[2013–14 Gib LR 243]

IN THE MATTER OF B. MARRACHE

IN THE MATTER OF S. MARRACHE

SUPREME COURT (Butler, J.): September 13th, 2013

Bankruptcy and Insolvency—realization of property—jointly-owned property—no automatic trust when parties hold property as legal joint tenants, so no implied underlying beneficial joint tenancy or trust for sale—severance therefore not possible—even if trust, and trust severed by bankruptcy, no presumption of trust for sale

Bankruptcy and Insolvency—realization of property—jointly-owned property—no power to order sale/possession of property belonging jointly to bankrupt and third party—would put trustee in stronger position than bankrupt and defeat purpose of Partition Acts in bankruptcy proceedings

The official trustee of Benjamin and Solomon Marrache sought orders for possession of the property each owned jointly with his wife.

Benjamin Marrache and his wife, Anjette, each owned 50% of the lease of their home on Main Street, where they lived with their children. In 2010, Benjamin Marrache was adjudicated bankrupt, and his interest in the property vested in the official trustee. Solomon Marrache and his wife, Monica, were in a similar position, and the cases were therefore heard together. The arguments relating to both were the same, and the decision relating to Solomon Marrache would follow automatically from the decision regarding Benjamin.

The official trustee sought an order for possession of the property, submitting that the power to order possession or sale of property under the Bankruptcy Act 1943, s.48(2) gave the court the power to enforce the acquisition or retention of the bankrupt's property by the trustee as if he were a receiver appointed by the Supreme Court. In the absence of any guidance as to how the court's discretion under s.48(2) should be exercised, the official trustee submitted that the test ought to be that the court would exercise its discretion to order sale in favour of the bankrupt's creditors, save in exceptional circumstances, which these were not. The use of such a test in applications like the present was, he submitted, supported by English authority and, in Gibraltar, contained in the new Insolvency Act, which, admittedly, was not yet in force.

Anjette Marrache submitted in reply that the court had no power to order possession or sale of the property. The test of requiring exceptional

circumstances in order to postpone sale relied on the application of the English Law of Property Act 1925, s.30, to which there was no equivalent provision in Gibraltar. The new Insolvency Act, even if it had been in force, would not have applied retrospectively to her case. She was not a beneficiary under a statutory trust for sale (she conceded that if she had been, an order for sale should have to be made) but had a joint legal interest. The interpretation of s.48(2) put forward by the trustee, she submitted, would have allowed a trustee in bankruptcy to ignore the rights of third parties and put him in a better position against third parties than the bankrupt had been.

Held, dismissing the application:

(1) The Bankruptcy Act 1934, s.48(2) did not give the court the power to order the sale or possession of property belonging jointly to the bankrupt and a third party. To adopt such an interpretation would effectively incorporate the Law of Property Act 1925, s.30 into bankruptcy proceedings without any guidance as to the exercise of the court's discretion; it would be surprising for Parliament to make such a change only in relation to bankruptcy. If such an effect had been intended, it would have been expressed far more clearly, and there was no authority in which the point had ever been considered before. It would put the trustee in a far stronger position against third parties than the bankrupt had ever been in, and would defeat the purpose of the (still applicable) Partition Acts in relation to bankruptcy proceedings (para. 11).

(2) There was no provision equivalent to the English Law of Property Act 1925, s.30 in force in Gibraltar, so the test requiring there to be exceptional circumstances before postponing the sale of jointly held property did not apply (para. 11).

(3) There was no need to imply a beneficial joint tenancy under a trust for sale, and severance did not therefore apply in this case. The maxim "equity follows the law" did not necessarily arise where there was no statutorily imposed trust when parties hold property as legal joint tenants. Even if there had been a trust, and that that trust had been severed by Benjamin Marrache's bankruptcy, there was no evidence that it would have been a trust for sale (paras. 12–13).

(4) The property which passed to the official trustee on Benjamin Marrache's bankruptcy was his legal title, shared with Anjette, and all associated rights—including those rights under the Partition Acts. It was arguable that one effect of s.48(2) was that partition may be applied for within bankruptcy proceedings (para. 14).

Case cited:

(1) *Citro*, *In re*, [1991] Ch. 142; [1990] 3 W.L.R. 880; [1990] 3 All E.R. 952; [1991] 1 F.L.R. 71, considered.

Legislation construed:

Bankruptcy Act 1934, s.48(2): the relevant terms of this sub-section are set out at para. 7.

Law of Property Act 1925 (15 Geo. V, c.20), s.30:

> "If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit."

N. Cruz for the official trustee;
C. Gomez for B. Marrache;
I. Jacob, Q.C. for Mrs. A. Marrache;
C. Finch for S. Marrache;
H. Budhrani, Q.C. for Mrs. M. Marrache.

1 **BUTLER, J.:** There are before me separate applications by the official trustee. The same point of principle arises in each case, and I have therefore heard argument about that point in both cases together. The result in the case of Solomon Marrache on that point will follow automatically from my decision in the case of Benjamin Marrache, with which I shall deal first. He has been represented by Mr. Gomez (who did not appear in relation to this point) but his submissions coincide with those of Mr. Jacob, who represents Benjamin Marrache's wife, Anjette. Solomon Marrache has been represented by Mr. Finch, who also adopted the submissions of Mr. Jacob on this point. A separate application was made by Mr. Gomez, which I heard on the next day and upon which I have delivered a separate *ex tempore* ruling. Solomon Marrache's wife, Monica Marrache, was represented by Mr. Budhrani, who similarly adopted Mr. Jacob's submissions.

2 The official trustee seeks an order for possession of property at 306 Main Street ("the property"). He does so pursuant to s.48(2) of the Bankruptcy Act 1934 ("The Act").

3 The lease of the property was assigned jointly to Benjamin Marrache ("the bankrupt") and his wife, Anjette Marrache ("the wife") in 2004. The bankrupt was adjudicated bankrupt on November 26th, 2010. It was their matrimonial home, occupied by them and their six children. The wife claims 50% ownership of the lease. She also claims that, at the time of the assignment, she and the bankrupt agreed that the property would not be sold so long as it was needed as a home for the children. The following are common ground:

(i) Upon his bankruptcy, the bankrupt's interest in the property vested in the trustee.

(ii) The trustee has a duty to gather in and realize the assets of the bankrupt for division amongst the creditors, said in this case to be owed about £26m. (or £40m., including unsecured creditors).

The legal issue

4 Mr. Jacob, on behalf of the wife, suggests that this court has no power to order possession of the property against her or to order a sale of the property. The trustee relies upon the English case of *In re Citro* (1), but that case depended on the application of the Law of Property Act 1925, which does not apply in Gibraltar. The 1925 Act provided that in England and Wales, a legal estate in land could not be held by two people. Any land conveyed to two or more people after the 1925 Act is automatically held on statutory trusts for sale. Under s.30 of the that Act, in circumstances such as arise in this case, the court has a discretion to order sale or possession of property where there is a trust for sale, which discretion (according to a long line of authorities, including *In re Citro*) is (in the absence of exceptional circumstances) normally to be exercised in favour of the trustee, for the benefit of creditors.

5 In this case, the wife has an individual legal interest as one of two tenants. But, says Mr. Jacob, in this case there is no trust for sale. If there were, he concedes that there would have to be a sale in the absence of a power to postpone sale.

6 Mr. Cruz, for the trustee, submits that this court does have power to order possession or sale of the property, and that *In re Citro* does apply. He points to my own decision in the case of Mr. Isaac Marrache, in which I delivered an *ex tempore* judgment following a hearing in which neither counsel referred me to the point now made by Mr. Jacob, and in which it was conceded that I had to apply the *In re Citro* test.

7 In the course of oral submissions, it became apparent that the issue depends entirely upon interpretation of s.48(2) of Gibraltar's 1934 Bankruptcy Act, which provides as follows:

> "The official trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the Supreme Court, and the court may, on his application, enforce such acquisition or retention accordingly."

8 In the absence of any statutory or judicial guidance as to the test to be applied in exercising the court's discretion, the trustee's case is that the test in *In re Citro* (1) should apply, and that its logic applies equally to an application under s.48(2).

9 Mr. Cruz points out that the *In re Citro* test in such applications in Gibraltar is contained in the new Insolvency Act. That Act, however, has

not yet commenced, since no accompanying Rules have been introduced. Mr. Jacob suggests that even if the Act were in force, it would not operate retrospectively.

10 It is trite law that it is the bankrupt's interest in property which automatically vests in the trustee on bankruptcy. No more and no less. But the trustee's case involves (as Mr. Cruz concedes) the proposition that s.48(2) gives the trustee the right to seek from the court an order giving him rights which the bankrupt did not have. It would give the trustee power to sell not only the bankrupt's interest in the property, but also that of the wife.

11 I am driven to find against the trustee. I have been referred to no judicial or academic authority to support such a proposition. Whilst I have little doubt that the test in *In re Citro* would be applicable if there were legislation in force in Gibraltar equivalent to the 1925 Act in England and Wales, there is no such equivalent legislation in this jurisdiction. If s.48(2) of the Bankruptcy Act were intended to have the fundamental effect on the court's powers and the trustee's rights in relation to the rights of innocent third parties which the trustee's submissions involve, I would expect that intention to be expressed much more clearly and specifically. Mr. Jacob says that this is the first time that it has been suggested that, under s. 48, this court has power to override third parties' rights. How he can make such an assertion I do not know, but I have not been referred to any authority in which the point has been considered. Whilst I am not impressed by the pejorative submission that the trustee's interpretation would enable the court to "ride roughshod" over the rights of third parties, I find that the trustee's submission would involve a change of law, effectively to incorporate s.30 of the 1925 Act in bankruptcy proceedings, without express provision and without any indication as to how the court's discretion should be exercised. Contrary to general principle, this would place the trustee in a much more favourable position against third parties than the bankrupt was before bankruptcy (and not only in cases involving matrimonial property or homes). It is also notable that the Partition Acts remain applicable in Gibraltar. A logical step, if the trustee were correct, would have been to abolish the right to apply for partition in cases of bankruptcy, rather than leaving the trustee with either option. Nor is it clear why the legislature would wish thus to change the law only in relation to bankruptcy. A statutory trust for sale was imposed on the land by the 1925 Act. Owners of undivided shares were no longer able to seek partition or a sale by the court. They were entitled only to shares of the net proceeds of sale.

12 As to the maxim that "equity follows the law," relied on by the trustee, I accept that the normal inference is that where property is held on trust by two or more parties who hold the legal interest, they will hold the beneficial interest as beneficial joint tenants. In the absence of any

legislative provision imposing a beneficial interest upon legal joint tenancies, however, the maxim does not necessarily arise. There is no statutorily imposed trust for sale in this case. A beneficial joint tenancy does not, in those circumstances, necessarily have to be implied and severance (in this case by virtue of the bankruptcy) does not apply. I do in this ruling decide that issue. It has not been submitted in this case that there is any express, resulting or constructive trust. A purpose of the 1925 Act was to avoid the expense and inconvenience to which partition actions generally gave rise. In Gibraltar (unlike in England and Wales) legal tenancies in common are still possible.

13 Even if the land were held on a trust which has been severed as a result of the bankruptcy, the point remains that there is no evidence before me that there was a trust for sale.

14 The wording of s.48(2) refers to the bankrupt's estate. Mr. Jacob points out that many assets in a bankrupt's estate may be difficult to realize. The section refers to "the purpose of acquiring or retaining possession of the property of the bankrupt . . ." Mr. Cruz relies particularly on the words ". . . and the court may, on his application, enforce such acquisition or retention accordingly." What is "the property of the bankrupt" for these purposes? In this case, I find that it is the bankrupt's legal title, shared with the wife, together with the attendant rights which such title carries with it (including those under the Partition Acts). It is certainly arguable that one effect of s.48(2) is that an application for partition may be dealt with within the bankruptcy proceedings but for reasons which follow I do not have to decide that issue in this ruling.

15 For the above reasons, I dismiss both of the trustee's applications under that section. It has not been necessary to determine how I would have exercised my discretion had I reached a different conclusion on this point, and, in view of the trustee's alternative application for partition, which I mention below, it would be unwise to do so.

Partition

16 Faced with bankrupts' arguments against his applications under s.48(2), the trustee applied for permission to amend his application in order to include an application for partition in each case. Mr. Jacob initially opposed the application, partly on the basis that there was no power to apply for partition within the bankruptcy proceedings.

17 For the reasons which I have mentioned, I am not convinced that a partition application could not be made within these proceedings, though the Civil Procedure Rules relating to joinder of causes of action do not apply, since those rules do not apply in Gibraltar in bankruptcy proceedings.

18 During the course of the hearing, the parties, in order sensibly to avoid any doubt about the legitimacy of applying for partition in these proceedings, agreed that separate partition proceedings should be commenced by the trustee. A sensible timetable for those proceedings was agreed. It is important that I mention this development, because there cannot be any question of *res judicata* or issue estoppel arising during those proceedings as a result of the present proceedings.

Applications dismissed.
