JOBNAME: Gibraltar Law Report PAGE: 259 SESS: 213 OUTPUT: Mon Feb 14 11:22:33 2011

[2007–09 Gib LR 259]

CRIPPS v. OEM ROSIA DEVELOPMENTS LIMITED

COURT OF APPEAL (Stuart-Smith, P., Aldous and Otton, JJ.A.): September 20th, 2008

Land Law—easements—creation—for Governor to create easement in favour of tenants of Government housing as representative of Crown in right of Gibraltar Government (under 1969 Constitution, s.75), Gibraltar Government must have interest in all lands affected—ownership by different entity, e.g. Crown in right of UK Government, insufficient

The appellant applied to the Supreme Court for a prohibitory injunction to restrain the defendant from carrying out building works on land adjacent to his property, which would allegedly interfere with his right to light.

The appellant was one of nine 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 defendant. 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. The estate was defined in all but the appellant's lease 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 appellant's lease provided that the estate was to the south of Rosia Steps and comprised dwellinghouses. The appellant sought an injunction restraining the defendant from developing Nelson's View as it would diminish his "right of light to all existing windows" provided by cl. 4 of Schedule 1 to the lease. The Supreme Court (Pitto, Ag. J.) dismissed the application. The proceedings in the Supreme Court are reported at 2007–09 Gib LR 235.

On appeal, the appellant submitted, *inter alia*, that (a) the judge erred in law in finding that the right to light granted in cl. 4 did not apply to the former naval land; (b) the terms of cl. 4 created an easement of light for the benefit of the estate (the dominant tenement) which bound the former naval land (the servient tenement) as both plots of land were in the common ownership of the Crown in right of the Government of Gibraltar; (c) the terms of cl. 4, when properly construed, applied to the former naval land, supported by the 1950 Constitution, s.75 which granted the Governor powers over "any lands" in Gibraltar which therefore extended his

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 1 / Date: 21/9

JOBNAME: Gibraltar Law Report PAGE: 260 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

rights over the former naval land; and (d) any intention to limit the scope of the right granted in cl. 4 should have been clearly identified and in the event of ambiguous wording, the *contra proferentem* rule should apply in his favour.

In reply, the defendant submitted, *inter alia*, that (a) the judge had been correct in construing cl. 4 that it could not be read as granting rights extending beyond the estate and that it did not apply to the former naval land; (b) considering the circumstances, mutual rights were intended to be granted to all tenants of the estate and the wording of the appellant's lease did not purport to extend the scope of the rights granted to him; (c) cl. 4 could not have applied to the former naval land as the Governor did not have power to grant rights over it in the pre-October 2004 leases as it was not owned by the Government of Gibraltar; and (d) following the transfer of the former naval land to the Government of Gibraltar in October 2004, there was no evidence to indicate a change of intention to grant any further rights to the appellant than those granted to the pre-October 2004 tenants as cl. 4 was worded identically and should be given the same meaning in both leases.

Held, dismissing the appeal:

(1) The Supreme Court decision would be upheld since the right to light provided by cl. 4 of Schedule 1 to the appellant's lease did not extend over the former naval land. When signing the pre-October 2004 leases, the Governor had no interest in the land as it was not owned by the Gibraltar Government but by the (UK) Ministry of Defence. The Governor did not possess general sovereign power but acted upon powers delegated to him by the Crown in separate capacities in Gibraltar and the United Kingdom. When he purported to grant rights to the tenants of the estate, he acted in his capacity in right of the Government of Gibraltar and he could not be given control over land vested in the Secretary of State. It would not have been intended that the former naval land would be the servient tenement of the easement because the only way an easement could have been granted over it, before 2004, was by the Secretary of State (paras. 24–26; paras. 29–30).

(2) There was no indication in the original drafting of cl. 4 that the rights granted should encumber the former naval land. After the transfer in 2004, the new leases were worded identically and without any evidence to support a change of intention. Clause 4 could not be read as granting the appellant, as a post-October 2004 tenant, extended rights over the former naval land since there had been a clear intention to grant mutual rights to all the tenants of the estate. In construing the terms of cl. 4, the opposite of the *contra proferentem* rule applied where the rights were granted by the Crown and cl. 4 should therefore be construed in favour of the party which did not require its inclusion in the agreement which, in this case, was the defendant (paras. 34–35).

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 2 / Date: 8/9

JOBNAME: Gibraltar Law Report PAGE: 261 SESS: 213 OUTPUT: Mon Feb 14 11:22:33 2011

Cases cited:

(1) *Booth* v. *Alcock* (1873), 8 L.R. Ch. App. 663, referred to.
(2) *R. (Quark Fishing Ltd.)* v. *Ministry of Foreign Affairs*, [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, referred to.
(3) *Rangeley* v. *Midland Ry. Co.* (1868), 3 L.R. Ch. App. 306, referred to.
(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, referred to.
(5) *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, referred to.

Legislation construed:

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.75: The relevant terms of this section are set out at para. 22.

C.A. Gomez for the appellant;
Ms. G. Guzman for the respondent.

1 **OTTON, J.A:** This is an appeal from a judgment of Pitto, Ag. J. given on July 4th, 2008 whereby he declined to grant an easement of light to the claimants and in particular the fourth named appellant, Louis Fortunato over former naval land in the City of Gibraltar.

Background

2 The claimants are the leasehold owners of Flats 43–50 located in the Rosia Dale Estate ("the estate"). The estate is owned by the Government of Gibraltar. The estate is separated from the development under construction by a road ("Nelson's View"). This land forming the estate and the road was formerly owned by the Royal Navy (the "former naval land"). Between 1988 and April 2004 seven leases were granted ("the pre-October 2004 leases"). Two further leases were granted in 2005 ("the pre-October 2004 leases").

3 The lease to the fourth appellant (Louis Fortunato) was granted on March 22nd, 2005. On October 4th, 2004, the former naval land was transferred by the Ministry of Defence to the Government of Gibraltar. Prior to the transfer, the Chief Minister publicly stated that—

> ". . . [S]ome development sites would be made available to private developers on condition that they build low cost, affordable housing for first time buyers. This will result in still more such houses being built."

4 On October 12th, the Government and the respondent announced their intention to build residential properties on the Rosia Tanks site, to be known as the "Nelson's View" development.

5 On November 17th, 2005, five claimants on behalf of the appellant

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 3 / Date: 21/9

JOBNAME: Gibraltar Law Report PAGE: 262 SESS: 213 OUTPUT: Mon Feb 14 11:22:33 2011

wrote to the Town Planning Department informing them that they had received expert advice that the lessees had a very strong case for an injunction. There was some delay and in December 2006, the claimants then commenced proceedings. They asserted, in essence, that the development infringed the express right of light granted to them by virtue of the leases.

6 Two features require emphasis and elaboration: (i) the properties in question are on the west side of the estate all of which have west facing windows and which look across the road on to the development site; and (ii) each of the leases contained an identically worded Schedule 1 entitled "Easements, rights and privileges hereby demised."

7 Clause 4 purported to grant "a right of light to all existing windows" and cl. 5 which grants the lease states that "the benefit of the covenants and restrictions contained in the lease granted or to be granted in respect of other premises comprised in the estate."

8 Central to this appeal is the assertion by the fourth appellant that cl. 4, when properly construed, gives him an easement of light over the former naval land. In essence, it is the fourth appellant's case that the protection afforded to the claimants by cl. 4 is unambiguous in its terms, extends beyond the estate and over the former naval land.

9 The matter came before Pitto, Ag. J. in January 2008. The reserved judgment was handed down on July 4th, 2008. The judge held that the ambit of cl. 4 of the first Schedule was unclear and all the surrounding circumstances could and should be taken into account in construing the clause. The protection in cl. 4 extended only to the estate and there was nothing in cl. 4 or the leases or the surrounding circumstances to indicate that it extended behind this or to the former naval land.

10 Before 2004, the estate and the former naval land were in separate ownership of the Government of Gibraltar and the Ministry of Defence. The learned judge acceded to the respondent's argument that the Crown was divisible. Section 75 of the 1969 Constitution did not grant the Governor the right to dispose of the land held by the Secretary of State. In executing the lease, the Governor was acting for the Crown in right of the Government of Gibraltar.

11 It followed that in respect of the pre-October 2004 leases there would be no grant of any easement over the former naval land. The fourth appellant's lease fell to be construed in the same way as the pre-October 2004 leases and did not involve a grant over the former naval land.

12 In the grounds of appeal, it is asserted that the learned judge erred in law in finding that the express grant of light in the fourth appellant's lease did not extend to the first respondent's adjacent land, *i.e.* Nelson's View.

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 4 / Date: 21/9

13 When the Crown granted the lease on March 22nd, 2005, the Crown owned and occupied Nelson's View. The first schedule to the lease lists the easements and privileges appurtenant thereto. Clause 4 expressly provides "a right of light to all existing windows," emphasis on "*to all existing windows*," which encompasses the fourth appellant's windows. Accordingly, the express right of light extends over all the land owned by the Crown at the date of the lease including Nelson's View.

14 Mr. Gomez for the appellant submitted that (i) the learned judge erred in law and in fact in finding that the ambit of cl. 4 was far from clear and accordingly ambiguous and then holding that the right was limited to an area within the estate; (ii) cl. 4 was only capable of construction and interpretation as creating a right of light over all the land belonging to the Crown, including Nelson's View; and (iii) if it had been the intention of the grantor to limit the ambit of the right of light to the confines of the estate this would and should have been expressly stated and in support, counsel pointed out such express provisions were expressly stated elsewhere with regard to rights and easements in the same Schedule.

15 In response, Ms. Guzman, counsel for the respondents, submitted that:

(i) the learned judge was right to conclude that the lease must be construed having regard to all the circumstances and correctly applied authority to this effect;

(ii) when all the relevant circumstances are considered the leases were intended to and did in fact create mutual rights and obligations between the lessees in respect of the estate. The leases do not purport to extend the scope of the right to light or any other easement over the former naval land; and

(iii) in the absence of any strong contrary indication the words and phrases used should be given the same meaning in each of the leases of properties on the estate. In other words, cl. 4 should bear the same meaning and effect both in the pre-October leases and the two post-October leases.

16 I am unable to accede to Mr. Gomez's contention that the learned judge should have confined himself to the strict language of cl. 4. There is clear authority that a lease must be construed having regard to all the circumstances in the reasonable contemplation of the parties at the time of the grant (see *St. Edmundsbury & Ipswich Diocesan Fin. Bd.* v. *Clark (No. 2)* (4) ([1975] 1 All E.R. at 779)).

17 There were compelling and incontrovertible circumstances. The former naval land was known to be designated as development land for public purposes in particular, low cost, affordable housing for first-time

JOBNAME: Gibraltar Law Report PAGE: 264 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

buyers. The estate was to be constructed as part of a single building scheme as a housing estate for Government rental.

18 Although the leases were granted between 1988 and 2005, they were all in identical terms. They were clearly intended to create mutual rights and obligations between the lessees themselves in respect of the estate. Nothing in Schedule 1, and in particular cl. 4, or any other part of the lease purports to extend the scope of the right to light or any other easement over the former naval land. In short, the right is neither expressed nor intended to extend over any other neighbouring, adjoining or adjacent property. This was the clear position pre-October.

19 I can find no basis for construing the two leases (and in particular cl. 4) granted to the post-October lessees so as to give these two lessees a greater right than their predecessors. It would be illogical and contrary to principle to do so.

20 The second line of argument advanced by Mr. Gomez is that even in respect of the pre-October 2004 leases, the Governor had power to grant an easement over the former naval land. At all material times, the Nelson's View site was owned by the Crown. Up until 2004, the site was in the possession, occupation and control of the Ministry of Defence. The Ministry of Defence on October 4th, 2004 transferred that possession, occupation and control to the local civilian authorities. The Governor was entitled to grant a right of light over the Nelson's View site after the transfer and he had done so by the time of the two subsequent leases. Moreover, had it been intended to restrict the Governor's powers in respect of lands in the possession of the Ministry of Defence, there would have been express provisions for this under the 1969 Constitution.

21 Counsel invoked s.75 of the previous 1950 Constitution which provided:

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

22 Counsel submitted that the use of the wide formula "any lands . . . in Gibraltar" that may lawfully be granted by Her Majesty reflects an intention that the disposal of land in Gibraltar should be dealt with in a unitary manner, *i.e.* without distinction between civilian and military use. In the current 2006 Constitution, s.75 provides:

> "(1) Subject to subsection (2) the Governor may, in Her Majesty's name and on Her Majesty's behalf, make grants and dispositions of any lands . . . in Gibraltar that may lawfully be granted or disposed of by Her Majesty (hereinafter called 'Crown Lands'). The Governor

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 6 / Date: 8/9

JOBNAME: Gibraltar Law Report PAGE: 265 SESS: 213 OUTPUT: Mon Feb 14 11:22:33 2011

shall exercise this power in accordance with the advice of the Chief Minister.

(2) The Governor may make grants and dispositions of any Crown Lands which are at any time in the possession, occupation, use or control of the Ministry of Defence or the Secretary of State for Defence or any other authority of Her Majesty's Government in the United Kingdom. The Governor shall exercise this power acting on the instructions of a Secretary of State and with the consent of the Chief Minister."

23 Counsel does not seek to argue that the Crown is not divisible. Constitutional law provides for the separate and juridical existence of the Crown in right of its Governor in Gibraltar on the one hand and the Crown in right of the Government of the United Kingdom on the other. Section 75 of the earlier Constitution evinced an intention that in relation to "any land . . . in Gibraltar that may lawfully be granted or disposed of by Her Majesty" the Governor should have the exclusive power to grant and make a disposition. In effect he did so after appropriate consultation where the interests of both civilian authorities and military authorities were represented. In other words, the system of Government in Gibraltar (*i.e.* as distinct from the United Kingdom), within which the exercise of any executive power in relation to any land, was with the Government of Gibraltar of which the Governor was the executive authority.

24 Notwithstanding this able and persuasive submission, I am unable to accede to the argument. The learned judge correctly referred to the latest principal statement of the proposition that the Crown is divisible and acts in separate capacities in respect of various territories (see *R. (Quark Fishing Ltd.)* v. *Ministry of Foreign Affairs* (2)). This principle is of singular relevance in relation to the disposition of the land owned by United Kingdom armed forces in Gibraltar.

25 The maintenance of the armed forces of the Crown is a prerogative function but largely governed by statute. In short, in maintaining a naval presence in Gibraltar the Crown has always acted "in right of the United Kingdom." Thus, in respect of the former naval land, the Crown acted, before the transfer in 2004, in right of the United Kingdom and not in right of the Government of Gibraltar. The Secretary of State for Defence acts on behalf of the Crown vested with a separate personality as a corporate sole (see the Defence (Transfer of Functions) Act 1964, s.2).

26 From the date appointed by statutory instrument, the former naval land was vested in the Secretary of State. When it came to the creation or transfer of rights over the land, the Secretary of State for Defence and not the Crown is the person vested with legal authority to make the relevant grant. Thus the Crown could not independently and unilaterally give

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 7 / Date: 21/9

JOBNAME: Gibraltar Law Report PAGE: 266 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

power to some other person or body (*e.g.* the Governor) to dispose of land vested by statute in the Secretary of State.

27 Thus, it follows that the Governor had no power to dispose of land held by the Secretary of State or to grant an easement of light over the former naval land. Section 75 of the 1969 Constitution does not affect the matter. The appellant argued that "any land" included all lands held by the Crown, whatever the capacity in which the Crown acted. The crucial phrase is "that may lawfully be granted or disposed of by Her Majesty." The Constitution is primarily directed at defining the powers of the Governor as representative of the Crown in right of Gibraltar.

28 As stated in 6 *Halsbury's Laws of England*, 4th ed. (Reissue), para. 828, at 481 the Governor—

> ". . . cannot be regarded as a viceroy nor can it be assumed that he possesses general sovereign power. His authority is confined to the powers thereby expressly or impliedly entrusted to him, including such prerogatives as may be delegated, and the statutory powers of the office."

29 I am satisfied that, on the basis of this analysis, references to "Her Majesty" in the Constitution means "Her Majesty in right of the Government of Gibraltar" and not in the wider sense contended for by Mr. Gomez. There is a further reason for rejecting the appellant's argument: the former naval land was not and could not have been the intended servient tenement. In order for the Government of Gibraltar to have granted an easement over the former naval land it would need to have had an interest in that land equivalent to that which it had in the estate (see *Booth* v. *Alcock* (1) and *Rangeley* v. *Midland Ry. Co.* (3)).

30 As already indicated, the ownership of the former naval land was with the Secretary of State (*i.e.* the United Kingdom Crown) and not the Government of Gibraltar (*i.e.* the Gibraltar Crown). The Government of Gibraltar could not, nor did it intend to, nor did it in fact or in law purport to, grant an easement. The only way an easement could have existed was if the Secretary of State had granted it. He did not.

31 In the transfer letter signed between the Ministry of Defence and the Government of Gibraltar, the Ministry of Defence "record(s) the arrangements with regard to the transfer of surplus Crown land and buildings held for defence purposes." This word can only mean that the Ministry of Defence owned the land. Moreover, the Ministry of Defence specify that they are retaining certain permanent easements that pass in or over the transferred area and list encumbrances that the transfer is subject to. It is silent as to any easement of light to any body or person.

32 As counsel for the respondent succinctly states in her submissions:

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 8 / Date: 8/9

JOBNAME: Gibraltar Law Report PAGE: 267 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

> "Consequently, if cl. 4 was drafted with no idea in mind of granting a right of light over the naval land (as the Government did not intend to grant, nor could it have granted at the time) and such drafting was automatically adopted in the post-October leases with no indication of any change or acknowledgement that the naval land had been acquired by the Government, this suggests that there was no intention to grant an easement over the naval land after 2004 either."

This, to my mind, says it all and I respectfully and gratefully adopt it.

33 Mr. Gomez further submitted in the alternative that cl. 4 is to be regarded as ambiguous and the learned judge erred in failing to apply the *contra proferentem* canon of construction. If he had done so he would have been bound to conclude that it was inappropriate to apply a strained, restrictive interpretation in favour of the proposition that a *prima facie* restrictive right was in fact to be interpreted so strictly as to have almost no practical effect.

34 This can be dealt with briefly. In *Viscountess Rhondda's Claim* (5) it was held that in construing the terms of a lease, the opposite of the *contra proferentem* rule applies where there is a grant by the Crown.

35 In summary, therefore, I conclude that—

(i) the learned judge was correct in law in rejecting the appellant's case that cl. 4 in his lease constituted an express grant of a right to light over the former naval land;

(ii) no right could have arisen prior to October 2004 as at that stage the Government had no interest in any servient tenement over which to grant such a right. Following the transfer to the Government, no intention was created to give to the fourth appellant any greater rights than those enjoyed by the pre-October 2004 leaseholders;

(iii) there was no provision in the leases indicating that cl. 4 was an express grant of right to light over the former naval land;

(iv) there was no provision in the leases indicating that the effect of cl. 4 extended any further than it did before October 2004, *i.e.* only to the estate land; and

(v) as there was no power to create a grant over the former naval land, there is no reason in principle, or otherwise, to read it as creating such a grant in the post-October 2004 leases.

36 Accordingly, I would uphold the learned judge's findings and dismiss this appeal.

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 9 / Date: 8/9

JOBNAME: Gibraltar Law Report PAGE: 268 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

37 **STUART-SMITH, P.** and **ALDOUS, J.A.** concurred.

Appeal dismissed.

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 10 / Date: 8/9