16 If this interpretation of the Ordinance is correct, it is clear, in our opinion, that the appellant was not guilty of any offence. On the agreed facts, the visitors were under no obligation to work and the appellant had no contractual obligations towards them. In our opinion, they were not employed by the appellant. The appeal is allowed, the decision of the learned Chief Justice is set aside and the order of the resident magistrate is restored.

Appeal allowed.

[1980–87 Gib LR 533]

INTERNATIONAL PROPERTIES (GIB) LIMITED v. GIBREALTY LIMITED and CUBIERTAS MZOV RAMAGGE LIMITED

SUPREME COURT (Kneller, C.J.), November 17th, 1987

Injunctions—interlocutory injunction—trespass—no interlocutory injunction to prevent trespass of airspace if at such height and for such length of time that ordinary use or enjoyment of land or buildings unaffected—interlocutory injunction only to be granted if necessary to maintain status of parties or if damages not adequate remedy—court to be satisfied serious issue to be tried

Tort—torts affecting land—trespass—use of tower crane—no trespass of airspace if crane crosses airspace at such height and for such length of time that ordinary use or enjoyment of land or buildings unaffected

Tort—torts affecting land—trespass—landlord not entitled to bring action for trespass unless land unoccupied or trespass would permanently damage land (to which landlord entitled in reversion)

The applicant sought both interlocutory and permanent injunctions to prevent the defendants from causing or permitting the arm of a crane to pass over its land.

G employed R to erect an eight-storey building on land situated opposite that of the applicant. When the building work commenced, R positioned a tower crane on G's land, the arm of which regularly swung over the applicant's land. Although all of the buildings over which the crane's arm passed had been insured against damage by R, the applicant

sought both interlocutory and permanent injunctions against both G and R to prevent the continued use of the crane.

The applicant submitted that the movement of the crane through its airspace constituted a trespass which it was entitled to prevent with either an interlocutory or permanent injunction.

Held, dismissing the application:

In the absence of a serious issue to be tried, the applicant was not entitled to either an interlocutory or permanent injunction to prevent the temporary use of the tower crane. An interlocutory injunction could only be granted if it was necessary to maintain the status of the parties until trial or if damages would not be an adequate remedy. Neither of these, however, was the case here. Although the crane had invaded the airspace of the applicant, it had done so at such a height and for such a length of time that it had not affected the applicant's ordinary use or enjoyment of either its land or the buildings on it. Further, the applicant, as the landlord of the affected premises, was not entitled to bring an action for trespass as it was not in occupation of them. A landlord could only sue if its land was unoccupied (when it could be deemed to be in occupation) or if the trespass would cause permanent damage to the land to which it would be entitled in reversion (para. 6; paras. 8–11).

Cases cited:

(1) *American Cyanamide Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, considered.
(2) *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72; 110 E.R. 382, referred to.
(3) *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.*, [1978] Q.B. 479; [1977] 3 W.L.R. 136; [1977] 2 All E.R. 902, referred to.
(4) *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589, referred to.
(5) *Damper* v. *Bassett*, [1901] 2 Ch. 350, referred to.
(6) *Jones* v. *Llanrwst Urban D.C.*, [1911] 1 Ch. 393, referred to.
(7) *Patel* v. *W.H. Smith (Eziot) Ltd.*, [1987] 1 W.L.R. 853; [1987] 2 All E.R. 569, referred to.
(8) *Woollerton & Wilson Ltd.* v. *Richard Costain Ltd.*, [1970] 1 W.L.R. 411; [1970] 1 All E.R. 483; (1970), 114 Sol. Jo. 170, considered.
(9) *Yelloly* v. *Morley* (1910), 27 T.L.R. 20, referred to.

Legislation construed:

Civil Aviation Act 1982 (c.16), s.76: "(1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case is reasonable . . ."

P.J. Isola for the plaintiff;
P.R. Caruana for the second defendant.

1 **KNELLER, C.J:** International Properties (Gib) Ltd. ("International") is the freehold owner of 149 and 151 Main Street. Gibrealty Ltd. ("Gibrealty") owns the freehold 153 to 159 inclusive of the same street. They are opposite one another. Cubiertas Mzov Ramagge Ltd. ("Ramagge") is a local building contractor.

2 Gibrealty has employed Ramagge to erect an eight-storey building on its land which was formerly the site of the Old City Bank. Ramagge has put a tower crane on the land and part of the crane's long arm sometimes sweeps over International's land and structures. International has claimed that the crane has trespassed over its airspace and asked Gibrealty and Ramagge to halt this, but neither has done so. Ramagge has twice discussed the problem with International's owner on a "without prejudice" basis but there has been no accord.

3 The building site is hemmed in by buildings and narrow streets on all sides, so a mobile crane or any other crane would be impractical. A hoist could be used if the tower crane were removed, but the work would have to stop and be re-planned. About 10 metres of the tower crane's jib sweeps round over the structure on International's land at a height of 14 metres or so, but its load and counterweight do not overfly International's property. Passers-by, occupants of the adjoining buildings, and the buildings themselves, have been insured against damage by Ramagge.

4 Another contractor, Taylor Woodrow, previously had to soothe its neighbours with appropriate sums when it began working with a tower crane on the redevelopment of the Old Command Education Centre. It is unusual, however, for neighbours in Gibraltar to complain of the use of tower cranes over their properties and, so far, only International has done so about Ramagge's crane. Gibrealty's building will be ready by October 1988, but the crane will be dismantled before then.

5 At one point, Gibrealty and Ramagge were telling one another (and International) that the other would be responsible for any trespass over International's airspace by the crane. International, however, has now issued a writ endorsed with a statement of claim asking for permanent injunctions against each of them, together with damages and costs, and by notice of motion asked for time injunctions. They have closed ranks to resist the interlocutory application.

6 Those are, in my judgment, the relevant facts and I turn now to the relevant law of England. First, injunctions. An interlocutory injunction maintains the status of the parties until their rights are decided at trial. Whether or not it should be granted is a matter for the discretion of the court. The applicant must show there is a serious question to be tried. If that is done, the court must then consider whether it is more convenient for the parties to grant or to refuse it. If damages would be an adequate remedy for the applicant, no interlocutory injunction should be granted

except in exceptional circumstances. Likewise, if damages would be an adequate remedy for the respondent, and recoverable from the applicant, then the applicant should have his interlocutory injunction. For all of that see *American Cyanamide Co.* v. *Ethicon Ltd.* (1) and O.29, r.1 of the Rules of the Supreme Court.

7 Secondly, trespass. It is actionable *per se*; damage need not be proved and therefore even the triviality of the trespass is no defence: *Yelloly* v. *Morley* (9). How does that come about? It is expedient. Trespass, in England at any rate, so often leads to a breach of the peace. Thus a freehold owner in occupation of land (whose title is not in issue) is *prima facie* entitled to restrain a trespass whether or not it harms him, except in exceptional circumstances: *Patel* v. *W.H. Smith (Eziot) Ltd.* (7).

8 Thirdly, only the person in actual or constructive occupation of the land, even if he is not the owner and does not derive his take from the owner, can sue. It follows that a tenant in occupation can sue but a landlord cannot unless the land is not occupied and then he is deemed to be in possession or, if there is someone in possession, the landlord can sue if the trespass has caused permanent injury to the land to which it is entitled in reversion. That principle is derived from *Baxter* v. *Taylor* (2); *Damper* v. *Bassett* (5); and *Jones* v. *Llanrwst Urban D.C.* (6). Thus a landlord cannot sue for the erection of a temporary structure such as a hoarding which masks a window in his building on his land for a year, but a tenant in occupation could: *Cooper* v. *Crabtree* (4).

9 An invasion of airspace, however, is also a trespass and if it is to be continued, interlocutory relief is possible even if it does no harm to the applicant. Indeed, if it does no harm to the applicant that would be a reason for, rather than against the granting of an injunction, because if there is no damage done, the damages recovered in the action will be nominal, and if the injunction is refused, the result will be more or less a licence to continue the tort of trespass for nominal payment, see Stamp, J., in *Woollerton & Wilson Ltd.* v. *Richard Costain Ltd.* (8). Among other considerations to be taken into account by a court when asked for interlocutory relief from a trespass of airspace caused by a swinging tower crane, are these:

(a) Is the crane a practical necessity?

(b) Could it be put somewhere else and used for the same work?

(c) What effect will its prompt removal have?

(d) Has the applicant been offered a substantial sum of money by the respondent?

(e) Did the airspace have any value before the tower crane broke into it?

(f) Have other neighbours claimed compensation or an injunction?

(g) Has the respondent offered insurance cover?

(h) Has the respondent wandered into this position by inadvertence or flagrant disregard of the applicant's proprietary rights?

(i) Is this matter one for granting an injunction but suspending it until the defendant has a proper opportunity to finish the job?

10 But to what extent does the applicant in England have rights over the airspace above the land or structures on it? Subject to s.76 of the Civil Aviation Act 1982, it is to such height as is necessary for the ordinary use and enjoyment of the land and structure on it. Above that height he has no greater rights over the airspace then any other member of the public: *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* (3).

11 No relevant Gibraltar legislation or reported decisions concerning trespass of airspace were cited. The English law on the matter, however, is appropriate for Gibraltar so I shall adopt it and apply it to the facts in this application. International's title to these freeholds is not in issue. Ramagge has invaded the airspace above the structures on them with its tower crane but at such a height and for such a length of time that it does not affect International's ordinary use and enjoyment of its land and the structures on it, particularly as it is not in either actual or constructive possession of them. Neither has there been permanent injury to its reversionary interest in it. It cannot sue Ramagge or Gibrealty.

12 In short, I find there is no serious issue to be tried. If that is wrong, however, and International is entitled to interlocutory relief, I would have let the injunctions go forth and suspend them until the crane is no longer necessary. It is true that passers-by, neighbours and their buildings have been insured. None of the other neighbours have claimed compensation or an injunction, the airspace above International's structures had no value before the tower crane revolved in it, and restraining the tower crane means it will be more difficult to finish the contract on time. On the other hand, in this application, it has not been shown that the tower crane was a practical necessity: could it not have been put elsewhere? The first contractor suggested that a hoist crane be used. It seems probable that Ramagge did not stumble into this dilemma by inadvertence, but marched into it because it thought International's rights came second to its right to use the most useful machinery it could to erect this building.

13 As it is, however, my view is that the motion fails and so it is now dismissed. In the circumstances of this application, which include the

finding that there is no serious issue to be tried, the costs will be awarded to the respondents Ramagge and Gibrealty.

Application dismissed.
