[2021 Gib LR 1]

GIBTELECOM LIMITED v. GIBRALTAR REGULATORY AUTHORITY and GIBFIBRE LIMITED

SUPREME COURT (Dudley, C.J.): January 27th, 2021

2021/GSC/02

Telecommunications and Broadcasting—communications providers—competition—on appeal against determination by Gibraltar Regulatory Authority, appellant's application to admit further evidence granted—regulatory dispute in highly technical industry—Directive 2002/21/EC, art. 4 requires court to have appropriate expertise to carry out its functions, achievable by court having benefit of expert evidence

The Gibraltar Regulatory Authority made a determination in respect of the appellant.

In 2008, the Gibraltar Regulatory Authority ("the GRA") determined that the appellant, 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 the second respondent, 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.

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.

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."

The Supreme Court granted leave to appeal and ordered a partial stay (that decision is reported at 2020 Gib LR 90). The court held that to the extent that 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.

The present proceedings concerned an application by Gibtelecom to admit further expert and factual evidence pursuant to r.21 of the Supreme Court Rules 2000 and an application by GibFibre seeking an order clarifying the scope of the partial stay ordered on February 14th, 2020.

There were three grounds of appeal: (1) that there were material errors of fact and law in the GRA's determination; (2) that the GRA erred in law in determining that the fact that Rockolo Ltd. was a wholly owned subsidiary of Gibtelecom was a relevant consideration (essentially, that Gibtelecom's analysis in Ground 1 was equally applicable irrespective of whether the data centre was owned by Rockolo or Gibtelecom); and (3) that GibFibre's request for access was not a reasonable request. Grounds 1 and 2 were set down for hearing and the application for permission to admit evidence was adjourned in so far as it related to Ground 3.

Held, ruling as follows:

(1) The essential issue raised in Grounds 1 and 2 of Gibtelecom's application to admit further evidence was whether the GRA had jurisdiction to order Gibtelecom to provide GibFibre with access to the data centre. Although the issues could be said to raise pure matters of law, the court was being asked to consider arguments in the context of a regulatory dispute in a highly technical industry. Article 4 of Directive 2002/21/EC required the appellate body to have the appropriate expertise to enable it to carry out its functions, and the way in which that could properly be achieved was by the court having the benefit of expert evidence, which should go some way to provide the Chief Justice with an understanding of the interplay between the relevant law and its application within the telecommunications industry. It followed that it was in the interests of justice for the Chief

Justice to exercise his discretion and allow the evidence that Gibtelecom wished to adduce together with any responsive evidence upon which the GRA and GibFibre might wish to rely. The extent to which aspects of the evidence might in due course prove irrelevant or the weight, if any, to be given to the evidence would fall to be considered at the substantive hearing of the appeal (paras. 13–15).

(2) GibFibre applied for an order clarifying the scope of the partial stay. The proposed order was that GibFibre equipment which was entirely housed (with the consent of the third party concerned) within space at the data centre rented by a third party was to be regarded as *de minimis* for the purpose of the stay; Gibtelecom was under an obligation to provide a wholesale leased line to GibFibre from a point outside the data centre to any such GibFibre equipment; and Gibtelecom must not obstruct any third party which rented space at the data centre from placing GibFibre equipment within such space. This proposal might be a pragmatic technological workaround solution to Gibtelecom's practical objections but it went further than the determination and therefore the application would be dismissed (paras. 16–25).

Cases cited:

(1) *British Telecomms. plc* v. *Office of Communications*, [2011] EWCA Civ 245; [2011] 4 All E.R. 372; [2012] Bus. L.R. 113, considered.

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

(3) *T-Mobile (UK) Ltd.* v. *Office of Communications*, [2008] EWCA Civ 1373; [2009] 1 W.L.R. 1565; [2009] Bus. L.R. 794, considered.

Legislation construed:

Communications Act 2006, s.91(2):

"(2) . . . 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."

Council Directive (2002/19/EC) of March 7th, 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), art. 12(1): The relevant terms of this paragraph are set out at para. 20 and para. 23.

Council Directive (2002/21/EC) of March 7th, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), art. 2: The relevant terms of this article are set out at para. 21.

art. 4: The relevant terms of this article are set out at para. 12.

R. Palmer, *Q.C.* with *M. Levy* (instructed by Hassans) for the appellant;
C. Allan (instructed by Peter Caruana & Co.) for the first respondent;
A. Maclean, *Q.C.* with *E. Phillips* (instructed by Signature Litigation) for the second respondent.

RULING NO. 2

1 **DUDLEY, C.J.:**

This is the ruling on:

(i) an application by the appellant ("Gibtelecom") to admit further expert and factual evidence pursuant to r.21 of the Supreme Court Rules 2000; and

(ii) an application by the second respondent ("GibFibre") seeking an order, as set out in an attached draft, seeking to clarify the scope of the partial stay which I ordered on February 14th, 2020 (reported at 2020 Gib LR 90).

2 The essential background to this ruling is to be found in my first ruling in this appeal of February 14th, 2020, pursuant to which I granted leave to appeal and ordered a partial stay. The grounds have since been perfected into three grounds, which in the memorandum of appeal are developed over some 30 paragraphs. I draw from the skeleton submissions and in summarizing the grounds no doubt understate them.

3 Ground 1: it is said that there were material errors of fact and law in the GRA's determination. In particular, that the GRA misunderstood what a "wholesale terminating segment of a leased line" is, in that, in relation to such a line, GibFibre would need to "install its own electronic equipment to each end of the leased line in order to use the leased line to provide communication services for its customer" (memorandum of appeal, §1(c)). Flowing from that, that as a matter of law (i) GibFibre has no right to place its equipment within the data centre; (ii) the GRA has no power to compel Gibtelecom to allow GibFibre to place its equipment within the data centre; and, therefore, (iii) the determination could not lawfully require Gibtelecom to provide a wholesale lease line terminating within the data centre. Of note that in the skeleton submissions filed for the GRA the following is said:

> "The only point that the GRA can highlight to the Court is that in making its Determination the GRA did not consider (nor were any submissions made to it by either party) that [Gibfibre] equipment would be needed to be installed anywhere within the data centre or within the customers racks."

4 Ground 2: the argument advanced is to the effect that the GRA erred in law in determining that the fact that Rockolo Ltd. ("Rockolo") is a wholly

owned subsidiary of Gibtelecom was a relevant consideration. Essentially, it is said that Gibtelecom's analysis in Ground 1 is equally applicable irrespective of whether the data centre is owned by Rockolo or by Gibtelecom itself.

5 Ground 3: this ground is advanced on an alternative basis and it is said that GibFibre's request for access is not a "reasonable request."

6 In contrast to grounds 1 and 2 which primarily turn on questions of law, determining ground 3 will necessarily involve an analysis of competing allegations of fact which were never advanced before the GRA and will likely require live evidence from witnesses of fact and experts. At the hearing of these applications, I expressed the view that from a case management perspective there could be merit in proceeding to hear and determine grounds 1 and 2, and in respect of those two grounds the substantive appeal was set down for January 27th, 2021, with a time estimate of three days. Consequently, and by consent, the application for permission to admit evidence was, in so far as it related to Ground 3 (essentially the expert report of Anthony Rossiter dated August 27th, 2020) adjourned.

7 In the circumstances, if the hearing of the appeal was to be effective, Gibtelecom's application, in so far as it related to Grounds 1 and 2, required an immediate determination if the respondents were to have sufficient time in which to file any responsive evidence. In the circumstances, I allowed the application to the extent that I gave permission for the admission of—

(i) the expert report of Dr. Stephen Unger, dated August 27th, 2020;

(ii) the first witness statement of Dwayne Lara, dated July 22nd, 2019 (erroneously dated July 15th, 2019 on the document);

(iii) the first witness statement of Daniel Hook, dated October 3rd, 2019; and

(iv) Exhibit DH1 to the third witness statement of Daniel Hook, dated August 28th, 2020.

I indicated that reasons would follow, these are they. Although in the event, and as a direct consequence of the Covid-19 pandemic and my reservations on hearing the appeal remotely, I directed that the hearing fixed for January 27th, 2021 be vacated and relisted.

Admission of fresh evidence

8 The GRA did not resist the application, albeit subject to the caveat that parts of the evidence which Gibtelecom seeks to rely upon are inadmissible, in the sense of not being relevant to any issue before the court, and reserved its right to advance submissions in that regard at the hearing.

9 GibFibre opposed the application, save in so far as it concerned the two documents at exhibit DH1 (which had been provided to the GRA for the purposes of making its determination) which GibFibre agreed should be admitted.

10 The challenged evidence which Gibtelecom sought to have admitted can be shortly described as follows:

(i) Dwayne Lara's first witness statement which is already part of the record in that it was filed for the purposes of the application for leave to appeal and provides some limited background to the dispute;

(ii) Daniel Hook's first witness statement which sets out a factual account of the data centre at Mount Pleasant with some explanation as to the configuration of its "Meet Me Frame." It is said by Gibtelecom that the explanation it provides in relation to the physical layout of the data centre is essential because it informs Dr. Unger's report; and

(iii) Dr. Unger's expert report, the nature of which is summarized at his para. 5 as follows:

> "In what follows I first describe what a leased line is, the various types of leased lines that exist, and how they are used. I then describe the regulatory framework that applies to these different types of leased lines within the EU. Finally I comment on some questions that have arisen in relation to the current case."

As I understood it (and unsurprisingly) there was no challenge as to Dr. Unger's expertise. Until recently, Dr. Unger was an executive board member of Ofcom, the UK regulator responsible for the telecommunications sector, and for a period he was its Acting Chief Executive.

The applicable legal principles

11 By virtue of s.91(2) of the Communications Act, an appeal against a decision of the GRA lies to the Supreme Court, 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; and

(d) that there was some other material illegality.

12 It is also common ground, and beyond dispute that art. 4 of Directive 2002/21/EC ("the Framework Directive") is engaged. It provides:

"**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."

The approach to be taken when ensuring "that the merits of the case are duly taken into account" was considered by the English Court of Appeal in *T-Mobile (UK) Ltd.* v. *Office of Communications* (3), in which it was held, as put by Jacob, L.J. in his judgment, that there is ([2009] 1 W.L.R. 1565, at para. 22), "an obligation on a national court to adapt its procedures as far as possible to ensure Community rights are protected." And later (*ibid.*, at para. 31):

> "After all it is inconceivable that article 4, in requiring an appeal which can duly take into account the merits, requires member states to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong."

Subsequently in *British Telecomms. plc* v. *Office of Communications* (1), the English Court of Appeal considered the principles applicable to the admission of fresh evidence. Toulson, L.J. (as he then was) said ([2011] 4 All E.R. 372, at para. 60):

> "The task of the appeal body referred to in art 4 of the Framework Directive is to consider whether the decision of the national regulatory authority is right on 'the merits of the case'. In order to be able to make that decision the Framework Directive requires that the appeal body 'shall have the appropriate expertise available to it'. There is nothing in art 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression 'merits of the case' is not synonymous with the merits of the decision of the national regulatory authority. The omission from art 4 of words limiting the material which the appeal body may consider is unsurprising. When an appeal body is given responsibility for considering the merits of the case, it is not typically limited to considering the material which was available at the moment when the decision was made. There may be powerful reasons why an appeal body should decline to admit fresh evidence

> which was available at the time of the original decision to the party seeking to rely on it at the appeal stage, but that is a different matter."

He went on to explain (*ibid.*, at para. 62) that in this regulatory context it was "virtually inevitable that, at the judicial stage, certain aspects of the decision [would be] explored in more detail than during the administrative procedure, and that it might be appropriate for the [Competition Appeal Tribunal] to receive further evidence and hear witnesses." Rejecting the submission that the Competition Appeal Tribunal should apply the rule in *Ladd* v. *Marshall* (2), he identified some of the relevant factors to be considered when engaging in the discretionary exercise of whether to admit fresh evidence, namely the encouragement of parties to present their case to the regulator as the circumstances permit and the potential prejudice in costs, delay or otherwise which other parties may suffer by allowing the introduction of material which could reasonably have been placed before the regulator. He then went on (*ibid*., at para. 72) to lay down the test to be applied on the following terms:

> "Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it. The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test, nor would I attempt to lay down a comprehensive list of relevant factors or suggest how they should be balanced in a particular case."

Discussion and conclusion

13 The essential issue raised in grounds 1 and 2 is whether the GRA has jurisdiction to order Gibtelecom to provide GibFibre with access to the data centre, that position was undoubtedly advanced on Gibtelecom's behalf in Hassans' letter to the GRA dated July 5th, 2019 when commenting on the proposed determination. In reaching its determination, the GRA had the advantage of having carried out a site visit to Mount Pleasant and the data centre located within it, and it must follow that no purpose was served at the time by Gibtelecom making that evidence available to the GRA in the form of a witness statement. There can therefore be no criticism if factual evidence as to physical layout and the technological practicalities of the enterprise are before the court. It may be that Dr. Unger's expert evidence, or such like evidence could have been placed before the GRA but, as I understand it, that evidence, at least in part, seeks to weave matters of law with highly technical issues. Knowledge of that type is something which both Gibtelecom and GibFibre could legitimately have expected the GRA to possess but which, for my part, I readily accept I do not have.

14 Mr. Maclean may be right when he says that the issues raised in grounds 1 and 2 raise pure matters of law, but I am being asked to consider any such arguments in the context of a regulatory dispute in a highly technical industry. Article 4 requires the appellate body to "have the appropriate expertise to enable it to carry out its functions," and the way in which that can properly be achieved is by the court having the benefit of expert evidence, which should go some way to provide me with an understanding of the interplay between the relevant law and its application within the telecommunications industry.

15 It follows that in my judgment it is in the interests of justice for me to exercise my discretion and allow the evidence that Gibtelecom wishes to adduce together with any responsive evidence which the GRA and GibFibre may wish to rely upon. The extent to which aspects of the evidence may in due course prove irrelevant or the weight if any to be given to the evidence will evidently fall to be considered at the substantive hearing of the appeal.

Scope of the stay

16 Although the application notice is canvassed in terms of seeking to clarify the scope of the partial stay I ordered on February 14th, 2020, the relief sought is set out in an attached draft order, the material parts of which reads:

"IT IS ORDERED THAT:

1. GibFibre equipment which is entirely housed (with the consent of the third party concerned) within space at the Mount Pleasant Date Centre ('the Data Centre') rented by a third party is to be regarded as de minimis for the purpose of the Stay.
2. Gibtelecom is under an obligation to provide a Wholesale Leased Line to GibFibre from a point outside of the Data Centre to any such GibFibre equipment.
3. Gibtelecom must not obstruct (or cause or permit any other person or entity to obstruct) any third party which rents space at the Data Centre from placing GibFibre equipment within such space . . ."

The nature of GibFibre's proposal is summarized at para. 14 of the first witness statement of Simon Easter, who is the head of technology at GibFibre, as follows:

"14 In summary, the proposal is as follows:

14.1 A third party ('Company X') which rents space within the Data Centre, and which wishes to use GibFibre's services, would place

certain GibFibre equipment ('the GibFibre Equipment') within the space that Company X rents. The GibFibre Equipment would consist of either one or two routers, and would occupy no more than 2U of space within Company X's Rack. A router is a networking device that forwards data packets between computer networks.

14.2 Gibtelecom/Rockolo would (with Company X's agreement) place a router within Company X's Rack and require the use of a patch panel already in Company X's Rack. A patch panel contains prewired sockets and is used to facilitate connections between different pieces of equipment. This router and patch panel would occupy 2U of space within Company X's Rack.

14.3 Gibtelecom/Rockolo would provide cabling from a point of connection with GibFibre (outside the Data Centre) to Company X's Rack (within the Data Centre). This cabling would connect to the Gibtelecom router and patch panel, which would in turn be connected to the GibFibre router(s). The GibFibre router(s) would then be connected to Company X's equipment."

Mr. Easter also explains in his witness statement, and as I understand it not in dispute, that within the data centre there are cabinets, each is known as a rack and as he puts it:

"Typically, each customer of the Data Centre will lease a Rack or Racks to which equipment can be installed using vertical space measured in 'U'. One 'U' is defined as 1¾ inches. A standard Rack has capacity for 42 U of equipment to be installed vertically and is 19 inches wide and has a depth of 36 inches."

17 GibFibre contends that Gibtelecom does not dispute that the proposal is for a wholesale leased line, that it does not involve the construction of a "Meet Me Room," and that therefore the only issue is whether the proposal would require Gibtelecom to host anything other than *de minimis* GibFibre equipment.

18 I am of the view that equipment housed in 2Us is to be treated as "*de minimis*." It is also right to say that (despite the parties not necessarily agreeing as to what the precise requirements of a wholesale leased line are) by Hassans' letter dated May 6th, 2020, Gibtelecom accepted that this proposal was a request for a wholesale leased line.

19 That, however, is not the end of the matter. Gibtelecom's motivation in opposing the application is no doubt grounded on commercial considerations and a desire not to lose market share even if only pending the hearing of the appeal, but the principal submissions advanced raise matters of principle.

20 For Gibtelecom it is submitted that the order sought does not come within the scope of the requirement to provide access to any "specific network elements" nor to any "associated facilities" imposed by art. 12(1) of Directive 2002/19/EC ("the Access Directive") and that it bears no connection to the determination. That headline submission requires some unravelling.

21 The determination reads:

> "THE OBLIGATIONS EXTEND AS FAR AS TO OBLIGE GIBTELECOM TO PROVIDE A WHOLESALE LEASED LINE TO GIBFIBRE FROM A POINT OUTSIDE OF THE DATA CENTRE TO A POINT WITHIN THE DATA CENTRE WHICH FORMS PART OF GIBTELECOM'S NETWORK. INCLUDING TO THE EXTENT THAT SUCH A POINT IS UNDER THE CONTROL OR OWNERSHIP OF ROCKOLO, OR IS ROCKOLO'S RESPONSIBILITY TO PROVIDE. IN DOING SO, THE GRA WOULD HIGHLIGHT THAT GIBTELECOM IS THEREFORE UNDER AN OBLIGATION TO GRANT GIBFIBRE THE RELIEF SOUGHT AS PER 2.2 ABOVE."

Paragraph 2.2 sets out the relief/remedy sought from the GRA by GibFibre as follows:

> "the economic unit which is formed by Gibtelecom/Rockolo enter into a Gibraltar RLLO 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."

22 To better understand the submission, it is useful to set out certain definitions which are to be found in Directive 2002/21/EC ("the Framework Directive") which is part of a package which includes another four Directives, one of which is the Access Directive. Relevant for present purposes are the following which are to be found at art. 2:

> "(d) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;
>
> (da) 'network termination point (NTP)' means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name . . ."

23 The Access Directive imposes obligations upon operators designated as having significant market powers. In the present case art. 12 is engaged, which in so far as is relevant provides:

> "1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.
>
> Operators may be required inter alia:
>
> . . .
>
> (i) to interconnect networks or network facilities."

In *GibFibreSpeed* v. *Gibraltar Regulatory Auth.*, the Court of Appeal, albeit dealing with a determination by the GRA in relation to Market 4, "Wholesale (physical) network infrastructure access," considered the scope of art. 12. Sir Patrick Elias, J.A. in his judgment said (2019 Gib LR 92, at para. 39):

> "39 As to the question whether the access was to elements of the network, in essence the analysis below was that the data centre itself does not have the attributes of a public communications network or a public electronic communications network, and therefore seeking access to the centre is not seeking access to any element of the network itself. Similarly, the third party servers are not part of the network. The relevant network must be the network of Gibtel itself, as the operator against whom access is sought, and third party servers are plainly not elements in its network. This is further supported by the fact that there is a definition of 'network termination point' in art. 2(1) of the Communications Act 2006 which provides that a network terminates at 'the physical point at which a subscriber is provided with access to a public electronic communications network.' So the hosted servers are not themselves part of the network."

24 Gibtelecom contends that GibFibre's proposal in effect bypasses Gibtelecom's "Meet Me Frame" and cross connect service and would in effect be a direct connection to customer X's rack and, crucially, requires GibFibre's equipment in customer X's rack. Gibtelecom further contends that *GibFibreSpeed* v. *Gibraltar Regulatory Auth.* is authority for the proposition that third party servers are not part of Gibtelecom's public communications network. The interrelated argument is that, viewed from the perspective of giving effect to the determination (subject to the partial stay), Gibfibre's application must fail because the determination imposes an obligation on Gibtelecom to provide a connection to "A POINT WITHIN THE DATA CENTRE WHICH FORMS PART OF GIBTELECOM'S NETWORK." and

customer X's rack is not part of the public network in respect of which the right arises.

25 It may be that GibFibre's proposal may be a pragmatic technological workaround solution to Gibtelecom's practical objections, but I accept Mr. Palmer's analysis that the proposal goes further than the determination and therefore the application is dismissed.

26 Orders accordingly and I shall hear the parties as to costs.

Application allowed in part.