[2010–12 Gib LR 46]

MARRACHE v. PORTINO COMERCIO INTERNACIONAL S.A. and HYDE

COURT OF APPEAL (Aldous, Parker and Tuckey, JJ.A.): September 8th, 2010

Civil Procedure—case management—adjournment—court may adjourn for whatever period necessary—not fettered by previous decision, indication, or intention to adjourn for a different period, since part of court's management of individual case

Civil Procedure—appeals—point not taken below—on appeal, cannot challenge service of process if opportunity not taken below to raise issue and file evidence in support

The first respondent commenced proceedings in the Supreme Court to recovery moneys standing to their credit that had been misappropriated from the client account of the law firm Marrache & Co. in the amount of €1.8m.

The action was brought against the appellant and his two brothers, as former partners of the firm. A consent judgment was entered against the brothers and a receiver was appointed in respect of several properties. A winding-up petition was presented against the firm by another creditor and joint liquidators were appointed. The first respondent then issued bankruptcy notices against the three brothers requiring them to pay the judgment debt and further sums. The notice was served on the appellant out of the jurisdiction at his London address. The firm was subsequently wound up under the Companies Act 1930 (as amended), s.351.

The appellant and his brothers failed to comply with the bankruptcy notices and the court gave permission to serve the notice again at his London residence. A return date for the bankruptcy proceedings was set for April 30th, 2010. The court appointed the second respondent, Mr. Hyde, as interim receiver and special manager of the appellant's affairs.

The appellant then made two applications in the Supreme Court, one to have the consent judgment in the action set aside, the other to adjourn or dismiss the bankruptcy proceedings.

At the return hearing of the bankruptcy proceedings, the appellant was absent and was not represented. The court (Prescott, J.) had regard to his applications, witness statement, and two affirmations. She initially intended to adjourn the hearing for two weeks, in so far as it related to the appellant, but, after submissions on the matter, adjourned until the next

working day after a holiday weekend, to allow consideration of the evidence submitted that morning. On that date, the appellant appeared in person and invited the judge to hear further argument. She declined to do so, declined to set aside the consent order, declined to dismiss or further adjourn the bankruptcy proceedings, and granted the receiving orders sought by the respondents.

The court granted a stay of the orders pending the appellant's appeal of those orders and of the consent judgment. At the appeal hearing, the appellant sought to rely on additional evidence not previously put before the court, disputing that he had been served with notice of the proceedings.

The appellant submitted that (a) Prescott, J. had erred in departing from her initial decision to adjourn for two weeks and, alternatively, that she should have exercised her discretion to grant a substantial adjournment; (b) his evidence on appeal that he had not been served with the notice should be admitted; (c) the appointment of Mr. Hyde as receiver and special manager risked a conflict of interest, since he acted for all three brothers; and (d) there were realistic prospects of having the consent judgment set aside either on the grounds of misrepresentation that the misappropriation action was the only claim, or because the moneys were not received in the ordinary course of business and therefore the Partnership Act 1895, s.15 provided a defence because he had no knowledge of the misappropriation.

The respondents cross-appealed against the stay of the orders and applied to set aside the appellant's notice of appeal, submitting that (a) the adjournment plainly fell within Prescott, J.'s case management discretion, who, assuming that a ruling had been made, was entitled to substitute a different ruling as she saw fit; (b) the appellant had had ample opportunity to file evidence disputing service at the hearing and could not now adduce additional evidence on appeal; (c) any possible conflict of interest arising from Mr. Hyde's position could be dealt with by the court at a later stage and could not prevent bankruptcy proceedings from continuing; and (d) there was no evidence establishing any realistic prospect of the consent order being set aside for misrepresentation and no defence to the proceedings under the Partnership Act 1895, s.15, because the moneys had been received by the firm in the ordinary course of its business, making the appellant liable as a partner.

Held, dismissing the appeal:

(1) The receiving orders would be enforced. There was no substance to the appellant's submissions that an adjournment for two weeks was mandatory. Even if the judge's original intention was to adjourn for that period, she had been plainly acting within the limits of her discretion in substituting a shorter period, which was a case management decision entirely for her to decide (paras. 41–43).

(2) Nor could the appellant now dispute service of the petition. He had had ample opportunities to file evidence disputing service prior to the return hearing and could not now adduce further evidence to the contrary.

Moreover, even if his evidence were admitted, there would be no prejudice to the appellant in upholding the order because he had, in fact, been fully aware of the bankruptcy proceedings, already sworn affirmations, and had made applications in the proceedings (paras. 44–46).

(3) Moreover, no objection could be made to the appointment of Mr. Hyde as special manager of the appellant's affairs. Any possible conflict of interest arising from his acting for all three brothers could be dealt with by the court at a later stage and would not prevent the bankruptcy proceedings from continuing (para. 47).

(4) Further, the consent judgment would not be set aside. Even if the appellant did believe that the misappropriation action was an isolated incident and had not anticipated further legal proceedings, the evidence did not support any misrepresentation on the part of Portino. Moreover, no defence was available under the Partnership Act 1895, s.15 because the moneys had been received by Marrache & Co. in the ordinary course of its business, to be held in its client account, for which the appellant was jointly and severally liable as a partner (paras. 48–52).

(5) As the appeal would be dismissed, the respondents' cross-appeal and application to set aside the notice of appeal did not arise for determination (para. 55).

Case cited:
(1) *Bass Brewers Ltd.* v. *Appleby*, [1997] 2 BCLC 700, referred to.

Legislation construed:
Partnership Act 1895, s.15:

> "If a partner being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein: Provided as follows:—
>
> (a) this section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and
>
> (b) nothing in this section shall prevent, trust money from being followed and recovered from the firm if still in its possession or under its control."

M. Watson-Gandy and *I. Massias* for the appellant;
C. Salter and *Miss A. Armstrong* for the first respondent;
K. Drago for the second respondent.

1 **PARKER, J.A.:** Before the court today are an appeal, two cross-appeals and an application. They all arise out of a receiving order made by Prescott, J. on May 4th, 2010 in respect of Mr. Isaac Marrache. Mr. Marrache is a former senior partner of the firm of Marrache & Co.,

solicitors, of which his two brothers Solomon and Benjamin were also partners. By an order dated May 27th, 2010, Prescott, J. stayed the receiving order pending an appeal against it by Mr. Isaac Marrache. That is the appeal before the court today.

2 Mr. Isaac Marrache appeared in person before Prescott, J., but before us we have had the benefit of representation of Mr. Isaac Marrache by Mr. Mark Watson-Gandy and Mr. Isaac Massias. We are extremely grateful to them for the assistance which they have given us, especially (if I may say so) Mr. Watson-Gandy, who (I infer) was instructed at relatively short notice.

3 The respondent to Mr. Isaac Marrache's appeal is Portino Comercio Internacional S.A. ("Portino"). Portino is a judgment creditor in the sum of €1,835,266.74, and it was on Portino's petition that the receiving order was made. By the receiving order the Official Trustee was appointed trustee of Mr. Isaac Marrache's property.

4 Portino and the Official Trustee cross-appeal against the stay granted by Prescott, J., but by their nature those appeals would only become operative in the event that the substantive appeal by Mr. Isaac Marrache is adjourned.

5 Portino appears by Mr. Charles Salter and Miss Ashbell Armstrong and the Official Trustee by Mr. Kerrin Drago.

6 There is also an application by Portino to strike out Mr. Marrache's notice of appeal.

7 I turn, then, to the substantive appeal.

8 The general background to the bankruptcy proceedings against Mr. Isaac Marrache is too well known to require rehearsal in this judgment. I can therefore turn straight away to the proceedings themselves in order to set the receiving order made by Prescott, J. and her subsequent order for a stay in their procedural and historical context.

9 On February 5th, 2010, Portino commenced an action against Mr. Isaac Marrache, his two brothers, and the firm ("the Portino action"), claiming the sum of some €1.8m., which I mentioned earlier as being moneys belonging to Portino which had been misappropriated from the firm's client account. On the same date, Portino obtained a world-wide freezing order against the three Marrache brothers.

10 On February 9th, 2010, judgment was entered by consent in the Portino action against each of the three Marrache brothers. Mr. Isaac Marrache was at that stage represented by Mr. Charles Gomez. Mr. Salter tells us that Mr. Gomez was a party to the drafting of the consent order and that he consented to it on behalf of Mr. Isaac Marrache. On February 11th, 2010, again by consent, Mr. Adrian Hyde, a solicitor and a licensed

insolvency practitioner, was appointed receiver of a number of properties under the Civil Procedure Rules, Part 69.

11 On February 12th, 2010, a winding-up petition was presented against the firm by another creditor of the firm, T & T Trustees. On February 15th, 2010, Mr. Lavarello, of PwC, and Mr. Hyde were appointed joint liquidators of the firm. On February 18th, 2010, bankruptcy notices were issued by Portino against the three brothers, requiring payment of the judgment debt and of a further sum of £10,000 owed to Portino within 31 days after service of the notice. Portino applied for, and obtained, leave to serve the bankruptcy notice in respect of Mr. Isaac Marrache out of the jurisdiction, as Mr. Marrache was at that time residing in London. On February 21st, 2010, the bankruptcy notice was served on Mr. Isaac Marrache in London at his residence. On March 7th, 2010 the firm was wound up under the Companies Act 1930 (as amended), s.351.

12 Mr. Isaac Marrache and his brothers failed to comply with the bankruptcy notices and on March 20th, 2010 the bankruptcy petition was presented by Portino in respect of each of them based upon the judgment debt and on the further debt of £10,000.

13 In the case of Mr. Isaac Marrache, leave to serve out of the jurisdiction was once again obtained and (according to an affidavit by the process-server Mr. Ciaran Teague) the petition was personally served on Mr. Marrache, once again at his London residence. (I shall have to return to the matter of service of the petition, for reasons which will appear later in this judgment.) The return date for the hearing of the petition was Friday, April 30th, 2010, that is to say the day before the May bank holiday weekend.

14 On April 14th, 2010, the court appointed Mr. Hyde interim receiver and special manager in relation to the affairs of Mr. Isaac Marrache.

15 On April 23rd, 2010, Mr. Isaac Marrache issued two applications. One was an application in the Portino action to set aside the consent judgment; the other was an application in the bankruptcy proceedings to dismiss or to adjourn the bankruptcy petition.

16 Mr. Marrache's application to set aside the consent judgment was supported by a witness statement by him in which he states that when he asked Mr. Gomez to act for him, concerns arose as to whether Mr. Gomez might be subject to a conflict of interest. However, says Mr. Marrache, he and Mr. Gomez were "reassured" by enquiries made at that time that the only matter with which Mr. Marrache need be concerned was the claim in the Portino action. Accordingly, he says, Mr. Gomez agreed to act for all three brothers on that basis.

17 In para. 8 of his witness statement, Mr. Marrache says this:

> "At this time no particulars of claim had been served other than the brief details of claim which appeared on the claim form and I have little knowledge of the matters in issue. However, I nonetheless reviewed the options which I thought were then available to me (including the option of defending the proceedings) and, in view of my belief (which Mr. Gomez also held) that this was the only matter which I needed to address, the decision was made that I should adopt a commercial approach to resolving these proceedings, rather than seeking the service of the particulars of claim and pleading my defence there to."

18 Taking it up again at para. 12 of his witness statement, Mr. Marrache says this:

> "There is no doubt that if I and Mr. Gomez had known that the present proceedings were not the only matter which needed to be addressed by me at that time then he would not have agreed to have acted for me by reason of an actual or potential conflict of interest arising and I would never have permitted the consent judgment to be entered against me but would have insisted on full particulars of claim being served and of defending the claim so that the court could make a decision on the merits by defence after a due process."

19 In para. 13 he says this:

> "In the event, this claim was not the only claim which concerned me and within one day of the consent order being entered on February 9th, 2010, the further claim of T & T Trustees Ltd. issued under [and he gives the claim number] was unexpectedly issued and served on me. As a result, at the court hearing of the present claim on February 16th, 2010, Mr. Gomez immediately informed the court of my intention to apply to set aside this judgment but, regrettably, by reason of the arduous chain of events which have occurred since then I have been unable to make this application until now."

20 In para. 14 of his witness statement he says this:

> "Since February 2010, there have been a series of other claims in Gibraltar and in England (which is where I am based) which have been served on me and I have, or am about to file, defences in respect of all these other claims. The only claim in respect to which I am presently unable to file a defence is the present claim and the reason for this is because of the entering of the above consent judgment which took place in the above-mentioned misleading circumstances and at a time when, if Mr. Gomez and I had not been misled as to the true position, I would also have filed a defence."

21 Mr. Marrache goes on to submit that he has a defence to the Portino claim based upon the Partnership Act 1895, s.15, on the basis that he was wholly ignorant of his brothers' dealings with the moneys in issue. I shall return to that submission later in this judgment. He accordingly invited the court to set aside the consent judgment.

22 The application was also supported by an affidavit by Mr. Gomez in which he states that he was given reason to believe that apart from a Financial Services Commission investigation, which he knew about, there were no further additional matters in addition to the present proceedings which involved Mr. Isaac Marrache and his brothers, and that on that basis Mr. Gomez agreed to act.

23 Mr. Marrache's application to dismiss or adjourn the bankruptcy petition was supported by two affirmations made by him. In the first of them he refers to his application to set aside the consent judgment. He continues at para. 6 of this affirmation: "For the reasons set out in the application to set aside my witness statement, this affirmation, and in the interest of justice, I apply for the petition to be either dismissed or adjourned generally with liberty to apply."

24 He goes on: "As I may not be able to attend the hearing of the application and the petition, I take this opportunity of referring the court . . . [and then he refers the court to his application to set aside the consent judgment]." He then goes on to submit that there is a genuine triable issue as to the existence of the judgment debt upon which the bankruptcy petition is based, and he refers to the wider powers of the bankruptcy court to investigate such an issue. He also submits in his affirmation that the freezing order which Portino had obtained afforded it adequate protection.

25 In para. 11 of this affirmation, Mr. Marrache asserts that in consenting to judgment he was "merely trying to find a commercial solution to the problems which were then being immediately faced." Mr. Marrache goes on to refer once again to a defence which he suggests that he has under the Partnership Act 1895, s.15.

26 I can now turn to Mr. Marrache's second affirmation in support of his application, where he says (at para. 3):

> "I repeat what was stated at para. 6 of my witness statement [I interpret that as a reference to his witness statement in the Portino action] that after further inquiries of my brothers were made soon after the Portino proceedings were served on me, I was reassured that (apart from the Financial Services Commission investigation, which I believe was a separate matter) the only matter I needed to be concerned with was the Portino proceedings."

27 The bankruptcy petition duly came on for hearing on its return date, which, as I said earlier, was Friday, April 30th, 2010. The hearing was listed before Prescott, J., who was unfamiliar with the case. Indeed, she had only been supplied with the voluminous bundles relating to this case earlier that very morning. Appearing before her on that occasion were Mr. Charles Salter, for Portino (he appears for Portino again today), Mr. Simpson for T & T Trustees, Mr. Bossino for two other supporting creditors, Mr. Drago for the Official Trustee, and Mr. Massias for Solomon and Benjamin Marrache.

28 Mr Isaac Marrache was neither present nor was he represented, although it has never been suggested (indeed it cannot be suggested) that he was unaware that the hearing was taking place.

29 Prescott, J. duly made the receiving orders against Solomon and Benjamin Marrache. In respect of Mr. Isaac Marrache, however, the judge was understandably concerned that she should have a proper opportunity to read and to consider Mr. Isaac Marrache's applications and the evidence in support of them, consisting of the witness statements and affirmations to which I have already referred. Initially, the judge was minded to adjourn the bankruptcy petition as against Mr. Isaac Marrache for a period of some two weeks, should a suitable date be available, but at a later stage in the hearing, following further submissions by counsel, she was persuaded not to adopt that course but instead to rule on the petition in respect of Mr. Isaac Marrache on the following working day (which was Tuesday, May 4th, 2010), thereby giving herself time to consider the relevant documentary material over the long weekend.

30 I refer briefly to passages in the transcript of the hearing on Friday, April 30th, 2010. Towards the conclusion of the hearing the judge said this:

> "I am persuaded to reconsider my tentative decision on the granting of an adjournment. Whilst Isaac Marrache now seeks an adjournment by way of correspondence, before I make a conclusive decision, and particularly in light of Mr. Bossino's submission this afternoon and to the case law referred to me, I am minded to give the matter some further thought. I still feel it is important, however, for me to consider the bundles, the seven bundles lodged with the court today, I said so at the start of the proceedings. Mr. Salter indicated that these bundles were specifically in reply to issues that Isaac Marrache had raised. I haven't had the opportunity to read them and I think it's prudent and important that I should do so before I make a conclusive decision. That said, I shall do so over the weekend and I will make my ruling on [Tuesday] morning at 9.30 a.m. and I will give brief reasons thereon."

31 It appears that Mr. Isaac Marrache arrived in Gibraltar on the bank holiday, Monday, May 3rd, 2010. At all events, he attended the hearing on the following day, Tuesday, May 4th, 2010. He appeared in person, without representation. He invited the judge to hear a further argument from him as to an adjournment of the case based among other things upon the existence of a real prospect (as he would have it) of his succeeding in his application to set aside the consent judgment. However, the judge declined to hear a further argument from him, explaining that she had already decided that she would rule on the matter that morning. She pointed out to Mr. Marrache that he had had a full opportunity of appearing on the previous Friday to make such submissions as he wished to make, either in person or by counsel. As she put it to Mr. Marrache (I am quoting again from the transcript):

> "Yes, Mr. Marrache, I am not unsympathetic to the magnitude of the task before you; however, you had ample notice that the hearing was on Friday, you could have appeared in person on Friday, you could have instructed counsel, you could have taken steps, you didn't and you've done so now and it's quite simply too late. I've heard submissions, I've taken into account your affirmations on the points you raised in your affirmation, the cases you highlight and I have ruled and I propose to read my ruling now. It's simply too late, I'm not going to hear any further submissions this morning."

32 Accordingly, she then proceeded to deliver her ruling and I now refer to that. She referred to the petition in respect of Mr. Isaac Marrache saying this:

> "The bankruptcy notice against Isaac Marrache issues out of the same facts, and in respect of the same debt, as the bankruptcy notice against Solomon and Benjamin and, like his brothers, he has consented to judgment being entered against him. To date, he has not complied with the bankruptcy notice. Unlike his brothers at this hearing, Isaac Marrache was not represented and made no appearance in person, instead he has faxed to the court three affirmations setting out his position which I have read and considered. It is not in dispute that all the formalities which should have been complied with by the creditors have been complied with. [I shall come back to that later in this judgment. She continues:] It is not in dispute that Isaac Marrache consented to judgment being entered against him. Mr. Marrache now asks this court to dismiss the petition or to adjourn it generally with liberty to apply. The distinguishing factors between Mr. Marrache and his brothers in this matter are that he has within the last few days, in particular on April 23rd, 2010, filed an application notice to set aside the consent judgment. Essentially he argues that he consented to judgment being entered into in an effort to adopt a commercial approach, believing that the Portino debt was

> an isolated incident and that had he known that there were more debts he would not have consented to judgment. He alleges his consent was induced by misrepresentation, although he stopped short of identifying who the author of such misrepresentation is. In any event he identifies the Partnership Act, s.15 as providing him with his primary defence."

33 She then turned to the application that the petition be dismissed altogether. She declined to do that, finding that Mr. Isaac Marrache had indeed committed an act of bankruptcy within the meaning of the Bankruptcy Act 1934. She then turned to consider the alternative application made by Mr. Marrache to the effect that the petition should be adjourned generally with liberty to apply. As to that, she said this: "The only ground upon which I could properly accede to an adjournment request under the court's inherent jurisdiction, is to give Mr. Marrache the opportunity to pursue his application to set aside the consent judgment."

34 She went on to express concern that Mr. Marrache may have been adopting delaying tactics in the litigation. I can pass over that for present purposes and continue where she says this:

> "On Friday, I was informed by Mr. Massias that it was Marrache's intention to travel to Gibraltar on May 5th. As it is, he is here today. Given that, although financially he is in a position to travel from the United Kingdom to Gibraltar, there is no reason before me why he could not have done so in time for the hearing last Friday. Had he done so, he could have applied for legal assistance and upon qualifying for the same, he would have been entitled to legal representation. For these reasons, I am not persuaded that his absence or lack of legal representation affords sufficient grounds for an adjournment. Therefore it only remains to consider whether an adjournment should be granted pending the application to set aside the consent judgment."

35 She then raised the question whether it was appropriate for her to take any view on that matter, but she concluded that it was appropriate that she should do so. She continued:

> "Mr. Marrache . . . argues that there is a genuine triable issue as to the existence of the debt and in such circumstances the court will set aside a consent judgment. His first point is that the consent judgment was not a genuine recognition of the debt but a commercial decision taken to resolve proceedings in the belief that this was an isolated claim by an isolated creditor. I have been provided with no authority to suggest that the existence of further claims by further creditors would invalidate acceptance of liability in respect of the original debt. Mr. Marrache is an experienced lawyer himself and he was legally represented at the time. Mr. Simpson suggests that had Mr.

> Marrache genuinely wanted to take a commercial view, he would not have accepted liability but would have taken responsibility jointly or otherwise to discharge the debt. This would certainly have been the more sensible approach consistent with adopting a practical commercial resolution but it is difficult to understand why Mr. Marrache would have ever admitted liability in respect of such a substantial debt of almost €2m. if he had no knowledge of the debt and bore no responsibility for it, whether or not it was an isolated debt . . . Mr. Marrache's second point and main argument is that by virtue of the Partnership Act, s.15, he escapes liability."

I will return to this last point later in this judgment.

36 The judge agreed with Mr. Salter that s.15 afforded no defence to Mr. Isaac Marrache in the circumstances of the case, based on the fact that the money in question had been received by Marrache & Co. in the ordinary course of its business. She referred to an authority supporting that conclusion, *viz.*, *Bass Brewers Ltd.* v. *Appleby* (1) ([1997] 2 BCLC at 711). After considering the suggested defence under the Partnership Act, s.15 in greater detail, the judge continued as follows:

> "From the material before me and in the absence of any indication to the contrary, the money which is the subject of the Portino debt was properly received by Marrache & Co. in the ordinary course of its business. The money was paid into the firm's client account and it is not alleged that the payment was improper. There is no indication that the money was received by one partner in his capacity as a trustee . . . The case is of the simplest. The money was received by the firm in circumstances which made the firm accountable to the plaintiffs and the firm has not accounted to them. I find no legal merit in the argument to set aside the consent judgment through reliance on the Partnership Act, s.15 as advanced by Mr. Marrache. In relation to the commercial argument, that too is devoid of merit. The application to set aside has little or no prospect of success and, in the circumstances, an adjournment is not merited and any further delay in this matter is unjustified."

37 Then, as it were by way of postscript to her ruling, she referred once again to the question of an adjournment, saying this:

> "Just for the sake of completion I would say which I ought to have said at the start, that some 20 minutes before the hearing on Friday, seven bundles of documents and further bundles of skeleton arguments were lodged with the court. I was informed by Mr. Salter that this material was lodged in response only to Mr. Isaac Marrache's three affirmations, the latest of which was received by fax on the morning of the hearing. I then proceeded to hear the petitions in respect of Solomon and Benjamin and proposed to adjourn the

matter in relation to Mr. Isaac Marrache. The next available date was on June 2nd. I was informed via Mr. Salter that, in the opinion of Mr. Hyde, such an adjournment would prejudice the creditors because despite the freezing order and the interim receiving order in place, there are provisions under the Insolvency Act which would allow the liquidator to rein in certain moneys spent by the bankrupt within the last six months. The provisions, however, are subject to narrow time limits. Having heard Mr. Salter, Mr. Bossino and Mr. Simpson, I adjourned over the long weekend so that I could read all the material before me and rule as to whether the matter in relation to Isaac Marrache should be adjourned. I find that the creditor has a judgment by consent against Mr. Marrache; that there has been no application to set aside the bankruptcy notice under the provisions allowed by the Bankruptcy Act 1934; that since the issue of the bankruptcy notice the debt has not been satisfied; and that although the creditors are protected by the freezing order and the entering of the receiving order of April 14th, 2010 they are likely to suffer some (albeit no substantial) prejudice by the proposed adjournment. The debtor has committed an act of bankruptcy specifically under the Bankruptcy Act, s.3(1)(g) and I therefore grant the creditor's application."

38 Subsequently, an application was made by Mr. Marrache for a stay of the receiving order pending his intended appeal (being the appeal before the court today). The judge indicated that she would grant such a stay. On that occasion, however, there was no discussion as to the precise terms of the order for a stay; that was subsequently rectified at a further hearing, at which the detailed terms of the order for a stay were discussed. That, in turn, led to the order for a stay dated May 27th, 2010, to which I referred at the beginning of this judgment.

39 I can now turn to the various grounds on which Mr. Isaac Marrache seeks to appeal against the receiving order.

40 As I said earlier, we have been greatly assisted in this respect by Mr. Watson-Gandy and by Mr. Isaac Massias. They have placed before us helpful outline submissions in writing on the basis of which Mr. Watson-Gandy made his oral submissions.

41 The first suggested ground on which Mr. Watson-Gandy relies relates to the granting (as he would have it) of an adjournment of some two weeks by Prescott, J. at an early stage in the hearing on April 30th, 2010, subsequently reviewed by the judge and replaced by a ruling that there should be no such adjournment but that she would rule on the matter on the following Tuesday.

42 Essentially, Mr. Watson-Gandy makes two submissions. First, he submits that it was not open to the judge, having indicated by way (as he would have it) of a ruling that there would be an adjournment of some two

weeks, subsequently to depart from that ruling or to reconsider it in any way. He referred us to authority to the effect that where there has been a full trial and a final order is delivered orally, that order may be taken to be final, notwithstanding that through some administrative error it may not be properly drawn out and entered. However, those cases have no bearing whatever on the circumstances of the instant case. In the instant case the judge was perfectly properly reviewing her intentions in relation to an adjournment by reference to the arguments which she heard. In my judgment, it was entirely open to her to reconsider her original intention, even assuming that her original statement of intention amounted to a ruling (and let it be assumed for present purposes that it did amount to a ruling), the judge was nevertheless fully entitled to review that ruling and to substitute a different ruling if she considered that that was what justice required. This was a case management decision by the judge and it was one which she was perfectly entitled to make.

43 The second point that Mr. Watson-Gandy seeks to make is that the judge ought, in the exercise of her discretion, to have granted a substantial adjournment, be it two weeks or some longer period. In my judgment, however, that is, with all respect to Mr. Watson-Gandy, a hopeless argument. This was a matter entirely for the judge. She was fully within the limits of her discretion in the ruling which she eventually made. Accordingly, I can for my part see no substance whatever in the submissions which Mr. Watson-Gandy has made on the question of an adjournment.

44 Mr. Watson-Gandy then turned to the service of the petition. As I mentioned earlier, there is on the file an affidavit by the process-server, Mr. Ciaran Teague, in which he deposes that he served a sealed copy of the petition on Mr. Isaac Marrache personally in London, as required by the bankruptcy rules. Until this hearing, there has been no evidence (and I emphasize "evidence") to any contrary effect. In the course of an interlocutory hearing before the Chief Justice in, I think, July of this year, Mr. Isaac Marrache stated that he had not been served with the petition, but even at that stage he did not make any affirmation to that effect. However, in the course of this hearing, when that deficiency was pointed out by the court, Mr. Marrache proceeded there and then to make an affirmation in which he deposes that he was never served with the bankruptcy petition. I do not need to read the affirmation; suffice it to say that its concluding sentence reads: "I have not been served with the bankruptcy petition."

45 Mr. Watson-Gandy invites this court to admit that affirmation as evidence of the fact to which it deposes.

46 Mr. Isaac Marrache is, as everyone knows, an experienced lawyer. He has had ample opportunity to file evidence to this effect at earlier stages in the proceedings, yet not only did he not file any such evidence but he

never mentioned the point in his earlier affirmations, nor did he mention it to the judge when he attended before her on Tuesday, May 4th, 2010. He has had a full opportunity to adduce additional evidence should he have wished to do so, yet it is only at some time past the eleventh hour that he seeks to put in evidence this affirmation. There can be no doubt that he has been fully aware of the bankruptcy proceedings: he has participated in them, has sworn affirmations in them, he has made applications in them. In the circumstances, there could be no possible prejudice to Mr. Marrache, even if the facts were as he deposes in his affirmation. For those reasons I would, for my part, refuse leave to adduce this affirmation in evidence at this stage.

47 Mr. Watson-Gandy then turned to the appointment of Mr. Hyde as special manager, suggesting that Mr. Hyde may prove to be subject to some conflict of interest in acting for too many parties, in particular for all three Marrache brothers. He suggests that that is a reason for allowing this appeal and preventing the bankruptcy proceedings from continuing. I cannot accept that suggestion. If it should transpire at some later stage that there is a conflict of interest which needs to be addressed, then the court is fully able to address it, and an application can be made accordingly. The court can then make whatever decision it considers to be just in all the circumstances. In my judgment, the possibility of some conflict of interest on the part of Mr. Hyde is certainly not a reason for rescinding the receiving order or for allowing this appeal.

48 Next, Mr. Watson-Gandy turns to the consent judgment, and to the application to set it aside. He began by referring us to the wider powers of the bankruptcy court to go behind a judgment and investigate the circumstances behind it. There is no doubt that the bankruptcy court does have wider powers in that respect in appropriate circumstances as the authorities show. The question for us, however, is whether Mr. Marrache has shown any realistic ground upon which his application to set aside the consent order could possibly succeed.

49 There are two basic grounds upon which he relies. One is the so-called "misrepresentation," as referred to in the evidence which I quoted earlier in this judgment. The second is the Partnership Act 1895, s.15.

50 As to the first ground, Mr. Watson-Gandy accepts (as he must) that in the context of an application to set aside a consent judgment, it is necessary to apply contractual principles. He suggests that on the evidence before the judge and before this court, a realistic prospect has been demonstrated of Mr. Isaac Marrache being able successfully to claim that the consent judgment was, in effect, a voidable contract by reason of misrepresentation. He has referred us to various documents in addition to the sworn evidence before us, in an attempt to make that submission good.

However, in my judgment, the evidence before the court, including the additional documentation to which we have been referred, goes nowhere near demonstrating any realistic prospect of the consent judgment being set aside on the grounds of misrepresentation by or on behalf of Portino – and that is the nature of the misrepresentation which one would need as a matter of contract in order to arrive at a situation where the contract is voidable at the suit of Mr. Marrache. As for Mr. Marrache's attempt to reach a commercial solution, that was a matter for him.

51 We have also been shown documentary evidence of contemporary negotiations which were taking place with Portino. No doubt Mr. Marrache hoped that an overall settlement could be reached and that the whole matter would, as it were, go away. Unfortunately, that expectation was, in the event, disappointed, but in my judgment that gives Mr. Marrache not a ghost of a chance of setting aside the consent order.

52 In so far as the other ground is concerned, that is to say the Partnership Act, s.15, Mr. Watson-Gandy very properly concedes that if the moneys in question were received by Marrache & Co. in the ordinary course of its business, then the Partnership Act, s.15 affords Mr. Isaac Marrache no defence on the ground that he was allegedly an innocent partner who knew nothing of the dealings taking place by his brothers with the money in question.

53 The facts as we understand them, and as confirmed by Mr. Salter and by documentation to which we have been referred, is that the moneys in question were paid in the normal way by Portino to Marrache & Co. to be held in the client account. Portino was the holding company of a subsidiary called Vanburgh, which owned a property in Spain. That property was sold and the proceeds of sale were remitted to Portino because Vanburgh apparently had no separate bank account. Portino intended to wind up Vanburgh, which appears to have been a one transaction company (but whether that be correct matters not), and remitted the money in question to Marrache & Co. to be held on client account. The payment was made in March, 2009, and the liquidation of Vanburgh did not take place until May 2009. On the basis of those facts there can, in my judgment, be no question but that the receipt of the money by Marrache & Co. was in the ordinary course of its business. Accordingly, on those facts there is, as Mr. Watson-Gandy rightly conceded, no available defence to Mr. Isaac Marrache under the Partnership Act, s.15.

54 I think I have now dealt with all the submissions made by Mr. Watson-Gandy in the course of his address to us today.

55 For the reasons I have given, therefore, I can see no possible ground upon which this appeal could succeed and I would, for my part, have no hesitation in dismissing it. On that basis the cross-appeals do not arise and

the application by Portino to set aside the notice of appeal does not arise either. Those, then, are the orders which I would propose.

56 **ALDOUS** and **TUCKEY, JJ.A.** concurred.

Appeal dismissed.

[2010–12 Gib LR 61]

GONZALES v. GRACIA

COURT OF APPEAL (Aldous, Parker, and Tuckey, JJ.A.): September 14th, 2010

Limitation of Actions—tort actions—personal injury—actions for "negligence, nuisance and breach of duty" in Limitation Act 1960, s.4(1) include actions for intentional injuries—three-year limitation period applies

The appellant claimed damages in the Supreme Court in respect of psychiatric injuries suffered by her as a result, she claimed, of the respondent intentionally harassing her with letters, criminal damage and assaults.

The incidents were alleged to have occurred in 2003. The respondent was convicted of criminal damage to the appellant's car in 2004. The appellant obtained a medical report confirming her psychiatric injuries in September 2006 and commenced proceedings in November 2007, having been advised that a six-year limitation period applied to the claim.

The Supreme Court (Pitto, Ag. J.) held that the appellant's action had accrued when she acquired all the material facts in 2003, before the medical report was obtained, and she had, therefore, commenced the proceedings after the expiry of the statutory limitation period of three years (Limitation Act 1960, s.4(1)).

On appeal, the appellant submitted that (a) the limitation period for the claim was six years, as the three-year period for "negligence, nuisance and breach of duty" claims under s.4(1) did not include intentional injuries. English authority that those words included intentional injuries should not be followed, as the Gibraltar court lacked the power to exclude the time limits in personal injury cases available to the courts in England; (b) to hold that intentional torts were subject to a three-year limitation period would cause hardship to the appellant; (c) the application of a three-year period amounted to a change of law that violated the appellant's right to a