IN THE COURT OF APPEAL OF GIBRALTAR

Civil Appeal No. 9 of 2013

Secretary of State for Defence

Appellant

v

Maria Pilar San Miguel Alvarado

Respondent

**JUDGMENT**

1. This is an appeal by the Secretary of State for Defence from a decision of Butler J given in the Supreme Court of Gibraltar on 25 March 2013 that, in the circumstances of this case, the Appellant is not entitled to rely on the defence of Crown Immunity, and that the Respondent (the Claimant in the court below) is not barred by that doctrine from pursuing her claim. The judge therefore dismissed the Appellant's application to strike out the Respondent's personal injuries claim.

2. Background

The Respondent claims to have been injured on 28 June 2003 when a metal object fell from a shelf whilst she was working as an employee of the Appellant at premises in Gibraltar. She did not immediately make a claim. We were told that there was never even a letter before action, but a claim form was issued on her behalf by her present solicitors on 23 June 2006, 5 days before the expiration of the applicable 3 year limitation period. It was not served until

the following September. On 18 October 2006 Particulars of Claim were served. In a letter to the Respondent's solicitors dated 8 November 2006 the Treasury Solicitors, instructed by the Appellant, began by pointing out that the claim form had not been validly issued or served, and continued –

> "There is no right of action for negligence claims against the Crown in Gibraltarian Courts. In the absence of any specific provision of Gibraltar Legislation or a rule of common law developed in Gibraltar allowing such proceedings to be brought, proceedings should have been issued against the Ministry of Defence in the UK Courts. As you know, the address for service on the MoD of Court Proceedings issued in England and Wales, as laid down under section 17 of the Crown Proceedings Act 1947, is the Treasury Solicitors at the above address. However this claim is out of time for issue and therefore also for service."

The letter went on to point out that the Particulars of Claim were not accompanied by a medical report or a schedule of expenses and losses as required by the Rules. We do not know when the Respondent decided to instruct solicitors, but on the information available to us it seems difficult to escape the conclusion that, had this matter been handled more expeditiously in its early stages, this court would not now be troubled with this appeal.

In 2006 the Respondent's solicitors were also acting for a Claimant named McWilliam in proceedings commenced in Gibraltar. The Treasury Solicitors had made an application to strike out that matter on the basis that proceedings should have been issued in the UK Courts, and in a letter of 8 November 2006 it was proposed that the present case be stayed pending a decision of the court in the case of McWilliam. That was agreed, but in the event McWilliam's case did not produce a decision, so on 11 February 2011 the stay was lifted and the Appellant's application to strike out in the present

case came before Butler J for hearing on 20 September 2012. The Judge decided to accede to the submission that he should resolve the issue of law on the basis that the Respondent's allegations of fact were correct, and the propriety of that decision is not seriously in issue in this appeal. Mr Restano, for the Respondent, submitted to the Judge that the application to strike out was premature, and made that ground 1 of his Notice of Cross – Appeal, but in paragraph 5 of his skeleton argument he indicated his cautious decision not to pursue his ground 1. The appeal has therefore concentrated on the substantial issue of law which was argued before us, and was decided by the Judge.

3. The Statutory Fading of CUK Immunity

It is common ground that the Crown as sovereign of the United Kingdom (CUK) is not the same legal entity as the Crown in its role as sovereign of Gibraltar (CG) and that the Appellant is an emanation of CUK carrying on certain industrial activities at premises in Gibraltar.

It is also common ground that prior to 1947 CUK could not be sued in contract or in tort or for breach of statutory duty, which is a form of tort. As the Judge said, that immunity is usually traced back to the fact that a lord could not be sued in his own court, and to the irrebuttable presumption that the king could do no wrong, nor could he authorise others to commit wrongful acts, so vicarious liability could not arise. The harshness of the rule was usually ameliorated in the case of contractual claims by the Attorney – General granting a Fiat to enable a Claimant to submit a Petition of Right. In cases of tort the individual Crown servant who was alleged to be at fault could be sued, if he or she could be identified. CUK would stand behind them, and satisfy any judgment that might be entered, but

the position was plainly unsatisfactory. In Royster v Cavey (1947) 1KB 204 the Defendant, whose identity had been supplied by CUK for the purposes of the action, was found not to be in any way personally responsible for the relevant accident, so the claim failed. At 206 Scott LJ said –

> "The Defendant to the proceedings could not be the Ministry of Supply which was the occupier of the factory, because that ministry, like every other government department, is simply in law the Crown, and in English law an action for tort, such as an action for negligence or breach of a statutory duty of this type, does not lie against the Crown."

He then referred to the practice of providing nominee defendants, recently considered by the House of Lords in Adams v Naylor (1946) AC 543, and continued at 209 –

> "I think the effect of what the House of Lords said is that this court has no jurisdiction to continue the hearing of a case where the cause of action alleged against a defendant is in truth not against the real defendant but against a name furnished for the purposes of trying an issue by agreement between the parties."

The importance of the decision in Royster v Cavey is that it clarified the position of CUK. It was not like a defendant able to decide whether or not to invoke a statutory time limit. It simply could not be sued. It was not a recognisable party to an action. So, for our purposes, it is of no significance that on occasions CUK may have submitted to the jurisdiction of Gibraltar Courts in the past.

The position of CUK was changed by the Crown Proceedings Act 1947, the long title of which begins –

> "An Act to amend the law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown ...."

Part I deals with "Substantive Law". Section 1 sets aside the need for a Petition of Right, and enables a claimant in contract to take proceedings directly against the Crown, "subject to the provisions of this Act".

Section 2 is headed "Liability of the Crown in Tort". So far as material for present purposes it reads –

> "(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; .....
>
> (2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity."

Section 40 is headed "Savings" and subsection 2, so far as material, reads –

> "Except as herein otherwise expressly provided, nothing in this Act shall:-
>
> (b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise that in respect of His Majesty's Government in the United Kingdom .... or affect proceedings against the Crown in respect of any such alleged liability as aforesaid."

Clearly the Act does not affect any alleged liability of the Crown arising in respect of Her Majesty's Government in Gibraltar, and before us no one has contended otherwise.

Section 52 in Part VI deals with the extent of the Act, and so far as material it reads –

> "This Act shall not affect the law enforced in courts elsewhere than in England and Scotland, or the procedure in any such courts."

Clearly the Act did not, and does not, affect the law enforced in courts in Gibraltar.

4. Could the Respondent have sued in England and Wales?

Mr Martin Chamberlain QC for the Appellant, submits that the Respondent could, and should, have relied on the 1947 Act to sue the Appellant in the Courts of England and Wales. Mr Restano, for the Respondent, submitted, and the Judge accepted, that she was unable to do so because the relevant accident happened in Gibraltar. If she commenced proceedings in England and Wales the court would apply Gibraltar law to decide whether or not the Appellant was liable, and if the Appellant is right, it is a part of Gibraltar law that CUK cannot be sued in Gibraltar. In 1951 Gibraltar enacted its own Crown Proceedings Act but it is common ground that it only applies to the role of the Crown in respect of the Government of Gibraltar, so section 29(2) of the 1951 Act, so far as material, reads –

> "(2) Except as herein otherwise expressly provided, nothing in this Act shall –
>
> (b) authorize proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown

> arising otherwise than in respect of the Government of Gibraltar, or affect proceedings against the Crown in respect of any such alleged liability."

I can find nothing either in statute, or in any authority, to support Mr Restano's submission. In an action in a court in England or Wales it will be for the court to decide, in accordance with UK law, whether CUK is a recognizable defendant. Mr Chamberlain referred to the application of the 1947 Act as a mandatory overriding provision, to be applied irrespective of the lex causae and referred us to examples of such provisions. For example, the Civil Liability (Contribution) Act 1978 was applied in Arab Monetary Fund v Hashim (No 9) (1994) Times 11 October, and in both Roerig v Valiant Trawlers Ltd (2002) 1 WLR 2304 and in Harding v Wealands (2005) 1 WLR 1539 (per Arden LJ at paragraph 49) section 4 of the Fatal Accidents Act 1976 was so classified. But my approach is simpler. There is nothing in Gibraltar law to suggest that CUK cannot be sued in England and Wales, where it has been rendered capable of being sued by statute. And there is nothing in the 1947 Act to suggest that under that Act CUK cannot be rendered liable for torts committed abroad. Such liability was established in Tito v Waddell (1977) Ch. 106 at 252-256 and in Mustasa v AG (1980) QB 114, and in Smith v MOD (2013) 3 WLR 69, although that case was mainly concerned with the scope of combat immunity. We are told that many Gibraltar claimants have sued CUK in England and Wales in the past (see, for example Bouchouk v MOD (2009 EWHC 2614). So this Respondent did have a remedy if she had chosen to make use of it in time, and in this case she can in reality claim no more than that she was entitled to a remedy of which she could avail herself in the courts of Gibraltar.

5. Interlocking Remedies

It was at the heart of Mr Chamberlain's submission that the structures of the 1947 Act, under which CUK can be sued, but only in England and Wales, and of the 1951 Act, under which CG can be sued, but only in Gibraltar, were deliberately interlocking in such a way as to have proper regard to the separate identities of CUK and CG. That it is important to keep such identities separate, and to recognize that their powers and duties differ, was clearly illustrated in R (Quark Fishing Ltd) v Foreign Secretary (2006) 1 AC 529, a case about a licence to fish in the waters of South Georgia, and the South Sandwich Islands. The importance of the separation, and the justification for it, is helpfully explained in Hendry and Dickson on British Overseas Territories Law, published in 2011. At page 27 the authors say –

> "It is submitted that the correct legal position is indeed that each overseas territory has a government distinct from the United Kingdom Government. That is the plain intention of the Orders in Council establishing a distinct constitution for each territory, most of which refer expressly to "the Government" of the territory and some to the Crown "in right of the Government" of the territory. Each territory has its own legislative and executive authorities separate from those of the United Kingdom. Each territory has its own courts, laws, public services and public funds, again separate from those of the United Kingdom. This situation is not altered by the fact that some territories are more susceptible to direction from London than others.
>
> The importance of this principle lies in the determination of the rights, powers, obligations and liabilities of the distinct governments of the Crown. This is crucial in settling legally which government – or put it another way, the Crown in right of which government – has particular rights, such as title to Crown land and other property in a particular territory, which government has power to take particular action, which government owes statutory or contractual obligations to particular persons, and which government is liable to others

> for acts or omissions. The consequences of a failure to determine correctly the possessor of such rights, powers, obligations and liabilities hardly need spelling out."

They then refer to section 40(2)(b) of the 1947 Act, and continue on page 28 –

> "Accordingly the Act does not authorise proceedings in the United Kingdom courts against the Crown in right of any overseas territory Government. This situation is reciprocated by equivalent provisions in the Crown proceedings legislation of the overseas territories."

If Mr Restano's submissions are correct that passage is wrong, so is the judge when, at page 48 of his judgment, he declined to give much weight to Mr Chamberlain's explanation of the interlock. Having accepted that its effect is to ensure that the government of one territory is not subject to the jurisdiction of another, the judge continued –

> "A simple statement of that fact does not, in my judgment, go far in current circumstances and in modern society as a legitimate aim or as justification for the principle. Nor is there anything before me to confirm Mr Chamberlain's assertion that this was the reasoning of the legislature."

I find that surprising. It seems to me that the reasoning of the legislature is clear when one reads the relevant parts of the statutes, and the importance of trying to ensure that the government of one territory is not subject to the jurisdiction of another is as important as ever it was.

As Mr Chamberlain submits, the distinction for which he contends in this case is similar to that recognized in the relationship between fully independent states. In Fogarty v UK (2002) 34 EHRR12 an employee at the US embassy in London claimed, after dismissal, that she had been the victim of sexual discrimination. She was

successful. She then brought a second discrimination claim, and on this occasion the US government invoked its right to immunity. She therefore had no remedy in domestic law and sought to persuade to the European Court of Human Rights that she had been deprived of her right of access to a court under article 6(1) of the European Convention on Human Rights. She failed. The court held that the right is not absolute; however, a limitation would not be compatible with article 6(1) if it does not pursue a legitimate aim, and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. It went on to point out, in paragraph 34, that sovereign immunity is a concept of international law "by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote good relations between States through the respect of another State's sovereignty."

Mr Chamberlain points out that in the present case the restriction of rights arises out of substantive not procedural law. It relates only to where the action may be brought, and so, he submits should be considered minor, proportionate, and serving a legitimate aim broadly similar to that identified in Fogarty. I agree.

6. Development of the Common Law – UK

The judge accepted Mr Restano's submission that, although neither the 1947 Act nor the 1951 Act enable the Respondent to sue CUK in Gibraltar in tort or for breach of statutory duty, the common law in Gibraltar is a living instrument, and it has evolved in such a way as to give her that right.

Mr Chamberlain's response is that there has been no similar evolution in the UK, and that the common law in Gibraltar is the same as in the UK. In Trawnick v Lennox (1985) 1WLR 532 a shooting range was being constructed on an airfield in the British sector of Berlin. Adjoining residents tried to obtain an order against the Crown in nuisance. It is clear from the judgments of the Court of Appeal that they accepted that liability in tort could only be established in respect of Her Majesty's Government in the UK by reliance on the 1947 Act. In the particular case that was not possible because, pursuant to that Act, it was certified by a Secretary State that the alleged liability did not arise in respect of Her Majesty's Government in the UK. Mr Restano submits that in Trawnick it does not seem to have been argued that Crown immunity no longer existed, but the decision of the Court of Appeal is clear, and, as Mr Chamberlain submits, it shows that many years after the 1947 Act was enacted, that Act was recognized to delineate the boundaries of the Crown's liability in tort.

In Matthews v MOD (2003) 1AC 1163 the focus was upon the time provisions of the 1947 Act which restricted the right to claim of anyone suffering from asbestos-related injuries, but the importance and width of Crown immunity prior to 1947, and its continuance outside the ambit of the 1947 Act, were accepted. At paragraph 4 Lord Bingham said –

> "Few common law rules were better-established or more unqualified than that which precluded any claim in tort against the Crown, and since there was no wrong of which a claimant could complain (because the King could do no wrong) relief by petition of right was not available."

At paragraph 15(8) he said –

> "It is what happens in practice which matters. The practice, as already mentioned, has been uniform and unvarying. Any practitioner asked to advise Mr Matthews on the assumed facts would have advised him, however reluctantly, that a certificate under section 10(1)(b) was bound to be issued, that he could apply for the grant of a pension if his disablement was of sufficient severity to qualify, but that he had no claim which had any prospect of success at common law."

At paragraph 54 Lord Hope said –

> "There is no doubt that the Crown Proceedings Act 1947 was designed to make new law. Until the coming into force of that Act the Crown had been protected from liability by two rules which were deeply rooted in English law. These were the rule of substantive law that the King could do no wrong, and the procedural rule that the King could not be sued in his own courts. The product of these rules was not only that the Crown could not be sued in respect of wrongs which it had expressly authorised but that it was also immune from liability in respect of wrongs committed by Crown servants in the course of their employment."

Lord Millett also dealt with the position before 1947 and at paragraph 84 he said –

> "These were substantive rules of law. They were rules of general application and marked the limits of tortious liability in English law."

He went on to deal with the impact of the 1947 Act, which made a change in the substantive law, but not such as to render the liability of the Crown unlimited. Exceptions to liability, "so far as they extended, operated to preserve the pre-existing law".

No one suggested that where they proved to be inconvenient, or even unjust, they could be restricted by a development of the common law.

Mr Chamberlain submits the reason is, at least in part, because where statute law has intervened there is no room left for further evolution of the common law. In ex p. Begley (1997) 1WLR 1475 the House of Lords considered the provisions of Northern Ireland legislation which restricted access to a solicitor during police interviews. The appellant asserted that it was a common law right, but at 1480H Lord Browne-Wilkinson said –

> "It is true that the House has a power to develop the law but it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament."

That passage was cited by Lord Nicholls in Re McKerr (2004) 1WLR 807, another Northern Ireland case, in which an attempt was made to create rights at common law in relation to inquests. Lord Nicholls then pointed out another difficulty, saying at 823E –

> "It must be a sound principle for a supreme court to develop the law only when it has been demonstrated that the just disposal of cases compellingly requires it."

He went on to point out that the right to life was already comprehensively protected by statute, and at 823F asked the rhetorical question –

> "Why is there now a need to create a parallel right under the common law?"

Mr Restano submitted that the decision in Trawnick should now be regarded as outdated, and invited our attention to the decision of the

United Kingdom Supreme Court in Jones v Kaney (2011) 2AC 398 as a recent example of the evolution of the common law, in relation to experts and their immunity from suit. However, as Mr Chamberlain pointed out, expert immunity existed at common law, unaffected by statute, and so the Supreme Court was free to develop the law at it did.

In my judgment there is nothing in the material we have seen to indicate that the law in the United Kingdom has developed, or could be developed, in such a way as to provide a claimant in the position of this Respondent with any right to proceed against CUK in tort or for breach of statutory duty, other than by means of the 1947 Act.

7. Development of the Common Law – Gibraltar

If I am right in concluding that the Respondent has no common law right to proceed against CUK in the United Kingdom she must then face the difficulty presented to her by section 2(1) of the English Law (Application) Act, which, so far as relevant, provides as follows –

> "The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by –
>
> (a) Any order of Her Majesty's in Council which applies to Gibraltar; or
>
> (b) Any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
>
> (c) Any Act."

Mr Restano recognises that difficulty, but submits that he can derive assistance from European Law and the Gibraltar Constitution to show that the Respondent did have a remedy available to her in Gibraltar. He also invites our attention to the wording of the 1951 Act, as well as to one decision of the Gibraltar Supreme Court, and he submits that in Gibraltar the original reasons for Crown immunity no longer apply.

I deal first with the impact of European Legislation in relation to health and safety. It is common ground that the Workplace (Health, Safety and Welfare) Regulations and the Management of Health and Safety at Work Regulations (transposing EC Council Directives 89/654/EEC and 89/391/EEC) are regulations upon which the Respondent is entitled to rely, and the Charter of Fundamental Rights of the European Union also sets out certain general rights. Article 47 reads –

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

Article 52.1 reads –

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general

> interest recognised by the Union or the need to protect the rights and freedoms of others".

Butler J accepted Mr Restano's submission that Crown immunity would render nugatory the regulations upon which the Respondent is entitled to rely. That may well be because the judge had already come to the erroneous conclusion that the Respondent could not sue CUK in England or Wales, but, in any event, as Mr Chamberlain points out, there is no principle of European Law which requires that claims against CUK must be actionable in the courts of Gibraltar, rather than in the courts of England and Wales. In Ministerio Delle Finanze v In.Co.Ge'90 (2001) 1CMLR31 the European Court of Human Rights said at paragraph 14 –

> "It should be noted .... that, according to a consistent line of cases decided by the Court, it is for each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law."

The same point is made at page 288 in the 6th (2011) edition of Wyatt & Dashwood's European Union Law. Mr Chamberlain submits and I accept that from the point of view of European Law the United Kingdom and Gibraltar are not for this purpose separate entities; the Respondent has effective protection for the rights conferred by the regulations if she is able to sue in England and Wales to enforce those rights. The inability to sue in Gibraltar is a restriction, but it is for a good reason, and relatively minor in effect. In this context it is worth remembering that citizens of Gibraltar frequently have resort to facilities not available in Gibraltar but available in the United Kingdom, such as certain types of medical care, university education and appeals to the Privy Council.

The Respondent's attempt to invoke the Gibraltar Constitution in order to establish her contention that the Common Law must have developed in such a way as to give her a remedy enforceable in the courts of Gibraltar seems to me to be equally ineffective. The Constitution guarantees fundamental rights and freedoms of the individual, including the right to protection of the law and access to the court (sections 1(a) and 8(8)); the right to the security of the person (section 1(a)); the right to enjoy property and not to be deprived of it (section 1(a) and (c)); and the right to private life (section 7). However, I do not consider that, in the context of this case, such rights are engaged simply by a requirement that the proceedings be brought in England and Wales. Nor do I consider that, as urged by Mr Restano, such a requirement involves a breach of the general constitutional principle of equality before the law.

Mr Chamberlain submits, and I accept, that neither the right to the protection of the law and access to the court, nor the right to the security of the person, can be used to manufacture a cause of action against CUK where none exists at Common Law or under any statute, and that the judge was wrong to decide otherwise. It is clear from Almeda v Attorney General (2003) UKPC 81, and from Matthews (supra) that rules of substantive law, as distinct from procedural immunities, do not engage the right of access to the court, and the rule that CUK cannot be sued in tort in Gibraltar is such a rule. Even if it were a procedural rule it imposes no more than a proportionate restriction, serving a legitimate aim, as explained above.

If, as alleged, the Respondent has incurred medical expenses, and continues to do so as a result of her accident, the payment of those expenses does not constitute a violation of her enjoyment of her

property. She may have been able to recover the expenses if she had brought a successful claim in tort, but the constitutional protection of property is not engaged because she had never been under any compulsion to spend her money in a particular way.

The attempt to rely upon the Constitution adds nothing to the Respondent's claim, and the same is true of some of the other points taken before the judge and before us. I accept, of course, that the Common Law can develop in different ways in different parts of the world, as accepted by Lord Lloyd in Invercargill City Council v Hamlin (1996) AC 624 at 640; however, I find no reliable evidence of that having happened in Gibraltar. It is true that it has its own courts, and that these days, because of strict liability laws, vicarious liability often carries with it no implication of wrongdoing. Thus much of the original rationale responsible for Crown immunity has gone; however, that does not enable courts to develop the law in a way which is plainly contrary to statute. As Mr Chamberlain pointed out, if Butler J is right, he has by implication repealed section 29(2)(b) of the 1951 Act, or at least developed it in a way not envisaged by the legislators. The judge derived some comfort from the long title to the 1951 Act, which speaks of declaring rather than changing the law. I am not impressed by that. To my mind it certainly does not convey the impression that the Common Law in Gibraltar already enabled actions to be brought against either CUK or CG. It seems clear that in TGWU v MOD (2005-2006) Gib LR 46 the defendants, having raised the issue of Crown immunity, abandoned it during the course of argument, so that at paragraph 56 of his judgment Schofield CJ felt able to say –

> "The claimants have a right to sue the Crown in right of the Government of the United Kingdom for breach of contract of employment. I agree with the claimants that the common law applicable in Gibraltar is not frozen in time and there is a line

> of authorities, as cited by them, which permits the claimants to pursue the claim."

Although we have looked at many authorities I have seen none to support the conclusion of the then Chief Justice in relation to Gibraltar.

8. Other Jurisdictions

In other jurisdictions decisions can be found to indicate that the common law has developed, or may be developing, in the direction contended for by Mr Restano.

In Johnstone v Commonwealth (1979) 143 CLR 398 the High Court of Australia considered whether a New South Wales resident, allegedly injured in South Australia, could have his action remitted to the Supreme Court of New South Wales. It was an issue of statutory construction as well as common law, and the claim did not succeed, but Murphy J, at paragraph 4 of his decision, took the opportunity to attack governmental immunity, which he regarded as no longer appropriate in Australia. His observations were obiter. They were not necessary to the decision, and they were at variance with what was said by others. For example Gibbs J accepted, at paragraph 5 of his decision –

> "(1) that the Commonwealth is immune from legal liability except such as is cast upon it by the Constitution or by statute and (2) that no court has jurisdiction to entertain a suit against the Commonwealth unless that jurisdiction is conferred on it by the Constitution or by statute."

In Commonwealth v Mewett (1996-7) 191 CLR 471, another decision of the High Court of Australia, the judges were divided as to whether the removal of Commonwealth immunity from suit in tort was attributable to the constitution or the statute. For present

purposes it does not manner, because the position under the 1947 Act is clear.

Our attention was invited to two decisions of courts in the United States. In Muskpof v Corning Hospital District (1961) 55 Cal 2d-211 the Supreme Court of California considered a patient's claim against a hospital for injuries sustained in a fall. Governmental immunity from tort liability was raised as a defence, and was rejected on the basis that it was an anachronism, without rational basis, and riddled with exceptions. There being no legislative obstacle to abolition, the court abolished it. In Nieting v Blondell (1975) 235 NW2d 597 the Supreme Court of Minnesota considered whether to abolish the tort immunity of the government of that state. It found such immunity to have been court-made, and noted that the legislature had failed to intervene to abolish the hardships which it created, so it acted judicially. Clearly the situation was not like that in the present case, where the Respondent has always had an available remedy – in England and Wales.

The only other decision of a foreign court which I need mention is that of the Constitutional Court of South Africa in Law Society of South Africa v Minister of Transport (2010) ZACC 25. The challenge was to the statutory abolition of the common law right to recover damages for injuries sustained in road accidents, in favour of a compensation scheme. Various aspects of the legislation were criticised but only one criticism was accepted. The prescribed tariff for hospital and other medical treatment was found to be inconsistent with the constitution, and invalid. Butler J in the present case found the South African case persuasive, because it showed that the constitutional right to security of the person is violated if the right to recover damages for personal injuries is

reduced in a way that cannot be rationalised. Whilst that proposition may well be correct, in the present case no one is purporting to remove or reduce any common law right. The Respondent has a clear right to recover damages from the appellant in full if she sues in England and Wales, and I am unable to derive any assistance from the South African case.

9. Contract

When this case was before Butler J there was no claim in contract. However, on 8 May 2013 the Respondent obtained permission from him to amend her Particulars of Claim to allege, in the alternative, that the appellant was in breach of an implied term of her contract of employment, arising from the same facts, in that they failed to –

(a) take all reasonable steps to ensure that she would be safe in performing any task required of her in the course of her employment;

(b) supply her with adequate equipment and training to enable her to carry out safely the duties required in the course of her employment

Mr Restano now submits in his Notice of Cross-Appeal that, even if her claim cannot proceed in tort, it should be allowed to proceed in contract because contractual claims do not enjoy Crown immunity. Although the Petition of Right was abolished by the 1951 Act this did not, he submits, abolish "the former common law rule that contractual claims no longer enjoyed Crown immunity". I do not accept that there was such a former common law rule. I have seen no evidence of it, and had there been such a rule there would have been no need for a Petition of Right.

10. Conclusion

Reverting to the Notice of Appeal and the Notice of Cross-Appeal, I therefore accept the appellant's first ground of appeal – the Respondent could have brought her claim against CUK in the courts of England and Wales had she done so within the applicable limitation period. She could not pursue that claim in the courts of Gibraltar because it was outside the scope of the 1951 Act.

Turning to Ground 2, Crown immunity was and remained part of the common law of both England and Gibraltar, save in so far as the 1947 Act gave rights to claimants to sue CUK in England and Wales, and the 1951 Act gave rights to claimants to sue CG in Gibraltar.

The court is not entitled to develop the common law in an area governed by a statute (Ground 3).

The recognition of Crown immunity in the present case would not render nugatory EC Health and Safety Directives transposed into Gibraltar law. They could be enforced against CUK in the courts of England and Wales (Ground 4).

The Gibraltar Constitution does not mandate or support the suggestion that the common law of Gibraltar should be developed to recognize a new cause of action against CUK because its immunity is a matter of substantive law; in any event, taken together with the 1947 Act and the 1951 Act, it imposes a moderate and proportionate restriction on the Respondent which serves a legitimate aim, demonstrated by the interlocking rights of redress which prevent both CUK and CB from being sued in each other's courts.

Turning to the Notice of Cross-Appeal, the judge was right not to hold that the doctrine of Crown immunity, in so far as it continues to exist, violates any right of the Respondent under the Charter of Fundamental Rights of the EU or of the Gibraltar Constitution, and the amendment to the Particulars of Claim to formulate the claim in contract adds nothing to the Respondent's case.

I recognise that it is inconvenient for anyone in the position of the Respondent not to be able to pursue a claim against her employers in Gibraltar but, for the reasons I have given, I am satisfied that the inconvenience is not one which can be swept away by the judiciary. It is the result of a carefully devised interlocking structure, which provides complete redress to potential claimants if they pursue their claims in the right jurisdiction, and which, if it is to be adjusted at all, should only be adjusted by legislation, after careful consideration. I would therefore allow this appeal, and strike out the Respondent's claim against the Secretary of State.

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**Kennedy, P**

1. I agree with the judgment of the President.

2. I was initially attracted to the conclusion reached by the judge.

3. The Claimant seeks damages in respect of personal injuries suffered by her on 28th June 2003 during her employment in Gibraltar by the Secretary of State for Defence. She was struck on her head by a metal kitchen appliance whilst cleaning at Devils Tower Camp. She alleges amongst other matters that the Secretary of State owed her a duty of care and was negligent. Shortly before the limitation period expired she issued these proceedings.

4. The Constitution of Gibraltar provides for access to justice. Thus the court system consists of the Court of Appeal, the four judges in the Supreme Court and the stipendiary magistrate supported by lay magistrates. They apply the law in Gibraltar with guidance from the Privy Council. The expertise is such as to enable radical decisions if appropriate.

5. The appellant contends that Gibraltar law does not recognise a cause of action in tort against the Crown in the right of the Government of the United Kingdom. He accepts that persons such as the claimant who suffer injury in Gibraltar at the hands of the Crown have a right to sue in England. Therefore the claimant had a remedy and should have issued her proceedings in England. It is now too late to take that route.

6. The appellant also accepts that if the claimant had been able to identify a person who had caused the metal kitchen appliance to fall on her head she could have sued that person in Gibraltar. However he contends that there would be no vicarious liability on the Crown. That cannot be "fair" as explained by Lord Nicholls in Marjrowski v Guys & St Thomas' NHS Trust [2007] 1 AC at paragraph 9.

7. In the 21st century the division of power between the Executive and the Queen is well established. No doubt the Secretary of State is an office held under the Crown, what happens is controlled by the Executive. Therefore there seems no merit, in the context of this case, in preserving a common law rule of law based on a fiction that the Crown can do no wrong.

8. That rule can create hardship. There can be real difficulties in litigating in England a claim by a person who suffers an accident in Gibraltar. Often the witnesses will be required to travel. No doubt video links help, but some travel would seem inevitable. Also there is a real difference in the legal aid systems in England and Gibraltar and the cost involved will be increased.

9. Judges in Australia, Canada and the U.S.A have made their views clear that the time has come to bury the common law rule that the Crown cannot be sued except as provided in statute. Thus the judge was in good company.

10. Despite my initial view, I have been persuaded that the statutory provisions in England and Gibraltar interconnect and that where, as in this case, statute has set out the intention of Parliament it would be wrong to provide for suit against the Crown in a way not contained in a statute. The judgment of the President sets out fully the reasons why that is so and I agree with it.

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**Aldous, JA**

I also agree with the judgment of the President.

.....

**Potter, JA**

15 November 2013