[2003–04 Gib LR 115]

EL HAJJI v. BENCRAFTS (CONSTRUCTION) LIMITED and FITZPATRICK CONTRACTORS LIMITED

SUPREME COURT (Schofield, C.J.): June 9th, 2003

Civil Procedure—service of process—law applicable—CPR, rr. 6.2 and 6.7 on service of process inapplicable in Gibraltar as pre-empted by Supreme Court Rules, r.3—failure to serve claim form in accordance with r.3 results in non-applicability of powers under CPR, r.9 to dispense with service

The claimant applied to dispense with service of a claim form pursuant to the Civil Procedure Rules, r.6.9.

The claimant was injured on August 23rd, 1999, allegedly by a breach of statutory duty and/or negligence on the part of the defendants. His solicitor did not file a claim form until August 22nd, 2002, in order to keep the claim within the limitation period of three years. At this time, copies of the claim form were sent to the solicitors for both defendants, but it was made clear that it was not officially by way of service. This meant that the claimant had until December 22nd, 2002 to serve the claim form officially. On December 13th, 2002, the claimant's solicitors sent to both defendants' solicitors, by ordinary post, *inter alia* the claim form, and a letter explaining that this was the official service of the claim form, and that they would extend the time for acceptance of service of acknowledgement of service, until January 31st, 2003. Also instructions were given for copies of the letters, *etc.* to be served on the defendants personally. Because of Christmas delays in the Gibraltar postal service at this time, the letters, *etc.*, were never received by post by either solicitor, and the instructions regarding service of the copies to the defendants personally were never carried out. The claim form was therefore not received by either solicitor, or either defendant.

Having not received acknowledgement of service by the already-extended deadline, the claimant's solicitors informed the defendants' solicitors that they would particularize and progress with the claim, unless they heard from them within a short period of time. The solicitor for the first defendant acknowledged that he had instructions to accept service of the claim form, but the solicitor for the second defendant made it clear that he had not received instructions to accept service of the claim form. Having realized that the correspondence had not reached the solicitors, and accepting that service on the second defendant's solicitor did not amount to good service, as it should have been served on the

second defendant personally, the claimant sought an order that the service of the claim form be dispensed with pursuant to the Civil Procedure Rules, r.6.9. The claimant accepted that an application to extend the time for serving the claim form would fail, as it did not fall within the Civil Procedure Rules, r.7.6(3).

The claimant submitted that (a) the court had the power under the Civil Procedure Rules, r.6.9 to dispense with service of a claim form retrospectively in exceptional circumstances where the claimant had already made an ineffective attempt to serve it by one of the permitted methods, and the present case involved such exceptional circumstances; and (b) if the deemed day of service was, pursuant to r.6.7, two days after the posting of the claim form, the defendant's solicitors had ample time within the period for service to inform the claimant's solicitor that they had no authority to accept service, which would have given the claimant's solicitor time to effect proper service.

The second defendant submitted in reply that (a) the copies of the claim form which were sent and received much earlier were accompanied by a letter making it clear that they were not by way of service, and service of the claim form had therefore not been made on either the solicitor or on the defendant personally, so that the claimant could not argue exceptional circumstances to enable the court to dispense with service; and (b) it had not instructed its solicitor to accept service of proceedings so that effective service on the solicitors would not in any event have been possible had the claimant actually served the claim form to the solicitor.

Held, dismissing the application:

(1) The Civil Procedure Rules, rr. 6.2 and 6.7 did not apply in Gibraltar, as the relevant part of r.3 of the Gibraltar Supreme Court Rules did not allow service of a document by ordinary post—in fact it would have been totally inappropriate for r.6.7 to have applied as there was no equivalent to first or second class post in Gibraltar. The claimant could not, therefore, bring his application within the exceptional circumstances envisaged by the English case law, based on the Civil Procedure Rules, rr. 6.2 and 6.7. Service of the claim form had not been effected on either defendant personally, and since no attempt had been made to effect service in a manner which was allowed by the Gibraltar Supreme Court Rules, the court could not exercise its discretion to dispense with service (paras. 17–18).

(2) Neither defendant nor their solicitors had been served with a claim form at all, as even though the solicitors had received copies of the claim form earlier, the letter accompanying them made it clear that they were not sent by way of service. The claimant could not, therefore, fall back on the fact that the claim form had been received by the defendants' solicitors, so as to argue that exceptional circumstances existed to enable the court to dispense with service. The court was unable to exercise its discretion under r.6.9 to dispense with service of the claim form on the

second defendant, and the application would therefore be dismissed. The first defendant did not take issue with service, but it was clear that the claim form was not effectively served on either the defendant personally or its solicitor, and it was therefore appropriate to call a case management conference to resolve the matter (paras. 19–21).

Cases cited:
(1) *Anderton* v. *Clwyd County Council*, [2002] 3 All E.R. 813; [2002] 1 W.L.R. 3174; (2002), 152 New L.J. 1125; 99 (25) L.S. Gaz. 38, distinguished.
(2) *Cranfield* v. *Bridgegrove Ltd.*, [2003] 1 W.L.R. 2441; [2003] 3 All E.R. 129, considered.
(3) *Vinos* v. *Marks & Spencer plc.*, [2001] 3 All E.R. 784; [2000] C.P.L.R. 570, followed.

Legislation construed:
Supreme Court Rules (L.N. 2000/031), r.3: The relevant terms of this rule are set out at para. 17.

Civil Procedure Rules (S.I. 1998/3132), r.6.2:
"(1) A document may be served by any of the following methods—
. . .
(b) first class post
. . .
(e) by fax . . ."
r.6.4: "(1) A document to be served may be served personally, except as provided in paragraphs (2) and (2A)."
r.6.7: The relevant terms of this rule are set out at paras. 12 and 13.
r.6.9: "(1) The court may dispense with service of a document.
(2) An application for an order to dispense with service may be made without notice."
r.7.5(2): The relevant terms of this sub-rule are set out at para. 7.
r.7.6(3): The relevant terms of this sub-rule are set out at para. 10.

N. Cruz for the claimant;
A. Haynes for the first defendant;
S. Catania for the second defendant.

1 **SCHOFIELD, C.J.:** This is an application by the claimant that service of the claim form on the second defendant be dispensed with pursuant to Civil Procedure Rules, r. 6.9.

2 Ahmed El Hajji ("the claimant") is a 51-year-old Moroccan who suffered injuries whilst working on the refurbishment of the New Health Centre on the second floor of the International Commercial Centre in Gibraltar. His injuries were so severe that, in the opinion of his consultant, he is unable to continue with his work in the building trade

and, being unqualified to take up any other kind of work, is now unemployed. His claim is that whilst he was employed by a company called Rush Trading Ltd., he was seconded to, and was a servant or agent of, Bencrafts (Construction) Ltd. ("the first defendant") and that this was the position at the time of the accident. It is his case that Fitzpatrick Contractors Ltd. ("the second defendant") was the main contractor on the site. The claimant claims that the accident was caused by a breach of statutory duty and/or negligence on the part of the defendants.

3 The accident occurred on August 23rd, 1999. His solicitors, Messrs. Cruz & Co., filed the claim form just within the three-year limitation period, on August 22nd, 2002. The claimant had approached Messrs. Cruz & Co. in early March 2000, and on March 15th of that year, Messrs. Cruz & Co. wrote to both defendants putting them on notice of the claim. On March 17th, 2000, Messrs. Isola & Isola replied to the letter to the second defendant denying the claim and there was further correspondence between the respective solicitors during the spring of that year. Correspondence was also exchanged in the same period between Messrs. Cruz & Co. and Mr. Andrew Haynes, who acts for the first defendant.

4 Messrs. Cruz & Co. asked that the consultant, Mr. Malik, prepare a medical report on the claimant. The first request was made on March 15th, 2000. Following a pattern familiar to this court, repeated reminders resulted in the medical report being obtained nearly two years later, on January 28th, 2002. The claimant is unable to fund the action and a meeting with the Claim Centre and the offer of a conditional fee agreement did not bear fruit, because the claimant had to return to reside in Morocco following the accident. An application for legal assistance was submitted on March 12th, 2002, and following a delay in the independent assessment of the application, which was not the fault of the claimant or his legal advisers, legal aid was granted on September 3rd, 2002.

5 The claim form had been filed, as has been seen, before the legal aid certificate was granted, on August 22nd, 2002, to keep the claim within the limitation period. On that date Messrs. Cruz & Co. sent a copy of the claim form to Mr. Andrew Haynes and to Messrs. Isola & Isola. On August 23rd, 2002, Messrs. Isola & Isola replied that they no longer acted for the second defendant and suggested that Messrs. Cruz & Co. should write to the second defendant directly. It seems that that suggestion was not taken up, but as the copy of the claim form was never returned by Messrs. Isola & Isola it is safe to assume that they informed the second defendant of its existence. This assumption is borne out by the fact that on October 16th, 2002, Messrs. Attias & Levy wrote to Messrs. Cruz & Co. to advise that they had been instructed by the second defendant to take over the conduct of the matter and had requested a copy of the file

from Messrs. Isola & Isola. Messrs. Cruz & Co. responded immediately in the following terms:

> "*Re: Ahmed El Hajji—date of accident: August 23rd, 1999*
>
> Thank you for your fax of October 16th, 2002. We enclose herewith exchange of correspondence in relation to this claim, which dates back to March 15th, 2000. Please be advised that a claim form was issued in the Supreme Court on August 22nd, 2002 to ensure that the claimant's claim was not time barred under the Limitation Ordinance. We enclose a copy of the said claim form but importantly not officially by way of service.
>
> We should be in a position to let you have our preliminary quantification of damages within the next seven days so that you are better informed of the nature of the case.
>
> Naturally if liability remains an issue we will serve the proceeding formally (and in any event before November 22nd, 2002) and thereafter particularize our claim in detail.
>
> I look forward to hearing from you with your comments on liability."

6 Subsequently Messrs. Cruz & Co. wrote to the solicitors for the defendants supplying them with a full quantification of the claim. The letter to Messrs. Attias & Levy was sent on October 24th, 2002, and a reply from them is dated November 5th, 2002. Messrs. Attias & Levy sought various items of disclosure and their letter ends as follows:

> "We note that the claim form's validity expires on December 21st, 2002 and we would therefore ask that you kindly provide us with the required disclosure soonest."

Further information was provided to Messrs. Attias & Levy which was followed by a request for still more information, which was provided on December 4th, 2002.

7 The claimant had "4 months after the date of issue" of the claim form in which to serve it (see CPR, r.7.5(2)). He therefore had until December 22nd, 2002, in which to serve the claim form on the defendants. On Friday, December 13th, 2002, Messrs. Cruz & Co. sent to Mr. Haynes and Messrs. Attias & Levy by ordinary post the claim form, response pack and a Part 36 offer and a letter to each firm of solicitors in almost exactly the same terms, as follows:

> "*Re: Ahmed El Haggi [sic] accident August 23rd, 1999*
>
> Enclosed please find, by way of service, claim form (Claim No. 2002-B-193) as issued on August 22nd, 2002.

> In light of the fact that we are awaiting a response from yourselves to our letter of October 24th, 2002, and our earlier letter of October 16th, 2002, and moreover taking into consideration the upcoming Christmas period, we are willing to extend time for service of acknowledgment of service until January 31st, 2003. To maintain costs as low as possible, pending your reply to our said letters and our Part 36 offers of even date, we will not particularize our claim unless you revert to us within the next seven days requesting the same."

These letters and enclosures were never received by either solicitor. Although at one stage the second defendant cast doubt on the matter, it is now accepted by both defendants that these letters and contents were actually posted. It is a matter of common knowledge within the jurisdiction that during the Christmas period of 2002 there was an amount of chaos with the postal service in Gibraltar and some mail went astray.

8 Mr. Cruz also gave instructions within his office that copies of the letters and enclosures be served on the defendants personally (*i.e.* Bencrafts (Construction) Ltd. and Fitzpatrick Contractors Ltd.). Unfortunately this instruction was never carried out. As a result the claim form prepared for service by Messrs. Cruz & Co. was not received by either defendant within the time allowed for service. On February 3rd, 2003, Messrs. Cruz & Co., who had of course received no response to their communication of December 13th, 2002, wrote to the solicitors for both defendants advising them that unless they heard from them within a short period of time they would particularize and progress the claim without further delay.

9 Mr. Haynes has acknowledged that he had instructions to accept service of the claim form. Messrs. Attias & Levy take a different stance. It is encapsulated in their letter to Messrs. Cruz & Co. dated February 4th, 2003, as follows:

> "*Re: Ahmed El Hajji—accident August 23rd, 1999*
>
> We refer to your letter of February 3rd, 2003 and to the subsequent telephone conversation between our Gillian Guzman and your Nicholas Cruz.
>
> As stated, we have not received the Part 36 offer dated December 13th, 2002 to which you refer in your letter under reply. More importantly, our client company has not been served with the claim form issued to our chambers on December 13th, 2002 as claimed, or at all. Furthermore, at no stage have we been instructed by our client to accept service of proceedings so that effective service on us would not, in any event, have been possible had you attempted to serve."

It is accepted by Mr. Cruz, for the claimant, that service of the claim form fell to be served on the second defendant personally, and that service on Messrs. Attias & Levy did not amount to good service (see CPR, r.6.4).

10 Mr. Cruz also accepts that his application to extend the time for serving the claim form must fail on the authority of *Vinos* v. *Marks & Spencer plc*. (3). In that case it was held that the general power to rectify errors contained in CPR, r.3.10 could not be invoked to circumvent r.7.6(3), which provides that the court may only extend the time for service of a claim form if—

> "(a) the court has been unable to serve the claim form; or
>
> (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and
>
> (c) in either case, the claimant has acted promptly in making the application."

It is conceded by Mr. Cruz that his application does not fall within r.7.6(3).

11 Mr. Cruz seeks an order that the service of the claim form be dispensed with pursuant to CPR, r.6.9. In *Anderton* v. *Clwyd County Council* (1), it was held that the court had power under r.6.9 to dispense with service of the claim form retrospectively in exceptional circumstances where the claimant had already made an ineffective attempt to serve the claim form by one of the permitted methods. In that case the Court of Appeal discussed the distinction between two different kinds of case in the following terms ([2002] 3 All E.R. 813, at paras. 57–59):

> "[57] First, an application by a claimant, who has not even attempted to serve a claim form in time by one of the methods permitted by r.6.2, for an order retrospectively dispensing with service under r.6.9. The claimant still needs to serve the claim form in order to comply with the rules and to bring it to the attention of the defendant . . .
>
> [58] Second, an application by a claimant, who has in fact already made an ineffective attempt in time to serve a claim form by one of the methods allowed by r.6.2, for an order dispensing with service of the claim form. The ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service within the period of four months, or an extension thereof. In the circumstances of the second case the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but he has failed to comply with the rules for service of the claim form. His case is not that he needs to obtain permission to

> serve the defendant out of time in accordance with the rules, but rather that he should be excused altogether from the need to prove service of the claim form in accordance with the rules. The basis of his application to dispense with service is that there is no point in requiring him go through the motions of a second attempt to complete in law what he has already achieved in fact. The defendant accepts that he has received the claim form before the end of the period for service of the claim form. Apart from losing the opportunity to take advantage of the point that service was not in time in accordance with the rules, the defendant will not usually suffer prejudice as a result of the court dispensing with the formality of service of a document, which has already come into his hands before the end of the period for service. The claimant, on the other hand, will be prejudiced by the refusal of an order dispensing with service as, if he is still required to serve the claim form, he will be unable to do so because he cannot obtain an extension of time for service under r.7.6(3).
>
> [59] In the exercise of the dispensing discretion it may also be legitimate to take into account other relevant circumstances, such as the explanation for late service, whether any criticism could be made of the claimant or his advisers in their conduct of the proceedings and any possible prejudice to the defendant on dispensing with service of the claim form."

12 The Court of Appeal was considering a number of cases and found that there were exceptional circumstances to cause them to invoke CPR, r.6.9 in two of them. The first was the case of *Chambers* v. *Southern Domestic Elec. Services Ltd.*, which was a claim under the Fatal Accidents Act. The last day for service of the claim form was July 13th, 2001. The claim form was sent to the defendant's solicitors on Thursday, July 12th, 2001 by first class post, a permitted method of service pursuant to CPR, r.6.2. By r.6.7, the "deemed day of service [was] the second day after it was posted" which was (accounting for the intervening weekend) Monday, July 16th, 2001. Despite the fact that the claim form arrived at the defendant's solicitors on the previous Friday, July 13th, that is on the last day for service, the district judge held that the date of deemed service was not rebuttable by evidence of actual service and refused to make an order to dispense with service under r.6.9. The Court of Appeal overturned that decision, holding that this was an exceptional case in that the claim form had come to the attention of the defendant's solicitors before the end of the four-month period for service, and that before then the defendant had admitted liability and negotiations had been afoot regarding quantum and, indeed, the defendant had made an offer of settlement.

13 The second exceptional case was that of *Dorgan* v. *Home Office*, where Dorgan alleged that he was assaulted by prison officers whilst an inmate of Wormwood Scrubs Prison. He issued proceedings against the Home Office on April 11th, 2001, and the period for service of the claim form expired on Saturday, August 11th, 2001. The claim form and particulars of claim were sent to the defendant's solicitors at 4.02 p.m. on Friday, August 10th, 2001 and were recorded as being received one minute later. The defendant's solicitors read the claim form and made a telephone call to the claimant's solicitors that afternoon requesting missing pages of a medical report. Service by fax is a permitted form of service under r.6.2 and, being served after 4.00 p.m. the claim form was deemed, under r.6.7, to be served "on the business day after the day on which it [was] transmitted," which was Monday, August 13th. The Court of Appeal noted that the claim form was served just three minutes after the time permitted by the rule and, in fact, the period for service did not expire until the next day, the Saturday. The court held that this was an exceptional case which permitted the court to dispense with service pursuant to r.6.9.

14 Since the arguments were heard in this case, on May 14th, 2003, the parties have drawn my attention to the Court of Appeal decision in *Cranfield* v. *Bridgegrove Ltd.* (2), which was handed down on that very day. In that case the Court of Appeal appears to have added refinements to the decision in *Anderton* (1), but for reasons which will become apparent I do not think I need to discuss the case.

15 Mr. Cruz has argued that this case is similar to *Dorgan's* in *Anderton*, in that if the deemed day of service, pursuant to r.6.7, is two days after the posting of the claim form (*i.e.* December 15th, 2002) then that gave the defendant's solicitors ample time within the period for service to revert to him and inform him that they had no authority to accept service. Mr. Cruz would then have had time to effect proper service.

16 I must say that I would have had a great deal of sympathy with this application if CPR, rr. 6.2 and 6.7 applied in this jurisdiction. The second defendant's solicitors invited communication in this case and clearly the claim form came to their attention and, inevitably, their client's attention well before the time for service of it expired. If the claim form were deemed to have been served on the solicitors rather than the defendant personally in error well in good time for the error to be rectified, it would have been a case where the court could, exceptionally, invoke the assistance of r.6.9, despite the fact that the claim form, through an error in the post office, was not received.

17 However, what all parties to this application seem to have missed is that CPR, r.6.2 does not apply in Gibraltar. The relevant part of r.3 of our Supreme Court Rules reads:

"**Service of documents.**

(1) A document may be served—

(a) by personal service;

(b) by post in a registered letter addressed to the person to be served at his usual or last known address;

(c) by fax or other means of electronic communication;

(d) by any alternative method ordered by a judge.

(2) A document shall be deemed to be served:

(a) if served by registered post, at the time at which the letter would in the ordinary course be delivered;

(b) if served by fax—

(i) if transmitted on a business day before 1.00 pm, on that day;

(ii) in any other case, on the business day after the day on which it is transmitted;

(c) if served by other means of electronic communication, on the second day after the day on which it is transmitted.

(3) The Court may dispense with service of a document.

(4) On matters of service the provisions of the rules and directions that apply for the time being in England in the High Court will apply, so far as circumstances permit."

This means that service by ordinary post is not an accepted method of service in this jurisdiction. Indeed, it would have been inappropriate to adopt the English r.6.2 because in Gibraltar there is no postal system which equates to the English system of first and second class.

18 The upshot is that Mr. Cruz cannot bring his application within the exceptional circumstances which would permit me to follow the reasoning in *Anderton* (1). By a mistake in his office, service of the claim form was not effected on either defendant personally. No attempt was made to effect service in a manner which was allowed by our Supreme Court Rules, which on my understanding was a pre-condition laid down in *Anderton* for the exercise of the court's discretion in such a case.

19 In fact, neither defendant nor their solicitors have been served with a claim form. The letter from Messrs. Cruz & Co. to Messrs. Attias & Levy, dated October 16th, 2002, specifically states that the claim form which they sent was not by way of service, so Mr. Cruz is unable to fall

back on the fact that the claim form had been received by the defendants' solicitors so as to argue that exceptional circumstances exist to enable this court to dispense with service.

20 In all the circumstances, therefore, I am unable to exercise my discretion under r.6.9 to dispense with service of the claim form on the second defendant and I dismiss the application with costs to the second defendant.

21 I must add that I am uncertain where this leaves the case against the first defendant, whose solicitor, Mr. Haynes, does not seem to have taken issue with service. No application was made to dispense with service on his client, but, in accordance with my findings, as the first defendant was not served in time with the claim form it seems appropriate that I should call a case management conference in the matter and I direct the Registrar to fix an early date so that the issue can be resolved.

Application dismissed.

[2003–04 Gib LR 126]

FORD v. R.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Hope of Craighead, Lord Rodger of Earlsferry and Sir Philip Otton): April 9th, 2003

Courts—Judicial Committee of Privy Council—leave to appeal—exhaustion of local remedies—special leave to appeal not granted in practice until all local remedies exhausted—remedies against decision of magistrates' court that no abuse of process or violation of human rights are statement of case to Supreme Court or application for judicial review

The petitioner was charged in the magistrates' court with assault.

She was due to appear in the magistrates' court on June 20th, 2001, having only received written notice to appear on June 12th. She claimed that this therefore constituted an abuse of process as it was a breach of her right to a fair hearing within a reasonable time, under s.8(1) of the Gibraltar Constitution and under art. 6(1) of the European Convention on Human Rights. The magistrates found that there had been proper service in accordance with s.82 of the Magistrates' Courts Rules 1968, attributing the delay to industrial action within the Post Office. The petitioner then lodged a notice of appeal in the Supreme Court, but was informed that this appeal procedure did not apply to her case and was advised that the procedure she should adopt was to apply to the magistrates' court for a case to be stated or to seek judicial review. She did not accept this advice and regarded it as having been based on a decision by the Chief Justice against which she was entitled to appeal, and attempted to lodge an appeal against it. The Registry of the Supreme Court refused to accept the notice of appeal on the ground that there had been no decision by the Chief Justice, and explained this to the petitioner whilst repeating the advice about the correct avenues of appeal. She then applied to the Judicial Committee for special leave to appeal.

The petitioner submitted that (a) the rejection of her notice to appeal and advice given by the Registry of the Supreme Court had been based upon a decision by the Chief Justice, against which she was entitled to appeal; (b) the case had been handled badly by the authorities from the outset; (c) she had done everything in her power to obtain justice and had exhausted every local remedy; and (d) events had shown that it was impossible for her to have a fair hearing in Gibraltar.

Held, dismissing the petition:

(1) The petition for leave to appeal would be dismissed on the ground that the petitioner had not exhausted all local remedies, which was a precondition for the Judicial Committee to grant special leave to appeal. There had been no determination of the merits of the appeal from the decision of the magistrates by the Supreme Court, or by the Court of Appeal. The petitioner had chosen a route of appeal which was not available to her, but there were routes she could have chosen (*i.e.* the statement of a case for the opinion of the Supreme Court under s.310 of the Criminal Procedure Ordinance or an application for judicial review), and had not therefore exhausted all local remedies (paras. 9–10; para. 12; para. 15).

(2) She had not been entitled to appeal against the rejection of her notice to appeal by the Registry of the Supreme Court because it had not been based upon any decision of the Chief Justice. He had simply given information in an administrative capacity as he was entitled and indeed bound to do (para. 8).

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.293: The relevant terms of this section are set out at para. 11.

s.310(1): The relevant terms of this sub-section are set out at para. 12.
(4): The relevant terms of this sub-section are set out at para. 13.
(6): The relevant terms of this sub-section are set out at para. 12.

Magistrates' Court Rules 1973 (L.N. 1973/012), r.2:
"The Magistrates' Courts Rules 1968 of the United Kingdom as amended from time to time shall apply in the magistrates' court in so far as they may be applicable thereto and with such modifications as the circumstances of Gibraltar may require."

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8(1): The relevant terms of this sub-section are set out at para. 3.

s.62(5): The relevant terms of this sub-section are set out at para. 9.

Magistrates' Courts Rules 1968 (S.I. 1968/1920), s.82: The relevant terms of this section are set out at para. 4.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6(1): The relevant terms of this article are set out at para. 3.

The petitioner appeared in person;
P. Hamlin and *A.A. Trinidad, Senior Crown Counsel* for the respondent.

1 **LORD HOPE OF CRAIGHEAD,** delivering the judgment of the Board: This is a petition for special leave to appeal against a ruling by the magistrates' court of Gibraltar in an application by the petitioner to stay a

summary trial on the ground of abuse of process. The application was dismissed by the magistrates. The petitioner seeks leave to appeal against that finding to their Lordships' Board. It is not the practice for their Lordships to give reasons for the decision which they have taken in an application for special leave to appeal, but they have decided to do so in this case in view of its unusual circumstances.

The facts

2 On November 14th, 2001, an information was laid before the magistrates alleging that on August 20th, 2001, in Gibraltar the petitioner unlawfully assaulted Ms. Davina Clancy, contrary to s.96 of the Criminal Offences Ordinance. It followed, upon a complaint which Ms. Clancy made to the police on August 20th, 2001, that the petitioner had assaulted her by pushing her in the chest with an envelope and impeding her passage when she was in Main Street. It appears that the incident came about because the parties were in dispute about payment for tiling work which the petitioner's husband, Daniel Ford, had carried out for Ms. Clancy in her house at 11 Rosia Steps.

3 The petitioner's application that there had been an abuse of process was heard by the magistrates on November 11th, 2002. She claimed that there had been an unreasonable delay in the service upon her of the summons to appear in the magistrates' court on June 20th, 2002, to answer the allegation of assault. Her complaint was that she did not receive any written notice to appear in that court until June 12th, 2002. The summons had been issued on November 17th, 2001. It bore a posting day of May 24th, 2002, which was also the date of posting according to the court's records, but it was marked as having been posted on June 11th, 2002. The petitioner submitted that there had been a violation of her right to "a fair and public hearing within a reasonable time," under s.8(1) of the Gibraltar Constitution Order 1969, that her rights "to a fair and public hearing within a reasonable time," under art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had also been breached and that there had been malpractice on the part of the prosecution and of the court also.

4 The magistrates delivered their judgment on December 9th, 2002. They found that there had been proper service in accordance with s.82 of the Magistrates' Courts Rules 1968, "by sending it by post in a registered letter" [the Rules are applicable in Gibraltar by virtue of the Magistrates' Court Rules 1973, r.2]. They attributed the delay between the recorded posting of the summons and its receipt by the petitioner to industrial action in the Post Office. They held that there had not been an unreasonable delay, that there had been no malpractice and that the petitioner's human rights had not been breached.

5 The petitioner was not satisfied with this decision, and she decided to appeal against it. On December 13th, 2002, she lodged a notice of appeal in the Supreme Court of Gibraltar. On January 14th, 2003, she was informed by a member of the court's staff that the Chief Justice, Schofield, C.J., had read the notice of appeal and had confirmed that the procedure which she had chosen did not apply to her case. The member of staff advised her orally that the procedure which she should adopt was to apply to the magistrates' court for a stated case or to seek judicial review. The petitioner did not accept this advice, which she regarded as a denial of her right to appeal against the ruling by the magistrates. She also regarded the advice which she had been given as having been based on a decision by the Chief Justice against which she was entitled to appeal. On January 16th, 2003, she attempted to lodge a notice of appeal against it. The Registry of the Supreme Court refused to accept her notice of appeal on the ground that there had been no decision by the Chief Justice, so the notice of appeal was incompetent. In a letter dated February 19th, 2003, the Registrar of the Supreme Court reiterated that there had been no such decision. She repeated the advice about the avenues of appeal against the magistrates' ruling which had been already given to the petitioner on several occasions by her deputy.

The petitioner's reasons for seeking leave

6 The petitioner presented her application for special leave to appeal in person in the hearing before their Lordships' Board. She explained that she is Russian and that her husband is English. They had gone to live in Gibraltar about two years ago. The background to the incident between her and Ms. Clancy was that a cheque, which had been sent to her husband for the tiling work, had bounced when it was paid in to the bank. She said that it was only Ms. Clancy's word against hers as to what had happened, that she was entitled to the presumption of innocence and that the case against her should now be stopped. She criticized the way in which the case against her had been handled from the outset by the authorities. She said that she had done everything that was in her power to obtain justice, and that she had exhausted every remedy. Events had shown that it was impossible for her to have a fair hearing in Gibraltar. It was a matter of very great importance to her that her argument, that there had been an abuse of process, should be heard by their Lordships' Board.

7 Their Lordships were impressed by the clarity of the petitioner's argument, to which they have listened with great care. They are aware that she has had a distinguished career as an athlete. She was a member of the Russian National Swimming Team and has a Masters' degree in rowing from a university in Lithuania. They were left in no doubt about the depth and sincerity of her belief that there has been an abuse of process in her case and that her human rights have been violated.

The Chief Justice

8 Their Lordships must deal first with the argument that the advice which the petitioner received from the Registry of the Supreme Court was a decision taken by the Chief Justice judicially against which she was entitled to appeal. It is plain that there was no such decision, nor did anything happen at that stage that could possibly be described as having been in violation of the petitioner's human rights. The Chief Justice was acting, as he was entitled and indeed bound to do, in an administrative capacity. He was simply asked to confirm the view which had been taken by the staff in the Registry that the petitioner's notice of appeal had followed the wrong procedure, and he did so. He then instructed the member of staff to offer advice to the petitioner about the other avenues of appeal that were open to her. He was doing his best to be helpful and there are no grounds on which the action which he took can reasonably be criticized.

Exhausting the remedy

9 Section 62(5) of the Gibraltar Constitution Order provides that "nothing in this section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter." Although that sub-section is in the widest terms, the practice of the Board is to insist that a petitioner must be able to demonstrate that all local remedies have been exhausted before leave to appeal can be granted. The petitioner did not seek to challenge this practice. Her argument is that she has exhausted all her local remedies and that she has been left with no alternative.

10 Their Lordships cannot accept this submission. There has been no determination of the merits of any appeal against the magistrates by the Supreme Court, let alone by the Court of Appeal of Gibraltar, from whose decisions only an appeal lies, in practice, to their Lordships' Board. There is no doubt that the decision of the magistrates that there had been no abuse of process could have been taken to appeal. Unfortunately, the route which the petitioner chose to appeal against it was the wrong route.

11 Section 293 of the Criminal Procedure Ordinance provides that "(1) a person convicted by the magistrates' court may appeal to the Supreme Court—(a) if he pleaded guilty, against his sentence; (b) if he did not, against the conviction or sentence." This is the procedure which the petitioner chose to follow, but it does not apply to her case. She has not been convicted by the magistrates' court. All that has happened so far is that a ruling has been made against her, as a result of which the case has been set down for trial. This is not to say that the petitioner is left without a local remedy. The alternatives have already been pointed out to her on more than one occasion. In the hope that she will feel able to accept the

view of the Board on this point, their Lordships will simply repeat what has already been said about them.

12 Section 310(1) of the Criminal Procedure Ordinance provides:

> "Any person who was a party to any proceedings before the magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the Supreme Court on the question of law or jurisdiction involved . . ."

There is a time limit of 14 days, but s.310(6) provides that "where justices refuse to state a case, the Supreme Court may . . . make an order of mandamus requiring the justices to state a case."

13 The petitioner refused to accept that this avenue of appeal was open to her because s.310(4) provides that "on the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision to the Supreme Court shall cease." But her objection is based on a misunderstanding of this sub-section. Its purpose is to avoid a duplication of appeals on the same point where two different routes are available. It has no application to the situation in which she finds herself at this stage in the proceedings, and there is no risk of her being prejudiced by it.

14 The other avenue which remains open to the petitioner is to seek judicial review of the decision by the magistrates. This remedy too is subject to a time limit, but it can be extended if a good reason can be shown for doing so: 1 *Civil Procedure 2002,* para. 54.5.4, at 1160.

Conclusion

15 For these reasons, their Lordships will humbly advise Her Majesty that the petition should be dismissed. There is no doubt, however, that the time and trouble which has now been expended on this case is out of all proportion to its importance. This point appears to have been appreciated at an early stage in these proceedings by the magistrates. The prosecution had offered to dispose of the case by withdrawing the charge if the petitioner was willing to agree to being bound over by the court. The petitioner objected to this on the ground that the prosecution were attempting to intimidate her. The magistrates dealt with this point at the end of the judgment which they issued on December 9th, 2002. They pointed out that the prosecution did not act incorrectly in offering this solution and that it was normal in similar cases for it to do so. But they acknowledged that a defendant had the full right not to agree to this, in which event the hearing would proceed.

16 In the course of their discussion of this point, the magistrates described the offence which had been alleged against the petitioner as a very minor one. Their Lordships respectfully agree with that assessment. The petitioner is perfectly entitled to refuse to agree to being bound over, to maintain her innocence and to insist on her right to a fair trial. The decision as to whether it is still worth maintaining the proceedings against her is a different matter. It is, of course, a matter for the prosecutor and not for the Board, but it has occurred to their Lordships that the prosecutor may wish to consider, in the public interest, whether the expense, time and trouble which further proceedings in this case will undoubtedly cause are really justified.

Petition dismissed.