[2020 Gib LR 90]

GIBTELECOM LIMITED v. GIBRALTAR REGULATORY AUTHORITY (GIBFIBRE as interested party)

SUPREME COURT (Dudley, C.J.): February 14th, 2020

Telecommunications and Broadcasting—communications providers—competition—no leave to appeal required under Competition Act 2006, s.91(5) against determination by Gibraltar Regulatory Authority

Gibtelecom sought to appeal against a determination by the Gibraltar Regulatory Authority.

The Gibraltar Regulatory Authority ("the GRA") was the national authority with responsibility for the regulation of electronic communications in Gibraltar. In 2008, it determined that Gibtelecom had significant market power in certain identified markets including "wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in Gibraltar" and "wholesale terminating segments of leased lines, irrespective of the technology to be used to provide leased or dedicated capacity." The GRA required Gibtelecom to meet reasonable requests for access to its network infrastructure and to its leased lines.

In earlier proceedings between GibFibre Ltd. ("GibFibre") and the GRA arising from a request for assistance by GibFibre to the GRA to compel Gibtelecom to enter into an agreement to allow access to the data centre owned or controlled by Gibtelecom, the GRA concluded there was no lawful basis on which it could compel access of the kind sought by GibFibre. On appeal, Butler, J. upheld the GRA's submission that it had no power to assist GibFibre in the manner sought. The Court of Appeal held (in a judgment reported at 2019 Gib LR 92) that the GRA had the power to provide access to GibFibre to enable it to place its server on the data centre and communicate with other servers, provided it thought it a proper exercise of its power. The GRA's decision was quashed and it was ordered to reconsider whether it would be appropriate to grant access. That judgment was being appealed by the GRA to the Privy Council.

In a determination in 2019, the GRA imposed on Gibtelecom certain access obligations requiring it to provide a wholesale leased line ("WLL") to GibFibre from inside the data centre to a point outside the data centre to which GibFibre was able to connect.

Gibtelecom sought permission to appeal against the determination and a stay of the determination pending the appeal.

Section 91 of the 2006 Act provided:

"(1) This section applies to any person who, on or after the appointed date, is aggrieved by—

(a) any measure adopted or issued by the Authority pursuant to—

(i) this Act; or

(ii) . . . in this section collectively referred to as a 'decision' . . .

(2) Subject to subsection (5), a person aggrieved by a decision to which this section applies may appeal against that decision on any one or more of the following grounds—

(a) that a material error as to the facts has been made;

(b) that there was a material procedural error;

(c) that a material error of law has been made;

(d) that there was some other material illegality.

(3) An appeal of the nature referred to in subsection (2) lies to the Supreme Court.

(4) The Supreme Court determining an appeal of the nature referred to in subsection (2) may:

(a) dismiss the appeal; or

(b) quash the decision and may refer the matter to the Minister or the Authority, as the case may be, with a direction to reconsider it and adopt a decision in accordance with the findings of the Supreme Court.

(5) No appeal under this section shall be brought unless the leave of the Supreme Court has been obtained in accordance with such rules as may be made under paragraph (a) of subsection (11).

. . .

(7) The bringing of an appeal under this section shall not operate to suspend the effect of the decision appealed against unless the Supreme Court grants interim measures.

. . .

(11) The Chief Justice may make rules prescribing any one or more of the following:

(a) a procedure for obtaining the leave referred to in subsection (5) . . ."

Article 4 of Directive 2002/21/EC provided:

"Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.

> Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise."

Gibtelecom submitted that, notwithstanding the wording of s.91(5), it could appeal as of right and was not subject to a threshold test of "real prospects of success." Section 91(5) had to be read in a purposive manner in accordance with art. 4 of Directive 2002/21/EC in order to provide an absolute right of appeal. The draft grounds of appeal raised factual issues which it appeared had not been relied on by Gibtelecom when the GRA invited representations on its draft decision. The draft grounds of appeal were predicated on the assertion that GibFibre equipment was required for the grant of the WLL to be effective. It was said that a "Meet Me Room" would have to be designed and built requiring specific structural and technical infrastructure.

Held, ordering as follows:

(1) A grammatical reading of s.91(5) of the 2006 Act required a prospective appellant to obtain leave before an appeal could be brought. However, it was common ground that the Act implemented various EU Directives, including Directive 2002/21/EC (the Framework Directive) which required Member States to establish independent national regulatory authorities so as to give effect to the EU harmonized regulatory framework. One of the principles underpinning the operation of national regulatory authorities was a right of appeal. Article 4 of the Framework Directive provided for a right of appeal. National courts must as far as possible interpret national law in light of the wording and purpose of relevant EU Directives. It was instructive that there was a right of appeal under the UK Communications Act 2003 which was not curtailed by a requirement to obtain permission. To impose a merits-based threshold leave test would run counter to art. 4 of the Framework Directive and therefore s.91(5) was to be interpreted as only requiring the court to be satisfied that the appeal came within the ambit of s.91(1). In the present case, it evidently did so and leave was granted (paras. 11–15).

(2) If the court were wrong in its interpretation of s.91(1), the court dealt with the leave application applying the threshold test of a "real prospect of success." The draft grounds of appeal raised factual issues which it appeared were not relied upon by Gibtelecom when the GRA shared its draft decision and invited representations. The draft grounds of appeal were predicated on the assertion that GibFibre equipment (beyond the need for the CCS cable) was required for the grant of the WLL to be effective. A possible failure on the part of the GRA to consider the infrastructural requirements to provide GibFibre with a WLL facility was sufficient to meet the low threshold required to obtain leave to appeal. However, given that it appeared that these concerns might not have been raised with the GRA, at the present juncture the court did not express a view as to whether in the context of an appeal from the GRA, the principle

in *Ladd* v. *Marshall* as to the admission of fresh evidence on appeal was engaged (paras. 16–18).

(3) While the general rule was that a stay of judgment would not be granted, the court had an unfettered discretion. In ascertaining what infrastructure might be required to give effect to the determination, the court was faced with untested conflicting evidence, which for the purposes of the stay application could not be resolved. In the circumstances, the court remitted itself to the GRA's determination and the conclusions it drew from its site visit. As the court understood the determination, at its most basic the WLL facility was capable of being provided via a cross connect service (a cable) from the hosted entity (GibFibre) to the "Meet Me Frame." To that extent, no injustice was caused by requiring Gibtelecom to give effect to the determination. However, to the extent that the effect of the determination might impose on Gibtelecom an obligation to construct a "Meet Me Room" or require it to host anything other than *de minimis* GibFibre equipment, the application for a stay was granted (para. 19; para. 23).

Cases cited:

(1) *British Telecomms. plc* v. *Telefónica O2 UK Ltd.*, [2014] UKSC 42; [2014] 4 All E.R. 907; [2014] Bus. L.R. 765, *dictum* of Lord Sumption, JSC considered.

(2) *Environment, Food & Rural Affairs Secy.* v. *Downs*, [2009] EWCA Civ 257, applied.

(3) *Ladd* v. *Marshall*, [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, referred to.

(4) *Leicester Circuits Ltd.* v. *Coates Bothers plc*, [2002] EWCA Civ 474, applied.

(5) *Marleasing SA* v. *La Comercial Internacional De Alimentacion SA*, ECJ C-106/89, November 13th, 1990, followed.

(6) *Swain* v. *Hillman*, [2001] 1 All E.R. 91; [1999] CPLR 779; [2000] PIQR 51; [2001] C.P. Rep. 16, considered.

Legislation construed:

Communications Act 2006 (L.N. 2006/071), s.91: The relevant terms of this section are set out at para. 10.

Council Directive (2002/21/EC) of March 7th, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), art. 4: The relevant terms of this article are set out at para. 12.

L. Baglietto, *Q.C.* and *M. Levy* for the intended appellant;
C. Allan for the intended respondent;
A. Maclean, *Q.C.* and *E. Phillips* for the interested party.

1 **DUDLEY, C.J.:** The intended appellant ("Gibtelecom") seeks permission to appeal, pursuant to s.91 of the Communications Act 2006 ("the Act") against Determination C02/19, dated July 16th, 2019 ("the determination") made by the respondent ("the GRA") and a stay of the determination pending appeal.

2 The determination imposes upon Gibtelecom certain access obligations requiring Gibtelecom to provide a wholesale leased line ("WLL") to GibFibre Ltd. ("GibFibre") from a point outside of a data centre located at Mount Pleasant ("the data centre") to a point within the data centre. The data centre is under the control of Rockolo Ltd. ("Rockolo") which is a wholly owned subsidiary of Gibtelecom.

3 The GRA maintains a neutral stance in respect of both applications. However, on September 19th, 2019, an order by consent was entered, granting GibFibre permission to participate at the hearing of these applications and it opposes both the grant of leave and the stay.

Background

4 The GRA is the national authority with responsibility for the regulation of electronic communications in Gibraltar, which is regulated through EU provisions known as the "Common Regulatory Framework." In exercise of its regulatory powers, on August 11th, 2008, it determined that Gibtelecom has "significant market power" ("SMP") in certain identified markets, including:

(a) the "Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location in Gibraltar" (the network infrastructure market); and

(b) the "Wholesale terminating segments of leased lines, irrespective of the technology to be used to provide leased or dedicated capacity" (the leased lines market).

These are known as Market 4 and Market 6 as defined in the Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications network and services.

5 As is put by Mr. Baglietto in his skeleton, in very broad terms, the effect of the access obligation imposed upon Gibtelecom by the GRA is that since August 11th, 2008, Gibtelecom has been required to meet reasonable requests for access to its network infrastructure and to its leased lines.

6 There is extant litigation between GibFibre and the GRA arising from a request for assistance by GibFibre from the GRA to compel Gibtelcom

to enter into agreement to allow access to the data centre in which Market 4 is engaged. Put very simply, the GRA decided that it could not compel access of the type sought by GibFibre. That decision was upheld by Butler, J. but on further appeal to the Court of Appeal the GRA's decision was quashed. Sir Patrick Elias, J.A. giving the only judgment of the court, with which Sir Colin Rimer, J.A. and Sir Maurice Kay, P. agreed, said (2019 Gib LR 92, at para. 51):

> "All that I have decided is that in my judgment, and contrary to its understanding of its own powers, the GRA did in principle have . . . power to grant access to [GibFibre] in order to enable it to place its server on the data centre and communicate with other servers, provided it thought it a proper exercise of its power."

The GRA's decision was consequently quashed and it was directed to reconsider it. That judgment is being appealed by the GRA to the Privy Council.

7 How arguments were developed during the course of those earlier proceedings may have encouraged the present Market 6 application. Indeed, Sir Patrick Elias, J.A. observed (*ibid*., at para. 36):

> "It is pertinent to note that [GibFibre] is not seeking access to the network itself; it is common ground that it would be entitled to such access by virtue of art. 4. This confers a right on an operator of a public communications network to interconnect with the network of another such operator on terms and conditions specified by the regulatory authority. If [GibFibre] had chosen that route, it could then undoubtedly link with the other servers on the data centre. But it has chosen, no doubt for commercial reasons, to eschew that path."

8 In an implicit criticism of GibFibre, Mr. Baglietto suggests that this new bid by it to obtain access is an attempt to circumvent certain aspects of the Court of Appeal's judgment as to what constitutes "network elements" or "associated facilities." For my part I fail to understand any such criticism. GibFibre is a telecommunications company which is seeking to diversify its services and target the commercial broadband market. It is difficult to understand why it should be criticized for seeking to rely upon regulatory provisions which may assist it. It is evident that although the legal issues that arise are regulatory, underpinning both sets of proceedings is a commercial conflict between competitors about market share and consequently profit.

The determination

9 The GRA identified the remedy sought by GibFibre at para. 2.2 of the determination as follows:

> "The relief or remedy sought by GibFibre, in accordance with its submission, is that 'the economic unit which is formed by Gibtelecom/Rockolo enter into a Gibtelecom RLLO [Reference Leased Lines Offer] leased line contract in respect of a leased line from inside Rockolo's data centre at Mount Pleasant to a spot on the complainant's/dispute referencer's network.'"

And having undertaken a site visit it found the following:

> "It was established that two authorised operators are present in the Data Centre. These are Gibtelecom and Sapphire Networks, who are present at the Data Centre by virtue of a hosting agreement which in turn permits them to connect to hosted entities. Each of these operate independently of each other and offer their services to hosted entities in the Data Centre. In order to connect a hosted entity at the Data Centre to a network operator, a cross connect service ('CCS') from Rockolo, is required. This is a physical cable which connects the hosted entity to the Data Centre's Meet-Me Frame ('MMF'), which is a physical location in the Data Centre where both the operators' services reach, and so are therefore able to connect to hosted entities . . ."

Thereafter, for the purpose of making its determination it posed itself the following two questions:

> "(1) Does Gibtelecom's obligation to grant a WLL extend as far as providing a WLL from a point outside the Data Centre (at which GibFibre is able to connect to), to a point on Gibtelecom's network within the Data Centre?
>
> (2) If the answer to the above is in the affirmative, does Gibtelecom's obligation to provide GibFibre with a WLL to a point within the Data Centre extend to those parts of the Data Centre under the control of Rockolo, namely but not limited to, the provision of CCSs, by virtue of the fact that Rockolo is wholly owned by Gibtelecom, and/or, as the case may be, that it forms part of a single economic unit with Gibtelecom?"

Dealing with both questions in some detail, it went on to answer both in the affirmative. It found that Gibtelecom and Rockolo are a single economic unit and determined that Gibtelecom was required to provide GibFibre the relief it sought.

The appellate statutory provisions

10 So far as material, s.91 of the Act provides:

> "91.(1) This section applies to any person who, on or after the appointed date, is aggrieved by—

(a) any measure adopted or issued by the Authority pursuant to—

(i) this Act; or

(ii) . . . in this section collectively referred to as a 'decision' . . .

(2) Subject to subsection (5), a person aggrieved by a decision to which this section applies may appeal against that decision on any one or more of the following grounds—

(a) that a material error as to the facts has been made;

(b) that there was a material procedural error;

(c) that a material error of law has been made;

(d) that there was some other material illegality.

(3) An appeal of the nature referred to in subsection (2) lies to the Supreme Court.

(4) The Supreme Court determining an appeal of the nature referred to in subsection (2) may:

(a) dismiss the appeal; or

(b) quash the decision and may refer the matter to the Minister or the Authority, as the case may be, with a direction to reconsider it and adopt a decision in accordance with the findings of the Supreme Court.

(5) No appeal under this section shall be brought unless the leave of the Supreme Court has been obtained in accordance with such rules as may be made under paragraph (a) of subsection (11).

. . .

(7) The bringing of an appeal under this section shall not operate to suspend the effect of the decision appealed against unless the Supreme Court grants interim measures.

. . .

(11) The Chief Justice may make rules prescribing any one or more of the following:

(a) a procedure for obtaining the leave referred to in subsection (5) . . ."

Leave to appeal

11 The grammatical reading of s.91(5) requires a prospective appellant to obtain leave before an appeal can be brought. In the absence of rules

having been made under s.91(11)(a), Gibtelecom properly applied for leave under the provision in the Supreme Court Rules 2000. However, notwithstanding sub-s. (5) and Gibtelecom's application for leave, it is submitted by Mr. Baglietto that, as a matter of law, Gibtelecom can appeal as of right and is not to be made subject to the "real prospect of success" threshold test which applies when leave (or permission, to use more contemporary language) to appeal is required.

12 It is common ground that the Act implements various EU directives, including Directive 2002/21/EC of March 7th, 2002 ("the Framework Directive") which requires Member States to establish independent national regulatory authorities so as to give effect to the EU harmonized regulatory framework. One of the principles underpinning the operation of national regulatory authorities is a "right of appeal," with art. 4 of the Framework Directive providing:

"**Right of appeal**

> Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority *has the right of appeal* against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. *Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.*
>
> Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise." [Emphasis added.]

Under the *Marleasing* principle (*Marleasing SA* v. *La Comercial Internacional De Alimentacion SA* (5) (ECJ C-106/89, at para. 8)) national courts must as far as possible interpret national law "in the light of the wording and purpose of the Directive in order to achieve the result pursued by the [Directive]." Whilst in *British Telecomms. plc* v. *Telefónica O2 UK Ltd.* (1), Lord Sumption, JSC described the requirements of art. 4 as follows ([2014] UKSC 42, at para. 13):

> "Article 4 of the Framework Directive requires that there should be a right of appeal from any decision of a national regulatory authority, whether under its regulatory or its adjudicatory powers. This is not just a right of judicial review. The appeal must 'ensure that the merits of the case are duly taken into account.'"

13 As I understand it, Mr. Baglietto's essential proposition is that s.91(5) must be interpreted in a purposive manner that preserves the absolute right of appeal on the merits, and that therefore the "leave" requirement should

be interpreted as limited to determining whether a decision the subject of an appeal is one which comes within the ambit of s.91(1).

14 It is instructive that s.192(2) of the United Kingdom Communications Act 2003 (which like our Act transposes the EU regulatory framework for communications) affords a right of appeal which is not curtailed by a requirement to obtain permission. For its part, r.11 of the United Kingdom Competition Appeal Tribunal Rules 2015 allows that tribunal, after giving the parties an opportunity to be heard, the power to strike out an appeal, *inter alia* where the notice of appeal, or part of it, discloses no valid ground of appeal. The application of that test may be materially the same as the leave to appeal test of "real prospect of success" that is to say that the prospects of success are realistic rather than fanciful (*Swain* v. *Hillman* (6)). However, the fundamental difference between a threshold leave test and a strike-out test is that the latter extinguishes an appeal that is devoid of merit whereas the former precludes such an appeal from being instituted.

15 In my judgment, imposing a merits-based threshold leave test runs counter to art. 4 and therefore applying the *Marleasing* principle, s.91(5) is to be interpreted as only requiring the court to be satisfied that the appeal comes within the ambit of s.91(1). In the present case it evidently does and therefore leave is granted.

16 In the event that I am wrong in my interpretation of s.91(1), I turn to deal with the leave application applying the "real prospect of success" threshold test.

17 The draft grounds of appeal identified by Mr. Baglietto raise factual issues which it appears were not relied upon by Gibtelecom when the GRA shared its draft decision and invited representations. As I understand them, the four draft grounds are predicated upon the assertion that GibFibre equipment (beyond the need for the CCS cable) is required for the grant of the WLL to be effective. The potential need for the installation of GibFibre equipment in the data centre is dealt with in witness statements filed by both Gibtelecom and GibFibre with their respective positions being materially different. GibFibre contends that the equipment that needs to be installed in the data centre would take up as little as 1–2m^2 of floor space, whilst for Gibtelecom it is said that a "Meet Me Room" would have to be designed and built requiring specific structural and technical infrastructure to operate as such.

18 A possible failure on the part of the GRA to consider the infrastructural requirements to provide GibFibre with a WLL facility is sufficient to meet the low threshold required to obtain leave to appeal. However, given that it appears that these concerns may not have been raised with the GRA, at this juncture I do not express a view as to whether in the context

of an appeal from the GRA the principle in *Ladd* v. *Marshall* (3), in relation to the admission of fresh evidence on appeal, is engaged.

The stay

19 In *Leicester Circuits Ltd.* v. *Coates Bothers plc* (4), the English Court of Appeal stated that (as summarized in the commentary to the CPR at 52.16.3) ([2002] EWCA Civ 474, at paras. 12–13):

> 12. . . . while the general rule is that a stay of judgment will not be granted, the court has an unfettered discretion and no authority can lay down rules for its exercise . . .
>
> 13. The proper approach is to make the order which best accords with the interests of justice . . . the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."

Whilst in *Environment, Food & Rural Affairs Secy.* v. *Downs* (2), Sullivan, L.J. sitting as a single judge stated ([2009] EWCA Civ 257, at para. 8):

> "A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted."

20 Although articulated in far greater detail, as I understand them, the grounds advanced by Gibtelecom are these:

(i) that if a stay is not granted, there is a risk that the appeal would be stifled. That one of Gibtelecom's contentions is that building a "Meet Me Room" is outside the scope of a "reasonable request" within the meaning of the access obligations, but once built it could make that ground nugatory as the room could potentially fall to be described as part of Gibtelecom's "network or associated facility";

(ii) the construction of the "Meet Me Room" would be time consuming, complex and expensive and likely to take several months;

(iii) requiring Gibtelecom to build a "Meet Me Room" amounts to an expensive and intrusive obligation and if it were to be successful in its appeal there would be no remedy in respect of the expense incurred; and

(iv) the alternatives suggested by GibFibre, that its equipment be hosted in a pre-existing room, are untenable given confidentiality requirements.

21 It is also said for Gibtelecom that GibFibre has failed to adequately quantify the loss it would suffer if a stay is granted but the appeal is unsuccessful. In my view, given the nature of this application, the

criticism levied by Gibtelecom is unfair, there is certainly evidence before the court which goes some way towards establishing that the loss of revenue which could be suffered by GibFibre (if quantified on an annual basis) may be capable of running into millions of pounds.

22 The evidence relied upon by GibFibre is in sharp contrast and its evidence is to the effect that there is no need to undertake a material redesign of the existing infrastructure at the data centre. On any view, it is unfortunate that Gibtelecom should have chosen to decline the request by GibFibre's expert to visit the data centre.

23 The upshot is that in ascertaining what infrastructure may be required to give effect to the determination, the court is faced with untested conflicting evidence, which for the purposes of the stay application cannot be resolved. In those circumstances, I remit myself to the GRA's determination and the conclusions it drew from its site visit. As I understand the determination, at its most basic the WLL facility is capable of being provided via a cross connect service (a cable) from the hosted entity (GibFibre) to the "Meet Me Frame." In my judgment, to that extent, no injustice is caused by requiring Gibtelecom to give effect to the determination. However, to the extent that the effect of the determination may impose upon Gibtelecom an obligation to construct a "Meet Me Room" or require it to host anything other than *de minimis* GibFibre equipment, the application for a stay is granted.

Orders accordingly.