ST HELENA, ASCENSION AND TRISTAN DA CUNHA

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JUDGMENTS OF THE ST HELENA SUPREME COURT AND COURT OF APPEAL ON THE APPLICATION OF UK EMPLOYMENT RIGHTS LAW TO ST HELENA AND ASCENSION

(Annexed to the General Introduction)

Editor's note:
The English Law (Application) Ordinance, 2005 (SH) applies UK statutes to St Helena up to 1 January 2006. The St Helena Law (Application to Ascension) Ordinance, 1988 applies St Helena law to Ascension, up to 1 April 2017. The Application of St Helena Law (Tristan da Cunha) Ordinance, 1988 applies St Helena law to Tristan da Cunha (with no cut-off date.)

Each of these Ordinances contains exceptions and limitations on the application of the relevant law. The decision on whether a law applies in any particular case is a matter for the courts. The following extracts are from judgments of the St Helena Supreme Court and Court of Appeal and are included for guidance on that subject.[1]

1. Extract from Judgment of Martin C.J. in Graham Slater v. Serco (SC 6 of 1998)
2. Judgment of Ekins CJ in Larry Francis v. Attorney General (SC 507 of 2007)
3. Judgment of Court of Appeal in Larry Francis v. Attorney General (Claim 1 of 2008)

1. Extract from the judgment of Martin C. J. in Graham Slater v. Serco Limited, Case 6/1998 of the Supreme Court of St Helena, 7 April 1999

ENGLISH LAW (APPLICATION) ORDINANCE - civil statute - principles upon which English law applied in St Helena

EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978 - applies in St Helena and Ascension in part.

This case was brought to establish whether the Employment Protection (Consolidation) Act 1978 applies in St Helena and Ascension. It was held to apply in part. Extensive guidelines are provided as to the application of English law under the English Law (Application) Ordinance.

The Judge considered the background, the local legislation and case law and continued—

"General principles of application of English law

Roberts-Wray on Commonwealth and Colonial Law is the standard reference work on such matters. It is almost impossible to obtain these days. For ease of reference in the future I

[1] The judgment of the Supreme Court in Graham Slater v. Serco refers to an earlier version of the English Law (Application) Ordinance. The judgments in Francis v AG related to Ascension but are relevant to St Helena also.

incorporate into this judgment a number of principles which the learned author has identified in cases throughout the Commonwealth on the subject of the application of English Law[2]:

"1. Where English law is applied in broad general terms [as in St Helena] the common law applies to a colony unless it is shown to be unsuitable, but an English statute should not be applied unless it is shown to be suitable.[3]

2. The view that the test of "local circumstances" may include the circumstances of an individual party to proceedings is very questionable;[4] it is more reasonable if the party is the Crown.[5]

3. If the law is to be applied "so far as the same can be applied" the test is whether it can be reasonably applied.[6] And "applicable" in a like context means "suitable" or "properly adapted".[7] So a United Kingdom Act passed after the date prescribed in a territory for the reception of English law is not an Act "applicable to" the territory because it alters the law in force in England on that date.[8]

4. A rule of law should not be treated as inapplicable to local circumstances except on some solid ground which establishes inconsistency.[9]

5. A principle can be extended beyond its limits in English law to take account of local conditions.[10]

6. (Refers to indigenous law, of which there is none in St Helena)

7. The expression "statutes of general application" is usually regarded as descriptive of Acts of Parliament which are of general relevance to the conditions of other countries and, in particular, not based upon politics or circumstances peculiar to England.

8. The recital in the preamble to an Act of abuses in a particular locality in England does not necessarily exclude its application elsewhere.[11]

9. The fact that an Act is "mingled with the whole body of English law" on a particular subject is a good reason for applying it as part of that law.[12]

10. The repeal of an Act in England after the date of reception of English law is, of course, irrelevant.[13]

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[2] *at page 555*
[3] *R v Crown Zellerbach Canada Limited* (1954) 14 WWR 433 (British Columbia)
[4] *Okeleji v Okupe* (1939) NLR 28 (Nigeria)
[5] *Cooper v Stuart* (1889) 14 App Cas 286 (New South Wales)
[6] *Jex v McKinney* (1889) 14 App Cas 77 (British Honduras)
Quan Yick v Hinds (1905) 2 CLR 345 (New South Wales)
[7] *Miller-Morse Hardware Co Ltd v Smart* (1917) 3 WWR 1113 (Saskatchewan)
[8] *Brand v Griffin* (1908) 1 Alta LR 510 (Alberta)
[9] *Leong v Lim Beng Chye* [1955] AC 648, 665
[10] *Nana Atta II v Nana Bonsra II* [1958] AC 95 (estoppel by res judicata)
[11] *Walker v Solomon* (1890) 11 NSWR 88 (New South Wales)
[12] *Doe d. Hanington v McFadden* (1836) 2 NBR 260 (New Brunswick)

11. As to the application of part of a statute it has been held -

    a) that it is not permissible to apply a particular provision of an Act not generally applicable;[14] but that 3 sections from 2 Acts could be held to be in force without considering whether the whole Act applied;[15] - two decisions not easily reconcilable;

    b) at the other extreme, that the impossibility of applying one or two provisions of an Act is irrelevant;[16]

    c) that inapplicable machinery or procedural provisions may be excluded without prejudicing the application of the remainder of the Act.[17] Indeed, it has been said that the application of English law relates only to substantive law and not to procedural matters.[18] "

He points out elsewhere[19] that it is necessary to consider local circumstances, and that "a Court may therefore hold, in the light of the [local] circumstances, that an English law is to be entirely rejected or that it must be applied with modifications. All the circumstances are to be taken into account, including the local relevance or otherwise of the circumstances in England which explain a particular law."

[The judge then reviewed the respective submissions and continued]

<u>At what date should applicability and suitability be assessed?</u>

There are four options, all of which have received judicial support in various jurisdictions:

1. The date of the English statute
2. The date of the local enactment
3. The time of the events giving rise to the case
4. The time of the proceedings.

The varying decisions appear to turn on the words used in the respective ordinances and no general rule can be derived from them. I deduce from the terminology of the Ordinance that the legislature intended to apply any English statute which was applicable and suitable to local circumstances on the date at which English law was applied - 1 January 1987. Any earlier date could introduce insurmountable problems in ascertaining what the local circumstances were many years previously; any later date would add to the uncertainty surrounding this particular piece of legislation.

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[13] *Kelly v Jones* (1852) 7 NBR 473,474 (New Brunswick)
[14] *Quan Yick v Hinds* (1905) 2 CLR 345 (New South Wales)
[15] *Miller-Morse Hardware Co Ltd v Smart* (1917) 3 WWR 1113 (Saskatchewan)
[16] *Attorney-General for New South Wales v Love* [1898] AC 679
[17] *Hall v Hall* [1941] 2 WWR 245 (British Columbia).
[18] *Morris v Morris* [1951] DLR 38 (Ontario)
[19] *at page 545*

<u>How is applicability and suitability to be tested?</u>

In respect of the arguments put forward I hold that:

1. Only a statute of general application can be applied under the Ordinance.

2. It can only be applied if it is both applicable; and suitable to local circumstances. The Ordinance uses two different words and it must be presumed that they are intended to have two different meanings. There are therefore two tests:

(a) is it applicable? If so

(b) is it suitable to local circumstances?

3. A statute is "applicable" if it is capable of being reasonably applied. That means that the circumstances which explain its origin in England are also relevant in St Helena. It must meet a similar need. It is "suitable" if it can be applied to meet that need without substantial modification.

4. If a statute deals with one subject only, applicability and suitability must be tested by reference to the whole Act. It is not permissible to apply one part only. If a substantial part of such a statute is both applicable and suitable, the whole may be said to be; and the parts which are not can be deleted as a necessary modification to meet local circumstances. But as the Attorney-General argued, there are limits to the changes which a court may make for this purpose. Modifications should not be made which would alter the substance of the statute. That is for the legislature, not for the court. If a statute dealing with a single subject cannot be made suitable to local circumstances without very substantial alteration, that is an indication that it is not in fact suitable.

In *Jex v McKinney*[20] the relevant ordinance applied laws "... in so far as they are applicable or can be applied to this settlement ...". Again there appeared to be two tests. The second (akin to the test of "suitable" in St Helena) was held[21] to include cases "... where some moulding in formal or insignificant details is required before an English statute, suitable in its nature to the needs of the colony, can be actually applied to them." I apply that test to ascertain whether the Act is "suitable".

Most of the case law is over 50 years old. Much of it is over 100 years old. The world has moved on and today the Ordinance must be interpreted in accordance with current legislative practice. In the past it was the practice to enact one statute dealing with one subject. Nowadays, no doubt partly because of the pressure on parliamentary time, it is not uncommon to find massive statutes dealing with a large number of separate subjects within the loose framework of a particular branch of the law. This is particularly true of consolidation statutes which collect together and re-enact a large number of earlier statutes, each passed to deal with a separate subject. The Act is just such a statute.

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[20] *(1889) App Cas 77*
[21] *at page 81*

In this situation it is quite artificial to say that the statute must be considered as a whole. It is not a coherent whole. It is a ragbag of assorted statutes re-enacted and lumped together for convenience because they fall within the same general field of law. In that situation I hold that it is permissible to take each separate subject on its own, and to consider whether that subject, as enacted, is suitable to local circumstances.

In that situation it is also legitimate to take note of the wording of the Ordinance. It applies English law "... only **in so far as** it is applicable and suitable to local circumstances." Those words have the same meaning as "only to the extent that it is applicable and suitable..." They can be taken to suggest that any part of any statute which meets both tests can be applied, and those which do not can be excluded. I do not believe this to be the intention. It would be contrary to *Jex v McKinney* and much other precedent[22], although not all[23]. But at the very least, it must mean that if a statute deals with a number of separate and identifiable subjects, some of which are applicable and suitable and some not, it is permissible to select those which are suitable and to disregard those which do not.

5. It is irrelevant that such rights are widely enjoyed throughout the developed world; or that there may be many good reasons making it desirable to apply the Act here. These are political considerations. It is for the legislature and not for the court to take account of such arguments.

6. A distinction has to be drawn between rights and obligations conferred and imposed, and the machinery by which they are to be enforced. Unless the procedural provisions are an integral part of the overall package, they can be excluded.[24]

Conclusions

1. The Act is a statute of general application. Everywhere in the civilised world there is some form of regulation of the terms of employment.

2. The machinery created for the enforcement of rights and for the settlement of disputes by conciliation is not an integral and essential part of the Act, so that its absence in St Helena and Ascension does not of itself make the Act inapplicable and unsuitable to local circumstances. The rights and obligations created by the Act are capable of standing on their own without the need for any particular form of enforcement procedure. They do not depend upon a particular form of procedure for their existence.

3. The Act is applicable to St Helena. It is as appropriate to regulate employment here as in England. The circumstances which explain its origin have as much relevance in St Helena and Ascension as in England. They are a desire to ensure open and fair dealings between employers and employees. There are very substantial similarities between the conditions of employment in England and in St Helena. In particular, all government servants are subject to public service regulations which mirror good employment practice in England.

[22] e.g. *Quan Yick v Hinds* (1905) 2 CLR 342
[23] e.g. *Miller-Morse Hardware Co Ltd v Smart* (1917) 3 WWR 1113
[24] *Hall v Hall* [1941] 2 WWR 245

4. It is necessary therefore to assess objectively whether the overall package of rights created by the Act is "... suitable to local circumstances."

The Attorney-General correctly predicted that the only way to assess that is to consider the Act section by section and schedule by schedule. I have carried out that exercise and my findings are shown in the schedule to this judgment. My assessment has been carried out on the this basis:

(1) those parts which are purely procedural I have ignored for the reasons already given.

(2) those parts which (a) reflect good employment practice; (b) would add little or no expense to employers or government; and (c) could be applied with little modification are suitable.

(3) those parts which require substantial modification are not suitable, for the reasons already given.

(4) Those parts which would impose additional cost on employers or government, such as those relating to maternity pay and redundancy payments, are not suitable. If such benefits are thought to be desirable it is for the legislature and not the court to impose them.

In so far as numbers are important, this exercise resulted in the inclusion of 64 sections with 4 schedules; the exclusion of 84 sections with 8 schedules, and disregarding 12 sections with 5 schedules. Parts I, IV and V are applicable with hardly any modification; as is one half of Part II. 3½ out of 7 non-procedural Parts are applicable. The provisions of approximately one half of the Act are suitable to the circumstances of St Helena.

This is a very different situation from that confronting Hannah J in *Thomas (Karen) v Musk (Greta Pat)*[25] when he declined to introduce a very large Act in order to use one small section of it.

Those parts of the Act which are suitable are:

Part I the whole (Written particulars of terms of employment)

Part II part (Trade Union membership and time off work)

Part IV the whole (Termination of employment)

Part V the whole (Unfair dismissal)

Those parts which are not suitable are:

Part II part (Guarantee payments -sections 12 –18)

(Suspension from work on medical grounds sections 19 – 22)

Part III the whole (Maternity rights)

[25] [1997] SHLR 2

Part IV the whole (Redundancy payments)

I have found that the Act is applicable.

Considered as a whole, and applying the test in *Jex v McKinney*[26] the Act requires too much modification for it to be considered suitable to local circumstances.

But —

(a) because of its nature, as a consolidation of several different statutes, and also

(b) applying the "in so far" test

the Act does not fall to be considered as a whole. It deals with a number of quite separate subjects, in readily identifiable parts, within the overall context of the general field of employment law. It is therefore permissible to apply those separate parts which meet the test of suitability, and to disregard those which do not.

I therefore hold that the Act is applicable and suitable to the circumstances of St Helena and Ascension. It applies, disregarding the enforcement procedures and otherwise subject to necessary modification, in relation to the following parts:

Part I the whole

Part II Trade Union membership and time off work

Part IV the whole

Part V the whole

It follows that Mr Slater is entitled to bring his grievance to a tribunal to be tested. Whether or not he succeeds is a separate matter. There being no provision for Industrial Tribunals locally, the tribunal must be the Supreme Court and the procedure should be by writ seeking compensation for unfair dismissal."

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2. Judgment of Ekins C. J. in Francis v Attorney General, Case 503/2007 of the Supreme Court of St Helena, 2007

BACKGROUND

1. The background to the claim has been set out in detail in the judgement of Jones J. dated …… who first dealt with the Defendant's application to strike out the Plaintiff's claim. I shall therefore do no more than rehearse the bare bones.

On 22nd February 2007 under Case No. 503/07, the Plaintiff commenced proceedings in the Supreme Court against the Ascension Island Government. The Plaintiff claimed constructive

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[26] (1889) App Cas 77

dismissal from his employment by the Defendant. The Plaintiff subsequently amended his statement of claim to substitute the Attorney General as Defendant. The amendment was effected on 12th March 2007.

2. By application dated 12th April 2007, the Defendant applied to strike out the Plaintiff's claim:

a) on the basis that it disclosed no reasonable causes of action; and / or

b) that the Plaintiff's claim was an abuse of the process of the Court.

In support of the application and by written submissions, the Plaintiff contended:

a) that the Plaintiff's claim was barred by the expiry of the relevant limitation period for the presentation of a claim of this type;

b) that the Plaintiff was in any event estopped from pursuing the claim, having accepted from Ascension Island Government shortly after the termination of his employment, the sum of £8000 "in full and final settlement of all claims arising out of (his) employment with Ascension Island Government or the termination thereof".

3. In his judgement Jones J. held that the Plaintiff's claim was not barred by reason of the expiry of the limitation period. I need deal no further with that aspect of the matter therefore.

4. On the question of whether the Plaintiff's claim was estopped, Jones J. declined, quite correctly in my view, to reach a final determination. He was considering the case solely on the basis of written submissions and the documents filed in the case. Jones J. held that the issue of estoppel required a hearing to enable "detailed consideration of factual issues concerning the availability of independent advice, as well as all the circumstances which would enable the Court to establish whether Section 203 (of the Employment Rights Act 1996 – ERA 1996) is applicable and suitable to local circumstances, in accordance with the test laid down in the case of Slater v Serco Ltd 6/1998." It is the hearing envisaged by Jones J. that I have conducted. The hearing commenced on Tuesday 13th November and was then adjourned to Saturday 8th December when submissions were concluded. The Plaintiff was represented by Counsel, Mr David Gray–Jones who appeared from London via live video link. The Defendant was represented by Miss Lorna Drummond, Crown Counsel in the Attorney General's chambers.

THE LAW

5. For the purposes of this application the issue is a relatively narrow one, namely whether Section 203 of the UK Statute, The Employment Rights Act 1996 applies to Ascension Island. Although relatively narrow in itself, the issue also raises questions under the Human Rights Act 1998 (HRA).

UK LEGISLATION

6. ERA 1996 is a consolidating Act which replaced the Employment Protection (Consolidation) Act 1978 (EPCA) incorporating the various amendments made to EPCA in the intervening period. For the purposes of this application the important amendment incorporated into ERA was the amendment introduced by Section 39 of the Trade Union Reform & Employment Rights Act 1993 (TURERA).

7. Section 140 EPCA imposed a restriction on the circumstances in which a person could be precluded from presenting a complaint to an industrial tribunal, save in specific circumstances. I do not propose to recite each and every exception but for example one such exception arose where the parties had both sought conciliation and (in effect) the Conciliation Officer approved any compromise reached. TURERA Section 39 (I)(b) introduced a further exception legitimising compromise agreements but only where:

a) the agreement was in writing;

b) the agreement related to the specific complaint;

c) the complainant had received independent legal advice from a qualified lawyer as to the terms and effect of the proposed agreement and in particular its effect on his ability to pursue his rights before an industrial tribunal;

d) the legal advisor had appropriate professional indemnity insurance;

e) the agreement identified the advisors;

f) the agreement stated that the conditions regulating compromised agreements under the Act were satisfied.

The Act went on to define the requirement of “independence” and the term “qualified lawyer”. As respects the latter, a qualified lawyer was defined as a Barrister or Solicitor of the Supreme Court.

8. Section 203 ERA 1996 largely replicated the provisions referred to above although widened the scope of those entitled to give the requisite advice. The “qualified lawyer” was replaced by a “relevant independent advisor” stated to comprise of a qualified lawyer, duly authorised officers or officials of independent Trade Unions and similarly authorised employees/volunteers working at advice centers. Provision was also made for the Secretary of State to specify by order other categories of persons. It has not been suggested that any such category exists, at least that is of relevance to this application.

9. As I have already indicated, the Plaintiff also submits that the HRA 1998 is of relevance to the application. I propose to deal with that aspect of the case under a separate heading.

LAWS OF ST HELENA AND ASCENSION ISLAND

10. By virtue of the English Law (application) Ordinance No. 10 of 2005, “adopted English Law” applies in St Helena but only insofar “as it is applicable and suitable to local

circumstances and subject to such modification, adaptations qualifications and exceptions as local circumstances render necessary".

11. Adopted English Law is defined as including the Common Law of England, including the rules of equity; and the Acts of Parliament which are in force in England at the time of the commencement of the Ordinance (i.e. 1st January 2006). However adopted English Law applies only to the extent that it is not inconsistent with specific Acts of Parliament extending to St Helena, Orders in Council extending to St Helena or the provisions of any law locally enacted. The St Helena Law (application) Ordinance chapter A 1 makes similar provision for the application of the law for the time being in force on St Helena to Ascension Island.

12. In Graham Slater v Serco Ltd (1999) SHLR 5 Martin CJ considered the extent to which EPCA 1978 was of application to St Helena. It's application to St Helena was considered under the St Helena English Law (application) Ordinance 1987 but for these purposes the considerations there were precisely the same as arise under the 2005 Application Ordinance. Martin CJ held that the whole of parts 1, 4 and 5 of EPCA 1978 were applicable and suitable to St Helena, as were parts of part 2. The unfair dismissal provisions were therefore deemed to apply to St Helena "disregarding the enforcement procedures" (at page 18 of the judgement). Explaining why they should be disregarded, Martin CJ said:

"the machinery created for the enforcement of rights and for the settlement of disputes by conciliation is not an integral and essential part of the Act, so that it's absence in St Helena and Ascension does not of itself make the Act inapplicable and unsuitable to local circumstances. The rights and obligations created by the Act are capable of standing on their own without the need for any particular form of enforcement procedure. They do not depend upon a particular form of procedure for their existence". (At page 15) It is clear therefore that although in his schedule the learned Chief Justice seems to have indicated that Section 140 EPCA did apply, the body of his judgement makes it clear that it did not. Indeed it is hard to see how it could have applied since St Helena has never had a conciliation service, either remotely akin to that in England or at all. What Martin CJ clearly held however was that the absence of such a service did not make the Act of itself inapplicable or unsuitable. In the circumstances the application of St Helena Law to Ascension rendered the same Parts of EPCA of application to Ascension.

13. ERA 1996 now stands in the shoes of EPCA. It follows therefore and is accepted for the purposes of this application that those sections of ERA which replicate, or largely so, those parts of EPCA held by Martin CJ to be of application are of similar application of today. The issue in relation to Section 203 ERA arises because it is broader in scope than the enforcement provisions under Section 140 EPCA.

HUMAN RIGHTS ACT 1998

14. For the purposes of this application both parties accepted that HRA 1998 applies both to St Helena and to Ascension. The laws of St Helena therefore must be read and be given effect in a way which is compatible with the Convention rights. Article 6 of the Convention provides:

"In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established law."

15. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any grounds such as sex, race, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

16. Article 1 of the first protocol states:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principals of international law."

17. Article 8 reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

LOCAL CIRCUMSTANCES

18. When the Defendant's application was heard by Jones J. the learned Judge as already noted, felt that a detailed consideration of factual issues was required. I therefore posed a number of questions, the answers to which I invited the parties to endeavour to agree. The answers subsequently received are annexed to this judgement and I am extremely grateful to the parties for the detailed answers given and the co-operation they have clearly demonstrated in reaching them.

Neither St Helena nor Ascension have any qualified lawyers in private practice. There is a Public Solicitor on St Helena whose duties are set out in the Legal Aid and Legal Services Ordinance Chapter 177. The Public Solicitor's powers concern the grant of legal aid (see section 7 et seq). In addition the Public Solicitor may provide legal services to any person requiring such services – see section 13 A. The Public Solicitor however is based on St Helena. There is no Public Solicitor on Ascension nor is there statutory provision for a Public Solicitor on Ascension. From time to time the Public Solicitor may pass through Ascension and in addition may be available to give advice by telephone on Ascension.

19. In addition to the Public Solicitor both St Helena and Ascension have Lay Advocates, appointed from fit and proper persons within the Community. Lay Advocates are not

qualified lawyers but have rights of audience in all Courts and whose function it is to advise and represent any person seeking advice or representation. They are prohibited from receiving a fee for their services and are entitled to receive the cooperation and assistance of the Public Solicitor. Under Section 4 of the Lay Advocates Ordinance Chapter 13, Lay Advocates are specifically granted immunity from civil suit.

20. The Public Solicitor and the Lay Advocates are the only people either on St Helena or on Ascension who could conceivably be described as falling within the definition of independent legal advisor as set out at Section 203 (3A) ERA 1996.

SUBMISSIONS

21. The submissions of the parties are set out in the respective skeleton arguments. I am grateful to both Mr Gray Jones and Miss Drummond for the clarity of each. I should however summarise a further submission made by Mr Gray Jones and which was not dealt with in his skeleton and which concerns Article 8 of the convention. Mr Gray Jones submitted that employment rights fall within those rights protected by Article 8, that the prohibition against interference with those rights imports not only a negative obligation but also a positive obligation to ensure that the individual has the ability, via appropriate mechanisms, to protect those rights. Mr Gray Jones referred me to the case of X and Y v The Netherlands (series A No. 91). In that case the applicant Y had mental disabilities and was living in a home for the mentally handicapped. She was subjected to sexual intercourse on a single occasion by the son-in-law of the Directress of the home, although he was not an employee of the home itself. The particular circumstances of the case disclosed a lacuna in Dutch law which made prosecution of the alleged offender difficult if not impossible. As a result no prosecution was undertaken. The court held that the criminal code of the Netherlands failed to provide the applicant with practical and effective protection; and that she was in consequence a victim of a violation of Article 8 of the convention. The Court held at paragraph 23 of it's judgement, that Article 8 "does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking there may be positive obligations inherent in an effective respect for private or family life……"

By extensions submits Mr Gray Jones there ought to be the basic infrastructure in place to ensure that section 203 ERA is suitable and of application both to St Helena and Ascension; and that the absence of such an infrastructure if such there be would amount to a violation of the Plaintiff's rights under Article 8.

CONCLUSIONS

22. The legislative policy behind section 203 ERA 1996 is clear: to ensure that the code of employment protection is not rendered "worthless if at the stroke of a pen it [can] be removed by a general waiver or a lease of rights". – See University of East London v Hinton [2005] EWCA 532.

23. The desirability of the protection seems to me also to be undeniable. In Slater v Serco Limited however Martin CJ said: "it is irrelevant that such rights are widely enjoyed

throughout the developed world; or that there may be many good reasons making it desirable to apply the Act here. These are political considerations. It is for the legislature and not for the Court to take account of such arguments." See paragraph 4 page 15.

The test to be adopted in cases such as this is "whether the statute or any given section of the statute is both applicable and suitable. It will be applicable if it is capable of being reasonably applied; in other words that the circumstances which explain its origin in England are also relevant to St Helena (and by extension Ascension). It must meet a similar need. It will be suitable if it can be applied to meet that need without substantial modification." – See Slater v Serco Limited paragraph 3 page 13.

24. I am satisfied that section 203 ERA 1996 would meet a need in St Helena and Ascension, but as similar to the need it was designed to meet in England. It is clearly desirable that by stroke of a pen an employee should not be able to deprive himself of employment rights afforded by statute without at least having first had independent legal advice.

25. Suitability is a different matter however. As already noted there are no lawyers in private practice either in St Helena or Ascension. Is section 203 and in particular section 203 (3) and (3A) which are intrinsic to section 203 as a whole suitable "subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary"?

26. The Public Solicitor is a qualified lawyer but the history of that office shows that there are occasions when the office has been vacant for protracted periods of time. That of itself is not necessarily surprising. Life on a remote island is not to everybody's taste or inclination and recruitment to the office can therefore present difficulties. In addition and inevitably and even when the office is not vacant there will be lengthy period of time when the Public Solicitor is unavailable whilst on leave. Finally, and as the evidence shows, there is no statutory requirement that the Public Solicitor carries professional indemnity insurance although in practice the Public Solicitor may in fact hold it for his/her own protection.

Lay Advocates are however permanently available both on St Helena and on Ascension. Some analogy might perhaps be drawn between Lay Advocates and volunteers working at an advice centre. There are however a number of distinctions to be drawn. In the first place there is no system of certification indicating that any given Lay Advocate is in fact competent to give advice on the legal niceties of the law on unfair dismissal or the proper method by which claims should be calculated. It is true to say that Lay Advocates can apply for legal aid to enable them themselves to seek professional assistance from qualified lawyers overseas thus to be able better to give advice. I understand however that although legal aid for that purpose has been granted it is certainly not guaranteed. Furthermore and of greater significance in my view, is the fact that not only do Lay Advocates not carry professional indemnity insurance; by statute they are granted immunity from civil suit. It must be the case that the UK Parliament considered this to be a central feature of the further protection to be afforded employees.

27. Approaching the matter in a slightly different way I have considered the extent to which section 203 would have to be adopted or modified were I to hold that it was suitable to St Helena and Ascension. Subsection (1) would require simply the substitution of the words “employment tribunal” with “Supreme Court”. That of itself would present no difficulty. Subsection (2) however I would have to hold unsuitable in its totality. Unless “relevant independent adviser” was to be restricted to the Public Solicitor subsection (3)(d) would have to be deleted in its entirety; and even if restricted to the Public Solicitor the law on St Helena would have to be amended to make it a mandatory requirement of the post that the holder of the post obtained professional indemnity insurance. Subsection (3A) would either have to be modified so as to retain 3A(a) alone with the deletion of the remaining subparagraph; or in addition I would have to adapt subparagraph (c) for example to refer to Lay Advocates.

28. In Slater v Serco Martin CJ made it plain that “modifications should not be made which would alter the substance of the statute…..if a statute dealing with a single subject cannot be made suitable to local circumstances without very substantial alteration that is an indication that it is not in fact suitable.” – See paragraph 4 page 13.

29. I appreciate that in this case I am not dealing with a whole statute. I am dealing with merely one section of a statute which in other substantial respects does apply both to St Helena and Ascension. But the section in question – section 203 – is discrete in the sense that it comprises the machinery created for the enforcement of rights and for the settlement of disputes either by conciliation or by agreement. It seems to me therefore that I need to look at the machinery as a whole. The extent to which the machinery would in my view require wholesale modification goes substantially beyond “some amount of moulding in formal or insignificant details” see Jex v McKinney (1889) APP Cas 77.

30. I am mindful of Mr Gray Jones submission that in this day of modern communication employees on St Helena or Ascension could themselves instruct private lawyers in England direct. Indeed I was told that in England it is frequently the practice of employers to contribute to the legal costs of employees who instruct lawyers for the purpose of reaching compromise agreements. In those circumstances submits Mr Gray Jones section 203 is clearly suitable.

31. Although superficially attractive I am not satisfied that an Act of the UIK Parliament can be rendered suitable by imposing upon employees the obligation or requirement that they instruct overseas lawyers many thousands of miles distant – irrespective of whether employers would or would not make a contribution to the costs incurred as a result. If employers declined to make such contribution then I am mindful also of the overall level of wages on St Helena and Ascension which are modest by English standards; and the hourly charging rate of solicitors in England which can easily be twice the weekly wage of an employee on St Helena or Ascension. Furthermore and whether or not the majority on St Helena and Ascension enjoy access to the internet and thus email – and the agreed statement of answers demonstrates that an overwhelming minority have internet access from their homes – the English law (Application) Ordinance section 3 requires that I have regard to “local circumstances”. To hold that section 203 is rendered suitable only because employees

in St Helena and Ascension might be able to instruct a lawyer in England seems to me to do some violence to the clear wording of the Ordinance.

32. In all the circumstances I hold that section 203 is not suitable to St Helena or Ascension and I therefore hold that it does not apply and does not form part of the law of St Helena or Ascension.

33. I then consider the question of whether or not its non application constitutes a violation of the Plaintiff's human rights under the Human Rights Act 1998 and the Articles of the Convention thereby adopted.

ARTICLE 6

34. I am satisfied that the Plaintiff fails to establish any violation of his rights under Article 6. Nothing in the laws of St Helena or Ascension impairs the Plaintiff's right if access to a Court. Indeed the Plaintiff had at all times an unassailable right to pursue a claim for unfair dismissal. The constraint that now arises is due to the fact that the Plaintiff compromised that claim accepting as he did the sum of £8,000.00 in full and final settlement of it.

35. There is no suggestion on the present case that the Plaintiff entered into the settlement agreement other than voluntarily and without constraint. Section 203 ERA 1996 is clearly designed to impose additional constraints upon compromise agreements in the specific context of the employer/employee relationship but the absence of those additional constraints does not I am satisfied constitute a violation of Article 6. Were I to hold otherwise then it seems to me that all compromise agreements would be in danger of falling foul of Article 6. At the end of the of the day the passage from the judgment of in the case of Stretford v Football Association Limited and another [2007] All ER (D) 346 and referred to in the Defendant's skeleton arguments sets out the position clearly, namely:

"where in a case involving litigation of a private right the claimant voluntarily limits his own right of access by agreement with the other party to the dispute the considerations of justice arise simply as between the parties to the dispute; no additional public interest element falls to be considered."

36. The Plaintiff's claim for unfair dismissal was a private right. It has never been suggested that he compromised the claim other than voluntarily. I can therefore find no attempted infringement or impairment of the right under Article 6 nor do I see the principles of proportionality are of relevance. The Plaintiff's contention for a lack of legal certitude is equally unfounded. The principles of compromise have long been well established.

37. Holding as I do that Article 6 has not been violated it would be surprising if the Plaintiff were able to establish a violation of rights by reference to another Article when the specific right protected by Article 6 has not itself been infringed. I can deal with the Defendant's submissions relatively briefly.

ARTICLE 1 OF THE FIRST PROTOCOL

38. I find no violation of the Plaintiff's rights under this Article adopting the reasoning in relation to Article 6. The Plaintiff has not been "deprived" of any possession. He voluntarily agreed to surrender his right to pursue a claim under a valid compromise agreement. The constraints upon compromise agreements enacted by section 203 ERA 1996 do not apply to St Helena or Ascension. Their non application does not amount to a deprivation of a possession.

ARTICLE 14

39. I find no merit in the Defendant's submission under this Article. Even within the UK itself the rights enjoyed by citizens are not uniform nationwide. Taken to its logical conclusion – proportionality aside – the English Law (Application) Ordinance would be rendered largely otiose as every UK Act of Parliament which conferred a "right" or benefit to a UK citizen resident in the UK would, by the overriding effect of the Article apply in St Helena or Ascension. The answer lies in application and suitability. If a UK Act of Parliament is unsuitable then its non application to St Helena or Ascension is likely to be proportionate even if the policy behind the UK Act of Parliament is ultimately desirable. Further and in any event I accept the defendant's submission that the Crown in right of St Helena is a separate entity to the Crown in right of the UK; and that this is not therefore a case where there is one public authority applying different and discriminatory rules to sections of the same group. I see no argument for discrimination within Article 14.

ARTICLE 8

40. I do not find any violation of Article 8 nor do I find the case of X and Y v The Netherlands to be of any great assistance. The fact that section 203 ERA 1996 is not suitable to St Helena or Ascension does not amount to an interference with the exercise of the right to a private and family life. Nor is the absence of a provision to similar effect to section 203 but which would be suitable. X and Y v The Netherlands was an entirely different case where a lacuna in the law made difficult if not impossible the prosecution of an alleged offender. The victim was therefore denied the basic protection which the criminal law ought to have afforded her. There is no deprivation even remotely similar in the present case.

41. Having found that section 203 of the Employment Rights Act 1996 is not suitable to St Helena or Ascension and having found therefore that it does not apply; and having decided that its non application constitutes no violation of the Plaintiff's rights under the Human Rights Act 1998; it follows that the Defendant's application to strike out the Plaintiff's claim succeeds and accordingly I strike it out.

42. This is not a decision I have reached with any great sense of satisfaction. The policy behind section 203 is, I am clear, desirable. In St Helena and Ascension where wages are comparatively modest or can be there might well be additional economic pressures upon a Plaintiff to settle a claim for unfair dismissal over hastily and therefore disadvantageously. Additional protection to plaintiffs in those circumstances could be extended by the legislature

utilising the services of the Lay Advocates. It seems to me however that that must be a matter for the legislature. To endeavour to manipulate and to alter section 203 to the extent necessary so as to render it suitable to local conditions is not in my view a function of this Court.

43. So far as costs are concerned I am happy to receive the parties written submission on costs and to make a determination in due course. I say now however that this case has raised important issues. It was entirely proper that those issues should be fully argued and determined. I would take some persuading in those circumstances that any order other than no order for costs was appropriate.#

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3. Judgment of the St Helena Court of Appeal in Larry Francis v. Attorney General, Claim No. 1/2008, 23 December 2008

JUDGEMENT

The President: Mr. Justice Appleby:

1. I will invite Mr. Justice Woodward to give the first Judgement in this appeal.

Mr. Justice Woodward:

The Background

2. The Appellant, Larry Francis, resided on Ascension Island and was employed there as a technical/assistant foreman, mechanical and electrical, by the Ascension Island Government, represented by the Respondent, the Attorney General. He had worked for them since at least March 1998. In the early summer of 2006 the relationship between the Appellant and his employer broke down. It is not necessary for the purposes of this appeal to consider the disputed details of that breakdown but ultimately the Appellant's employment came to an end.

3. As might be expected, given the nature of the dispute, the Appellant and his employers endeavoured to reach a settlement. Ultimately the employers offered and the Appellant accepted an offer of £8,000 "in full and final settlement of all claims arising out of (his) employment with the AIG (Ascension Island Government) or the termination thereof." That compromise, it was accepted was without admission of any liability by AIG.

The Proceedings

4. In the Spring of 2007 the Appellant issued proceedings in the St Helena Supreme Court in respect of the ending of his employment, making a number of allegations, asserting breaches of implied terms, fundamental breach of his contract of employment and contending that the dismissal was unfair. He sought reinstatement upon the same terms as before, that he should be employed under a different manager, compensation for loss of earnings with interest, compensation, including for hurt to feelings and interest, together with interest upon

the whole of the sum claimed. Essentially, apart from any common law element, this was a claim for unfair dismissal.

5. The Respondent, in defence to that claim, over and beyond raising certain issues of fact and disputing the merits, took both a limitation point and contended that the claim was precluded by reason of the settlement that had been reached.

6. Taking the limitation and the compromise point, the Respondent applied to strike out the action.

7. The Appellant sought to meet the Respondent's arguments both upon limitation and compromise by relying upon the provisions of the Employment Rights Act 1996 as amended (ERA 1996), the Employment Act 2002 (LEA 2002) and the Employment Act 2002 (Dispute Resolution) Regulations 2004, unequivocally identifying his claim as one for unfair dismissal.

8. For reasons which are not relevant here the limitation point no longer needs to be considered.

9. According to Section 203 of the ERA 1996, the compromise of a claim for unfair dismissal is not binding unless certain criteria/conditions are satisfied. The parties are agreed that those requirements were not satisfied. The Respondent's contention was throughout that the statutory provisions as to compromise do not apply to the law of Ascension Island or of St Helena.

10. A further point was raised by the Appellant. He contended that pursuant to the provisions of the Human Rights Act 1998 (HRA 1998) the exclusion of Section 203 of the ERA 1996 from the laws of Ascension Island and St Helena would infringe the Appellant's Convention rights. Before the Supreme Court both parties accepted that the HRA 1998 applied to Ascension Island and to St Helena.

The Decision Appealed From.

11. On the 14th December 2007 Chief Justice Ekins, striking out the Appellant's claim, found that Section 203 of the ERA 1996 did not apply to Ascension Island and accordingly that the Appellant's pursuit of his claim was precluded by the compromise that had been entered into. He further concluded that there was no breach of the Appellant's human rights.

12. It is against that decision which the Appellant appeals to this Court.

13. Not surprisingly, given the way that the case was argued below and a previous ruling of his predecessor in the Supreme Court, Chief Justice Ekins proceeded upon the premise that the ERA 1996 applied but exempted from its application the provisions of section 203. The Respondent had however reserved the right to contend that the earlier decision, that in Graham Slater-v-Serco Ltd (1999) SHLR5, was wrong.

14. Upon a preliminary reading of the papers in this case it appeared to this Court that, before any issue of the effectiveness of any compromise of a claim for unfair dismissal could

be considered, it was necessary to address the question of whether or not the law of unfair dismissal as existing in England applied to Ascension Island or to St Helena.

15. That in turn raised an even more fundamental question, namely of whether or not the English employment law, and in particular the Employment Rights Act 1996 as amended, applied to Ascension Island and to St Helena.

16. Directions were accordingly given requiring argument upon the application of the ERA 1996 to St Helena and to Ascension Island, upon the correctness of the case of Slater and upon the jurisdiction of a Court of Law in this jurisdiction to hear, determine and grant remedy for a claim for " unfair dismissal", as opposed to a claim for breach of contract or wrongful dismissal. The parties were given leave to serve further argument thereon.

<u>Graham Slater-v- Serco Ltd.</u>

17. In Graham Slater -v- Serco Ltd (1999) SHLR5, Chief Justice Martin considered the precursor of the ERA 1996, the Employment Protection (Consolidation) Act 1978, (EPCA 1978), the issue before him being whether there was any entitlement for employees on Ascension Island or St Helena, to pursue a claim for unfair dismissal.

18. In coming to his decision the Chief Justice considered it necessary to endeavour to identify and set out some general principles for determining the application of an English statute to Ascension Island and St Helena.

19. The Chief Justice then applied the principles which he had identified concluding that the EPCA 1978 did apply, subject to certain modifications, holding that it was "a ragbag of assorted statutes re-enacted and lumped together for convenience because they fall within the same general field of law." Accordingly he held that it was "permissible to take each separate subject on its own and to consider whether that subject, as enacted, is suitable to local circumstances".

20. He went through the EPCA 1978 producing a table identifying those sections which in his view applied or did not apply. It would seem that there had been no argument before him upon whether or not the provisions relating to those particular employment rights should or should not be held to be applicable or suitable. By what criteria he arrived at his various conclusions one way or the other does not appear.

21. He saw no difficulty with the provisions of the EPCA 1978, which were substantially, in the relevant respects, the same as the provisions now embodied in the ERA 1996, in drawing a distinction between the rights and obligations conferred thereby on the one hand and the machinery by which they were to be enforced on the other, saying that unless the procedural provisions were an integral part of the overall package they could be excluded.

22. He excluded them and resolved the problem of there being no industrial tribunals or machinery for the resolution of any disputes arising on Ascension or St Helena under the Act

by saying "the tribunal must be the Supreme Court and the procedure should be by Writ seeking compensation for unfair dismissal".

23. It is not surprising, accordingly, that the Appellant, Mr. Francis, so proceeded.

The Courts of St Helena and its Dependencies

24. By the Constitution of St Helena there was established a Supreme Court in and for St Helena and its Dependencies, one of which is Ascension Island. That Court is a superior court of record and it has, according to the Constitution such jurisdiction in and in relation to St Helena and its Dependencies as may be prescribed by that Constitution or any other law. The Supreme Court possesses and may exercise all the jurisdiction which is vested in, or is capable of being exercised by Her Majesty's High Court of Justice in England. See Section 43 of the Constitution.

25. It has not been suggested in this appeal or at any point in these proceedings that the relevant jurisdiction of the Supreme Court is, for any allowable reason, in any way different from, or wider than, the jurisdiction vested in the English High Court of Justice. .

26. By Section 47 of the Constitution there was established this Court, the Court of Appeal for St Helena and its Dependencies.

27. The jurisdiction of this Court is defined by Section 48 of the Constitution, it having all the powers and jurisdiction of the Court from which an appeal is made to it.

The Application of English Statute Law

28. In the absence of English statute law being expressed to apply to St Helena or to Ascension Island or not having been applied thereto by Order in Council or not having been applied by or under local law, it may apply by virtue of the provisions of the St Helena Law (Application) Ordinance Cap A1 which applies, subject to the terms thereof, the law of St Helena to Ascension Island.

29. By the English Law (Application) Ordinance, 2005 the law of St Helena was expressed to be the "Adopted English Law" meaning the common law of England, including the rules of equity and the Acts of Parliament which were in force at the time of the commencement of that Ordinance. That Ordinance came into force on the 1st January 2006.

30. The application of Adopted English Law to St Helena was expressed to be that it should apply to St Helena "only in so far as it is applicable and suitable to local circumstances and subject to such modifications, adaptations, qualifications and exceptions as the local circumstances render necessary." See Section 3. Further such Adopted English Law was expressed to apply to St Helena only in so far as the same was not inconsistent with any act of Parliament of the United Kingdom extending to St Helena otherwise than by virtue of the Ordinance or any Order of Her Majesty in Council extending to St Helena otherwise than by virtue of that Ordinance or any provision made by or under any law enacted by the legislature in St Helena.

31. It was also provided by the Ordinance that the Governor in Council might by Order:-
(a) declare that any specified part or parts of the Adopted English Law were not suitable to local circumstances and that such part or parts are accordingly accepted from the provisions of Section 3 by the proviso thereto or

(b) direct that any part of the Adopted English Law shall have effect subject to such modifications as may be specified in the Order or

(c) direct that any Act of Parliament which is not within Section 2(b), shall (subject to such modifications, if any as may be prescribed in the Order) be in force in St Helena.

32. Accordingly for an English statute to apply in Ascension Island it is a prerequisite that it is part of the law of St Helena and must satisfy, in relation to Ascension Island the tests of applicability and suitability. These were substantially the same questions that were considered by the Chief Justice in Slater -v- Serco Ltd.

English Employment Law

33. Going as far back as the Industrial Relations Act 1971 the English Parliament has enacted a detailed statutory framework governing industrial relations including within it a statutory scheme for providing for compensation for unfair dismissal, transforming the nature of the contract of employment, stage by stage. Statute by statute, that law has developed balancing the interests of employers and employees having regard to changed social circumstances and view of the status of employee and the nature and significance of an individual’s employment and general economic interests.

34. Unfair dismissal was an entirely new statutory concept. It was established with statutory remedies, the jurisdiction over which was within the specifically created National Industrial Relations Court. That jurisdiction is now exercised by Employment Tribunals and, as it was put by Lord Hoffmann in his speech in Johnson -v- Unisys Ltd 2003 1.A.C. 510 at page 543 that “jurisdiction forms part of the fabric of English employment law.”

35. I can do no better than refer to the observations of Lord Hoffman in Johnson’s case where, in describing the English employment law, he spoke of Parliament setting up “an entirely new system outside the ordinary Courts, the tribunals staffed by majority of lay members, applying new statutory concepts and offering statutory remedies”. He described its rules as being “based upon policy and representing an attempt to balance fairness to employees against the general economic interests of the community”.

36. In specific terms, as in relation to the pursuit of other rights identified in the Employment Rights Act 1996, the right to complain for unfair dismissal was a right to complain to an Employment Tribunal, see Section 111. Where provision is made for complaint to an Employment Tribunal, Section 205 of the Employment Rights Act 1996 provided that the remedy of an employee for infringement of that right was by way of such complaint “and not otherwise”. Those provisions mirrored the provisions in the legislation considered by the Chief Justice in Slater’s case.

37. The composition and powers of Employment Tribunals are set out in the Employment Tribunals Act 1996.

38. At the time of the consideration of these proceedings by Chief Justice Ekins the tribunal system consisted of a President, with full-time regional chairmen and chairmen, part-time or full-time, appointed by the Lord Chancellor and lay members appointed by the Secretary of State after consultation with employees' and employers' organisations, being people with special knowledge and experience in commerce and industry, who would be expected to bring that practical expertise to bear in their judicial role.

39. A full Tribunal such as might sit to determine a complaint of unfair dismissal would, and does, ordinarily consist of the legal chairman and the two lay members. Whereas the chairman's role includes advising the lay members on the relevant law and its application to the facts of the case and the task of giving the reasons for the Tribunal's decision, he has a voice equal to that of the lay members who sit not as assessors but as full members of the tribunal.

40. An appeal from an Employment Tribunal lies to the Employment Appeal Tribunal which also has legal and lay members. Both the Employment Tribunal and the Employment Appeal Tribunals are specialist tribunals with lay members bringing their experience and industrial judgement to the application of the law and to the decision to be reached.

41. It is difficult, if not impossible looking at the English employment legislation, as contained in the Employment Rights Act 1996 as amended and the Employment Tribunals Act 1996 as amended, to regard it other than as all part of a piece. To dissect the statutory rights from the clearly and unambiguously expressed intention of those rights being subject to the exclusive jurisdiction of an Employment Tribunal and a specific appeal procedure to an Employment Appeal Tribunal is to transform the concept and essence of the legislation and of the resolution of issues and appeals arising under it.

42. Without the prescribed resolution mechanisms the remaining provisions are effectively marooned.

43. If those mechanisms are disregarded, both the employee and the employer are deprived of that which Parliament considered necessary for the determination of their rights namely a forum with the specialist input of the experience and industrial judgement of the lay members both at first instance and at appeal and where a majority decision would prevail. Other aspects too would disappear, for example those relating to conciliation.

44. I consider that entitlement to be fundamental to and an essential part of the English employment law and crucial to the application of the ERA 1996.

45. If it is excised by the Court, the question arises as to what it is to be replaced by and who it is that should decide thereon. That material lacuna has to be filled. These are serious and fundamental matters.

The Principles Identified in Slater's Case

46. The principles enunciated by Chief Justice Martin in Slater were:-

1. Only a statute of general application can be applied under the Ordinance.

2. A statute can only be applied if it is both applicable and suitable to local circumstances. There are two distinct tests. Is it applicable and is it suitable?

3. A statute is "applicable" if it is capable of being reasonably applied. It must meet a similar need to that justifying its existence in England and it is suitable if it can be applied to meet that need without substantial modification.

4. If a statute deals with one subject only, applicability and suitability must be tested by reference to the whole Act. It is not permissible to apply one part only. If a substantial part of such a statute is both applicable and suitable the whole may be said to be. The parts which are not can be deleted as a necessary modification to meet local circumstances.

I would add that appropriate regard has to be had to the use of the word "modification". Modification by deletion is to be contrasted with modification by addition or insertion. The latter, unless it does no violence to the clear intention of the law makers, or does not alter the essential nature of the legislation, or does not remove or alter any of the rights given, is properly the function of the legislature as the English Law (Application) Ordinance provides.

5. A distinction may be drawn between any rights or obligations conferred or imposed by the statute and the machinery by which they are to be enforced, unless that machinery, the procedural provisions and the mode of enforcement, are an integral part of the legislation, in which case they may be excluded.

6. It is irrelevant so far as the Court is concerned that such rights as are contemplated by the Statute in question may be widely enjoyed whether in England or other parts of the world or that a particular social, economic, political or other view may cause them to be thought to be desirable as part of the law of St Helena or Ascension Island.

47. Whilst the Court being invited to apply a particular English statute must have regard to those tests, it is important to remember that the jurisdiction of the Court is no more than that vested in or capable of being exercised by the English High Court of Justice. Its powers must not be confused with that of the legislature. The power of the Court in identifying the relevant legislation is not to alter it or interfere with its essential nature or to produce a result contrary to the clear intention of the legislature or to the express wording of the statute. Changes which involve a balancing of competing interests, complex political or social considerations or the identification of and evaluation of economic implications are properly the province of the legislature.

48. It is important that the law should, so far as can be, be clear and certain. The Court's role is to declare and, so far as if possible, without doing violence to the intention of the

statute or its provisions, to endeavour to make the statute work without, in effect, legislating. In so doing is not the Court's task to re-write the legislation.

The Application of the Principles to the ERA 1996

49. In my view the EPCA 1978, or its successor the Employment Rights Act 1996 as amended, cannot be properly described as a " ragbag of assorted statutes". It and the machinery for its enforcement are part of a code separate and apart from the common law.

50. There being no Employment Tribunals or machinery on Ascension Island or in St Helena for the enforcement of the rights and obligations in the Employment Rights Act 1996 as amended, in my view it cannot be said that the legislation is applicable. Moreover, even if applicable it cannot be rendered suitable by the excision of a substantial part of it, namely the machinery for its enforcement.

51. If it is so excised, a means of its enforcement has to be identified or devised.

52. What the Chief Justice did in Slater in one sentence, declaring "The Tribunal must be the Supreme Court and the procedure should be by Writ seeking compensation for unfair dismissal", was, in my view, to change beyond recognition what Parliament had clearly intended. In one stroke he purported to substitute the Courts for the specialist Tribunals with their rules, procedures and, in the appropriate circumstances the right of appeal to an Employment Appeal Tribunal, depriving the parties to an unfair dismissal dispute of their right to have their dispute heard and determined by a body with members bringing their experience and industrial judgement to the application of the law and the decision to be reached.

His decision appears to have had no regard for its implications or for the implications for the parties. It does not appear to have contemplated how an appeal should proceed and by the same act deprived the parties of an appeal level.

53. The solution adopted by Chief Justice Martin gives rise to more problems than that it solves and it did not accord with the principles he enunciated. Principles with which I, with the reservation and modification as above, agree.

54. Further he extended the jurisdiction of the Supreme Court, and in consequence that of this Court, where there was no legal basis for so doing. He substituted this Court for the Employment Appeal Tribunal.

55. It is noted that the English Law (Application) Ordinance of 2005 provides, at Section 5, that the Governor in Council may, by Order:-

(a) declare that any specified part or parts of the Adopted English Law are not suitable to local circumstances and that such part or parts are accordingly accepted from the provisions of Section 3 by the proviso thereto or

(b) direct that any part of the Adopted English Law shall have effect subject to such modifications as may be specified in the Order or

(c) direct that any Act of Parliament which is not within Section 2(b) shall (subject to such modifications, if any, as may be prescribed in the Order) be in force in St Helena.

56. The power clearly exists in the legislature to do what it considers necessary and appropriate but the very fact that the Employment Rights Act 1996 as amended can only be made workable by the Supreme Court substituting itself for the Employment Tribunal structure is eloquent indication of the fact, as I see it, that it is neither applicable nor suitable to St Helena and accordingly not to Ascension Island. If, contrary to my view it were to be regarded as applicable it is not, without the existence of an Employment Tribunal type structure, suitable. It is incapable of working as intended.

57. It follows from the above that the Employment Rights Act 1996 as amended whether in the context of unfair dismissal or otherwise does not apply and cannot, by judicial intervention, by what has elsewhere been described as the " moulding of formal or insignificant details", be made to do so.

58. The Supreme Court did not have the jurisdiction to take unto itself the determination of those statutory rights within the Employment Rights Act.

59. It is not difficult to understand the desire on the part of Chief Justice Martin to endeavour to afford to the people of Ascension Island or St Helena rights enjoyed in other places. For that to happen in my view requires, however, legislation appropriately drawn, taking into account all necessary interests, concerns, social and economic or other arguments pertaining thereto, balancing in the devising of such legislation the competing interests in a manner in which a Court is not suited to. It is a legislative not a judicial task.

60. In coming to the foregoing conclusion I have not addressed the application of the Human Rights Act 1998. I do not find it necessary so to do. It has not been suggested that the application of Section 2 or of Section 3 of the Human Rights Act 1998 would enable a conclusion upon the application of the Employment Rights Act 1996 as amended to be any different. Were the HRA 1998 to apply, having considered its provisions and addressing the issue of the application of the ERA1996 in the light thereof, my conclusion would be the same. Indeed, in the light of the provisions of the HRA 1998, I would have found even greater difficulty with the excision by Martin C.J. of the entitlement of the parties to an unfair dismissal dispute to the benefits of what might be described as the Employment Tribunal system.

61. Given that the Appellant never had a statutory right to claim for unfair dismissal any claim that he had arising out of the events of the summer of 2006 could only have been pursued at common law and in contract, which claim he had compromised. There was no suggestion that his compromise should impugned other than by reason of its alleged failure to comply with the provisions of Employment Rights Act 1996 as amended.

62. The observations of the House of Lords in Johnson -v- Uniys Ltd are interesting. It is clearly there indicated that, but for the existence of the statutory provisions relating to employment with jurisdiction to the Employment Tribunals, the common law might have

been developed. That would not avail this Appellant for he had compromised such claims as he had.

63. I would dismiss this appeal.

<u>The President:</u>

64. I have read the judgement of Mr Justice Woodward and I agree.

65. In the case of Slater-v-Serco Ltd the Chief Justice sought to make the Employment Protection (Consolidation) Act 1978 as amended applicable to St Helena and to Ascension Island with the best of intentions, so as to enable a claim for unfair dismissal to be available. I say “with the best of intentions” since the parties to this appeal are agreed that it might be considered to be desirable for this be the case. Such of course would be dependent upon whether appropriate and compatible procedures and means of determination of such rights can be devised. Thinking through the problems that that might give rise to, it is in my view more appropriate that the legislature in St Helena should apply its mind to the question of whether or not and to what extent there should be such provision in employment law for St Helena and how and in what manner and by what form it should be enforceable. Similarly consideration should be given to the situation on Ascension Island.

66. When the Chief Justice said that “There being no provision for industrial tribunals locally, the Tribunal must be the Supreme Court and the procedures should be by Writ seeking compensation for unfair dismissal” in my view that suggestion represents far more than modification of formal or insignificant details. It would necessitate substantial redrafting. Indeed below in this case when Ekins CJ observed in paragraph 31 of his judgement that whereas simply substitution of the words Employment Tribunal with Supreme Court would present no difficulty he then went on to consider, in the narrow context of compromise, the difficulty that such gave rise to.

67. The whole basis of the Employment Rights Act as amended is the Tribunal system. As Lord Hoffmann observed in Johnson -v- Unisys Ltd, with regard to the Employment Rights Act 1996, “Instead it set up an entirely new system outside the ordinary Courts with Tribunals staff by a majority of lay members applying new statutory concepts and offering statutory remedies”. As the headnote of that case says “It would be an improper exercise of the judicial function for the House to take such a step in the light of the evident intention of Parliament that such claims should be heard by specialist Tribunals”.

68. The substitution of the Supreme Court for an Industrial Tribunal is clearly inappropriate when one looks at the legislation being considered in Slater, namely the Employment Protection (Consolidation) Act 1978 which, in Section 129 says “The remedy of an employee for infringement of any of the rights conferred on him … if provision is made for a complaint or for the reference of a question to an Industrial Tribunal shall be by way of such a complaint or reference and not otherwise”, (my emphasis)

69. The whole essence of the Act is that matters should be determined by a Tribunal consisting of a legally qualified chairman and two lay members, one of whom represents

employers and the other employees. With the greatest of respect I consider that the Chief Justice was in error in his conclusions in Slater -v- Serco Ltd.in the application of the principles he had there enunciated.

70. As I have indicated I take the view that one cannot substitute the Supreme Court for an Industrial Tribunal.

71. Whilst others might disagree I do not consider that the main obstacle to the applicability of the provisions of the Act to a compromise is the availability or otherwise of an independent legal adviser.

72. I do not find it necessary to decide whether the Human Rights Act is applicable. If it does apply Sections 2 and 3 would be particularly relevant bearing upon the construction or interpretation of the Employment Rights Act 1996 as amended. Applying those criteria my decision upon the construction and application of the Employment Rights Act 1996 as amended is not affected.

73. In the circumstances of this case there was a valid compromise of such claims as the Appellant had. Being sui juris and not the subject of any legal disability no other ground is advanced for invalidating or setting aside the compromise. There is no necessity for a litigant or potential litigant to receive independent legal advice before being able to compromise at common law whatever claim he may have or contend that he has.

74. May I just add the importance of a full Tribunal is signified by the fact that the lay members (unlike the Supreme Court) within strict limits are appointed to draw upon their specialised knowledge when coming to a Tribunal decision, in particular their knowledge of local conditions.

75. I would only add that the importance of lay members is that they are part-timers who “appear to the Lord Chancellor and the Secretary of State to have special knowledge or experience of industrial relations either (a) as representatives of employers or (b) as representatives of workers. See Section 22(52) of the Employment Tribunals Act 1996.

76. I would dismiss this appeal.

Mr. Justice Rubery:

77. Having considered the Judgement of Mr. Justice Woodward I concur and have nothing to add.

78. I too would dismiss this appeal.

Order

There will be judgement accordingly for the Respondent.

The appeal is dismissed.

Following agreement between the Parties, with the approval of the Court, there will be no order as to costs.

This judgement is, with the assent of the Parties, to be delivered to them by simultaneous Fax and, further, will be dated as being given on the date that such Fax is sent. Further such judgement will be available for reading at the Court office by arrangement upon reasonable notice being given thereto.

Dated 23rd December 2008