes of s.33. This was because the claimant was a customer/client of the Gibraltar

banks (who were "relevant persons" for the purposes of s.33), and the conduct of the banks could not be understood without information, in so far as it was related to the banks, about their customers/clients and their activities (para. 29).

(5) The requirement of s.58(2)(d) that, for the defendant to disclose information to an authority outside Gibraltar, the authority must be of regulatory equivalence to the defendant did not mean that they had to be identical. It merely required that there was significant overlap in the functions which the regulatory bodies perform, and in the present case the defendant and the foreign regulatory authority satisfied this requirement (paras. 39–40).

(6) It was within the defendant's powers to remove compulsorily acquired property from Gibraltar without the need for the Constitution to give an express power permitting it. The example of s.6(2), where such an express power was given, was for a specific purpose and too much significance should not be attached to it. In any case, the "property" in issue here was not the actual documents, but the information, which was not covered by this part of the Constitution, which referred to tangible property (paras. 45–46).

Cases cited:

(1) *Att.-Gen.* v. *Antigua Times Ltd.*, [1976] A.C. 16; [1975] 3 All E.R. 81; 119 Sol. Jo. 528, followed.

(2) *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, considered.

(3) *Nielsen* v. *Denmark* (1989), 11 E.H.R.R. 175, considered.

(4) *R.* v. *Lord Saville of Newdigate, ex p. A*, [2000] 1 W.L.R. 1855; [1999] 4 All E.R. 860; [2000] 2 L.R.C. 175, followed.

(5) *R.* v. *Ministry of Defence, ex p. Smith*, [1996] Q.B. 517; [1996] 1 All E.R. 257; [1995] T.L.R. 567; [1996] I.C.R. 740; [1996] I.R.L.R. 100, followed.

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

(7) *Roquette Frères S.A.* v. *Directeur Gén. de la Concurrence, &c.*, E.C.J. Case No. C—94/100, considered.

(8) *Société United Docks* v. *Govt. of Mauritius*, [1985] A.C. 585; [1985] 1 All E.R. 864; [1985] L.R.C. Const. 801; (1985), 129 Sol. Jo. 65, followed.

Legislation construed:

Banking Ordinance 1992, s.60:

> "An authorized officer may exercise the powers conferred by section 60 for the purpose of assisting an institution's relevant supervisory authority in the performance of any material supervisory functions . . ."

Financial Services Ordinance 1989, s.33: The relevant terms of this section are set out at para. 24.

s.38: The relevant terms of this section are set out at para. 27.
s.58: The relevant terms of this section are set out at paras. 35–36.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.6: The relevant terms of this section are set out at para. 42.
s.7: ". . . [N]o person shall be subjected to the search of his person or his property or the entry by others on his premises . . ."
s.8: ". . . [T]he case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law . . ."
s.55: "(1) For the purposes of this Constitution 'defined domestic matters' means such matters as may from time to time be specified, by directions in writing, by the Governor . . ."

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6:
". . . [E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal . . ."

P. Gardner, Q.C. and *R.M. Vasquez* for the claimant;
G. Moss, Q.C. and *D. Feetham* for the defendant;
C. Greenwood, Q.C. and *A. Christodoulides* for *X* and *Y*, interested parties;
T. Ward for *Z*, an interested party;
N. Caetano for the second Gibraltar Bank, and *L.E.C. Baglietto* for the first Gibraltar Bank, who took no part in the proceedings.

1 **SCHOFIELD, C.J.:** *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 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 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*.

2 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.

3 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.

4 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.

5 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*.

6 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.

7 Regco II invited the Commission to examine its records regarding the claimant and followed the meeting up with a letter dated November 23rd, 2000, which replied to the notice. The letter referred to the meeting held with officers of the Commission and enclosed copies of certain documents held in its file. The letter went on:

> "We are of the view that the enclosed documents are delivered to you in your capacity as regulator of financial services in Gibraltar and that no part of the same should be disclosed to a foreign authority save for established legitimate regulatory purposes. Some of the documentation enclosed herewith we acknowledge to be available publicly and therefore issues of confidentiality do not arise in relation to them. However, some other information disclosed in the enclosed documentation is held by us under a duty of confidentiality on the above basis. We are particularly mindful of the fact that the ultimate beneficial owner of the companies is not referred to in your said letters as being the subject of any enquiry. We are also concerned that although there is an allegation of 'illegal business conduct and market manipulation,' the judicial procedures to lead to discovery of documentation, with the safeguards which the Gibraltar and/or foreign law would afford our client companies, have not been instituted. We trust that you will agree that the procedure set out in s.33 of the Financial Services Ordinance 1989 should not be used or abused by a foreign authority as a means of avoiding due process of law by recognised legal procedures."

8 Regco I's reply to the notice is dated November 22nd, 2000. It stated that it had transferred its mandate to Regco II and that the documentation

which it held on and for the claimant was handed to Regco II. The letter concluded by adding certain further information in answer to the notice.

9 Gibbank I provided various documents in letters addressed to the Banking Supervisor. Those letters asked the addressee to contact Gibbank I prior to supplying any information contained therein to the R.A. or any other third party. Furthermore, on December 8th, 2000 a meeting took place between the Commissioner, a member of his staff and two officials of Gibbank I, *A* and *B*, in which *A* gave certain further information to the Commissioner. A note of the meeting also contains the following:

> "[*A*] pointed out that he was aware that there [*sic*] some investigations currently been [*sic*] conducted in [R.A.'s country] and added that there were concerns about client confidentiality and divulging of information. [*A*] explained that [the claimant] had now threatened [Gibbank I] with legal action prohibiting the bank from disclosing the name of the beneficial owner.
>
> [*A*] added that it was felt by some that [the foreign state] could well be abusing its powers in requesting information directly from other regulators rather than going through the proper channels *via* the judicial system. He added that this could well be because the information required would probably not be available *via* the judicial system because, for instance, in the [London-based company] case the time period in question predated the implementation of the legislation governing price manipulation [1997]."

10 A letter from Messrs. Hassans, acting for Gibbank I, dated February 5th, 2001, contained the following:

> "As I mentioned to you, our client's legal advisers in another European country have held meetings with [*Z*'s] legal attorney.
>
> We have subsequently been informed by our client's attorney that [*Z*'s] adviser in [the other European country] has been assured by the [R.A.] that it is not undertaking any investigation against [*Z*]. Accordingly, he has invited [Gibbank I] to respond to a number of questions after certain matters have been clarified by yourselves."

The matters sought to be clarified were, in summary:

(a) Whether the R.A. had requested administrative assistance from the Commission relating to *Z*, in which case a copy of that request was sought; and

(b) Whether the Commission itself was investigating *Z*. If so, why and whether information would be passed to R.A. in certain circumstances.

11 It will be seen that one of the matters on which Gibbank I sought clarification was whether the Commission was conducting its own

investigation of *Z* independent of any request from the R.A. and, if so, what would be the reason for such an investigation.

12 The Commissioner replied to that question on February 12th, 2001, in the following terms:

> "I would explain, on an entirely voluntary basis, that the information provided by the [R.A.] led us to conclude that there were good domestic supervisory reasons to make enquiries about certain matters, particularly given the apparent involvement of persons who fall within the arrangements for 'fitness and properness' assessment in Gibraltar. Powers were therefore exercised under s.33 of the Financial Services Ordinance 1989 to require production of information. The [Commission] may well require more detailed information and would, if necessary, continue to use the s.33 powers. The [Commission] is thus still examining the matter and, at this stage of its enquiries, I can confirm that it has not passed any confidential information to the [R.A.]. Given other legal representations, we have agreed voluntarily to a stay on passing of material at least for 21 days from January 30th, 2001.
>
> I would point out that the [Commission] has statutory gateways through which the passing of confidential information it may properly acquire may occur. The 'gateways' include the passing of information to assist a fellow regulatory body (see, for example, s.22(2) of the Financial Services Commission Ordinance 1989—and there are comparable powers in other enactments)."

13 Gibbank II's reply to the notice drew a distinction between information which it could pass as a result of a request pursuant to s.33 of the Ordinance and information which it could pass as a result of a request made relating to banking services. The Commissioner replied that the distinction made by Gibbank II was "artificial and irrelevant" since the Commissioner could request the information sought under s.60 of the Banking Ordinance 1992, wearing his hat as Commissioner of Banking. He then repeated his request to Gibbank II for the information requested in the notice of November 15th, 2000, in his capacity of Commissioner of Banking. On November 24th, 2000, Gibbank II replied to the notice.

14 It will be seen from these replies that Regco II and Gibbank I raised the issue of whether it was proper for the information obtained pursuant to the notices to be passed to the R.A.

15 On December 21st, 2000, the claimant entered the fray claiming, in a letter from its solicitors to the Commissioner, that the information obtained from Regco II and Gibbank I was obtained *ultra vires* the power of the Commissioner under s.33 of the Ordinance and seeking a stay of any intended disclosure to the R.A. This stay was granted by the R.A. and

was maintained throughout correspondence between the parties and has been maintained throughout the course of these proceedings.

16 Despite the objections of the claimant, set out in a letter from the claimant's solicitors to the Commissioner dated February 16th, 2001, the Commissioner made a decision ("the decision") to pass the information disclosed by Regco II and Gibbank I to the R.A. The decision was conveyed in a letter from the solicitors for the Commissioner, dated June 11th, 2001, to the solicitors for the claimant which is in the following terms:

> "***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 this letter refers to a letter of February 16th, 2001. In that letter, Messrs. Triay & Triay set out in detail the claimant's objections to the Commissioner's intended assistance to the R.A. In the final paragraph of the letter, the Commissioner was asked a number of questions, one of which was what information he proposed to deliver to the R.A. The reply of June 11th, 2001, in which was communicated the decision, did not answer that question and 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 it had received as a result of the notices.

18 It was only on the third day of the hearing that we learned that the Commissioner only intended to transmit some of the material it had received. A witness statement of the Commissioner produced at the hearing specified the documents which he intends to provide to the R.A. stating that:

(a) such disclosure is limited to such information as was relevant to the R.A. enquiry; and

(b) such disclosure is limited to such information as was necessary to disclose in the interests of the public within s.58(2)(d) of the Ordinance.

19 The claimant, supported by *X*, *Y* and *Z*, seeks:

(a) an order quashing the decision;

(b) a declaration that the information obtained by the Commission in the purported exercise of its powers under s.33 of the Ordinance was not obtained in the course of carrying out its functions and/or that it would be unlawful for the information to be re-disclosed to the R.A. or another agency; and

(c) an order directing the return of the information whence it was obtained.

20 It has been suggested by the Commissioner that the claimant is abusing the process of this court by instituting these proceedings. He asserts that the claimant itself would not be affected by the disclosure to the R.A. and therefore has no real concern, in the legal sense, in the decision. The claimant is not under investigation by the R.A. and faces no potential prosecution. In other words, the claimant's concern is the protection of the interested parties and not its own protection. The argument goes that the claimant's witness statements do not reveal who are the ultimate beneficiaries or controllers of the claimant and who is

giving the instructions to institute and conduct these proceedings or who is paying the legal bills. The interested parties are not citizens of Gibraltar and do not reside here and it is argued by the Commissioner that the true interest of the claimant as an honest citizen of Gibraltar is to co-operate with the Commission and not to obstruct the passing of information to the authorities of a friendly, civilised country. He also questions the interest of the interested parties in the proceedings because the documents disclosed do not belong to any of them and they have no right to confidentiality in any of them or the information contained in them.

21 The claimant is alleging that the decision will contravene its constitutional rights. As will be seen, I am satisfied that at very least the claimant's constitutional rights to privacy (see s.1(c) of the Gibraltar Constitution Order) are engaged in this matter. Despite a suggestion on behalf of the Commissioner to the contrary, I am satisfied that the claimant is entitled to the protection of the Constitution although it is a limited company and not a natural person. Chapter 1 of the Constitution deals with the protection of fundamental rights and freedoms of "the individual." Section 1, in setting out those fundamental rights and freedoms, repeats the use of the word "individual." The following sections of the Constitution, in setting out the protection of specific rights, use the word "person." In *Att.-Gen.* v. *Antigua Times Ltd.* (1), it was held that there is nothing in the context of the Antigua Constitution to exclude artificial persons so far as they were capable of enjoying the fundamental rights and freedoms protected by their Constitution. The Constitution of Mauritius sets out the fundamental rights and freedoms protected thereby in very similar terms to our own Constitution. In *Société United Docks* v. *Govt. of Mauritius* (8), it was said ([1985] L.R.C. Const. at 842):

> "In *Att.-Gen.* v. *Antigua Times Ltd.*, [1976] A.C. 16 it was argued that the redress given by the Constitution of Antigua to a 'person' was not available to a corporation. Lord Fraser of Tullybelton delivering the judgment of the Board said, at page 25, that '. . . having regard to the important place in the economic life of society occupied by corporate bodies, it would seem natural for such a modern Constitution, dealing with, *inter alia*, rights to property, to use the words "person" to include corporations.' On the present appeals it was suggested on behalf of the Government of Mauritius that a different result should follow in the present case because section 3 of the Constitution of Mauritius referred to the right of 'the individual.' But no logical distinction can be drawn between the individual protected by section 3 and 'the person' protected by the remaining sections of Chapter II of the Constitution. Both expressions include a corporation where the context so allows, as it does in the present instance."

Section 15 of the Constitution gives the claimant access to this court if its constitutional rights are at risk.

22 The decision involves the exercise of the Commissioner's discretion under s.58 of the Ordinance. In addition to any rights it may have under the Constitution, the claimant seeks judicial review of that exercise. The claimant, which has a legal personality, is directly affected by the notices. The decision will result in confidential information contained in documents which have been obtained as a result of the notices being handed over to authorities outside the jurisdiction. Most of those documents belong, relate or are ascribed to the claimant. In those circumstances the claimant's rights are affected by the administrative action of the Commission and it has a right to challenge that action in judicial review.

23 The Commissioner suggests that the claimant's failure to disclose the individuals behind it and the fact that those individuals may well not be citizens of Gibraltar could in some way affect its right of access to this court. Furthermore, that the claimant and the interested parties have no interest to pursue in these proceedings. I must say that I find those propositions to be most unattractive. The law of Gibraltar permits a company such as the claimant to be managed by nominees. The claimant has a right to confidentiality in the documents and their contents. I cannot understand how a challenge to the constitutionality or lawfulness of the Commissioner's actions is affected by the disclosure or non-disclosure of further confidential information or how the citizenship of various individuals could affect access to the court in the circumstances of this case. The claimant has a right to challenge the decision both under the Constitution and by way of judicial review and that challenge is not dependent upon the disclosure of information which is not relevant to the matters at issue. It may be that the interested parties have no right to confidentiality in the documents or their contents, but they are targets of investigations. They must have the right to test the lawfulness of the exercise of powers which may affect them, and that is so whether they are suspected of criminality or not.

24 The claimant argues that the notices were *ultra vires* the Commission. The notices were issued pursuant to s.33(1) of the Ordinance, which reads:

> "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."

25 "The Authority" referred to in this provision is the Commission/the Commissioner. "A relevant person" is defined in s.32, the provisions of which I need not recite here because it is accepted by all parties, I think, that the four addressees of the notices were "relevant persons" for the purposes of s.33 and the claimant was not such "a relevant person."

26 The claimant submits that s.33 relates exclusively to the Commission obtaining information from "a relevant person" and that, as the claimant is not such a person, the information which was sought in respect of the claimant is not covered by the terms of the Ordinance and that, accordingly, the notices were *ultra vires*.

27 The argument goes that s.33(1) must be read in the context of that Part of the Ordinance, Part V, in which it is contained. Part V concerns the powers of intervention of the Commissioner and sets out in whose affairs he may intervene and what forms that intervention may take. Section 33 deals with the power to require information and production of documents *etc.*, s.34 with the extension of those powers to applicants for licences and ss. 35 and 36 with the power to give directions to cancel, suspend or impose conditions on a licence and the form of notices to be given to directors. It is argued that each of these powers is a gradated form of intervention into the various spheres of activity which are regulated by the Commission. None of the decisions of the Commissioner under ss. 33 to 36 are subject to the prior authorisation of the court. The final two sections of Part V, ss. 37 and 38, are more invasive forms of intervention and are made subject to court control. Under s.37, the Commission may apply to remove a manager, trustee or custodian of a collective investment scheme. Section 38 gives the Commission the power to appoint an investigator. I think it as well to set out s.38, which reads:

"(1) The Authority may appoint one or more persons (an 'appointed person') to investigate and report on—

(a) the affairs of any person, including a person falling within paragraph (a) or paragraph (b) of section 32, suspected of

carrying on an investment business or a controlled activity contrary to any of the provisions of this Ordinance, or in a manner which is otherwise prejudicial to the public, to any investor or potential investor, or to the reputation of Gibraltar as a financial centre; or

(b) the affairs of, or of the manager, operator, trustee or custodian of, an authorised or a recognised scheme, in so far as they relate to the activities carried on in or from within Gibraltar or any other collective investment scheme, if it appears to the Authority that it is in the interests of the investors or potential investors or of the reputation of Gibraltar as a financial centre so to do;

. . .

(2) An appointed person may also, if he thinks it necessary for the purposes of an investigation under paragraph (b) of subsection (1) investigate the affairs of any other authorised or recognised collective investment scheme whose operator, trustee or custodian is the same person as the operator, trustee or custodian of the scheme which is the subject of the investigation.

(3) The appointed person under this section shall have all the powers conferred on the Authority under and by section 33.

(4) An appointed person may, and if so directed by the Authority shall, make interim reports to the Authority and on the conclusion of his investigation shall make a final report to it.

(5) Any such report shall be written or printed as the Authority may direct and the Authority may, if it thinks fit—

(a) furnish a copy, on request and on payment of the prescribed fee to any person whose affairs are under investigation pursuant to the provisions of paragraph (a) of subsection (1) of this section or to the manager, operator, trustee, custodian or a participant in a collective investment scheme under investigation or any other person whose conduct is referred to in the report; and

(b) cause the report to be published.

(6) Nothing in this section shall require a person carrying on the business of banking to disclose any information or produce any document relating to the affairs of a customer unless—

(a) the customer is a person who the appointed person has reason to believe may be able to give information relevant to the investigation; and

(b) the Authority is satisfied that the disclosure or production is necessary for the purposes of the investigation; and

(c) the Supreme Court so order.

(7) A person shall not under this section be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the Court or on grounds of confidentiality as between client and professional legal adviser in any such proceedings, except that a lawyer may be required to furnish the name and address of his client."

28 The claimant argues that an appointee under s.38 has all the powers to undertake an investigation together with the more limited powers which the Commission might exercise under s.33. The exercise of the wider powers is, by s.38(6), subject to court control to protect confidentiality. The terms of s.33(1) are, it is submitted, plainly restricted to requiring "a relevant person" to provide information, books or papers limited to material concerning himself. This conclusion, it is said, follows from the context and from the interaction of the powers under s.33(1) with the wider power to investigate under s.38. Since s.38(6) protects the provision of confidential material about customers with specific safeguards, it must follow, the argument goes, that s.33(1) does not provide an avenue to obtain information about customers. Otherwise the safeguards of s.38(6) would never apply if the appointee could obtain information about customers, notwithstanding confidentiality concerns, by exercising the powers under s.33(1) through s.38(3).

29 I am unpersuaded by these arguments. Regco I and Regco II, and I am sure many licensees under the Ordinance, provide shareholder and director services and any meaningful control over their activities must involve the power to investigate those bodies for whom they provide those facilities. The conduct of the licensee, or "relevant person," cannot be understood or investigated without information about the clients and their activities so far as they relate to the licensee.

30 Furthermore, if the legislature had intended s.33(1) to have the restricted interpretation the claimant asks me to give it, it would have been a simple task for a few words to be imported into the sub-section to achieve that effect.

31 I read the provisions of s.38 differently from the claimant. The claimant reads the section as giving the Commission wide powers of investigation and incorporating the narrower powers under s.33. In my view sub-ss. (1) and (2) of s.38 lay down who may be investigated (and it is noteworthy that investigations are not, as under s.33, restricted to "relevant persons"), and also set down the purpose and scope of such

investigation. For the means of exercising the power of investigation, we go to sub-s.(3) which specifically incorporates s.33. To my mind, sub-s.(3) is not incorporating into the section narrower powers within wider powers given elsewhere in s.38, otherwise the sub-section would be redundant. Rather sub-s.(3) provides the power to require information and call for documents to the appointed person, the scope of whose investigation is laid down by sub-s.(1).

32 Read in this way, s.38(6) confirms the interpretation placed on s.33(1) by the Commissioner. If the power to require information is contained in, and limited to, s.38(3) then that power must contain the power to require the disclosure of information relating to the affairs of a customer, otherwise there would be no need to place restrictions on such disclosure by a person carrying on the business of banking. If s.38(3), and of course s.33, did not include the power to require the production of information and documents relating to clients then there would be no need for the legislature to enact s.38(6).

33 Section 33 deals with the powers of the Commissioner as regulator and in the exercise of those powers he is bound by the confidentiality provisions of s.58 of the Ordinance. Section 38 is providing for a situation where there are specific suspicions that the interests of the public, investors or the reputation of Gibraltar as a financial centre are at risk. In those circumstances the rights of those being investigated, particularly as they may not be "relevant persons" within the meaning of the Ordinance, take on a different dimension. Hence the safeguards set out in sub-ss. (6) and (7) of s.38.

34 In my view, the notices were not issued outside the powers of the Commissioner. I should add that I consider that it was perfectly proper, indeed prudent, for the Commissioner when he was put on notice by the R.A. that certain "relevant persons" within his jurisdiction could be involved in impropriety (innocently or not) to make his own investigation within his powers under s.33. The information alerting the Commissioner may have resulted from the R.A. request, but once he had that information, the Commissioner was right to make inquiries into the fitness and properness of various individuals involved in companies subject to his regulatory jurisdiction. It was rightly of concern to the Commissioner that the claimant, which was controlled through entities regulated by him, should be suspected of involvement in money laundering and he had a duty not to sit on that information but to conduct reasonable inquiries.

35 The claimant makes a further argument that the provision of information to the R.A. falls outside the powers of the Commission because there is no regulatory equivalence between the two authorities. The Commissioner claims authority to transmit the information obtained

under the notices by virtue of the provisions of s.58 of the Ordinance. It is necessary to recite the relevant portions of s.58 for the purposes of dealing with the argument raised here and for the purposes of dealing with arguments which I shall later consider. Section 58(1) deals with confidentiality of information acquired by the Commissioner. It reads:

> "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."

36 Exceptions to that general duty of confidentiality are set out in s.58(2), which reads:

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

The exception on which the Commissioner relies is that contained in s.58(2)(d).

37 The claimant submits that the R.A. does not carry out functions corresponding to those of the Commission and therefore the Commission has no power to assist the R.A.

38 The argument is that s.58 lays down the Commissioner's duty of confidentiality and that duty is subject to a number of limited exceptions

as prescribed by sub-s.(2). It must be an exceptional circumstance which justifies the normal rule of confidentiality to be avoided and that s.58 must be read subject to the requirement to interfere as little as possible with the right to confidentiality. It is submitted by the claimant that in order to limit the scope of breach of confidence, the foreign authority must be conducting its own lawful and equivalent inquiries into the same matter that the Commission has inquired into. On the present facts, it is argued, that is not the case. The R.A. is investigating criminal allegations, which fall outside the scope of the Commission's responsibilities in Gibraltar.

39 If the disclosure of information, contrary to the normal rule on confidentiality, appears to the Commissioner to be necessary then he must be satisfied, under the terms of s.58(2)(d), that the outside authority appears to exercise functions corresponding to his own. This, in my view, is not a requirement that the Commissioner must be satisfied that the outside authority exercises functions identical to his own. It is unlikely that an authority in a foreign jurisdiction would be given precisely the same functions as the Commission; each jurisdiction will tailor its regulatory authorities to suit its own requirements. It may be that the R.A.'s powers are wider than those of the Commission but I accept the submissions of the Commissioner that to satisfy the requirements of s.58(2)(d), it is sufficient that there is significant overlap between the functions of the outside authority and the Commission.

40 From all the material before me, it is clear that the R.A. has similar regulatory functions to the Commission and that there is a significant overlap of functions with the Commission. The Commissioner was justified in assisting this outside authority, as an authority exercising functions corresponding to his own if, of course, all other requirements for that assistance, now to be considered, are met.

41 The claimant further submits that the Constitution does not permit the removal from Gibraltar of compulsorily-acquired material such as the documents acquired as a result of the notices. The general principle of statutory interpretation is that the ambit of a statute is territorial. Hence, it is submitted, the powers and duties created under an enactment, including the Constitution, are limited in their scope to Gibraltar. Under the Constitution, the Gibraltar legislature is restricted to legislating on defined domestic matters as specified in s.55 which relate to Gibraltar alone. There is expressly no general legislative competence in respect of matters external to Gibraltar. The claimant submits that unless the Constitution makes express provision to the contrary, the powers which it grants and the exceptions to the rights which it protects are subject to the overriding presumption that they may be exercised in Gibraltar but not outside. As a result, the compulsory taking of the claimant's property and

the acquisition of confidential information by the notices and the decision, which involves the transmission of that confidential information outside the jurisdiction, require clear justification under the Constitution.

42 The claimant's argument is that the list of exceptions to the protection of privacy and property in the Constitution is exhaustive and there is no express power permitting compulsorily-acquired material to be removed from Gibraltar. The absence of such an express power for this purpose, in the face of express provisions permitting the compulsory acquisition and retention of property for other purposes, leads to the conclusion that the omission is deliberate. To support this submission the claimant refers to s.6 of the Constitution, the portions of which, relevant to these submissions, are:

> "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—
>
> (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit; and
>
> (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
>
> (c) provision is made by a law applicable to that taking of possession or acquisition—
>
> (i) for the prompt payment of adequate compensation; and
>
> (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.
>
> (2) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax imposed in respect of its remission) to any country of his choice outside Gibraltar.
>
> . . .

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property—

. . .

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon—

(A) of work of soil conservation or the conservation of other natural resources; or

(B) of agricultural development or improvement that the owner or occupier of the land has been required, and has, without reasonable and lawful excuse, refused or failed to carry out . . .”

43 The claimant argues that there is no specific right for a public power to remove compulsorily-acquired property from the jurisdiction as is given to a person receiving compensation by s.6(2). Furthermore, s.6(4)(a)(vii) permits the Commission to retain the compulsorily-acquired property only “for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry” and that to relinquish control of the property to a foreign jurisdiction would be to go beyond the powers given by the Constitution.

44 In dealing with these submissions I should first of all point out that the “property” being referred to here is not the documents obtained pursuant to the notices, or even copies of them. At one time, I think, it was feared by the claimant that the documents themselves were to be transmitted to the R.A., but I understand that that is not the case. The “property” being referred to is the information in the documents which, says the claimant, is “property” within the meaning of the Constitution. I have discovered no definition of the word “property” in the Constitution itself. I cannot go to the Gibraltar Interpretation and General Clauses Ordinance for assistance with the interpretation of the Constitution for to do so would be to use as an authority an Ordinance of the very legislature which is created by that Constitution. Section 79(6) of the Constitution tells us that we must go to the English Interpretation Act 1889, which, on my reading, does not assist us with the meaning of the word “property.”

45 It seems to me that when s.6(4)(a)(vii) talks of “the taking of possession or acquisition of property for so long only as may be necessary” it is more likely that the “property” being referred to is tangible property. Indeed, the whole tenor of s.6 seems to be focused on

tangible property and, despite s.6(1) referring to "property of any description," I am far from certain that the framers of the Constitution had in mind, when s.6 was drafted, that "property" would include information.

46 Even if I am wrong in that, in my judgment the claimant seeks to put too restrictive a scope on the powers of the Gibraltar legislature. I am unpersuaded that the Constitution prevents the legislature from giving the Commission the power to garner information and, in a proper case, transmit that information outside the jurisdiction. I am unable to attach to s.6(2) the significance which the claimant asks me to attach to it. It seems to me that the provision is designed to prevent an impecunious or oppressive government, which is bound by the terms of the Constitution to award compensation to a person deprived of his property, from depriving that person of the right to deal with that compensation in any way he chooses. I am unable to read s.6 in a way which would prevent the legislature from giving an authority the power to require information to be furnished within Gibraltar and then transmitted from Gibraltar, subject of course to appropriate safeguards. This is not, to my mind, a case of a statute having extra-territorial effect in the sense that it offends principles of comity of nations. All the acts of the Commissioner under s.58 of the Ordinance are undertaken within Gibraltar even though the effect of his actions is the transmission of material out of the jurisdiction.

47 The claimant maintains that the decision offends the terms of the Constitution. As I have just said, I am by no means certain that s.6 of the Constitution is engaged in this case.

48 It has been submitted on behalf of *Z*, that the right to a fair trial is engaged by the decision. The right to a fair trial is, of course, protected by s.8 of the Constitution. The European Court of Human Rights has, in its interpretation of art. 6 of the European Convention on Human Rights, held that in assessing the fairness of proceedings, the entirety of the proceedings will be looked at, including the investigative stage (see, for example, *Nielsen* v. *Denmark* (3)). Thus, it is submitted, investigative steps taken in Gibraltar may affect the fairness of any subsequent trial overseas. The Gibraltar court should ensure that the material provided to a prosecuting authority overseas, and the manner in which it is obtained, does not undermine a person's right to a fair trial. There is a request from the magistrate which is being dealt with under our Evidence Ordinance by which judicial scrutiny will prevent the right to a fair trial being undermined. The decision, which is not subject to the same safeguards as the request under the Evidence Ordinance, is therefore at risk of offending s.8 of our Constitution.

49 This submission was made when those advising *Z* thought that material concerning him was to be communicated to the R.A. As I have

said, during the hearing it was made clear to the parties and the court that not all the information obtained as a result of the notices was to be transmitted overseas. Despite this revelation, Mr. Ward maintains his argument, submitting that whilst he is entitled to be heard by this court, he may challenge the public law *vires* of the decision.

50 Although it may be perceived that *Z* is a target of the investigation being undertaken in another European country, I am by no means certain that his right to a fair trial is engaged in these proceedings. Whether or not any of the documents covered by the decision refers to any of the interested parties does not matter for the purposes of this judgment. I do not consider that whether *Z*'s right to a fair trial is or is not engaged affects the outcome of these proceedings, as I think will become clear as I reach my conclusions.

51 I think there is more weight in the claimant's argument that its rights to protection from search under s.7 of the Constitution are engaged, in that the documents were obtained by the exercise of compulsory powers akin to a search of the "relevant persons" under the notices. What I am satisfied of is that this case involves consideration of the claimant's right to privacy (see s.1(c) of the Constitution). Furthermore, that a right under s.1 of the Constitution is justiciable (see *Rent Tribunal* v. *Aidasani* (6)). As I have already said, a limited company is entitled to the protection of the Constitution where the context so allows (see *Société United Docks* v. *Govt. of Mauritius* (8)). Although the Commissioner sought to cast doubt on the question of whether European jurisprudence applies the right to privacy to a limited company, it seems that the matter has now been settled in the recent case before the European Court of Justice of *Roquettes Frères S.A.* v. *Directeur Gén. &c.* (7). That European authority is persuasive in the interpretation of the rights given by the Gibraltar Constitution.

52 The claimant's privacy was not only interfered with by the Commissioner's gathering of the information in the documents. The decision involves a further interference in the claimant's privacy in that it involves a dissemination of that information to the R.A. and an onward transmission of that information to other overseas authorities. That being so, this court must subject the decision to review, the standard of which I shall shortly consider. The claimant maintains that the Commissioner has made no, or no proper, evaluation of its constitutional rights. On the other hand, the Commissioner claims that he is pursuing a legitimate aim of general public importance and in the pursuit thereof it is proper for him, in the exercise of his statutory power, to override the claimant's constitutional right to privacy.

53 The power of the Commission under review was exercised pursuant to the provisions of s.58 of the Ordinance. I have set out the relevant

portions of s.58 at paras. 35 and 36 above. The first point to make here is that the section sets out the basic proposition that information disclosed to the Commission is to be regarded as confidential. It is only in exceptional circumstances that that confidentiality may be breached and those circumstances are set out in s.58(2). The Commissioner was under no obligation to provide the R.A. with the information it sought. Under s.58(2) the Commissioner was exercising a discretion to assist the R.A. and the test which he must apply before exercising that discretion to override his general duty of confidentiality is the high one of necessity. Furthermore before the Commissioner assists the R.A., he must be satisfied that the assistance is necessary "in the interests of the public" which must, to my mind, mean the public of Gibraltar. The decision, being an exercise of the Commissioner's discretion, is subject to the control of the courts in judicial review applying ordinary public law principles.

54 The parties are at issue on the question of whether the Commissioner properly interpreted his powers under s.58. However, it is as well here to review, as briefly as I can, submissions made on behalf of *X*, *Y* and *Z*. On June 27th, 2001, the magistrate from the foreign country sent a request for judicial assistance to the Attorney-General of Gibraltar, which is in very similar terms to the request for information sent by the R.A. to the Commission on November 10th, 2000. The request stated that *X*, *Y* and *Z* are accused of "unfaithful business management", possibly embezzlement and money laundering, all contrary to provisions of the foreign country's criminal code. Five days before that request was sent, the Commissioner had written to the R.A. in the context of the R.A. request, informing him of these impending judicial review proceedings and saying:

> "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."

55 The argument is that it is evident even from the R.A. request that the primary focus of the foreign country's authorities' investigations is on the possible violations of the criminal law and that there appears to be no clear distinction between the investigations being carried out by the R.A. and the magistrate. There seems to be a duty of mutual assistance between the R.A. and the magistrate and so any information which the Commissioner passes to the R.A. will go to the person undertaking the criminal investigation and who has made a contemporaneous request to our Attorney-General which falls to be processed under the Evidence Ordinance.

56 I need not recite here all the differences between the procedures on a request for assistance in a criminal investigation and those on a request to the Commission. It is sufficient to note that a request for co-operation in a criminal investigation is attended by important statutory safeguards and judicial supervision for the protection of those under investigation which do not apply to a request for assistance from the Commission.

57 It is argued for *X*, *Y* and *Z*, that if the decision takes effect then the safeguards and limitations on obtaining evidence for use in criminal proceedings will be circumvented. It is an improper use of the Commissioner's powers under s.58 to provide the information to the R.A. when there is extant a request from a criminal authority seeking assistance in almost identical terms to that before the Commissioner. It would be wrong for the authorities of the foreign country to obtain through administrative channels that which could only properly be obtained with the benefit of judicial scrutiny. Furthermore, the argument goes, it makes no difference to the outcome of these proceedings whether the magistrate's request is met or not. If it is met then the information received by the magistrate will be passed on to the R.A., and in those circumstances it cannot be said that it is "necessary" for the Commissioner to pass on the information it received to the R.A. If the request from the magistrate is denied then it would be an improper use of the Commissioner's powers to hand over information in circumvention of the procedures under the Evidence Ordinance.

58 It is also argued that these submissions are reinforced by the evidence of the Commissioner, filed during the course of the hearing, that he only intends to pass to the R.A. certain parts of the information he has obtained. Even if none of the documents were to refer to the interested parties, it is submitted that, of the information it has been decided not to disclose, there is some which is potentially exculpatory. This demonstrates, it is argued, that the Commissioner did not give any, or any proper, consideration to the criminal law aspects of the case, and in failing to disclose the potentially exculpatory material the Commissioner was acting unreasonably.

59 It is also pointed out that attached to the request from the magistrate is a request for assistance from a third state. It seems that the claimant is allegedly subject to tax liability in that third state. It is argued that once the decision is effected, the Commission will have no control over the use made of the material transferred to the R.A. Not only is the R.A. under a duty to pass the information on to the examining magistrate, but it may be passed on to other authorities.

60 For his part, the Commissioner maintains that the request by the magistrate in no way affects his powers under s.58 in what is a regulatory matter.

61 The court will normally hold that a power was not validly exercised if the decision-maker was influenced by irrelevant considerations or that he failed to take relevant considerations into account (see, for example, *Hanks* v. *Minister of Housing & Local Govt.* (2)).

62 The court will not substitute its own decision for that of the decision-maker but it is entitled to determine whether the decision-maker has acted within the boundaries of what is permissible. In *R.* v. *Ministry of Defence, ex p. Smith* (5), Bingham, M.R. has this to say ([1996] Q.B. at 554–555):

> "Mr. David Pannick, who represented three of the applicants, and whose arguments were adopted by the fourth, submitted that the court should adopt the following approach to the issue of irrationality:
>
> > 'The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'
>
> This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in *Reg.* v. *Secretary of State for the Home Department, ex p. Bugdaycay*, [1987] A.C. 514 and *Reg.* v. *Secretary of State for the Home Department, ex p. Brind*, [1991] 1 A.C. 696. In the first of these cases Lord Bridge of Harwich said, at p. 531:
>
> > 'I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which

> may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

Lord Templeman, at p. 537H, spoke to similar effect. In the second case, having concluded that it was not open to an English court to apply the European Convention on Human Rights, Lord Bridge said [1991] 1 A.C. 696, 748–749:

> 'But I do not accept that this conclusion means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights. Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, article 10(2) of the Convention spells out and categorises the competing public interests by reference to which the right to freedom of expression may have to be curtailed. In exercising the power of judicial review we have neither the advantages nor the disadvantages of any comparable code to which we may refer or by which we are bound. But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.'

Again, Lord Templeman spoke to similar effect, at p. 751:

> 'It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable.'"

63 In *R.* v. *Lord Saville of Newdigate, ex p. A* (4), Lord Woolf, M.R. said ([2000] 1 W.L.R. at 1867):

> "What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinize the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham M.R. in *Reg.* v. *Ministry of Defence, Ex parte Smith* [1996] Q.B. 517 which is not in issue."

64 Whilst it is accepted that this case does not involve rights relating to life and limb, and so the court's anxiety may not be as great as if it did, fundamental rights to privacy are at issue here and accordingly the decision will be subject to scrutiny which reflects the importance of those fundamental constitutional rights.

65 It is right to say that as early as January 30th, 2001, the Commissioner had told the solicitors for the claimant that he thought that the R.A.'s request was reasonable but that he would give the claimant time to consider the legal implications of the matter. In that letter the Commissioner also indicated that he was sensitive to his duty to balance the need to preserve confidentiality with the need to comply with reasonable requests for information from authorities exercising similar functions to his own in other jurisdictions. The decision was communicated in a letter to the claimant's solicitors dated June 11th, 2001, which I have set out in para. 16 above. In that letter, the Commissioner indicated that he had made the decision after taking legal advice on the claimant's objections to the exercise of his powers. Save to say that the Commissioner had considered all the arguments presented by the claimant, which he regarded as having no real substance, and that balancing those arguments against the need to maintain the good reputation of Gibraltar as a finance centre, he decided it was in the public interest to disclose the information, the Commissioner did not communicate in that letter his reasons for reaching the decision.

66 Messrs. Triay & Triay responded to the decision by informing the Commissioner that an application for judicial review would be filed and stating that the Commissioner did not particularize the advice he had received or set out the reasons why he had rejected the claimant's submissions. Messrs. Isola and Isola, solicitors for the Commissioner,

replied to that letter on June 26th, 2001. It is a very lengthy letter and I do not feel it necessary to repeat it in full because much of it deals with arguments on matters I have already considered in this judgment. However, the following passages are relevant in that they give an insight into the reasons why the Commissioner, in balancing the right to privacy against the need to maintain the integrity of Gibraltar as a finance centre, came down in favour of the latter:

"**Legitimate concerns of the Commission**

The use of licensed Gibraltar entities for the receipt or laundering of proceeds of ill-gotten gains from a market manipulation in another European country, the position suggested by the information coming from the [R.A.], was naturally and properly of considerable concern to the Financial Services Commission of Gibraltar. Such transaction could put at risk the reputation of Gibraltar, the effectiveness of supervision of licensed entities in this jurisdiction and could amount to criminal activities by regulated entities here in Gibraltar if they were involved knowingly. It was, therefore, both essential and proper for the Commission to look into the alleged payments and their circumstances from the Commission's own point of view, quite apart from any consideration of wishing to co-operate with a reputable foreign regulator.

In these circumstances, the Commission properly used its powers under s.33 of the Financial Services Ordinance to seek information from [Gibbank I, Regco II, Gibbank II and Regco I]. Each of these parties is 'a relevant person' within the meaning of s.33 by reason of s.32(a).

. . .

The right to privacy

Once again, the point you make is misconceived.

The real concern is not that confidential information has been obtained about [the claimant] but that it might be passed to the [authorities of another European country] and that it might be used in [that other European country] against the individuals they are investigating.

Again, however, the Commission in coming to its decision considered more general issues.

The first question that arises in this more general enquiry is whether the human right to privacy applies to a corporation. It is clear that many human rights do apply to artificial legal persons: see *e.g. Air Canada* v. *U.K.* . . . in relation to art. 6(1). Certain convention rights

are obviously not applicable to companies, such as the right to life (art. 2), freedom from torture (art. 3) and the right to marry (art. 12).

It is still not entirely clear whether a company may rely on the right to privacy in art. 8. The E.C.H.R. has not considered this question. However, the European Court of Justice has consistently held that the protection afforded by art. 8(1) is not available to a company: *Hoechst Att.-Gen.* v. *Commission* . . .

Even if the protection afforded by art. 8(1) is available to a company, you rely on the case of *Funke* v. *France* . . . However, that was a case of search and seizure at a person's home and was therefore much more obviously an invasion of privacy. Even in such cases, the court was of a view ([1993] 1 C.M.L.R. at 912–913):

> 'Undoubtedly, in the field under consideration—the prevention of capital outflows and tax evasion—States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse.'

This extract shows that the right to privacy does not prevent the existence of even search and seizure powers at a person's home, one of the most serious possible invasions of privacy, providing that there is a recognised need in the public interest, together with adequate and effective safeguards against abuse. The actual finding in the *Funke* case on the question of a breach of the right of privacy was based (*ibid.*, at 913) on the absence of any requirement of a judicial warrant and the fact that restrictions and conditions provided by law appeared too lax and full of loopholes for the interference in the individual's right to have been strictly proportionate to the legitimate aim pursued.

With regard to s.33, we have not the slightest doubt that there is a legitimate aim, no less important than the aim of preventing tax evasion that was being considered in *Funke*. On the other hand, the invasion of privacy by means of s.33 is much less serious than a search and seizure at a person's home. Furthermore, sub-s.(1)(b), in respect of which the complaint is made, is limited to a reasonable requirement by the Commission. If the party concerned did not consider the requirement to be reasonable he could no doubt

challenge that in the courts. The Commission certainly could not enforce the requirement without being able to demonstrate that it is reasonable. Accordingly, we can see no difficulty about the interference with the right to privacy in this case being any more than is strictly proportionate to the legitimate aim being pursued by the Commission in seeking information pursuant to s.33.

Thus in *R.* v. *Inland Rev. Commrs., ex p. Banque Intl. Luxembourg S.A.* . . . Lightman, J. readily held that the notices served on the bank requiring disclosure of a client's accounts, was amply justified under art. 8(2) and was a rational and proportionate action.

Disclosure to the authorities of the foreign country

By s.58 of the Financial Services Ordinance 1989, information acquired by the Commission in the course of carrying out its function is confidential and may not be disclosed without consent, except to the extent of the gateways set out in the section. Gateway (d) permits the Commission to assist any authority 'which appears to the [Commission] to exercise in a place outside Gibraltar functions corresponding to those of the authority . . .'

As we have pointed out above, your clients' real concern is the potential use of this gateway to pass information to the authorities of a foreign country, not in relation to its own position [*i.e.* the claimant], but in relation to third parties connected with it. This is not a real concern in a legal sense of the claimant, who would not be legally affected by the disclosure. From the point of view of the Commission, however, it would obviously be adverse to the interests of Gibraltar for such disclosure not to be given to the authorities of the foreign country in relation to business of a dubious nature, which passes through or affects Gibraltar.

The Commission must, first of all, form the view that the [R.A.] 'appears' to be exercising 'functions corresponding to those of the [Commission]'. The fact that the functions may not be identical appears to us to be quite irrelevant. It seems to us that the [R.A.] is also a regulator in the financial services sector and has functions which overlap with those of the Commission. Accordingly, it seems to us that the Commission is entitled to be of the view that the authority from the foreign country is exercising functions corresponding to those of the Commission.

We find it difficult to understand the points being made to the contrary by you in your letter of February 16th, 2001, where you state at page 10:

> 'To argue otherwise would permit the [Commission] to hand documents over to the [R.A.] which could, in turn, be

> empowered to conduct numerous ancillary exercises. Indeed, in the circumstances it is clear that the Commission know and intend that the information delivered is intended to be and can be used as "evidence" in proceedings extraneous to those for which it is being sought.'
>
> As far as we understand it, what you are saying is that because the [R.A.] may use the information as evidence in criminal proceedings, the [R.A.] is not exercising functions corresponding to those of the Commission. In our view, such a suggestion would be plainly wrong. What matters is that there is a significant overlap between the types of investigatory and regulatory functions carried out by [the foreign country] and Gibraltar authorities in question. The fact that information passed between them may be used in criminal proceedings by the [foreign authorities] does not appear to alter the fact that the [authority of the foreign country] appears to exercise functions corresponding to those of the Commission.
>
> Once that precondition is met, it seems to us that the Commission is perfectly entitled to pass such information to the [relevant authorities of the foreign country] through the statutory gateway mentioned above.
>
> Additionally, of course, [the other European country] is a signatory to the European Convention of Human Rights and your client is also protected in that respect."

67 It is interesting to note that four days before that letter was written the Commissioner had written to the R.A. asking whether the information it required could not be obtained through other routes, for example a request in a criminal investigation, and that the request from the magistrate addressed to the Attorney-General is dated June 27th, 2001. In later correspondence Messrs. Triay & Triay asked the Commissioner, through his solicitors, whether he still opposed this application for judicial review in the face of that request. The relevant part of the letter in response, dated January 11th, 2002, reads as follows:

> "As you yourselves point out (para. 2(f) of February 15th, 2001), your clients are not being investigated in respect of any criminal conduct by the authorities of [the foreign country]. Accordingly, we cannot see what proper interest they can have in attempting to block information being sent to [the other European country] in relation to other parties. Indeed, on any rational view, your clients' interests as a Gibraltarian company are in helping and not obstructing the investigation of international crime. Accordingly, there is only one rational inference to be drawn from your clients' conduct, namely the inference set out in the additional grounds.

> Further, the point you make about judicial assistance is not entirely accurate. Our understanding is that a request was made but refused by H.M. Attorney-General on the grounds that the request did not satisfy the requirements of the local Ordinance. In any event, it makes absolutely no difference and your suggestion that this somehow shuts the gateways afforded by the Financial Services Ordinance is wholly misconceived as a matter of law."

68 It seems that at the date that letter was written, the request from the magistrate had been rejected by the Attorney-General for technical reasons, but that it was subsequently put into proper form. A later suggestion by the claimant that the judicial review proceedings should be conceded because of the request of the magistrate met with the following response dated April 2nd, 2002:

> "In your letter of February 12th, you appear to suggest that my client should concede the judicial review proceedings. I have already provided you with an answer in my previous letter to you of the January 11th, 2002. In that letter I told you that the Financial Services Ordinance provides a different gateway for assistance and remains unaffected by the request I made of the Attorney-General. Indeed, one is dealing with two separate bodies at either end (*i.e.* at [the foreign country] end and at the Gibraltar end) to those involved in these proceedings. Moreover, I do not know what documents have been sought from the Attorney-General or what his attitude is to the request. Your reference to the request being 'satellite' litigation, implying some form of joint enterprise between my client and the Attorney-General, is absurd. As I have already told you, I had been informed last year that a request had been received and had been rejected. The next time I knew anything about a request being processed was when you wrote to me on January 11th, 2002. Please tell me what documents are the subject of the request made to the Attorney-General. I assume that you will be resisting the request. Please confirm."

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.

70 Counsel for *Z* has argued that the R.A. request was bad on its face in that in its terms the request is made in support of an investigation into "presumed violations" of the Criminal Code of the foreign country, whereas in explaining the source of its powers, the R.A. says that its powers are exercisable for the enforcement of the Stock Exchange and Securities Trading Act only. Furthermore, that in the interview with the officers of Gibbank I, *A* suggested that the transactions under investigation pre-dated the legislation which were purported to offend. I must say that I would not find these two matters determinative of this application. The most I could make of them would be as demonstrating that the Commissioner did not view the R.A. request as critically as he ought.

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.

Order accordingly.