[2005–06 Gib LR 238]

CERISOLA v. ATTORNEY-GENERAL

COURT OF APPEAL (Staughton, P., Stuart-Smith and Kennedy, JJ.A.): September 21st, 2006

Estoppel—estoppel from pleading limitation—estoppel by convention—estopped from raising limitation as defence if shared assumption of fact or law communicated between parties, course of dealing based on that assumption, and detriment to one party if other allowed to resile from it—may operate to prevent reliance on limitation as defence

Constitutional Law—fundamental rights and freedoms—fair hearing within reasonable time—Limitation Ordinance provisions generally observe access to courts required by Gibraltar Constitution, s.8(8)—pursue legitimate aims of ensuring certainty and finality, barring stale claims and using proportionate means

Limitation of Actions—constitutional status—extension of time—restricted power to extend time under Limitation Ordinance, ss. 5, 6 and 28(2)(b) not unconstitutional as disproportionately reducing access to courts—no requirement that court to have general discretion to extend time to satisfy Constitution, s.8(8)

Limitation of Actions—extension of time—minor "in custody of parent"—no disproportionate reduction of access to court in Limitation Ordinance, s.28(2)(b) for minor "in custody of parent" at time of personal injury—assumed that custodial parent will take early opportunity to obtain redress and no need to allow same extension of time permitted to other minors not in custody

The appellant brought an action against the Government in the Supreme Court to recover damages for personal injury sustained following a rock fall on the Upper Rock.

The appellant's injury was sustained in January 1995, when, aged four years old, he was walking with his grandfather in the area of the Mediterranean Steps. Although it was impossible for some time to determine the full effect of the injury, it was clear from the beginning that it was significant and that there was likely to be lasting disfigurement and disability in the appellant's left arm. His solicitors almost immediately notified the solicitors of the company responsible for managing the area on behalf of the Government. They denied liability pending receiving instructions but, despite reminders at various times up to November 1999, only inconclusive responses were received. At that time, the appellant's solicitors intimated that they proposed to issue proceedings (although the limitation period had expired in January 1998).

The matter was passed to the Attorney-General's Chambers in June 2002 but prevarication and the denial of liability continued, although a site meeting took place for clarification in July 2003. No claim was issued, however, and the matter remained dormant until February 2005 when the appellant's solicitors again contacted the Attorney-General's Chambers. The defence that the proceedings were out of time was then raised for the first time but the claim form was finally issued in September 2005. When the action came to trial, the Supreme Court (Schofield, C.J.) determined as a preliminary issue that it was statute barred.

On appeal, the appellant submitted that (a) the defendant was estopped either by convention or by promissory estoppel from raising limitation as a defence in the light of its acquiescence and/or conduct up to the commencement of the proceedings; (b) s.28(2)(b) of the Limitation Ordinance, which did not allow the extension of the limitation period in personal injury cases to adulthood if the minor claimant was "in the custody of a parent" at the time of the injury, was invalid as discriminatory and a procedural bar preventing effective access to the court as required by s.8(8) of the Constitution; and (c) the mechanism provided in ss. 5 and 6 of the Ordinance, which allowed the extension of time if the claimant or his parent lacked knowledge of "facts of a decisive nature" during the limitation period, also conflicted with s.8(8) of the Constitution as it was unduly restrictive and deprived the court of the opportunity to grant an extension of time purely in the interests of justice.

Held, dismissing the appeal:

(1) The claim that the defendant was estopped by convention from raising the defence of limitation had not been made out. To succeed with such a claim, there would have had to be an assumption about facts or law which was shared and communicated between the parties, a course of dealing based on that assumption, and detriment to one party if the other were allowed to resile from it. In fact, at no time had the defendant or the solicitors originally handling the claim accepted that the appellant had a valid claim—but rather they had persistently denied liability. Nothing in the correspondence suggested that there had been any misleading words or conduct on the part of the defendant, or any waiver of the limitation defence, and the defendant was not therefore estopped from relying on it (paras. 12–14).

(2) The provisions of s.28(2)(b) of the Limitation Ordinance did not offend s.8(8) of the Constitution by unfairly denying the appellant access to the court. Limitation periods themselves were perfectly legitimate restrictions of access to the courts, provided that they represented the pursuit of legitimate aims and adopted proportionate ways of achieving them. The Gibraltar legislation sought legitimately to ensure legal certainty and finality, bar stale claims, primarily for reasons of the lack of reliable witnesses, especially in personal injury cases. Similarly, there was no lack of proportionality in s.28(2)(b) in discriminating between different groups of children, because the identification of a group of children "in the custody of a parent" relied upon a genuine dissimilarity. It might have been unfair if all minors, irrespective of custody, had been allowed no extension of time but denying an extension to a child "in the custody of a parent" at the time of the injury was based on the assumption that the parent would know of the injury and take proceedings on behalf of the child. That was what had happened in the present case—the appellant's parents had sought to obtain access to the courts on his behalf and he had only been deprived of it by the dilatory conduct of the solicitors (paras. 21–22; paras. 25–27).

(3) Similarly, neither the absence of a general discretion to extend time under s.28(2)(b) of the Ordinance, nor the more restrictive powers conferred by ss. 5 and 6 of the Limitation Ordinance, had a disproportionate effect in effectively reducing access to the court. It was true that the corresponding English legislation (Limitation Act 1980, s.33) had been amended so as to strike the balance more in favour of minors and claimants generally—but to make such an amendment lay within the proper margin of appreciation of the Gibraltar legislature and it could not be faulted because it had chosen not to adopt such a change (para. 29).

Cases cited:

(1) *Amalgamated Inv. & Property Co. Ltd.* v. *Texas Comm. Intl. Bank Ltd.*, [1982] 1 Q.B. 84; [1981] 1 All E.R. 923; [1981] Com. L.R. 37; (1981), 125 Sol. Jo. 133; on appeal, [1982] Q.B. 84; [1981] 3 All

E.R. 577; [1982] 1 Lloyd's Rep. 27; [1981] Com. L.R. 236; (1981), 125 Sol. Jo. 623, *dicta* of Lord Denning, M.R. applied.

(2) *Ashingdane* v. *United Kingdom* (1985), 7 E.H.R.R. 528, applied.

(3) *Cachia* v. *Faluyi*, [2001] 1 W.L.R. 1966; [2002] 1 All E.R. 192; [2002] P.I.Q.R. P5; [2001] C.P. Rep. 102; [2001] EWCA Civ. 998, observations of Brooke, L.J. applied.

(4) *Cartledge* v. *E. Jopling & Sons Ltd.*, [1963] A.C. 758; [1963] 1 All E.R. 341; [1963] 1 Lloyd's Rep. 1; (1963), 107 Sol. Jo. 73, referred to.

(5) *Co-operative Wholesale Socy. Ltd.* v. *Chester-le-Street District Council* (1998), 10 Admin. L.R. 592; [1998] 38 E.G. 153; [1998] R.V.R. 202, distinguished.

(6) *Donovan* v. *Gwentoys Ltd.*, [1990] 1 W.L.R. 472; [1990] 1 All E.R. 1018, referred to.

(7) *Hewer* v. *Bryant*, [1970] 1 Q.B. 357; [1969] 3 All E.R. 578, *dicta* of Lord Denning, M.R. considered.

(8) *London Borough of Hillingdon* v. *ARC Ltd. (No. 2)*, [2000] 3 E.G.L.R. 97; [2000] R.V.R 283; [2001] C.P. Rep. 33; [2000] EWCA Civ. 191, distinguished.

(9) *Minister of Home Affairs* v. *Fisher*, [1979] A.C. 319; [1979] 3 All E.R. 21, distinguished.

(10) *R.* v. *Lord Chancellor, ex p. Witham*, [1998] Q.B. 575; [1997] 2 All E.R. 779; [1997] C.O.D. 291, distinguished.

(11) *R. (Daly)* v. *Home Secy.*, [2001] 2 A.C. 532; [2001] 2 All E.R. 433; [2001] UKHL 26, distinguished.

(12) *Stubbings* v. *United Kingdom* (1996), 23 E.H.R.R. 213; [1997] 3 F.C.R. 157; [1997] 1 FLR 105; [1997] 1 Fam. Law 241, applied.

(13) *Todd* v. *Davison*, [1972] A.C. 392; [1971] 1 All E.R. 994, *dicta* of Lord Pearson applied.

Legislation construed:

Limitation Ordinance (1984 Edition), s.4(1):

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—
>
> (a) actions founded on simple contract or on tort;
>
> . . .
>
> Provided that, in the case of actions for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

s.5: "(1) Section 4(1) (which, in the case of certain actions, imposes a time limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—

(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
(b) the requirements of subsection (3) of this section are fulfilled.

. . .

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which was not earlier than three years before the date on which the action was brought."

s.6: "(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(1); and
(b) to fulfil the requirements of section 5(3) in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 5) to afford a defence under section 4(1)."

s.28: "(2) In the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person—

(a) the preceding provisions of this section shall have effect as if for the words 'six years' there were substituted the words 'three years'; and
(b) this section shall not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent."

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.8(8): The relevant terms of this sub-section are set out at para. 20.

Limitation Act 1980 (c.65), s.33: The relevant terms of this section are set out at para. 29.

European Convention for the Protection of Human Rights and Funda-

mental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), art. 6(1):

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

K. Azopardi for the appellant;
R. Rhoda, Q.C., Attorney-General and *L. Yeats* for the respondent.

1 **STUART-SMITH, J.A.:**

Introduction

This is an appeal from a judgment of Schofield, C.J., given on March 31st, 2006, in which he determined, on the trial of a preliminary issue, that the claimant's claim was statute barred by operation of the provisions of the Limitation Ordinance 1960, as amended.

Background facts

2 On January 8th, 1995, Angelo Cerisola, the appellant, who was then 4 years old, was walking in the area of the Mediterranean Steps with his grandfather and his twin brother Alessandro. There was a rock fall as a result of which the appellant sustained serious injuries, mainly to his left arm. Alessandro was also injured, but much less seriously. Since the accident, the appellant has been under the care of Mr. Malik, Consultant Orthopaedic & Trauma Surgeon at St. Bernard's Hospital. Because of his young age, it was impossible for some time to determine the ultimate effect of his injuries. But it has been clear throughout that the injury was significant and there was likely to be lasting disfigurement and disability.

3 Soon after the accident, the appellant's parents consulted Messrs. Attias & Levy who entered into correspondence with Messrs. Isola & Isola, the solicitors for Sights Management Ltd., who were believed to be the managers of the Upper Rock on behalf of the Government, and Gibraltar Tourism Agency Ltd., a Government company responsible for tourism and the Upper Rock. The claim was notified to them on March 24th, 1995. On March 28th, Isola & Isola replied that they were seeking instructions and pending instructions denied liability. Nothing further happened until June 1997 when Attias & Levy wrote again to Isola & Isola. After sporadic reminders, on December 30th, 1997 Isola & Isola said that they had been unable to obtain instructions but said they would try again and hoped to be able to deal with the matter. The solicitors spoke on January 30th, 1998; Isola's representative said that he was still without instructions; the appellant's solicitors said that he had obtained a preliminary medical report and would revert to him again with a general assessment of damages. The

appellant's solicitors sent a chasing letter in March and June 1998 and in January 1999. They received no reply. The limitation period in respect of the appellant's claim expired on January 7th, 1998, though it would appear that his solicitors were unaware of this fact.

4 On November 25th, 1999, the appellant's solicitors wrote to the Ministry of Tourism & Transport intimating a claim. Further sporadic correspondence ensued. Liability was not accepted. It was suggested that Sights Management Ltd. would be responsible. Eventually, in June 2002, the matter came to be handled by Mr. Pitto in the Attorney General's Chambers. No progress was made. On November 1st, 2002, the appellant's solicitors wrote to Mr. Pitto saying that unless they received a substantive reply within seven days, they would issue proceedings. In reply, on November 7th, 2002, Mr. Pitto said that he still had no instructions on the issue of liability; there were difficulties with changing personnel, paucity of records about the incident and the condition of the Upper Rock. He hoped to be making a decision soon. Finally he wrote: "It would of course be a matter of regret if proceedings were to be commenced unnecessarily. I would therefore request that you hold back proceedings till the end of the month." There is a note on the copy letter received by the appellant's solicitors that she had had a without prejudice conversation with Mr. Pitto. The note records that the latter was still awaiting information but that "provided that the facts give rise to a claim, his view was that liability should be accepted." On December 3rd, Mr. Pitto wrote saying that he was unable to accept liability. Notwithstanding this, proceedings were not issued. Mr. Pitto said that there was a lack of clarity as to where the accident had taken place. Eventually, a site meeting took place on July 10th, 2003. By November 27th, 2003, the matter had not been resolved.

5 The matter then appears to have lapsed until February 2005 when the appellant's solicitors wrote again to the Attorney General's Chambers. On March 11th, 2005, Mr. Yeats, who was now handling the matter on behalf of the Attorney General, asserted that the claim was statute barred, as well as adverting to other possible defences. After further correspondence, in which the appellant's solicitors sought a reconsideration on the plea of limitation, the claim form was eventually issued on September 19th, 2005.

6 I have set out the effect of the correspondence at some length because Mr. Azopardi, counsel for the appellant, relied upon it as founding his submission that the respondent is estopped by convention from asserting that the claim is barred by limitation.

Proceedings in the court below

7 It was accepted by both parties that the statutory limitation period for such an action is three years from the date of the accident (see s.4(1) of

the Limitation Ordinance). In the case of minors, it is three years after the date on which they attain their majority, namely 18 (s.28(2)(a)). But that does not apply if at the time that the cause of action accrued the minor was in the custody of a parent (s.28(2)(b)). It is accepted on behalf of the appellant that at the material time he was in such custody.

8 Nevertheless, the appellant sought four orders expressed in the alternative:

(a) a declaration that s.28(2)(b) of the Ordinance amounts to a procedural bar which contravenes the claimant's right to effective access to the court under s.8(8) of the Gibraltar Constitution Order 1969;

(b) an order pursuant to s.6 of the Ordinance, as read with s.5(3) thereof, that the court grant leave extending the time for bringing the action;

(c) a declaration, pursuant to the CPR, r.25.1(1)(b) that the defendant be estopped from raising limitation as a defence in view of its acquiescence and/or conduct in the period up to 2005; or

(d) a declaration that the extension mechanism in ss. 5 and 6 of the Ordinance is unduly restrictive and amounts to a procedural bar which contravenes the claimant's right to effective access to the court.

9 The judge declined to make any of the orders sought. That under para. (b), namely the contention that the nature or extent of the injuries resulting from the negligence or nuisance of the defendant were at all times outside the knowledge of the claimant (or in this case his parents) until he reached an age when they could be properly assessed (see ss. 5(3), 6, 10(3)–10(6)), is no longer pursued.

The appeal

10 By his appeal, the appellant seeks the orders set out in paras. (a), (c) and (d) above. Mr. Azopardi's submissions fall under three main heads:

(1) *Estoppel*. He submits that the doctrine of estoppel by convention prevents the defendant from setting up the defence of limitation. In his skeleton argument, Mr. Azopardi relies as an alternative on promissory estoppel because of the conduct and acquiescence of the defendant. He relies on the same underlying facts as those which he submits amount to convention estoppel. He did not develop this aspect of the case in oral argument, and it seems to me that Mr. Azopardi accepted that if he could not succeed on convention estoppel, he could not succeed on promissory estoppel;

(2) that s.28(2)(b) unfairly discriminated against minors who are in the custody of a parent at the material time and infringes the appellant's right to effective access to the court contrary to s.8(8) of the Constitution;

(3) that the extension mechanisms in the Ordinance, which enable the court to extend time where certain material facts are not within the knowledge of the claimant (or his parent where he is in the parent's custody), conflict with s.8(8) of the Constitution because they deprive the court of the ability to grant extensions in the interest of justice.

Estoppel by convention

11 In *Amalgamated Inv. & Property Co. Ltd.* v. *Texas Comm. Intl. Bank Ltd.* (1), Lord Denning, M.R. stated ([1982] 1 Q.B. at 122):

> "When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

12 In that case, there was a common understanding between the parties as to the effect of the contractual arrangements where the bank had acted to its detriment on the faith of the understanding. The doctrine can also apply where the parties are in negotiation. The necessary ingredients are, first, that there must be an assumption about certain facts or law which is shared and communicated; secondly, that there is a course of dealing based on that assumption; and thirdly, that one party will suffer detriment if the other party were permitted to resile from the assumption.

13 Mr. Azopardi referred us to two cases in support of his submissions. *London Borough of Hillington* v. *ARC Ltd. (No. 2)* (8) and *Co-operative Wholesale Socy. Ltd.* v. *Chester-le-Street District Council* (5). Both cases are concerned with limitation in respect of the prosecution of claims before the Lands Tribunal. Both cases depend on a finding that the defendants accepted that there was a valid claim for compensation, the only question being the quantum of the claim. They do not assist the appellant unless this crucial fact can be made out. So much Mr. Azopardi accepts. But although the defendants, and before them Isola & Isola, were being pressed to accept liability, they never did so. It was never accepted that the appellant had a valid claim, which simply required quantification. There was a time on December 3rd, 2002 when Mr. Pitto asked the appellant's solicitors to delay proceedings till the end of the month. If that had been done during the currency of the limitation period, that period would have been extended by so much. But by then the limitation period was long past; it could not be revived by such a request. And in any event proceedings were not issued for a further $2\frac{1}{2}$ years.

14 Mr. Azopardi further submits that the solicitors on both sides were conducting the matter during the period up to 2005 on the assumption that there was no limitation issue. He even goes so far as to assert that this was common ground. I have little doubt that the appellant's solicitors overlooked the provisions of the Limitations Ordinance and particularly in s.28(2)(b), perhaps in the erroneous belief that the law in Gibraltar was the same as in England. But I can see no warrant for inferring that the defendants were also under this misapprehension simply because they did not raise the limitation defence until 2005, when proceedings were actually threatened. A defendant is not obliged to take a limitation defence. Provided that he does not mislead the claimant into thinking that he will not take it, whereby the claimant suffers detriment, and provided he does not actually waive the defence, there is nothing to prevent him raising the defence at any time. I can find nothing in the correspondence, and that is all that Mr. Azopardi relies upon, to suggest that there were any such misleading words or conduct or any waiver of the limitation defence. For these reasons I would reject Mr. Azopardi's submission based on estoppel.

The constitutional issues

15 Mr. Azopardi's principal submission under this head is that s.28(2)(b) is a procedural bar which contravenes the appellant's right to effective access to the court as provided by s.8(8) of the Constitution Ordinance. Fundamental to this submission is a comparison of the provisions of the UK Statutes of Limitations with the regime in Gibraltar. It is submitted that that in the United Kingdom is, at any rate since 1975, fair and proportionate, striking a proper balance between the rights of minors and those of potential defendants, whereas that in Gibraltar is not, though Mr. Azopardi does not contend that anything less than the English provisions offend the Constitution.

16 This being so, it is necessary to set out in outline the relevant provisions of the two jurisdictions. At common law there was no limitation in respect of the actions founded on simple contract and tort. In 1623, the statute of James I introduced a limitation period of six years for such actions; but in the case of persons under a disability the period was extended to six years after cessation of disability and in the case of minors this was from the date of majority at 21. That remained the position in England until the Public Authorities Protection Act 1893, which provided that all actions against public authorities had to be brought within six months of the accrual of the cause of action. In such cases, there was no provision safeguarding the position of persons under a disability. This drastic position was changed by the Limitation Act 1939. The period for suing public authorities was extended to a year. In the case of persons under a disability, the period was six years from the accrual of the cause of

action or one year after the disability ceased. But that did not apply where the person under a disability was in the custody of a parent when the cause of action accrued. The Law Reform (Limitation of Actions) Act 1954 substituted a period of three years for six years in the case of actions for personal injuries based on the negligence, nuisance or breach of duty of the defendant. It also extended the protection hitherto extended only to public authorities to all defendants. In the case of those under a disability, for such actions the period was to be three years from the cessation from disability; but again that did not apply where the person under a disability was in the custody of a parent. This Act also introduced for the first time provisions for the extension of time in cases where certain material facts, notably those in relation to the nature and extent of the injury, were not known at the date of the accrual of the cause of action. This change was prompted by the case of *Cartledge* v. *E. Jopling & Sons Ltd.* (4) where plaintiffs were unaware, until a lapse of many years after their exposure to noxious dust, that it had caused them injury.

17 In *Hewer* v. *Bryant* (7), Lord Denning, M.R. criticized these provisions in relation to minors which could lead to unfairness. After describing the changes effected by the 1939 and the 1954 Acts to the position as it had stood since 1623, he said ([1970] 1 Q.B. at 368):

> "Parliament thus showed itself more solicitous for defendants and their insurers than for infants. It still left an infant without any right to bring an action for *himself*. It put *no one* under any responsibility to bring an action for him. Yet it barred him from any claim unless he proved that at the time of the accident he was not 'in the custody of a parent.' I suppose that Parliament thought that every parent who had the custody of a child ought to bring an action for him: and if he did not do so, the child must suffer. So be it. But I wish that Parliament had told us what it meant by the words 'in the custody of a parent.' They have aroused acute controversy. One school of though says that 'custody' is a legal concept, and that a son remains in the custody of his father until he is 21. The other school of thought says that 'custody' is a factual concept, and that a son is only in the custody of his father when he is, in fact, in his father's care and control."

18 In 1975, Parliament in England again altered the law in two material respects. It repealed the provision relating to minors in custody of a parent, so that in all cases minors had three years from the date they attained 21, now 18. Secondly, a general discretion to extend the time in the interest of justice was introduced, the court being required to balance the hardship to each party.

19 The law in Gibraltar is different. In some respects it has followed the English legislation. In others it has not. It was not until 1960 that the Act

of 1623 was altered. In that year, the Limitation Ordinance 1960 brought the law into line with that enacted in the 1954 English statute, save that it did not incorporate the provisions to extend time when certain material facts were outside the knowledge of the claimant. The Ordinance was subsequently amended on three occasions: in 1965, when the provisions were added for extending the period when material facts were outside the knowledge of the claimant; in 1973, when the provisions were extended to fatal cases; and finally in 1983, when an amendment was made which is immaterial for the present purposes. But the Gibraltar legislature did not abolish the provision in s.28(2)(b), nor provide a general discretion to extend the time in the interests of justice, weighing the prejudice to the claimant against the prejudice to the defendant. And in these two important respects it did not follow the English practice.

20 Mr. Azopardi's principle submission is that s.28(2)(b) is inconsistent with the appellant's right under s.8(8) of the Constitution which provides, so far as is material:

> ". . . [W]here proceedings for such a determination [as to the existence or extent of any civil right or obligation] are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

This section is akin to art. 6 of the European Convention on Human Rights.

21 It is well established that the European Court of Human Rights recognizes that the enactment of limitation periods represents pursuit of a legitimate aim. The court has recognized the legitimacy of other restrictions on the right of access to a court that have been drawn to its attention from time to time. The governing test, set out in the judgment of the ECHR in *Ashingdane* v. *United Kingdom* (2) and repeated in other cases, is that such restrictions must not impair the essence of the right of access. They must have a legitimate aim and the means used must be reasonably proportionate to the aim sought to be achieved (see *per* Brooke, L.J. in *Cachia* v. *Faluyi* (3) ([2001] 1 W.L.R. 1966, at para. [18])).

22 In *Stubbings* v. *United Kingdom* (12), the ECHR pointed out that contracting states enjoy a certain margin of appreciation, though the final decision as to the observance of the convention's requirements rests with the court. The court said (23 E.H.R.R. 213, at para. 49):

> "It is noteworthy that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, to protect potential defendants from stale claims which might be difficult to counter, and to prevent the

injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time."

23 The Chief Justice correctly summarized the law as set out in *Stubbings* but Mr. Azopardi criticizes him for not distinguishing between the facts of that case and the present. Had he done so, it is argued, he would have concluded that s.28(2)(b) was a disproportionate restriction. I cannot accept this submission. The facts of the cases are quite different and it is not a comparison of like with like. *Stubbings's case* was concerned with a deliberate sexual assault as opposed to an action based on alleged negligence, nuisance or breach of duty, to which the extension provisions relating to the date of knowledge of the extent of the injury did not apply. The limitation period was therefore six years from the age of majority. To argue, as Mr. Azopardi sought to do, that the ECHR would have approved a period of three years after majority, but not the limitation imposed by s.28(2)(b) because it regarded the six-year period after majority as "not unduly short" is untenable.

24 Mr. Azopardi submits that the court should apply s.8(8) to the Constitution in a liberal and full way and should be reticent in applying it restrictively. He cites the case of *Minister of Home Affairs* v. *Fisher* (9) ([1979] A.C. 319); *R.* v. *Lord Chancellor, ex p. Witham* (10); and *R. (Daly)* v. *Home Secy.* (11) to support this proposition. But I do not see how these authorities can affect the statement of the law as laid down in the cases of *Ashingdane* (2) and *Stubbings* (12). There is no ambiguity in s.28(2)(b) to which a liberal construction can be applied so as to assist the appellant.

25 It is said by Mr. Azopardi that the rule gives rise to unfairness, discriminates between groups of children and gives rise to lack of proportionality. One can compare the position of a child who is in the custody of a relation other than the parent, who enjoys a longer period. Or children who are in custody at the time of the accident but are thereafter orphaned, perhaps within a very short time, or those whose parent's own action caused or contributed to the injury and he is therefore reluctant or refuses to act as litigation friend. But it is in the nature of the law of limitation that there may be hard cases which fall on the wrong side of a line which is set to achieve certainty and finality.

26 The Chief Justice himself in his judgment drew attention to the unfairness that might arise if the custodial parent caused or contributed to the injuries. But that is not a reason to sweep aside s.28(2)(b). If such a case came before the court, it may be that effect could be given to the constitutional right by drafting a proviso to s.28(2)(b). But in the present case there was nothing in the sub-section that unfairly denied the

appellant his right of access. His parents sought to exercise it on his behalf. It was the dilatory conduct of the solicitors that deprived him of the right.

27 Mr. Azopardi further submits that there was no evidence of pressing social need for the rule in s.28(2)(b), and that accordingly the court should not be satisfied that there was a legitimate aim for it. I do not myself see how evidence in the form of oral or written testimony could be adduced on such a matter. Rather, it seems to me that the court must examine the statutory provisions and deduce its purpose. In this case the rationale of the rule is to be found in the speech of Lord Pearson in *Todd* v. *Davison* (13) ([1972] A.C. at 411):

> "Nevertheless, I think one can infer what was the policy underlying the provision. It can be stated in three stages.
>
> (1) Stale claims can produce serious injustice to defendants, especially in accident cases, where most of the evidence usually is (or at any rate usually was under the procedure in force in 1939 and 1954) oral evidence given by witnesses who were at the scene of the accident. After five or 12 or 20 years the plaintiff himself or some relative or friend may still be able to give a reasonable account of the accident, but any persons who might have been witnesses for the defence are likely to be untraceable or if traced to have little or no recollection of the facts of the accident.
>
> (2) It would, however, be in general unfair to persons who are under disability, and so unable to sue on their own behalf, if time ran against them while they were under disability.
>
> (3) But if time did not run against any person under disability so long as the disability remained, there could be too many stale claims and actions brought many years after the event. Some provision was required to reduce the number of such stale claims and actions, and that was evidently the object of the provision which is under consideration in this appeal. It must have been assumed that, in the case of an infant or person of unsound mind in the custody of a parent or quasi-parent at the time when the right of action accrued (i.e. in almost every case the time when the accident happened), the parent or quasi-parent would know about the accident and would be likely to look after the interests of the infant or person of unsound mind by taking legal advice and bringing an action as next friend if so advised."

28 Mr. Azopardi submits that this was not a stale claim because the defendants were notified of it within a short time. Even assuming that this is so and that one can equate Sights Management Ltd. and Gibraltar Tourism Agency Ltd. with the respondent, and I am by no means satisfied

that one can, the point is irrelevant. The period of limitation does not depend on notification of a claim; the critical matter is that the proceedings are issued within a time limit with or without prior notification. Early notification may well be a relevant consideration in balancing the hardship of the parties where the court is asked to extend the time in its discretion (see *Donovan* v. *Gwentoys Ltd.* (6)). But this is not in point here. Moreover, I think the Chief Justice was perfectly entitled to point out that the claim was so old that there was a strong possibility that after such a lapse of time it would not be possible to have a fair trial. This was clearly a case where, if the final effect of the injuries could not be determined within three years, there could and should have been a trial of the issue of liability first.

29 Finally, Mr. Azopardi relied on the absence of a general discretion to extend time in the interest of justice, such as it is contained in s.33 of the English Limitation Act 1980 ("In acting under this section the court shall have regard to all the circumstances of the case . . ."), as showing that the effect of s.28(2)(b) of the Ordinance was disproportionate. That Parliament has struck the balance more in favour of minors and indeed claimants generally, by introducing this section, cannot be denied. But it does not follow that failure to do so in Gibraltar shows that the law is unreasonably disproportionate. In my judgment, such a decision lies within the proper margin of appreciation of the Gibraltar legislature. The fact that amendments were made to the 1960 Ordinance after the law had been altered in England, suggests that the legislature in Gibraltar has not seen fit to adopt those alterations. Section 33 of the Limitation Act 1980 gives rise to much uncertainty and frequent litigation, since it is very difficult, except in obvious cases, to predict how the court will exercise its discretion. It is a perfectly legitimate aim to try and avoid these consequences.

30 For these reasons, I would uphold the decision of the Chief Justice and dismiss the appeal.

31 **STAUGHTON, P.** and **KENNEDY, J.A.** concurred.

Appeal dismissed.