[2003–04 Gib LR 325]

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

SUPREME COURT (Schofield, C.J.): December 8th, 2003

Estoppel—representation—detrimental reliance on representation—no estoppel unless representation induces other party to rely on it to his detriment—solicitor would be estopped from claiming improper service of process if induces improper service by representation that will accept it—not estopped because no authority to vary permitted manners of service

Civil Procedure—service of process—dispensing with service—Supreme Court Rules, r.3 applicable to court's discretion to dispense with service of claim form—dispensation only in truly exceptional circumstances—may rely on English authorities by virtue of "practice and procedure" provision of Supreme Court Ordinance, s.15

The claimant applied for an order dispensing with service of a claim form on the first defendants, pursuant to r.3(3) of the Supreme Court Rules.

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 any such instructions. 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 on the second defendant be dispensed with pursuant to the Civil Procedure Rules, r.6.9. The Supreme Court (Schofield, C.J.) refused to make such an order (in proceedings reported at 2003–04 Gib LR 115) and, following this, the first defendant made it clear that it would oppose any application to dispense with service on it.

The claimant, in applying for an order dispensing with service of the claim form on the first defendant, submitted that (a) the first defendant was estopped from opposing the application because its solicitors had, before and after the date service of the claim form should have been effected, expressly confirmed that they would accept service; (b) as Gibraltar has its own rule of the Supreme Court, r.3, relating to service of claim forms, the court should not apply rules originating from English authorities; and (c) in any case, the English authorities pointed to special circumstances, which were similar to the present case, where the court had exercised its discretion in dispensing with service as the departures from the permitted method of service were only minor.

Held, dismissing the application:

(1) The first defendants were not estopped from opposing the application, as for estoppel to apply it would be necessary to show that the first defendant, or its solicitors, had done something which influenced the claimant's solicitors to serve the claim form by ordinary post, which was not an accepted method of service. The fact that the first defendant's solicitors indicated that they would accept service did not raise an estoppel, as they had no power to dispense with proper service of the claim form since this was something which could only be done by an order of the court (para. 3).

(2) The circumstances of this case were not truly exceptional, to allow the court to dispense with service, and as the distinction between the first and the second defendant was not such as to warrant a different decision, the application would be dismissed for the same reasons as were given in respect of the second defendant. It was correct to follow the decisions of the High Court in England, so far as the circumstances permitted, in interpreting r.3 of the Supreme Court Rules as this was required by s.15 of the Supreme Court Ordinance (para. 4; paras. 9–10).

Cases cited:

(1) *Anderton* v. *Clwyd C.C.*, [2002] 1 W.L.R. 3174; [2002] 3 All E.R. 813; (2002), 152 New L.J. 1125; 99(25) L.S. Gaz. 38, distinguished.

(2) *Baglietto* v. *Asquez*, Supreme Ct., Case No. B 232 of 2003, unreported, followed.
(3) *Cranfield* v. *Bridgegrove Ltd.*, [2003] 1 W.L.R. 2441; [2003] 3 All E.R. 129, distinguished.

Legislation construed:
Supreme Court Ordinance (1984 Edition), s.15:
"The jurisdiction vested in the court shall be exercised . . . in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

Supreme Court Rules (L.N. 2000/031), r.3: The relevant terms of this rule are set out at para. 4.

N. Cruz for the claimant;
Ms. P.J. McEwan for the first defendant;
S. Catania for the second defendant.

1 **SCHOFIELD, C.J.:** This is an application for an order dispensing with service on the first defendant, Bencrafts Construction Ltd., made pursuant to r.3(3) of the Supreme Court Rules. On June 9th, 2003, I refused a similar application of the claimant in respect of the second defendant, Fitzpatrick Contractors Ltd. In that application I followed the English Court of Appeal's decision in *Anderton* v. *Clwyd C.C.* (1), and held that, as the claimant's solicitors had not attempted to serve in time a claim form by one of the accepted methods of service, I ought not to exercise my discretion to make the order sought.

2 In my judgment of June 9th, 2003, I set out the facts and my understanding of the law, and this judgment should be read alongside my judgment in respect of the second defendant. I do not intend to repeat the facts here. At the earlier hearing no application was made in respect of service on the first defendant because its solicitors had not indicated that they would take any exception to service. However, in my judgment I did express uncertainty as to how my orders affected the first defendant and at a subsequent case management conference Ms. McEwan informed the court that she had instructions to oppose any application to dispense with service on that defendant. Although at this moment the second defendant is out of all the proceedings by virtue of the order of June 9th, 2003, I permitted its counsel, Mr. Catania, to make submissions, because if I held the proceedings open against the first defendant then the second defendant may be the subject of Part 20 proceedings.

3 Let me first deal with the suggestion by Mr. Cruz that the first defendant is estopped from opposing this application because (a) its solicitors had expressly confirmed that they were instructed to accept service; and (b) by letter dated May 13th, 2003, its solicitors

acknowledged they would accept service and had been minded to do so since January 2003. For an estoppel to apply in this case it would be necessary to show that the first defendant, or its solicitors, did something which influenced the claimant's solicitors to serve the claim form by ordinary post, not being an accepted method of service. That the first defendant's solicitors indicated they would accept service before and after the date service of the claim form should have been effected does not raise an estoppel. The first defendant's solicitors could not dispense with service of the claim form as this is something which can only be done by order of the court (see CPR, rr. 7.5, 7.6, 7.7 as read with r.6.9).

4 Mr. Cruz also suggests that because Gibraltar has its own rule of the Supreme Court, r.3, relating to service, this court should apply its own rules regarding dispensing with service. The application of English authorities in the construction of r.3 was considered by Pizzarello, A.J. in *Baglietto* v. *Asquez* (2), where he said:

> "So I turn to consider the question posed in para. 18(d): should the court exercise its discretion to dispense with the service of the claim form pursuant to CPR, r.6.9, *i.e.* r.3(3) of the Supreme Court Rules 2000? Rule 3 of the Supreme Court Rules as far as is relevant reads:
>
> '(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.'
>
> It seems to me to be clear that r.3(4) reinforces the provisions of s.15 of the Supreme Court Ordinance, which requires the Supreme Court of Gibraltar to follow the practice and procedure for the time being observed in England in the High Court of Justice and therefore the court in Gibraltar should follow the decisions of the Court of Appeal in these matters. I do not attach importance to the expression 'so far as circumstances permit' in the context of the present case. As far as I can see, and the latest decision appears to be *Cranfield* v. *Bridgegrove Ltd.*, none of the English cases touch upon the question that arises for my consideration. What the English cases show is that CPR, r.6.9 applies to service of claim forms and I hold to r.3(3)."

I respectfully agree with Pizzarello, A.J.

5 Mr. Cruz has submitted that his application is based on facts similar to that of *Dorgan* v. *Home Office*, discussed in *Anderton* (1), and related in my judgment of June 9th, 2003. In *Anderton*, Mummery, J. had this to say ([2002] 3 All E.R. 813, at para. 84):

> "The application to dispense with service was made promptly after the claimant's solicitors were notified that it was not accepted that

> there had been effective service of the claim form. An order dispensing with service will not prejudice the defendant, other than depriving it of a time point on the rules which may be removed by the exercise of the discretion under r 6.9. The defendant had already been notified of the claim and had been supplied with details of it in correspondence. On the other hand, the claimant will be prejudiced by a refusal to dispense with service, in that his claim will be statute-barred and he will be deprived of a trial on the merits of a claim."

6 However, the passage immediately preceding the passage quoted by Mr. Cruz shows how far *Dorgan's case* was from the present case (*ibid.*, at para. 84):

> "[84] In our judgment, the judge was entitled to exercise his discretion under r.6.9 to dispense with service of the claim form. The judge inferred that the reason for the delay in the service of the claim form was that the claimant's solicitors erroneously believed that they had to serve the particulars of claim and the medical report, as well as the claim form, within the period of four months. It is agreed that the claim form was received by fax on Friday 10 August only 3 minutes after the 4 p.m. deadline for service by fax on that day and it came to the attention of the defendant's solicitor shortly thereafter. The period for service of the claim form did not expire until the following day, Saturday 11 August. Within minutes the defendant's solicitor faxed back to the claimant's solicitor requesting that five more pages of the medical report, which had not come through, be faxed. That was then done."

7 In *Dorgan's case* the claim form was received by a proper method of service three minutes after the time permitted for deemed service and the day before the last day for actual service, which, unfortunately for the claimant, was a Saturday. In this case, although the claim form was sent several days before the final day for service, it was sent by an unpermitted method, did not arrive before the last day for service and, in fact, has not arrived to this day. And it does not profit the claimant to say that he sent a copy of the claim form to the first defendant's solicitor on August 22nd, 2002, the date the claim was filed, for it was expressly stated that the claim form was not sent by way of service.

8 Mr. Cruz has also addressed me on the English Court of Appeal decision in *Cranfield* v. *Bridgegrove Ltd.* (3), to which I referred in passing in my judgment of June 9th, 2003. Mr. Cruz submits that *Cranfield* explains that the restrictions on the power to dispense with service identified by the earlier cases such as *Anderton* (1) are not exhaustive and that it is not appropriate to attempt to provide constraints or an exhaustive guide to the circumstances in which the power should be

exercised. He also drew attention to the following passage of the judgment of Dyson, L.J. ([2003] 3 All E.R. 129, at para. 32):

> "[32] In *Anderton*'s case, the court did not have to consider whether the exception might also apply in a case where there has been some comparatively minor departure from the permitted method of service. An example of what might fairly be described as a minor departure is where the claim form has been sent by second class post (instead of first class post), and has been sent to the right person at the right address and has been received within the four-month period. We do not think that we are bound by *Anderton*'s case and *Wilkey*'s case to hold that a court could not properly exercise its discretion to dispense with service in such a case. In our view, it is not appropriate to attempt to provide an exhaustive guide to the circumstances in which it is proper to dispense with service of a claim form retrospectively under r.6.9, whether in pre-*Anderton* cases, or in post-*Anderton* cases."

9 In my judgment of June 9th, 2003, in regard to the second defendant, I based my decision on the fact that service had not been attempted by a permitted method of service pursuant to our r.3, because the claim form was sent by ordinary post rather than by the required registered post. Mr. Cruz draws comfort from the above passage, but of course there is a distinction in quality as between service by ordinary post and service by registered post (which requires to be signed for) which does not exist as between first and second class post in England. Furthermore it is of great significance that the example above requires that the claim form has been received within the permitted time limit, whereas in the instant case the claim form has not been received at all. Later in *Cranfield* (3), Dyson, L.J. emphasizes that "the power to dispense with service retrospectively is confined to truly exceptional cases" (*ibid.*, at para. 32).

10 I do not find this a truly exceptional case. I do not find that the distinction between the first defendant and the second defendant is such as to warrant me making a different decision in the case of the first defendant from that which I made in the case of the second.

11 The application fails and costs will follow the event.

Application dismissed.