# GIBRALTAR HOMES LIMITED v. BANCO ESPAÑOL DE CREDITO S.A.

SUPREME COURT (Schofield, C.J.): January 20th, 1998

*Civil Procedure—service of process—service out of jurisdiction—service in Spain of documents issued by Supreme Court valid under Hague Convention—unaffected by Spanish non-recognition of Supreme Court as authority—validity of service determined by court itself*

*Civil Procedure—service of process—service out of jurisdiction—service in Spain by notary public instructed by Spanish attorney is service by "person interested" in judicial proceeding through "competent person" within meaning of Hague Convention, art. 10(c)*

The plaintiff brought proceedings to recover moneys due under contracts with the defendant.

The plaintiff was given leave to serve a writ on the defendant at an address in Spain. It instructed a Spanish law firm which in turn engaged a notary public to serve the documents. The documents were served at the defendant's business premises, apparently in accordance with the local rules applicable to service by a notary public.

The defendant applied for a declaration that the writ had not been duly served pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. It submitted that (a) since the Supreme Court—which had been designated by the United Kingdom under art. 18 of the Convention as an authority in respect of requests to and from other contracting States for service of documents—was not recognized by Spain as an authority, any documents emanating from Gibraltar should have been served in Spain through the United Kingdom's Central Authority, the Foreign and Commonwealth Office; and (b) service of a writ in Spain otherwise than under the Convention could only be effected through the courts and not through a notary public.

The plaintiff submitted in reply that (a) the service in Spain of documents issued by the Supreme Court was valid since (i) the *note verbale* containing the Spanish Government's refusal to recognize the Supreme Court as an authority under the Convention was issued after service of the writ had been effected, (ii) under art. 21 of the Convention, Spain could only object to the manner in which service was effected and not the designation of an authority by another signatory, and (iii) as a later signatory, Spain could not object to the United Kingdom's accession to the Convention under art. 28 or its designation of the Supreme Court as

an authority; and (b) service through a notary public constituted valid service in Spain under art. 10(*c*) of the Convention.

**Held,** dismissing the application:

(1) Since the Supreme Court itself determined the validity of service of documents emanating from it and the court was regarded by Gibraltar and by the United Kingdom as a validly designated authority under art. 18 of the Convention, the service in Spain of documents it had issued was unaffected by the declaration contained in the Spanish Government's *note verbale*. Furthermore, since the *note verbale* had been issued several weeks after service had been effected it was too late to affect such prior service, and there was, in any event, no provision in the Convention under which Spain could object to the designation of an authority by an existing signatory or withdraw its acknowledgment of the same (page 220, line 43 – page 221, line 6; page 222, line 1 – page 223, line 4).

(2) In this case, service had been validly effected through a notary public, who was a "competent person" instructed by a "person interested" in the proceedings (Spanish lawyers) for the purposes of art. 10(*c*) of the Convention, and who, in the absence of evidence to the contrary, was to be taken as having complied with the formalities of service in Spain. Accordingly, there had been no irregularity in the service of the writ and supporting documents (page 223, lines 8–21; page 223, line 39 – page 224, line 15).

**Legislation construed:**

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, November 15th, 1965; UK Treaty Series 50 (1969)), art 2: The relevant terms of this article are set out at page 220, lines 8–13.

art. 10: The relevant terms of this article are set out at page 221, lines 11–22.

art. 18: The relevant terms of this article are set out at page 220, lines 14–16.

art. 21: "Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

. . .

(*a*) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(*b*) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(*c*) all modifications of the above designations, oppositions and declarations."

art. 28: "The Convention shall enter into force for [a contracting] State in the absence of any objection from a State, which has ratified the Convention before [the deposit of the instrument of accession],

notified to the Ministry of Foreign Affairs of the Netherlands within six months after the date on which the said Ministry has notified it of such accession."

art. 31: "The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

. . .

(*e*) the designations, oppositions and declarations referred to in article 21 . . . ."

*G.S. Stagnetto* for the plaintiff;
*N. Keeling* for the defendant.

**SCHOFIELD, C.J.:** I have adjourned delivery of this order into open court. A writ of summons was issued in this suit on May 9th, 1997 in which the plaintiff claims from the defendant the sum of £632,713.70 under three contracts entered into between the parties. The contracts were made in Gibraltar and were expressed to be subject to the laws of Gibraltar. I do not think there is any challenge to the jurisdiction of this court to hear the action.

The defendant is a banker and carries on business at P. Castellana 103, 28046, Madrid, Spain. On May 12th, 1997 I gave leave to the plaintiff to issue the writ and to serve it on the defendant at that address or elsewhere in Spain. The plaintiff's solicitor instructed a Spanish law firm to serve the writ and on July 30th, 1997 the writ and a Spanish translation thereof were served by Jose Maria Alvarez Vega, a notary public instructed by the Spanish law firm to effect such service. The documents were delivered to the defendant's address and were there handed to a security guard.

There is no doubt that the defendant received the documents or that it has notice of the nature of the action it faces. It has instructed a solicitor in Gibraltar who has entered a conditional acknowledgement of service. On this summons I am asked to declare that the writ has not been duly served pursuant to the Hague Convention (hereinafter called "the Convention"). In other words, the defendant does not claim it has not received the writ but claims that the service was irregular.

It is the defendant's contention that the service purported to be effected under the rules contained in the Convention. I think that is accepted by the plaintiff. However, the defendant says that the following *note verbal*e issued by the Spanish Government and deposited with the Ministry of Foreign Affairs of the Netherlands pursuant to art. 31 of the Convention (to which I shall refer as "the *note verbale*") renders the service of process transmitted from our Supreme Court Registry null and void. The defendant also points to other alleged irregularities which are, perhaps, of a more technical nature and to which I shall return. The *note verbale*, in translation, reads:

"*Notification in conformity with Article 31*

For the application of this Convention Spain does not recognise the Supreme Court of Gibraltar as an authority and consequently any documents submitted by that body will be considered null and non-existent."

The United Kingdom became a signatory to the Convention in 1970 and Spain became a signatory in 1987. Article 2 of the Convention reads:

"Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law."

By art. 18, "each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence." In 1970 the Registrar of the Supreme Court was designated as such an authority by the United Kingdom. The *note verbale* set out above was issued by the Spanish Government on August 26th, 1997. The defendant's argument is that as Spain no longer acknowledges the Registrar of the Supreme Court of Gibraltar as an authority, service of documents emanating from Gibraltar must now be effected through the UK Central Authority, the Foreign and Commonwealth Office in London.

The court has had the benefit of opinions, on behalf of the defendant, of Carlos Bueren supported by Esteban Astarloa, lawyers of the Spanish law firm of Uria & Menendez and, on behalf of the plaintiff, Jose Antonio Sanmartin of the Spanish law firm of Gomez Acebo & Pombo. It is Sr. Bueren's opinion, in his first report dated August 27th, 1997, that as the Supreme Court of Gibraltar is not recognized in Spain as a competent authority to request juridical and international assistance intended to achieve the service or transmission of documents for civil purposes for the delivery to persons in Spain, such service or transmission of documents forwarded by or from our Supreme Court will be held null and void and non-existent.

What Sr. Bueren's first report did not tell us was that the *note verbale* on which the defendant relies was issued on August 26th, 1997, that is almost four weeks after service of the writ of summons in this case was effected. When this was pointed out to Sr. Bueren his response was that at the date of his first opinion he did not have information of the date of the *note verbale*. In any event, he says, the date of the note is irrelevant in the light of previous exchanges of notes between the Kingdom of Spain and the Government of the United Kingdom on Spain's position with regard to Gibraltar.

With respect to Sr. Bueren, his contention that the date of the note is irrelevant cannot be right. The Spanish Government must have intended, by the issue of the note, to alter the effect of the Convention so far as it

related to the Supreme Court of Gibraltar. Otherwise there was no purpose to be served in issuing the note. If the *note verbale* had any effect at all, its effect was from the date of issue, August 26th, 1997. The *note verbale* therefore did not affect the validity or regularity of any service of judicial documents prior to that date, including the writ of summons in this case.

The plaintiff maintains that service in this case was effected under art. 10*(c)* and this, in the opinion of Sr. Sanmartin, is good service under the Convention. It is as well, here, to set out art. 10 of the Convention. It reads:

> "Provided the State of destination does not object, the present Convention shall not interfere with—
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> (*a*) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (*b*) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (*c*) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

Señor Bueren tells us that under Spanish law the only way a defendant may be summoned in proceedings instituted in Spain is through the Spanish courts and service by a notary public is not known to Spanish law. Nevertheless Spain has ratified certain conventions under which service may be effected through Central Authorities. Presumably, although he does not tell us, Sr. Bueren includes the Convention in this category. Señor Bueren accepts, for the purposes of this argument, Sr. Sanmartin's opinion that service under the Convention can be effected by notary public for, in a second opinion countersigned by Sr. Astarloa, he says:

> "The purpose of the opinion of Mr. Bueren of August 27th, 1997 was not to examine whether the summons through a public notary in Spain is valid under the Hague Convention of 1965. On the contrary, the purpose of the opinion of Mr. Bueren was to examine whether the Supreme Court of Gibraltar is an authority recognized by Spain for the purposes of the 1965 Hague Convention and Mr. Bueren concluded that the Supreme Court of Gibraltar is not a competent authority recognized by Spain for that purpose."

Señor Bueren makes another argument against service by a notary public, to which I shall return, but the thrust of this, his main challenge to service, is that since the Supreme Court of Gibraltar is not now regarded as an authority for the purposes of submission of documents for service in Spain, service by a notary public under art. 10(*c*) is not good service.

This contention is predicated on the assumption that the *note verbale* has the effect of removing Gibraltar as an authority designated under art. 18 at least for the limited purposes set out in the *note verbale*. Does it have that effect? Señor Bueren does not say that the effect of the *note verbale* is to render the service of documents from our Supreme Court illegal in Spain. I have no opinion before me as to the legal effect in Spain of the *note verbale*. Señor Bueren's opinion is that the service is null and void. We must then ask ourselves: by whom is it considered null and void? Certainly it is not considered null and void by the Supreme Court for it is the court which determines the validity of service of process emanating from it. Certainly the United Kingdom still regards the Registrar of the Supreme Court of Gibraltar as an authority under the Convention for we have as an exhibit a letter from the Foreign and Commonwealth Office to that effect.

It seems that Sr. Bueren is saying that the Spanish Government's objection to the Registrar of the Supreme Court of Gibraltar as an authority takes Gibraltar out of the Convention for the limited purposes contained in the *note verbale*. Can the Spanish Government object to the designation of an authority under the Convention? Article 10 permits service to be effected in various ways "provided the State of destination does not object . . . ." So Spain can object to the manner in which service is effected under the Convention within its own territory. But Spain's objection to service of process emanating from the Gibraltar court is not an objection to the manner of service. It is an objection to the source of the documents, that is, an attempt to take the Gibraltar Supreme Court out of the Convention as an authority, at least for the limited purposes stated in the *note verbale*. Article 10 permits objection by a State to the manner of service within its jurisdiction but does not give authority to Spain to object to the designation of an authority by another signatory to the Convention. The *note verbale* cannot, therefore, have been issued pursuant to art. 10.

Article 28 permits a signatory to the Convention to object to the accession to the Convention of any State. In other words a signatory can object to a prospective signatory. The United Kingdom was a signatory before Spain and, indeed, had designated the Registrar of the Supreme Court as an authority before Spain became a signatory. The *note verbale* was not an objection to a prospective signatory and cannot have been issued pursuant to art. 28. I have, indeed, been directed to no provision of the Convention which permits a signatory to withdraw its acknowledgement of an existing signatory or to object to the designation by another signatory of an additional authority pursuant to art. 18. Article 21 provides that each signatory shall inform the Ministry of Foreign Affairs of the Netherlands (pursuant to art. 31) of certain oppositions and declarations, but that article does not refer to the kind of opposition or declaration contained in the *note verbale*.

It follows from all of the above that I do not consider that the *note verbale* has the effect which Sr. Bueren suggests it has and it does not affect the question of whether this court accepts the validity of service in these proceedings.

In his second opinion Sr. Bueren, supported by Sr. Astarloa, stated that he "seriously doubted" that service by notary public was good service in Spain, although he did not give a firm opinion that such service was bad. Señor Bueren draws the distinction between the two different legal systems of Europe, the civil law system and the common law system. His argument is that under the civil law system a particular person or body is charged with the service of process in judicial proceedings, whereas in the common law system service is effected through the solicitors for the parties. He argues that when art. 10(*c*) talks of service through "other competent persons" it is referring to solicitors in the common law system and not to notaries public in the civil law system.

If the Convention intended to draw a distinction between the two systems of law in Europe one would have expected such distinction to have been made in the Convention itself. There is no such distinction made. Señor Sanmartin opines firmly that service in Spain through a notary public is valid in accordance with art. 10(*c*), and I prefer his opinion.

Señor Bueren points to the relevant Spanish regulations which require a notary public, in performing the service of documents, to identify himself as a notary and this, he says, the notary serving the writ in this case failed to do. Señor Alvarez was the notary public in question and this is taken from his certificate of service:

> "*Proceedings*: The same day being 18:50 p.m., I went personally to the reception office of Banco Español de Credito S.A. of 14, Calle Alcala in Madrid, which has its entrance through 3, Calle de Sevilla, where I was received by a person by the name of Mr. Jorge Valencia, a security guard for the Bank, whom I informed of the reason for my presence there and I served him the document that I was holding, which I had placed inside an envelope, for handing over to Mr. Juan Montojo, and he told me that he would deliver the said document to the said Mr. Juan Montojo as soon as possible.
>
> With that this service is ended, which I give as finalized in all legal aspects and I endorse accordingly as having been completed at my professional address on the notes taken in the place of my service."

Señor Alvarez is a notary public and must be taken to know what is legally required of him. He said that he informed the person to whom he delivered the writ of the reason for his presence and, later in the certificate, that service was "finalized in all legal aspects." Although he does not specifically state that he identified himself as a notary public, in the absence of specific evidence that he did not, I accept that he completed the legal formalities for the effective service of process.

The final objection taken to service of the writ in these proceedings is that art. 10(*c*) speaks of the freedom of "any persons interested in a judicial proceeding to effect service." Señor Bueren says that the Spanish firm of lawyers who instructed the notary public to effect service are not "interested persons" under the Spanish concept of an "interested person."

It would be surprising indeed if service of documents in Spain under the Convention had to be conducted personally by a party, by a third party who could benefit from or be damaged by a judgment in the proceedings or by a third party who is interested in the fact that one of the parties wins or loses the action, as suggested by Sr. Bueren. Señor Bueren seems to be suggesting that service through agents of interested persons is not acceptable, a suggestion which is given short shrift by Sr. Sanmartin.

For all these reasons I find that there was no illegality or irregularity in the service of the writ. I am satisfied the defendant properly received the documents.

I dismiss the application with costs to the plaintiff.

*Application dismissed.*