

[2005–06 Gib LR 1]

**FISHER v. SMALL**

SUPREME COURT (Schofield, C.J.): February 4th, 2005

*Courts—Supreme Court—jurisdiction—personal jurisdiction—court has jurisdiction to hear civil action against persons domiciled in Gibraltar—by Civil Jurisdiction and Judgments Ordinance, s.24, evidence of actual residence required for domicile*

The claimant brought an action for damages for injuries caused by the defendant's alleged negligence.

The claimant was injured when he fell from a golf cart he alleged was driven negligently by the defendant. Although the incident occurred in Spain, he brought the action in Gibraltar as he considered that this was where the defendant was domiciled.

The defendant applied for the action to be struck out on the grounds that, since he was not resident in Gibraltar, the court lacked jurisdiction to hear the case, and furthermore, the claim was defectively served because the documents were left in his post box by a process server.

The claimant submitted that the court had jurisdiction since the defendant was domiciled in Gibraltar because (a) he owned a property here; and (b) he was registered under the Civilians Registration Ordinance and possessed a civilian registration card.

The defendant submitted in reply that (a) his ownership of a property in Gibraltar in order to qualify for tax benefits did not make him domiciled here for the purposes of the jurisdiction of the court; (b) his possession of a registration card was not evidence of domicile, since it was not a requirement of the Ordinance that he be resident in order to register and receive a card; and (c) in any event, the claim was defectively served because the method used was not one prescribed by the Supreme Court Rules.

**Held**, granting the application:

(1) The court did not have jurisdiction since the defendant was not domiciled in Gibraltar within the meaning of the Civil Jurisdiction and Judgments Ordinance, s.24 and the claim would therefore be struck out. Mere ownership of a property for tax purposes, without evidence of actual residence here, did not make him a resident for the purposes of the court's jurisdiction, nor did possession of a civilian registration card, since there was nothing in the Civilians Registration Ordinance that required him to live in Gibraltar in order to register and hold a card (paras. 8–9).

(2) The previous finding made it unnecessary to decide the issue of improper service of the claim form. However, the service was, in any event, defective because service by a process server did not fall within the Supreme Court Rules, r.3(1) (para. 10).

**Legislation construed:**

Civil Jurisdiction and Judgments Ordinance 1993 (No. 29 of 1993), s.24 (as substituted by the Civil Jurisdiction and Judgments (Amendment) Ordinance 2004 (No. 15 of 2004), Schedule 10, para. 8): The relevant terms of this section are set out at para. 4.

Civilians Registration Ordinance (1984 Edition), s.3: The relevant terms of this section are set out at para. 8.

Schedule 1, para. 3: The relevant terms of this paragraph are set out at para. 8.

Qualifying (Category 2) Individuals Rules 2004 (L.N. 2004/070), r.2: The relevant terms of this rule are set out at para. 7.

r.3: The relevant terms of this rule are set out at para. 7.

Supreme Court Rules (L.N. 2000/031), r.3(1): The relevant terms of this sub-rule are set out at para. 10.

Council Regulation (EC) No. 44/2001 of December 22nd, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 2.1: “Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

*D.J.V. Dumas, Q.C.* for the claimant;

*J. Leighton Williams, Q.C.* and *D. Hughes* for the defendant.

1 **SCHOFIELD, C.J.:** On April 1st, 2002, the parties to this suit were playing golf at the Aloha Golf Course in Spain. The defendant, Albert Small, was driving his golf cart and the claimant, Idwal Fisher, was a passenger in the cart. The claimant’s case is that the defendant drove his golf cart in a negligent manner causing him, the claimant, to be thrown from it. The golf cart then came to rest by the side of the claimant, he says, and it landed heavily on the claimant’s side. The claimant’s left shoulder was injured and it required surgery and still requires treatment. He has another condition which he puts down to the stress from the injury. The claimant also claims that his golf has suffered as a result of the accident. He claims damages against the defendant and filed an action in this court in a claim form dated February 6th, 2004. The particulars of claim were filed on June 4th, 2004. No defence has, as yet, been filed by the defendant, but in his witness statement in support of this application he accepts that the accident did occur but asserts that the circumstances of it were very different from the claimant’s description.

2 In this application, the defendant seeks orders that the claim be struck out on the grounds of:

- (1) defective service of the claim form and particulars of claim;
- (2) lack of jurisdiction to hear the claim; and
- (3) *forum non conveniens*.

The defendant concedes that the *forum non conveniens* argument is really a makeweight and his real argument is that the claim should not have been brought in Gibraltar because this court does not have jurisdiction to deal with it.

3 The Brussels and Lugano Conventions (“the Conventions”) were implemented in Gibraltar by the Civil Jurisdiction and Judgments Ordinance, ss. 4(1) and (3). The Conventions have been largely superseded by Council Regulation (EC) No. 44/2001 (“the Regulation”) and parts of that Regulation have been implemented in Gibraltar by the Civil Jurisdiction and Judgments Ordinance, as amended. It is accepted by the claimant that he could, under the terms of the Conventions, art. 5 and the Regulation, ch. II, art. 5, have brought this action in the Spanish courts, being “the courts for the place where the harmful event occurred.” The reason he chose not to, surmises the defendant, is that by Spanish law he is on the wrong side of a one-year limitation period. Not so, says the claimant, for the defendant has acknowledged his liability and thus the claim would hold in the Spanish courts. Nothing rests on the reason why the claimant chose to bring action in Gibraltar. He says that he has chosen this jurisdiction because this court is the court of the place where the defendant is domiciled. Again it is common ground between the parties that under the Conventions, art. 2 and the Regulation, ch. II, art. 2 this court has jurisdiction to entertain this suit if the defendant is domiciled in Gibraltar. The point at issue in this application is whether the defendant is domiciled in this jurisdiction.

4 Assistance is given in determining where a party is domiciled by the Civil Jurisdiction and Judgments Ordinance, s.24, the relevant part of which reads:

“(1) Subject to Article 59 (which contains provisions for determining whether a party is domiciled in a Regulation State), the following provisions of this paragraph determine, for the purposes of the Regulation, whether an individual is domiciled in Gibraltar or in a state other than a Regulation State.

- (2) An individual is domiciled in Gibraltar if and only if—
  - (a) he is resident in Gibraltar; and
  - (b) the nature and circumstances of his residence indicate that he has a substantial connection with Gibraltar.

(3) In the case of an individual who—

(a) is resident in Gibraltar; and

(b) has been so resident for the last three months or more,

the requirements of sub-paragraph (2)(b) shall be presumed to be fulfilled unless the contrary is proved.”

5 The defendant has a residence at 312 Eurotowers, Gibraltar, but this is kept, he says, so that he qualifies to pay tax in Gibraltar under the Qualifying (Category 2) Individuals Rules (“the Rules”). The flat, which he has had for about 2½ years, is a one-bedroom, basically furnished residence, and is kept for tax purposes only. He spends hardly any time in Gibraltar, no more than two or three hours at a time. In his witness statement, the defendant said he spends no more than a day or two at any one time in Gibraltar, but in his evidence before me he sought to rectify that, saying that he has never stayed overnight in the flat. He spends most of his time in Spain, pursuing his interest in golf, and brings his wife to Gibraltar so that they can shop at the local supermarkets. He owns a townhouse in Spain and pays a wealth tax on his ownership of that property but he does not pay income tax in Spain and is not treated as a Spaniard. He told me that he probably spent four or five months in Spain last year. The defendant has no business interests in Gibraltar and does not socialize here. Nonetheless, he has a Gibraltar civilian registration card issued under the Civilians Registration Ordinance.

6 The defendant is Scottish by birth and owns a property in Glasgow. He is semi-retired and is a shareholder in, and director of, a construction company, but for tax reasons is careful to spend less than 90 days in each tax year in the United Kingdom. In the current tax year he has spent 41 days in Scotland. Initially, in his evidence before me, the defendant said he paid no tax in the United Kingdom. When the matter resumed for further argument on one narrow point the following day he rectified that, saying that his secretary had reminded him that last year he wrote a cheque to the United Kingdom income tax authorities for about £38,000 on a dividend he had received from his company. The defendant says he rents a property in the Irish Republic and spends about 3 months a year there.

7 The claimant argues that the fact that the defendant has a residence in Gibraltar, combined with his residence here for tax purposes and his possession of a Gibraltar civilian registration card, demonstrate his domicile in Gibraltar so as to give this court jurisdiction in this suit. By the Rules, r.3, in order to qualify as a Category 2 individual and obtain the income tax advantages which go with that status, the individual must have available to him for his exclusive use approved residential accommodation in Gibraltar. By r.2, “approved residential accommo-

ation” means any property of which the Finance Centre Director approves and “exclusive use” means for the residential purposes of the individual and his family together with the occasional use of non-paying guests, but does not include letting or leasing of any sort. A Category 2 individual may not engage in trade, business or employment except in very restricted circumstances (see r.5). There is no requirement in the Rules that a Category 2 individual actually makes use of the qualifying residence or actually resides in Gibraltar.

8 By s.3 of the Civilians Registration Ordinance there shall be a register of all civilians “who are now in or who may at any future time enter Gibraltar” and any such civilian shall register in accordance with the provisions of the Ordinance. By s.6, the Registration Officer shall issue a card to persons specified in Schedule 1 to the Ordinance. By Schedule 1, para. 3, a card is to be issued to individuals who meet the requirements of para. 1(d), *i.e.* “an individual, who is not a visitor, entitled to be resident in Gibraltar and present in Gibraltar.” There is nothing in the Civilians Registration Ordinance which says that the holder of a civilian registration card must reside in Gibraltar and the value of the card to the defendant is that he is registered under the Ordinance if he chooses to reside in Gibraltar.

9 In my judgment, the fact that the defendant elects to purchase a property in Gibraltar so as to make him qualify for the peculiar tax benefits of Gibraltar and thus reduce his world-wide tax liability is insufficient, without more, to make him a resident for the purposes of the jurisdiction of this court to try this suit. His possession of a civilian registration card, which fulfils the requirements of the Civilians Registration Ordinance, does not take the claimant’s case for jurisdiction any further without evidence of the defendant’s actual residence in Gibraltar. What we have in this case is a defendant who has a flat in Gibraltar, who visits here for two or three hours at a time to go shopping (and on this I accept his evidence) and does not lay his head in his flat. That is insufficient to make him domiciled in Gibraltar to fulfil the requirements of the Civil Jurisdiction and Judgments Ordinance, s.24. The claimant has not satisfied me that I have jurisdiction and the claim form and all subsequent proceedings must be struck out.

10 This finding makes it unnecessary for me to deal with the second point at issue, whether the claim form was properly served. However, I ought to point out that service was, in any event, bad. Service was effected by a process server leaving the documents in the defendant’s post box at 312 Eurotowers. It is as well to remind solicitors in Gibraltar that we have our own rules on service of documents in the Supreme Court Rules, r.3, the relevant portion of which reads:

“(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.”

Service in this case did not fall within r.3(1).

11 For the above reasons, the defendant’s application succeeds and he will have the costs which flow therefrom.

*Application granted.*

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