[2007–09 Gib LR 235]

CRIPPS and EIGHT OTHERS v. OEM ROSIA DEVELOPMENTS LIMITED and GRP INVESTMENTS LIMITED

SUPREME COURT (Pitto, Ag. J.): July 4th, 2008

Administrative Law—Crown—divisibility of Crown—Crown rights divisible—Governor may, as required by law, act in distinct capacities as representative of Crown in right of Gibraltar Government and as representative of Crown in right of UK Government

Land Law—easements—creation—if Governor grants easements to tenants of Government housing estate as representative of Crown in right of Gibraltar Government (under 1969 Constitution, s.75), inoperative outside estate boundary unless adjacent servient tenement owned by Crown in right of Gibraltar Government, not by different entity, e.g. Crown in right of UK Government

The claimants applied for a prohibitory injunction to restrain the defendants from carrying out building works on land adjacent to their properties, which would allegedly interfere with their right to light.

The claimants were the lessees of flats in the Rosia Dale Estate ("the estate"), owned by the Government of Gibraltar and separated by a road from the development known as "Nelson's View" which was under construction by the defendants. Nelson's View was being built on land previously owned by the Royal Navy, which was transferred to the Ministry of Defence before being transferred to the Government of Gibraltar in October 2004. Seven leases had been granted between 1988 and April 2004 and a further two were granted in 2005. With the exception of the fourth claimant's lease, the estate was defined in all the leases as being bound by the former naval land on the south and east sides, Rosia

Steps to the north and a road to the west. The lease of Flat 45 provided that the estate was to the south of Rosia Steps and comprised dwelling-houses. The claimants sought an injunction restraining the defendants from developing Nelson's View as it would diminish their "right of light to all existing windows" provided by cl. 4 of Schedule 1 to the lease. The court decided the case based on the fourth claimant's lease but it was understood that its ruling would apply to all of the claimants.

The claimants submitted that an injunction should be granted because, *inter alia*, (a) the terms of cl. 4 of Schedule 1 to the leases were unambiguous in that the right to light extended beyond the estate to the former naval land; (b) the right to light granted by cl. 4 was an easement granted in favour of the estate (the dominant tenement) which bound the former naval land (the servient tenement) because when all of the leases were signed, both plots of land had been in the common ownership of the Crown which was to be treated as an indivisible entity; (c) it followed that the transfer of the former naval land by the Governor in 2004 was valid since the Governor had, under the 1969 Constitution, s.75, the power to transfer and grant rights over all Crown lands and this meant that the servient tenement was still within the contemplation of, and bound by, the rights created in favour of the dominant tenement; (d) no specific identification of the land over which the rights were granted in the leases was necessary because the right granted in cl. 4 had a wide scope and was only restricted by operation of law; and (e) the lessees of the flats held the common areas of the estate jointly—no development could take place if one of them opposed it and their rights in respect of common areas were, by default, protected.

The defendants submitted that their development of Nelson's View could not have any legal implications for the claimants' right to light because, *inter alia*, (a) cl. 4 could not be read as granting rights extending beyond the estate as there was no reference in the leases to any land other than the estate; (b) when the pre-October 2004 leases were granted, the two plots of land were owned separately by the Crown in different capacities (the Crown's rights being divisible)—the former naval land was owned by the (UK) Ministry of Defence while the estate was owned by the Government of Gibraltar; (c) it followed that before the transfer of the former naval land, the Governor could not grant rights over the Crown-owned former naval land as he had acted in his capacity as representative of the Government of Gibraltar and not of the Crown and therefore the Government of Gibraltar had no interest in the former naval land to enable the Governor to grant rights over it; and (d) after the transfer of the former naval land, no intention to grant any rights over the former naval land could be inferred from the leases as there was nothing to suggest a change of intention by the Crown in right of the Government of Gibraltar between the pre- and post-October 2004 leases.

Held, dismissing the appeal:

(1) The right to light guaranteed to the claimants in cl. 4 of Schedule 1

to their leases did not extend to the Nelson's View development because of its location—the scope of cl. 4 was limited to the estate itself and did not extend to any adjacent land. Since the leases made no reference to the former naval land, there was no intention for the right to light provided to bind this land and cl. 4 did not therefore cover any loss of light caused by the defendants' development (paras. 10–12; para. 26).

(2) The Crown had to be treated as divisible in this case and the Governor therefore acted in two distinct capacities—one as the representative of the Crown in right of the Government of Gibraltar and the other as the representative of the Crown in right of the Government of the United Kingdom. As grantor of the rights to the tenants of the estate, the Governor needed to have an interest in the former naval land in order to grant any additional rights to the tenants which would affect it, which he did not as he signed the leases in his capacity (under s.75 of the 1969 Constitution) as the representative of the Crown in the right of the Government of Gibraltar. Before the transfer, he could only grant rights affecting the former naval land in his capacity as the representative of the Crown in right of the Government of the United Kingdom as the land was not owned by the Government of Gibraltar but by the (UK) Ministry of Defence. After the transfer of the land, despite the two plots of land being in the common ownership of the Government of Gibraltar, there could be no evidence of a change of intention to grant extended rights to the tenants in the post-October 2004 leases when cl. 4 was worded identically to the pre-October 2004 leases (paras. 23–26).

Cases cited:

(1) *Booth* v. *Alcock* (1873), 8 L.R. Ch. App. 663, referred to.

(2) *R. (Indian Assn. of Alberta)* v. *Foreign & Commonwealth Secy.*, [1982] Q.B. 892; [1982] 2 W.L.R. 641; [1982] 2 All E.R. 118, referred to.

(3) *R. (Quark Fishing Ltd.)* v. *Foreign Affairs Secy.*, [2006] 1 A.C. 529; [2005] 3 W.L.R. 837; [2006] 3 All E.R. 111; [2005] H.R.L.R. 41; [2006] UKHRR. 535; [2005] UKHL 57, *dicta* of Lord Bingham applied.

(4) *St. Edmundsbury & Ipswich Diocesan Fin. Bd.* v. *Clark (No. 2)*, [1975] 1 W.L.R. 468; [1975] 1 All E.R. 772; (1975), 29 P. & C.R. 336, *dicta* of Pennycuick, J., considered.

C.A. Gomez for the claimants;
Ms. G. Guzman for the defendants.

1 **PITTO, Ag. J.:** This is an application by the claimants for an injunction restraining the defendants from developing a project known as "Nelson's View" which would diminish, to an actionable extent, the right to light to all windows, granted in their leases. They further seek a demolition order if necessary.

2 The claimants are the leasehold owners of Flat 40 and Flats 43–50

("the flats") located in the Rosia Dale Estate ("the estate"). The estate is owned by the Government of Gibraltar. The estate is separated by a road from the development known as Nelson's View under construction on land formerly owned by the Ministry of Defence ("the former naval land"). Seven leases were granted between 1988 and April 2004 ("the pre-October 2004 leases"). A further two were granted in 2005 ("the post-October 2004" leases").

3 Schedule 1 in all the leases is headed: "Easements, Rights and Privileges Hereby Demised." Clause 4 of Schedule 1 provides "a right of light to all existing windows." With the exception of the lease pertaining to Flat 45, the estate is defined in all the leases as being bounded by Ministry of Defence land on the south and east sides, Rosia Steps to the north and a road to the west. The lease of Flat 45 provides that the estate is to the south of Rosia Steps and comprises dwellinghouses. Until its transfer to the Government of Gibraltar on October 4th, 2004, the former naval land was owned/occupied by the Royal Navy.

4 Mr. Gomez for the claimants submits that (a) the protection afforded to the claimants by cl. 4, in unambiguous language, extends beyond the estate and over the former naval land; (b) that the clause is unambiguous in its terms and should be given its ordinary, natural meaning; (c) that the estate and the former naval land have, at all material times, belonged to the Crown which is one and indivisible; (d) the Governor's powers under s.75 of the 1969 Constitution to transfer and grant rights over all Crown lands is unrestricted, therefore the rights demised under cl. 4 extend over the former naval land; and (e) that neither the Gibraltar nor the United Kingdom Governments own the land they occupy or use, as ownership is vested in the Crown.

5 Ms. Guzman for the defendants submits that (a) cl. 4 cannot be read as granting rights extending beyond the estate; (b) nothing in the leases or the plans annexed thereto can support such an interpretation; (c) the rights granted are limited to the common areas in the estate; (d) that the Crown is divisible; (e) that when the pre-October 2004 leases were granted, the two adjoining plots were owned by the Crown in distinct capacities—the former naval land owned by the Ministry of Defence, the estate owned by the Crown in right of the Government of Gibraltar; (f) that when the Governor granted the claimants' leases he could not, in law, grant an easement over the former naval land when signing on behalf of the Government of Gibraltar; (g) that no intention to grant any rights over the former naval land can be inferred and, further, there is nothing to suggest a change of intention by the Crown in right of the Government of Gibraltar between the pre-October 2004 leases and those signed after that date when it owned/occupied both plots; (h) all the evidence suggests the Government and the Ministry of Defence acted as though there was no easement restricting the development of the naval land; (i) that the only

reference to an easement affecting the former naval land is to a Mr. Harrison's right to build a garage using a retaining wall on the land; (j) that there is no evidence supporting the existence of an easement and such evidence as there is supports the argument that the easement did not extend over the former naval land; and (k) that Governments do own land and cites the deed of surrender by the Ministry of Defence to the Government of Gibraltar which the Ministry of Defence transferred a site on Cumberland Road, which was surplus to requirements.

6 Only the fourth claimant's case is to be determined. This is a post-October lease and in determining this claim, all issues relating to all the claimants will be before the court.

7 The first issue to be decided is: Does the fourth claimant's lease contain a right to light extending over the former naval land? For an easement to exist there must be a dominant and a servient tenement. The grantor must have an interest in the servient tenement, at the time when he makes the grant, at least as great as the right granted (see *Booth* v. *Alcock* (1)).

8 The ambit of the clause is, with respect to Mr. Gomez, far from clear and it is the surrounding circumstances that have to be taken into consideration in construing any but the clearest words in an instrument. In *St. Edmundsbury & Ipswich Diocesan Fin. Bd.* v. *Clark (No. 2)* (4), Pennycuick, J.A. stated ([1975] 1 W.L.R. at 477) that—

> "[i]t is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression upon such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction. Of course, one may have words so unambiguous that no surrounding circumstances could affect their construction."

9 The material words are "a right to light to all existing windows." Clause 4 is identically worded in all the leases. In cl. 5, the lessor grants the lessees "the benefit of all the covenants and the restrictions contained in the leases granted or to be granted in respect of other premises comprised in the estate." Schedule 2, which is likewise identical in all the leases, reserves unto the lessor and other lessees "the easements and rights over and along through and in respect of the demised premises equivalent to those specified in Schedule 1." There is thus evidence within the leases themselves that the rights and obligations granted in the leases are referable to the estate itself.

10 There is no reference in the leases or in the plans annexed thereto to the former naval land. The plans show the area of the estate. Shown on the plans and marked in yellow is a right of way granted to the occupier of

Rosia Cold Stores. There is no evidence that the Ministry of Defence granted a right to light or was aware that any such right had been granted. The only evidence of the existence of any easement affecting the former naval land produced in court was in the transfer letter dated October 4th, 2004 in which the Ministry of Defence transferred the former naval land to the Government of Gibraltar. In the section on encumbrances, the only interest listed by the Ministry of Defence as affecting the "transferred area" and to which the transfer "will be subject" is to Mr. Harrison's right to build a garage using part of the retaining wall in the former naval land. The Ministry of Defence also reserved their rights to services that pass through or over the transferred land.

11 The claimants' statement of case does not identify the servient tenement. Mr. Gomez contends no identification is necessary because the right is at large, its scope being restricted by operation of law. Ms. Guzman submits the clause protects leaseholders from any (actionable) diminution of their right to light as a result of further development or alterations in the common areas of the estate. Mr. Gomez argues no such protection is required as the leaseholders hold the common areas jointly, no development could take place if one of the leaseholders opposed it. Mr. Falero, director of Land Property Services (the Government's advisers and agents in property matters) stated in answer to Mr. Gomez that management companies administering housing estates can act by majority decision.

12 Schedule 1 relates to matters within the estate. There is nothing in the wording of cl. 4 or in the leases or the surrounding circumstances to indicate that the protection granted extends beyond the estate. The court was referred to numerous similar provisions in other leases, but what draughtsmen have done on other occasions does not affect the wording and effect of the clause in issue. None of the clauses referred to by Mr. Gomez has been tested in court.

13 Ms. Guzman's argument that cl. 4 is limited in its effect to the estate, is reinforced by the fact that until October 4th, 2004 the former naval land and the estate were respectively under the ownership of the Ministry of Defence and the Government of Gibraltar. To grant a right over land, the grantor must own the land to be encumbered, or have an interest in it equivalent to the right granted. The defendants rely on the separate ownership as evidence that the clause cannot be read as encumbering the former naval land. That applies to the lease granted before the transfer of the land to the Government.

14 The divisibility of the Crown is only relevant if the former naval land was owned by the Ministry of Defence or ultimately by the Crown in right of the Government of the United Kingdom when the pre-October leases

were granted. Mr. Gomez contends that only the Crown owns land and Governments and Government departments merely use Crown land.

15 Ms. Guzman submits that the Ministry of Defence owns land in Gibraltar. As evidence of her assertion she referred the court to the deed of surrender of the Cumberland site. This was a large number of flats which were surplus to requirements. The heading of the deed is instructive and states that it is made—

> "between the Secretary of State for Defence of the United Kingdom . . . being the successor in title to the Lords Commissioners of the Admiralty . . . of the one part and His Excellency The Honourable Sir Francis Richards, K.C.M.G., C.V.O., Governor of the City of Gibraltar for and on behalf Her Majesty The Queen in right of the Crown in right of the Government of Gibraltar."

16 Affixed to the deed is the corporate seal of the Secretary of State for Defence and the public seal of the City of Gibraltar. The licence agreement granting Mr. Harrison the right to build against a wall is headed: "Between the Secretary of State for Defence . . . for and on behalf of the Her Majesty . . . and Mr. Steven Harrison."

17 The Governor does not, as demonstrated by the deeds of surrender, necessarily have a role in the disposal of Ministry of Defence land. The Secretary of State for Defence can dispose of the Defence Estate in Gibraltar as such land ultimately belongs to the Crown in right of its Government in the United Kingdom. The distinction is thus made between the Secretary of State and the Crown in right of the Government of the United Kingdom, and the Governor who ordinarily acts on behalf of the Crown in right of its Government in Gibraltar. This transaction and the reservations entered denote ownership. Only an owner can surrender property, grant a licence and retain rights over property to be transferred to another owner. Mr. Gomez argues that no Deed of Surrender has been brought to court concerning the former naval land because none was necessary as the Crown retained ownership throughout. Mr. Falero said in evidence that for decades the practice has been to transfer Ministry of Defence land to the Government of Gibraltar by way of land agreements.

18 Mr. Gomez relies on s.75 of the 1969 Constitution (in force when the pre-October leases were granted) in support of his submission that because both plots belonged to the Crown, the Governor was empowered to grant rights over land forming part of the Defence Estate. Section 75 provides:

> "Subject to the provisions of any law for the time being in force in Gibraltar, the Governor, acting after consultation with the Gibraltar Council, may in Her Majesty's name and on Her Majesty's behalf, make grants and dispositions of any lands or other immovable

property in Gibraltar that may lawfully be granted or disposed of by Her Majesty."

19 Mr. Gomez submits that the lack of any limitation on the Governor's power in the section means that the grant in cl. 4 extends over the former naval land as it was made by the Governor. This argument cannot be a correct interpretation of the law. It ignores the divisibility of the Crown, the effect of the 1969 Constitution and the nature of the office of Governor. Lord Bingham in *R. (Quark Fishing Ltd.)* v. *Foreign Affairs Secy.* (3) stated ([2006] 1 A.C. 529, at para. 9):

". . . [I]t is now clear, whatever may once have been thought, that the Crown is not one and indivisible: *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. Indian Association of Alberta* [1982] Q.B. at 911, 916–917, 920–921, 928. The Queen is as much the Queen of New South Wales (*In re Bateman's Trust* (1873) L.R. 15 Eq. at 361) and Mauritius (*R.* v. *Secretary of State for the Home Department, ex p. Bhurosah* [1968] 1 Q.B. at 284) and other territories acknowledging her as head of state as she is of England and Wales, Scotland, Northern Ireland or the United Kingdom. Thus the Secretary of State as a servant of the Crown exercises executive power on behalf of the Crown in whatever is, for purposes of that exercise of executive power, the relevant capacity of the Crown."

20 The divisibility of the Crown is based on the existence of "an established government of the Crown in the overseas territory in question" (see *R. (Indian Assn. of Alberta)* v. *Foreign & Commonwealth Secy.* (2) [1982] Q.B. at 927). It is not even dependent on the degree of self-government enjoyed by the territory (although this would be a relevant factor in determining the capacity in which the Crown acts in a given case). South Georgia has a less advanced form of self-government than Gibraltar but the principle of the divisibility of the Crown applied. That was so, even though the issue in *Quark Fishing* concerned a decision taken by an appointed official acting on instructions from London. Once a territory has an established Government, it assumes responsibility for its actions, liabilities and revenues, to the greatest extent possible consistent with its sub-sovereign status.

21 This division is reflected in the Governor's position under the 1969 Constitution. Section 19 provides that "the Governor shall have such functions as may be prescribed and such other functions as Her Majesty may be pleased to assign to him . . ."

22 Sections 45–55 deals with the Governor's role within the Executive. With regard to defined domestic matters he must act on the advice of the Council of Ministers or, as s.50 states—

". . . a Minister acting on the general authority of the Council in the

formulation of policy relating to any defined domestic matter and in the exercise of any power conferred upon him by this Constitution or any other law . . ."

However, the defence was not a defined domestic matter (and remains outside the competence of the Government of Gibraltar under the 2006 Constitution). In the dispatch to the Governor which accompanied the Constitution, the then Foreign Secretary Michael Stewart stated that the Governor retains direct responsibility for, *inter alia*, "matters affecting the armed forces and the United Kingdom civilian departments in Gibraltar, including their land and property."

23 There is no evidence of the involvement of the Ministry of Defence in granting the easement. The only evidence is that the Ministry of Defence was unaware of the grant. The Governor's position thus extends beyond those occasions when he acts on behalf of the Crown in right of its Government of Gibraltar. He has a distinct role as representative of Her Majesty as Queen of the United Kingdom. This has to be so. The Governor represents the Crown in the fullness of its sovereignty and not solely with regard to those of its functions, the exercise of which is regulated by the Gibraltar Constitution. The distinct roles have important consequences for the present case. Thus, when acting with regard to matters of defence (and other non-defined domestic matters), and the needs of the defence estate must be an aspect of defence, the Governor does not act in right of the Government of Gibraltar (which has no competence in matters of defence). As Lord Bingham said in his speech in *Quark Fishing* (3) ([2006] 2 A.C. 529, at para. 9), "a servant of the Crown exercises executive power on behalf of the Crown in whatever is, for the purposes of that exercise of executive power, the relevant capacity of the Crown."

24 The central issue in this case is in what capacity the Governor was acting when he signed the leases? The documents themselves provide the answer. The Governor used the public seal of Gibraltar. The address for service was that of the Administrative Secretary at No. 6 Convent Place. He was clearly acting for Her Majesty in right of the Government of Gibraltar.

25 When the Governor disposes of land under s.75 he does not do so freely but is acting within the law. The Governor has no right to dispose of Crown lands held by the Ministry of Defence when acting on behalf of the Crown in right of its Government of Gibraltar. He has no more right to grant rights over Ministry of Defence land at the behest of the Government of Gibraltar than he would in reverse.

26 Does the transfer of the land in October 2004 alter the position with regard to the fourth claimant's lease? The answer is No. The clause, of itself, does not encumber the former naval land. Secondly, it could not do so in the pre-October leases because the Government did not own the

former naval land and could not grant rights over land in which it did not possess any interest. Taking the surrounding circumstances into consideration, there was no intent to encumber the former naval land in the earlier leases and no evidence that there was any change of intention when the fourth claimant's identically worded lease was signed.

27 For the reasons herein, I hold that the right to light in cl. 4 of the fourth claimant's lease does not extend over the land on which Nelson's View is under construction.

Application dismissed.