[2016 Gib LR 46]

IN THE MATTER OF WARDOUR TRADING LIMITED

COHEN (as Liquidator of WARDOUR TRADING LIMITED) v. NEKRICH and SAGREDOS

SUPREME COURT (Jack, J.): February 16th, 2016

Civil Procedure—appearance—setting aside judgment for non-appearance—to set aside judgment for defendant's non-appearance at trial, lower standard of compliance with "prompt action" under CPR, r.39.3(5)(a) required for foreign defendant with limited connection to Gibraltar

Civil Procedure—service of process—alternative methods of service—to justify order for alternative service, claimant not required to take every conceivable step to locate defendant—unusual circumstances required to set aside order for alternative service obtained by innocent misrepresentation if service successful

The applicant applied to set aside an order for damages made against him by the Supreme Court.

Following an 11-day trial, the Supreme Court found the applicant to be liable under s.315 of the Companies Act 1930 for fraud against the creditors of a company (the liquidator of which was the respondent in the present proceedings) and made an order for damages of $90m. The applicant did not attend the trial and applied to have the order set aside.

The applicant had connections with residential properties in Greece and Monaco, among others. The Supreme Court authorized alternative service on him at an address in Greece, and the respondent delivered the originating summons (which was a summons in Company Claim No. 22 of 2009, whereas the order against the applicant was made in Company Claim No. 56 of 2005) to that address, where it was accepted by a housekeeper. The applicant disputed the validity of this purported service. A Greek court, in injunction proceedings between the respondent and the applicant, held that it was probable as a matter of Greek law that he had received valid notice of the proceedings in Gibraltar.

After experiencing delays arising from problems such as the difficulty of finding appropriate counsel in Gibraltar, the applicant applied to set aside the Supreme Court's order three months and three weeks after it had been made on the grounds that (a) he had never been properly served with the originating summons in the claim against him, or (b) the order should

be set aside under the Civil Procedure Rules, r.39.3(3) due to his failure to attend the trial. On the question of service, he submitted, *inter alia*, that (i) he had been residing in Monaco not Greece when service was attempted; (ii) the originating summons purportedly served on him was a summons in Claim 22 of 2009, rather than 56 of 2005; (iii) the order authorizing service by alternative means should be set aside because it was obtained as a result of the court being innocently misled by the respondent's failure to take sufficient steps to discover his residence in Monaco; and (iv) the findings of the Greek court could not be relied on by the respondent because they were given in injunction proceedings which had a lower standard of proof. In relation to CPR, r.39.3(3), he submitted that all the conditions in r.39.3(5) for setting aside the order had been satisfied in that (i) he had acted promptly on discovering that the court had made an order against him; (ii) he had a good reason for not attending the trial, namely that he had not been properly served or informed of the trial date; and (iii) he had a reasonable prospect of success on a retrial.

The respondent submitted in reply that (a) the applicant had been validly served as a matter of Greek law in that the originating summons had been received by his housekeeper at an address in Greece at which he had been residing on the date of service; or (b) alternatively, the findings of the Greek court that he had been properly served estopped him from denying that he had been validly served.

Held, refusing the application:

(1) The application would be refused because the applicant had been properly served and he had not satisfied the conditions for the judgment to be set aside under CPR, r.39.3(3). Each of his arguments on service was incorrect: (i) the factual evidence indicated that he had been residing at the Greek address at which service took place and delivery of the originating summons to the housekeeper was valid service under Greek law; (ii) the fact that the originating summons was for Claim 22 of 2009 rather than 56 of 2005 was merely a procedural irregularity, and if it had been a defect affecting the validity of the judgment, the court would have rectified it under CPR, r.3.10; and (iii) the Supreme Court's order authorizing service by alternative means would be upheld because the respondent had made extensive efforts to discover the applicant's place of residence and he did not need to show that he had taken every possible or conceivable step to locate him to justify an order for alternative service. Even if the Supreme Court had been innocently misled, the order would be affirmed, since unusual circumstances would be required for the court to set aside an order for alternative service when the relevant documents had in fact come to the attention of the applicant (paras. 12–20; paras. 26–29).

(2) Alternatively, the doctrine of *res judicata* would operate to estop the applicant from denying that he had been validly served. The decision of the Greek court gave rise to an estoppel because it was not subject to appeal, despite being technically interlocutory; it was a decision between the two parties at present before the court; and the issue of service had

been fully ventilated. The lower standard of proof was irrelevant (although, in an extreme case, the court might refuse to recognize the binding effect of a foreign judgment for the purposes of *res judicata* on grounds of public policy). On interlocutory matters, it was arguable that the strict rules on *res judicata* did not apply, or applied to a lesser degree (paras. 36–40).

(3) The applicant had not satisfied the conditions in CPR, r.39.3(5) for the order to be set aside on the ground of his non-attendance at the trial under r.39.3(3). He had satisfied the requirement of prompt action in r.39.3(5)(a), which had to be applied with a reduced standard of diligence to take account of the fact that he had only a limited connection with Gibraltar. However, he had failed to show a good reason for failing to attend the trial as required by r.39.3(5)(b). It was possible that, if a defendant reasonably believed that he had not been validly served, that would be a good reason for failing to attend, but the applicant here must have realized that he had been properly served and, if he had doubts about the validity of service, he should have sought legal advice. Further, his evidence to refute the respondent's allegations was self-serving and false and he had therefore failed to show a reasonable prospect of success on a retrial as required by r.39.3(5)(c) (paras. 51–52; paras. 56–59; para. 61).

Cases cited:

(1) *Advalorem Value Asset Fund Ltd.* v. *Redford*, Supreme Ct., Claim No. 2015–A–132, September 4th, 2015, unreported; on appeal, 2015 Gib LR 380, referred to.

(2) *Bank of Scotland plc* v. *Pereira*, [2011] 1 W.L.R. 2391; [2011] 3 All E.R. 392; [2011] C.P. Rep. 28; [2011] H.L.R. 26, applied.

(3) *Bols Distilleries B.V.* v. *Superior Yacht Services Ltd.*, 2005–06 Gib LR 143; [2007] 1 W.L.R. 12; [2007] 1 All E.R. (Comm) 461; [2007] 1 Lloyd's Rep. 683; [2007] 1 C.L.C. 308; [2007] I.L. Pr. 46; [2006] UKPC 45, referred to.

(4) *Brazil* v. *Brazil*, [2003] C.P. Rep. 7; [2002] N.P.C. 113; [2002] EWCA Civ 1135, applied.

(5) *Calyon* v. *Michailidis*, 2007–09 Gib LR 321; [2009] UKPC 34, referred to.

(6) *Desert Sun Loan Corp.* v. *Hill*, [1996] 2 All E.R. 847; [1996] 5 Bank. L.R. 98; [1996] C.L.C. 1132; [1996] I.L. Pr. 406, applied.

(7) *ED&F Man Liquid Products Ltd.* v. *Patel*, [2003] C.P. Rep. 51; [2003] C.P.L.R. 384; [2003] EWCA Civ 472, referred to.

(8) *Elliott* v. *Tinkler*, [2012] EWHC 600 (QB); on appeal, [2013] C.P. Rep. 4; [2012] EWCA Civ 1289, applied.

(9) *Estate Acquisition & Dev. Ltd.* v. *Wiltshire*, [2006] C.P. Rep. 32; [2006] EWCA Civ 533, applied.

(10) *Gesil Ltd., In re*, Supreme Ct., Comp. No. 24 of 2013, October 14th, 2014, unreported; noted at 2015 Gib LR *N* [2], referred to.

(11) *Hollington* v. *F. Hewthorn & Co. Ltd.*, [1943] K.B. 587; [1943] 2 All E.R. 35, considered.

(12) *Regency Rolls Ltd.* v. *Carnall*, [2000] EWCA Civ 379, applied.
(13) *Sabbagh* v. *Khoury*, [2014] EWHC 3233 (Comm), referred to.
(14) *Sir John Fitzgerald Ltd.* v. *Macarthur*, [2009] EWHC 2659 (QB), applied.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.6.15(1): The relevant terms of this sub-rule are set out at para. 12.
r.39.3: The relevant terms of this rule are set out at para. 42.

T. Mowschenson, Q.C. and *N. Howard* for the applicant;
The first respondent did not appear and was not represented;
Sir Peter Caruana, Q.C. and *C. Allan* for the second respondent.

1 **JACK, J.:** This is an application to set aside a judgment for $90m.

2 By order of March 18th, 2015, I declared that the respondents ("Mr. Nekrich" and "Mr. Sagredos") were:

(a) knowingly party to the business of Wardour Trading Ltd. ("Wardour") being carried on to defraud creditors, and were jointly and severally liable to pay Wardour $48,250,449.84; and

(b) jointly and severally liable to account to Wardour for profits made of $11,303,238.

I gave a money judgment for those sums plus interest, so that the total payable by Mr. Nekrich and Mr. Sagredos was $89,536,826.84. In addition, I made provision for costs.

3 The same day, I granted a worldwide freezing order (or *Mareva* injunction) against each of Mr. Nekrich and Mr. Sagredos in the sum of $90m. I made the usual disclosure orders.

4 The orders were made following the handing down, on February 9th, 2015, of a reserved judgment following an 11-day trial in January 2015. This judgment should be read in conjunction with the judgment of February 9th, 2015.

5 Mr. Sagredos did not appear at the trial and now applies to have the judgment against him set aside. Two grounds are relied upon. First, Mr. Sagredos says that he was never properly served. Secondly, if his first ground fails, he applies under the Civil Procedure Rules, r.39.3(3) to set aside the judgment on the grounds that he did not attend the trial and that he satisfies the conditions set out in CPR, r.39.3(5) for the making of an order under r.39.3(3).

6 By way of cross-application, the applicant ("the liquidator") sought an order to cross-examine Mr. Sagredos on his affidavit of means. In the course of the hearing, it was agreed that this application should be

adjourned generally with liberty to apply. This was on that basis that the liquidator would first seek to ask further questions of Mr. Sagredos in writing. If the latter failed to answer the questions with a statement of truth in a manner which the liquidator considered adequate, he would restore the application to cross-examine Mr. Sagredos.

Proper service

7 The liquidator's case is that Mr. Sagredos was served with the proceedings on June 28th, 2010. The originating summons and other documents were given to his live-in housekeeper, Ms. Ilina Stoyanova, at his house, 95 Ethnikis Antistaseos Street in Neo Psichiko, Athens, at a time when Mr. Sagredos was living there. That was good service in Greek law.

8 Sir Peter Caruana, Q.C., who appeared for Mr. Sagredos, made three points, any of which, he submitted, were good enough to result in the service on that day being bad.

(a) Mr. Sagredos was not residing at 95 Ethnikis Antistaseos Street at the relevant time. He was residing in Monaco.

(b) The originating summons served on Mr. Sagredos (assuming *quod non* that it was served on him) was a summons in Company Claim No. 22 of 2009 ("22 of 2009"), not in Company Claim No. 56 of 2005 ("56 of 2005"), which was the claim in which the judgment was given.

(c) The order of March 23rd, 2010 which permitted (he said) alternative service was not complied with and was in any event obtained as a result of the court being innocently misled by the liquidator's legal representatives.

Alternative service

9 It is convenient to deal with these points in reverse order. Dealing first with (c), Dudley, C.J. on March 23rd, 2010 ordered in 22 of 2009 that—"the liquidator do have permission to serve the summons dated August 10th, 2009 on [Mr. Sagredos] out of the jurisdiction at Ethnikis Antistaseos 95, Neo Psichiko 15451, Athens, Greece and Via Laret 8A, 7500 St. Moritz, Switzerland."

10 I am doubtful whether this is truly an exercise of the court's power to allow service by alternative means under CPR, rr. 6.15 and 6.27. It seems to be more permission to serve outside the jurisdiction at two particular addresses. However, it is not necessary to decide the point.

11 Sir Peter argued that the terms of the order required the liquidator to serve both at the Athenian address and at the Swiss address. Service at only one would not, he submitted, be good service under the order. It was common ground that the attempted service in St. Moritz was ineffective:

Mr. Sagredos was not there and the documents were sent back. In my judgment, however, there was no *requirement* to serve at both addresses; the order merely *permitted* service at those addresses. Accordingly, I reject Sir Peter's argument on this.

12 Sir Peter's argument that the court was misled was based on the submission that more could have been done to identify Mr. Sagredos's address in Monaco and the fact that he was residing there. In my judgment, Sir Peter is putting the test which the liquidator has to meet too high. All CPR, r.6.15(1) requires is that "it appears to the court that there is a *good reason* to authorise [alternative] service . . ." [Emphasis supplied.] An applicant need not show that he has taken every possible or every conceivable step to track down the party to be served. If the applicant has taken reasonable steps to identify a means of effecting ordinary service on a respondent but has failed, that would normally be sufficient to justify the court granting an order for alternative service.

13 The evidence of the liquidator's lawyer, Mr. Howard, and Chernogorneft's lawyer in Moscow, Mr. Dudko, is that extensive efforts were taken to trace Mr. Sagredos, involving private detectives, but that these efforts had not succeeded. It was thought that Mr. Sagredos had left Monaco in 2008. There is no basis for suggesting that Mr. Howard or Mr. Dudko did not believe that.

14 Mr. Sagredos says that he was living in Monaco throughout. I shall consider his evidence on this below when dealing with service in Athens. However, I accept the evidence given on the liquidator's part of the efforts to trace Mr. Sagredos. The fact that some other step *might* have been taken is not determinative.

15 Mr. Sagredos says that an application should have been made to the court in Monaco for an order revealing his address in Monaco. Each side has instructed experts in Monégasque law, Me. Gardetto for the liquidator and Me. Giccardi for Mr. Sagredos. They agree that there is no public register of residents' addresses in Monaco. Foreign residents ought to register any change of address with the Monégasque authorities, but they agreed that "not all address changes are performed by the residents within the requested deadlines." There was a procedure for applying to the President of the Court of First Instance for disclosure, but the experts disagreed on what the prospects of success might be, with Me. Gardetto more pessimistic than Me. Giccardi.

16 On this state of the expert evidence, in my judgment, it was reasonable for the liquidator not to have taken the step of applying to the President. There was no guarantee of success, even if Mr. Sagredos had still been living in Monaco. The President might have refused the order, or the information in the register might have been out of date. Even if the President had made the order and the information in the register was

correct, it might still have been that Mr. Sagredos was not in fact living in Monaco when service was attempted there.

17 Accordingly, I find that there was good reason for making an order for alternative service. There are, in my judgment, no reasons for setting aside the order of March 23rd, 2010.

18 Even if (contrary to my determination) Dudley, C.J. had been misled, that would not automatically have meant that the order should be set aside. Sir Peter accepted that any misleading had been done innocently. It is thus possible for the court to affirm the order attacked if it considers that no injustice was done. (The position is potentially different where the court is deliberately misled.) In my judgment, if the means of alternative service adopted does result in the person served gaining knowledge of the documents served, then the purpose of CPR, r.6.15 is achieved. Indeed, even if the means of alternative service was not authorized at all by the court, r.6.15(2) allows retrospective approval of such alternative service.

19 In a sense, when a prospective or retrospective order for alternative service is made, the proof of the pudding is in the eating. If service results in the other party becoming aware of the proceedings, the form of alternative service (whether previously authorized by the court or not) has succeeded. It is likely to require unusual circumstances for the court to set aside an order for alternative service obtained by non-deliberate misrepresentation in circumstances where the alternative means of service has in fact resulted in the document to be served coming to the attention of the person to be served. No unusual circumstances are shown here.

20 In the current case, as I shall explain, I find that there was good service in Athens. However, had it been necessary, I would, in accordance with the overriding objective (especially CPR, r.1.1(2)(d)), have granted retrospective approval of the means of service adopted in Athens.

Consolidation

21 Secondly, as to point (b), it is true that the originating summons served on June 28th, 2010 was in 22 of 2009. There was a subsequent order of September 14th, 2010 in 22 of 2009 which provided: "These proceedings be transferred to be heard in Comp No. 56 of 2005 and the proceedings to be consolidated in that regard." This order is expressed to be made after hearing counsel for Mr. Nekrich and for the then liquidator. In fact, no hearing seems to have been held, but nothing, in my judgment, turns on this.

22 On May 28th, 2014, the court made an order substituting Mr. Cohen for Mr. Robinson as the liquidator. The order went on to provide:

> "5 The [liquidator] do file and serve on [Mr. Nekrich] the Amended Originating Summons and Re-Re-Amended Particulars of Claim by

> Friday, June 6th, 2014 and do file and serve on [Mr. Sagredos] the Amended Originating Summons and Re-Re-Amended Particulars of Claim out of the jurisdiction in the normal course . . .
>
> . . .
>
> 15 The trial of the claim herein . . . be relisted for hearing on Monday, January 5th, 2015 with an estimated length of hearing of 15 days."

The amended originating summons retained the numbering 22 of 2009, but with the endorsement that it was amended pursuant to the order of Dudley, C.J. of May 28th, 2014, this order being headed with 56 of 2005. The re-re-amended particulars of claim were headed in 56 of 2005.

23 The change in the numbering of the case is a result of the practice of the Court Registry in Gibraltar. When a petition to wind up a company was presented under the Companies Act 1930, the court started a file and allocated a claim number. Thus the winding-up proceedings in respect of Wardour were given the number 56 of 2005. 56 of 2005 was therefore the lead file for all Companies Act matters involving Wardour and its liquidation. However, when a liquidator sought to bring a separate claim under the Companies Act against a third party, the Registry would routinely start a new court file with a new number for that claim. The effect was to keep the documentation in individual files within a reasonable size and to keep together documentation on separate claims brought by liquidators against different individuals. Hence the originating summons issued in 2009 was given the number 22 of 2009. (There had been an earlier originating summons issued in Company Claim No. 45 of 2007, but it could not be served and it was not proceeded with.)

24 Practice in Companies Act matters in Gibraltar differs from that in England in some respects. For example, forms which were authorized by the Rules of the Supreme Court continued to be used after the introduction of the CPR: *In re Gesil Ltd.* (10) (at para. 17). Prescott, J. held that that was at most an irregularity which was justified by custom and practice and could be rectified if necessary (*ibid.*, at paras. 25–27). In the current case, the Registry's practice as regards numbering of files is a perfectly sensible administrative practice, followed for good reasons. Rule 11(2) of the Companies (Winding-up) Rules 1929 provides for the same action number to be used throughout, but again a failure to observe this provision is at most an irregularity.

25 Sir Peter argued that the order for consolidation of September 14th, 2010 could not result in the two cases, 22 of 2009 and 56 of 2005, proceeding as one. No originating summons was issued in 56 of 2005, so there was nothing for 22 of 2009 to be consolidated with under CPR,

r.3.1(2)(g). After that order, 22 of 2009 simply "disappeared," he submitted. There was no originating process in 56 of 2005 on which a judgment in 56 of 2005 could be hung.

26 Even Sir Peter was constrained to admit that this was (as he described it) a somewhat Jesuitical argument. It is not, however, in my judgment, necessary to consider aspects of Christian theology to determine this issue. The numbering of claims is, as I have explained, purely a matter of administrative convenience; it is not a matter of substance. The underlying claim brought by the liquidator is and always has been that in the originating summons in 22 of 2009. There was no question of consolidation of actions in the sense meant by CPR, r.3.1(2)(g), because there were not two actions being brought against Mr. Nekrich and Mr. Sagredos. There was simply an order that the case proceed under the rubric of 56 of 2005. The order of September 14th, 2010 rectified any breach of r.11(2) caused by the court creating a file for 22 of 2009.

27 Accordingly, there is, in my judgment, no formal defect in the granting of the judgment in 56 of 2005 rather than in 22 of 2009. Even if there were, it would be a plain case for applying CPR, r.3.10 or r.223(1) of the 1929 Rules to rectify any procedural defect.

Residence in Greece

28 Thirdly, I turn to (a), the question of Mr. Sagredos's residence on June 28th, 2010, when service of the originating summons in 22 of 2009 is said to have been made on him. It is common ground that, in order to be valid, service at 95 Ethnikis Antistaseos had to be good as a matter of Greek procedural law. Again, that required 95 Ethnikis Antistaseos to be Mr. Sagredos's "residence" as a matter of Greek law. I shall come back to the evidence as to what "residence" means in Greek law. It is convenient to make findings of fact first.

[29 The learned judge considered expert evidence regarding Greek law on service and factual evidence on Mr. Sagredos's place of residence and concluded that he was resident at 95 Ethnikis Antistaseos Street on June 28th, 2010 and that valid service of the originating summons and other relevant documents had been effected on that date through delivery of those documents to his housekeeper. He continued:]

The decision of the Athens court: issue estoppel

30 I reach that conclusion independently of the decision of Asteri, C.J. in the Athens Court of First Instance given on December 15th, 2015. The Greek judgment is, however, in complete agreement with my own conclusion.

31 The issue for Asteri, C.J. was whether Mr. Sagredos had been properly served with Greek injunction proceedings issued by Mr. Cohen. These proceedings had a return date before the Athenian court of August 21st, 2014. Ms. Bounakou served these Greek proceedings by affixing an envelope to the door of 95 Ethnikis Antistaseos. This was the same way as all the Gibraltarian documents (apart from the first) had been served.

32 The learned judge in her decision sets out the liquidator's difficulties with tracing Mr. Sagredos. She then says:

> "[Mr. Sagredos] asserts that he has been a resident of the Principality of Monaco since 2004, yet fails to specify his residential address. However, it was established that at his above residence [95 Ethnikis Antistaseos] in Neo Psichiko, the 'G. Sagredos' had been written on the door bell since 2010, even though after his father died (13.2.2010)—who lived at the above address—the only person who lived in that residence was a housekeeper named Ilina Stoyanova. When court bailiff Konstantina Bounakou appeared at the residence in New Psichiko . . . on 28.6.2010 for the purpose of serving on Georgios Sagredos a duly certified copy [of the documents in the current proceedings] the latter (housekeeper) confirmed that [Mr. Sagredos] lived there and that he was out doing chores at the time but expected to return soon. Hence, she was served the relevant documentation on his account . . . During period 2010–2014 [Mr. Sagredos] was served various court documents at that above address, including the [Greek] petition for conservative attachment, as the above court bailiff has never identified any change to [Mr. Sagredos's] residential address. In fact, it is established that [Mr. Sagredos] was aware of the proceedings initiated before the Supreme Court of Gibraltar, which is why on September 27th, 2010 he sent a handwritten letter to the above court by fax, stating verbatim the following: [which is then set out]. It is therefore found to be probable that [Mr. Sagredos] became aware of the documentation served to him at 95 Ethnikis Antistaseos Street."

33 The liquidator says that Mr. Sagredos is bound by an estoppel *per rem judicatam* from disputing that he was served on June 28th, 2010. Now, strictly speaking, Asteri, C.J. was only determining the question of whether the Greek proceedings were served in 2014. However, she made various determinations as regards the service of the Gibraltarian documents in 2010–2014 as part of her reasoning. The liquidator says that this gives rise to an issue estoppel.

34 The English Court of Appeal in *Desert Sun Loan Corp.* v. *Hill* (6) held (reading from the headnote) ([1996] 2 All E.R. at 847–848):

> "An issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, i.e. non-substantive, issue, thereby

> preventing a defendant from raising that issue in subsequent enforcement proceedings, where (i) there was express submission of the procedural or jurisdictional issue to the foreign court, (ii) the specific issue of fact had been raised before and decided by that court and (iii) caution was exercised in relation to practical considerations, such as whether the issue was or should have been fully ventilated before the foreign court . . ."

35 Sir Peter Caruana, Q.C., in his skeleton argument, submits that Asteri, C.J.'s decision is not binding on this court because:

> "The Greek court was concerned with a judicial procedure relating to injunction measures under which the litigant parties do not have to provide the court with full proof of their allegations, as required under the ordinary judicial procedure, because under the injunction procedure likelihood is sufficient."

36 That statement of Greek law is supported by Mr. Constantes's report and not contradicted by Prof. Dr. Delikostopoulos. However, in my judgment, it is not relevant. It is common ground that the decision of Asteri, C.J. on the question of service is not subject to appeal. It is a final determination of the issue of good service and therefore, in my judgment, final for the purposes of the rules on *res judicata*, despite the fact that it may technically be interlocutory. It is, of course, also a decision between the same parties as are before me, which is another requirement of *res judicata.* Both parties put before her submissions about the service of documents between 2010 and 2014, so she was fully justified in taking those matters into account in determining the issue of service of the Greek proceedings. The matter was "fully ventilated" before her, so an issue estoppel arises under the *Desert Sun* principle.

37 The fact that the standard of proof applied by Asteri, C.J. was "probability" rather than "full proof" is not, in my judgment, relevant. Different nations use different tests for the degree of certainty required to prove different matters. In Germany, for example, contested issues in civil matters have to be proved to the criminal standard of proof, so the judge is sure: §286 Zivilprozessordnung (Code of Civil Procedure); save in special circumstances, *e.g.* §495a (small claims) and §287 (assessment of damages), where a lower standard of certainty is permissible.

38 Nor is a different standard of certainty unknown in our domestic law. In Gibraltar, when deciding whether the parties have made an agreement conferring jurisdiction on the Gibraltar courts, the issue is which side had a "good arguable case," defined as a much better argument than the other side's: *Bols Distilleries B.V.* v. *Superior Yacht Services Ltd.* (3). It is possible that in an extreme case, *e.g.* where a man's testimony was by law given greater weight than a woman's, the Gibraltarian court might refuse recognition of a foreign court's decision on grounds of public policy.

However, there is nothing at all objectionable in the test applied by the Greek court. It seems very similar to the familiar balance of probabilities test used generally in civil proceedings in Gibraltar.

39 Accordingly, even if I had not independently reached the conclusion that there was good service on June 28th, 2010, Mr. Sagredos would have been estopped from asserting the contrary by reason of the decision of Asteri, C.J. I accept that this court needs to show caution in applying her decision, but she would be much more familiar than this court not just with the law and the practice but also with the realities of service of documents in Greece in accordance with Greek law. She gives a full statement of facts (so that this case differs from *Calyon* v. *Michailidis* (5), where the Greek court did not make adequate findings of fact). It would be strange if this court could not place reliance on her decision.

40 For completeness, I should add that, even if the technical requirements to found an issue estoppel were not made out, the decision of Asteri, C.J. would still, in my judgment, be of persuasive effect, certainly as regards Greek law, but probably also as regards the facts of this matter. On interlocutory matters, it is arguable that the strict rules on *res judicata*, such as *Hollington* v. *F. Hewthorn & Co. Ltd.* (11), do not apply, or not to the same degree: *Sabbagh* v. *Khoury* (13) ([2014] EWHC 3233 (Comm), at paras. 202–207), applied in *Advalorem Value Asset Fund Ltd.* v. *Redford* (1) (at paras. 15–18) (upheld by the Court of Appeal of Gibraltar on other grounds, but without criticizing this point of law (2015 Gib LR 380, at para. 13(3)).

Setting aside on Mr. Sagredos's non-appearance at trial

41 Since I have concluded that there was good service on Mr. Sagredos, it is necessary to consider his secondary application to set aside the judgment based on his failure to attend the trial in January of last year.

42 The power to set aside the judgment is given by CPR, r.39.3(3). Rule 39.3 provides:

> "(1) The court may proceed with a trial in the absence of a party but—
>
> (a) if no party attends the trial, it may strike out the whole of the proceedings;
>
> (b) if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and
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> (c) if a defendant does not attend, it may strike out his defence or counterclaim (or both).

(2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.

(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

(4) An application under paragraph (2) or paragraph (3) must be supported by evidence.

(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant—

(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial."

43 In the current case, no application was made at trial to strike out Mr. Sagredos's case. Instead, I tried the case against Mr. Sagredos on the evidence adduced by the liquidator and by Mr. Nekrich.

44 In order to set aside a judgment under CPR, r.39.3(3), it was common ground between the parties, first, that I had a discretion whether to do so, but, secondly, that I could only come to the exercise of that discretion if all three conditions in r.39.3(5) were satisfied. Accordingly, I shall examine each condition. Mr. Mowschenson, Q.C. submitted that Mr. Sagredos was able to satisfy none of them.

(a) ***Acting promptly***

45 The relevant chronology is this. I handed the substantive judgment down on February 9th, 2015. However, the order which gave effect to the judgment was only made on March 18th, 2015. Mr. Sagredos says he only learnt of the order on March 25th or 26th, 2015 when his Greek bank told him a lien had been placed on his property in Greece.

46 The liquidator invites me to disbelieve what Mr. Sagredos says on this. Whilst there is a suspicion that someone like Mr. Hatchwell or Mr. Nekrich would have told Mr. Sagredos about the outcome of the trial earlier, there is no concrete evidence to gainsay what Mr. Sagredos says about when he learnt of the judgment. In these circumstances, I accept that Mr. Sagredos first learnt of the judgment on March 25th or 26th, 2015.

47 Mr. Sagredos then says there was a delay tracking down Mr. Hatchwell because (as was indeed the case) he had moved firms. He was

thus first able to talk to Mr. Hatchwell in the middle of April 2015 and only obtained a copy of the judgment on April 20th, 2015. He then consulted Mr. Hatchwell and his own Greek lawyer about instructing a lawyer in Gibraltar. There were problems with finding a lawyer who was not conflicted. He was able to speak to Sir Peter Caruana, Q.C. on May 12th, 2015 and formally retain him on May 18th, 2015. Thereafter, Sir Peter and his assistant, Mr. Allan, inspected the court files in the matter. Due to what they found to be gaps in the court files, it took some time to gain sufficient overview of the case to be able to advise Mr. Sagredos on his prospects of setting aside the judgment. The application to set aside was issued on July 10th, 2015.

48 As to the law, the English Court of Appeal in *Regency Rolls Ltd.* v. *Carnall* (12) held that "promptly" meant "with alacrity" ([2000] EWCA Civ 379, at para. 24). Simon Brown, L.J. said (*ibid.*, at para. 45):

> "At first blush it might be thought that any inappropriate delay whatever on the part of an applicant would require that he be found not to have acted promptly. Yet such a construction would carry with it the Draconian consequence that, even if he had a good, perhaps compelling, reason for not having attended the trial, and a reasonable—perhaps, indeed, excellent—prospect of success at trial, the court would still be bound to refuse him a fresh trial. I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."

49 Stadlen, J. held in *Sir John Fitzgerald Ltd.* v. *Macarthur* (14) ([2009] EWHC 2659 (QB), at para. 62):

> "It is, in my view, self evident that the question whether in any particular case the applicant has acted with all reasonable celerity in the circumstances is to be answered in the context of an assessment of the relevant circumstances and what if any impact they had on the time it took the applicant to act. That this is so and in particular that there is no arbitrary rule of thumb as to a particular period which will mark the dividing line between what is and what is not prompt is illustrated by the fact that in the Regency case an application to set aside made 4 weeks after the hearing was held to not have been made promptly, whereas in *Watson* v. *Bluemoor Properties Limited* [2002] EWCA Civ 1875, December 10 2002 the Court of Appeal held that a company did act promptly when, in a case involving 'a considerable amount of documentation,' an application to set aside was issued 6 weeks after judgment."

50 Lord Neuberger, M.R. in *Bank of Scotland plc* v. *Pereira* (2) held ([2011] 1 W.L.R. 2391, at para. 26) that—

> ". . . what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct . . . [L]ike all other rules, CPR r 39.3 is subject to the overriding objective, and must be applied in that light."

51 In my judgment, it is appropriate to look at the individual steps Mr. Sagredos took leading up to the issuing of the application on July 10th, 2015, rather than to take a global view of the entire period from March 25th or 26th. It is important to bear in mind that Mr. Sagredos is not a lawyer. Although it is suggested he has experience of litigation in the United States, there is no suggestion that he has any familiarity with either English or Gibraltarian law and practice. In my judgment, it would be wrong to hold a foreigner, such as Mr. Sagredos, with only a limited connection with Gibraltar (essentially just his involvement with Wardour Trading Ltd. and CIB Ltd.), to too high a standard of diligence. The initial period in which Mr. Sagredos attempted to track down Mr. Hatchwell and obtain a copy of the judgment does not seem unreasonable. Likewise, the period taken to instruct Sir Peter Caruana is reasonable.

52 Once he was instructed, Sir Peter Caruana, Q.C. appears to have acted with reasonable alacrity. This was a heavy case and required serious investigation by Sir Peter and his associate, Mr. Chris Allan. There is a practical tension between the three hurdles in CPR, r.39.3(5). Whilst it may be easy to put together a client's case on his reason for non-attendance at the trial, it may be much more time-consuming to assemble the materials necessary to show that the client has a reasonable prospect of success. Indeed, the more marginal the case on the merits, the more work needed to establish the necessary prospect of success. The court, in my judgment, should give a reasonable degree of leeway to lawyers, such as Sir Peter and his firm, who come to a case completely cold, as here.

53 In these particular factual circumstances, I find that Mr. Sagredos did act with all reasonable celerity. Accordingly, he satisfied the requirements of CPR, r.39.3(5)(a).

(b) ***Good reason for not attending trial***

54 The English Court of Appeal in *Brazil* v. *Brazil* (4) discussed what constituted a "good reason" for not attending trial. Mummery, L.J. said ([2003] C.P. Rep. 7, at para. 12):

> "In my opinion the search for a definition or description of 'good reason' or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart, J. [at first instance] that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a 'good reason.' The court has to examine all the

> evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true 'reason' for nonattendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase 'good reason' as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance."

55 That test was considered by the English Court of Appeal in *Estate Acquisition & Dev. Ltd.* v. *Wiltshire* (9), where Dyson, L.J., as he then was, said ([2006] C.P. Rep. 32, at paras. 21–22):

> "21 In my judgment, if the reason for a party's non-attendance is that he did not know that the hearing was taking place on the day when it did take place, it will usually be necessary to ask why the party was not aware that the hearing was taking place on that day: see para. 21 of Brazil's case. The mere assertion that the party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason. It will usually be relevant to inquire whether the party was aware that proceedings had been issued and served. Once a party is aware that proceedings have been served, he knows that it is likely that steps will be taken in the proceedings and that there will be a hearing or hearings. Unless he has nominated a solicitor to act on his behalf, he must be taken to expect to receive communications personally from the opposing party and/or the court. These will include notifications of hearing dates. If he does not have a system in place for ensuring that such communications are received by him, he is unlikely to be able to rely on the absence of such a system to say that he had a good reason for not attending the hearing.
>
> 22 Similarly, if a party is aware that proceedings are imminent and he has not established a system for ensuring, so far as practicable, that communications relating to the impending litigation are received by him. It will be particularly difficult for a party to argue that he had a good reason for not attending if the court concludes that he deliberately avoided receiving such communications in order to frustrate the litigation process."

56 I could envisage a case where a defendant had a reasonable belief that the service attempted on him was bad service. In such a case, the defendant *might* (I put it no higher than that) show a "good reason" for even a deliberate failure to appear at trial. It is possible to imagine a court

accepting the argument of a defendant that service on him was bad, but that judgment being overturned by a higher instance.

57 That is not, however, this case. Ms. Stoyanova would have given Mr. Sagredos the originating process as soon as he returned home from his errands. He must have known full well that he had been properly served. If he had doubts about whether service had been properly effected, he could easily have obtained legal advice from a Greek lawyer. Instead, in my judgment, he decided that, in due course, he would simply brazen the matter out.

58 I reject Mr. Sagredos's case that he was not properly served with the proceedings and that he was not informed of the trial date. The service of the notification of the trial date was good service. I consider that the notification of the trial date would have come to his attention, if not directly, then through Ms. Stoyanova's forwarding it to him. Insofar as this notification did not come to his attention (and I consider it unlikely that it did not), that would, in my judgment, have been due to a deliberate decision by Mr. Sagredos to refuse to establish a system for the receipt by him of such documents. Such Nelsonian blindness cannot amount to a good reason for non-attendance at trial.

59 Accordingly, I hold that Mr. Sagredos has failed to show a good reason for not attending trial.

(c) ***Reasonable prospect of success***

60 It was common ground that the test of having a "reasonable prospect of success" under CPR, r.39.3(5)(c) is the same as that for summary judgment under CPR, r.24.2(a) ("no real prospect"). To have the requisite prospect of succeeding, the defence must not be false, fanciful or imaginary. The case must be better than merely arguable. It must be "a defence which carries some degree of conviction": *per* Sharp, J. in *Elliott* v. *Tinkler* (8) ([2012] EWHC 600 (QB), at para. 58), applying Potter, L.J.'s test for setting aside a judgment in default in *ED&F Man Liquid Products Ltd.* v. *Patel* (7). (Sharp, J.'s judgment was reversed by the Court of Appeal, but on other grounds.)

[61 The learned judge examined the evidence presented by Mr. Sagredos and concluded that it was self-serving and false and that his defence would therefore not have a reasonable prospect of success if a retrial were ordered. He continued:]

62 Even if the court did consider that the threshold for allowing the defence to proceed was passed (and I find that it has not been), it would then have to consider whether any order setting aside the judgment should be on terms of payment of moneys into court: see CPR, Practice Direction 24, para. 5.2(1), which can be applied by analogy to CPR, r.39.3. Such

would be the marginal prospects of success that such an order would have been appropriate.

Conclusion

63 Accordingly I hold:

(a) Mr. Sagredos was properly served with the originating process in this matter on June 28th, 2010.

(b) His application to set aside the judgment entered against him on March 18th, 2015 was made promptly, but he had no good reason to fail to attend the trial and he has no realistic prospect of success on a retrial.

(c) His application to set aside the judgment is refused.

Application refused.