[2018 Gib LR 171]

R. MARRACHE v. LAVARELLO and HYDE (joint liquidators of MARRACHE AND COMPANY) and LAVARELLO (as official trustee of the estates of I. MARRACHE, B. MARRACHE and S. MARRACHE)

COURT OF APPEAL (Smith and Rimer, JJ.A.): March 22nd, 2018

Civil Procedure—execution—stay of execution—stay of execution pending appeal—must be justified by appellant showing he would otherwise suffer injustice

The respondents sought, inter alia, a declaration that the appellant's shares in the estates of his grandfather and mother vested in them.

The appellant had six siblings, five brothers and a sister. Their grandfather died in 1968. By his will, part of his estate devolved on trust to his son (the siblings' father) for life and then, upon the father's death in 1993, to the appellant and his brothers in equal shares. Each brother therefore had a one-sixth share in certain interests arising from this estate. The father's estate devolved to his wife, the appellant's mother. She died intestate in 2008 and her estate devolved to all of her children. They each therefore had a one-seventh share. The estates owned a number of properties.

Isaac, Benjamin and Solomon were three of the appellant's brothers. In 1985, Isaac set up a legal practice and shortly thereafter entered into a partnership with Benjamin. Solomon was the firm's finance director. The firm was a large one and appeared to be successful and well regarded. However, the brothers had been misapplying and misappropriating clients' moneys. In 2010, a winding-up petition was presented against Marrache & Co. The respondents were appointed as liquidators. Isaac, Benjamin and Solomon were also adjudged bankrupt, and the second respondent was appointed official trustee of the estates of the bankrupts. In 2014, Isaac, Benjamin and Solomon were convicted of conspiracy to defraud.

In the course of their investigation into the affairs of the firm, the respondents discovered that payments had been made to the appellant amounting to approximately £1.1m. It was believed that the payments related to an agreement between Isaac and/or Benjamin and the appellant whereby the appellant sold his entitlement in the respective estates of his grandfather and mother. In the Supreme Court, Yeats, Ag. J. made an order declaring that the second respondent (in his capacity as official trustee in bankruptcy of the estates of Isaac and Benjamin) was the absolute legal and beneficial owner of any interest the appellant had in the properties devolved by the estates of his grandfather and his mother, and that any such interest vested in the second respondent in his capacity as official trustee of the bankrupts' estates. The appellant was ordered to pay the costs of the action save the costs incurred by an application by the respondents to amend the pleadings (those proceedings are reported at 2018 Gib LR 19). The application to amend the pleadings, which was made very late, was granted by the judge (in proceedings reported at 2018 Gib LR 24). The order was stayed until March 31st.

The appellant appealed against the trial order and the amendment order. He filed three applications. He applied for an extension of the stay of the trial order (*i.e.* the vesting order). He wished to prevent the respondents from selling *Fortress House*, the valuable family home in Gibraltar. He believed that they would sell it at an undervalue, resulting in a substantial loss for him if his appeal were to succeed. Secondly, the appellant applied for a stay of the amendment order. Thirdly, he applied for the appeal to be summarily allowed on account of the judge's alleged conflict of interest and demonstrable bias against him (the judge had been Senior Crown Counsel in the Attorney-General's department until 2013, and had dealt with some administrative aspects of the prosecution of the appellant's three brothers).

The applications were opposed by the respondents. They submitted that there would be no detriment to the appellant if they were allowed to proceed with their proposals to deal with the assets currently available to them. All of the properties devolved under the wills of the grandfather and mother were charged to a bank as security for loans to the firm. The bank had sold all of the properties except *Fortress House* and land in Spain, retaining the proceeds in satisfaction or diminution of the firm's indebtedness to it. The respondents contended that the bank's charges were invalid.

They faced contested litigation with the bank before they could sell *Fortress House* or recover the proceeds of sale of any of the other properties in the estate.

The respondents applied for security for the costs of the appeal (£35,000) and for the estimated costs of the trial (£75,000). The appellant gave evidence that he was unemployed, had no earning capacity and no assets, and had debts of some $200,000.

Held, ruling as follows:

(1) The appellant's application that the court should immediately declare that there had been a mis-trial and set aside the whole of the judge's order would not be granted. The respondents had not yet had the opportunity to respond to the appellant's allegations that the fact that the judge, when senior counsel in the Attorney-General's department, had dealt with some administrative aspects of the prosecution of the three Marrache brothers, gave rise to a perception of bias such that the judge should have recused himself, and other allegations of bias against the judge which were not at present particularized. Nor had the judge had an opportunity to respond. For that reason alone, it was quite clear that the application could not be dealt with in the present hearing. Furthermore, it was not a matter that was suitable for separate consideration. It was part of the appeal and would be put off until the hearing of the appeal (paras. 8–9).

(2) The stay of the substantive order, *i.e.* the vesting order, would be continued. It was not usual to impose a stay pending appeal and a stay had to be justified by the appellant showing that he would suffer injustice if the order was not stayed. That was often difficult because in most cases there was an obvious advantage to the successful party below being able to make use of what he had won. The appellant seeking a stay had to overcome that hurdle. In the present case, however, the advantage to the respondents in the lifting of the stay was hard to discern. They could not distribute any assets until the litigation with the bank was resolved. They were free to proceed with that litigation and they would not be at a disadvantage in negotiating with the bank if a stay were in place. The overwhelming likelihood was that the appeal would be determined well before the respondents were in a position to sell *Fortress House* or distribute any assets. Only in the unlikely event that the respondents were able first to negotiate a settlement of their claim against the bank within a few months, and also rapidly to complete the technical formalities so as to be able to commence distribution, would the respondents be in any way affected by the stay. Therefore, the usual starting point should not apply in the present case. It was more sensible and just to consider the balance of fairness as between the parties when considering the continuance of the stay. If, as the respondents thought possible, the claim against the bank might be compromised quite quickly, then it seemed that the appellant did face some risk of injustice. The respondents might be in a position to distribute the proceeds of the litigation and any other sums they had

recovered. They would be bound to distribute to them the shares of the three innocent siblings but would be free to take the appellant's share and mix it with the funds to be distributed to the creditors of the firm. The respondents, as liquidators, should be expected to be able to pay the appellant his share if his appeal were to succeed, but it was potentially quite a large sum and it was not fanciful to suppose that they might not be able to do so. For that reason and because there was no obvious advantage to the respondents if the stay were discharged, it was fair and just to keep the stay on the substance of the judge's order in place pending the outcome of the appeal (paras. 13–15).

(3) The stay of the order requiring the appellant to pay the costs of the trial would also be continued. The usual position was that a costs order would not be stayed unless there was some real risk of injustice to the losing party in the sense that that party might not be able to recover the costs already paid if the appeal were to succeed. There was no such danger in the present case. Although the administration of the liquidation had not been easy, it was very unlikely that the respondents would be unable to repay the modest sum of £75,000 if the appellant were to pay the costs and then succeed on appeal. On the other hand, there would be a real advantage to the respondents to be able to proceed with the recovery of their costs. However, the appellant's financial situation was such that there was no realistic prospect of his being able to satisfy the order and a risk that he might be prevented from pursuing his appeal for non-compliance. The timing of events was also relevant to the court's decision. If the stay were lifted, there would first be an assessment, which would take some time, and then an order for payment, which would have to allow some time for compliance. Thereafter, assuming the appellant did not pay, as seemed overwhelmingly likely, the respondents would have to enforce the order, which, as the appellant lived in Israel, would not be easy. By the time the respondents had obtained payment (which was very unlikely) or an order debarring the appellant from proceeding with his appeal on the ground of his non-compliance, the appeal would be on for hearing or would have been heard. In these circumstances, the imposition of a stay on the costs order would have little practical disadvantage or effect for the respondents. The respondents would be at liberty to apply to have their costs assessed, but there would be a stay to prevent them from enforcing payment of any sum of costs so assessed (paras. 19–21).

(4) The appellant's application for a stay of the judge's order permitting the respondents to amend their claim form and particulars of claim at a very late stage of the action would be refused. The appellant could, if he wished, pursue this aspect of the judge's decision on appeal but his request that the order should be stayed showed a misunderstanding as to what a stay was intended to achieve. A stay was intended to prevent a successful party from doing something immediately which the order would allow him to do. In the present case, there was nothing that the respondents were able to do which a stay could prevent in respect of the amendment of the

pleadings. The amendment order could only be undone if the Court of Appeal decided that the judge had been wrong to allow the amendment (para. 22).

(5) The respondents' application for security for the costs of both the appeal and the proceedings below would be refused. An application for an order under the Court of Appeal Rules 2004, r.55 for security for costs (further to the £120 which had to be paid as a matter of course under r.53) had to be decided by reference to the requirements of CPR r.25.13, which provided that a court might make an order for security for costs if (a) it was satisfied, having regard to all the circumstances, that it was just to make such an order; and (b) the claimant was resident out of the jurisdiction but not resident in a Brussels Contracting State, a state bound by the Lugano Convention, a state bound by the 2005 Hague Convention or a Regulation State as defined in s.1(3) of the Civil Jurisdictions and Judgments Act 1982. In the present case, the appellant was resident in Israel, which was not a Brussels Contracting State, a state bound by the 2005 Hague Convention or a Regulation State as defined in the 1982 Act. The court had jurisdiction in the present case to make an order for security for costs but it would not be just in all the circumstances to do so. It was most unlikely that the appellant would be able to obtain a further loan so as to provide security for costs, and it was likely that this appeal would be stifled if an order for security were made. The appeal appeared to be at least arguable. It would not therefore be just to make an order for security (paras. 24–39).

Case cited:

(1) *Sagredos* v. *Cohen*, C.A., Civil Appeal No. 1 of 2016, November 4th, 2016, unreported, followed.

Legislation construed:

Court of Appeal Rules 2004, r.53: The relevant terms of this rule are set out at para. 25.

r.55: The relevant terms of this rule are set out at para. 24.

Civil Procedure Rules 1998, r.25.13: The relevant terms of this rule are set out at paras. 28–29.

The appellant appeared in person;
N. Cruz and *C. Wright* for the respondents.

1 **SMITH, J.A.:**

Introduction

On February 7th, 2018, Yeats, Ag. J. handed down his judgment in respect of a claim brought by the respondents against the appellant. He made an order declaring, first, that the second respondent (in his capacity as official trustee in bankruptcy of the estates of Isaac and Benjamin Marrache) is

the absolute legal and beneficial owner of any interest the appellant has in the properties devolved by the estates of his grandfather Abraham Samuel Marrache and his mother Reina Marrache and, secondly, that any interest the appellant has in the properties devolved by the estates vests in the second respondent in his capacity as the official trustee of the bankrupts' estates. Under the third part of the order, the appellant was ordered to pay the costs of the action save costs incurred on an application to amend the pleadings. The judge also made an order for the assessment of the costs. The second and third parts of the trial order, that is the vesting order and the order for costs, were stayed until March 31st, 2018 or further order of this court.

2 On the same day, February 7th, 2018, the judge also handed down his judgment in respect of the respondents' application for the amendment of their claim form and the particulars of claim. He made an order granting the respondents permission to amend the claim form and the particulars of claim.

3 On February 21st, 2018, the appellant filed a notice of appeal in respect of the trial order and a separate notice of appeal in respect of the amendment order. Since that time the appellant has filed three applications to this court. First, he has applied for an extension of the stay in respect of the trial order (that is, of the vesting order) which is due to expire on March 31st. Secondly, he applied for a stay of the amendment order and, thirdly, he made an application that the appeal be summarily allowed on account of the judge's alleged conflict of interest and his allegedly demonstrable bias against the appellant.

4 There is now also before the court a notice of motion from the respondents seeking an order for security for costs in the sum of £35,000 for the costs of the forthcoming appeal and a further £75,000 for the estimated costs of the trial below which have not yet been assessed.

The facts

5 The appellant's father and mother had seven children: six sons and one daughter. On his death, the six sons inherited equal shares in several properties in Gibraltar to which the father had been entitled to a life interest under his father's will. That at least is what the judge understood the position to be, although the appellant has told this court that all seven children were to be treated equally under the father's will. It matters not for present purposes. On the death of their mother, all seven children inherited equal shares in the family home in Gibraltar called *Fortress House* and possibly some land in Spain.

6 Three of the sons, Isaac, Benjamin and Solomon, were involved in a solicitor's practice which I shall call "the firm," which went into liquidation in 2010. The deficit was some £28m. There had been a large-scale

fraud on money held in clients' accounts. Those three brothers were convicted of offences of fraud, served terms of imprisonment and were declared bankrupt. The first respondent is their trustee in bankruptcy. The firm was ordered to be wound up as an unregistered company. The respondents are the joint liquidators.

7 The trustee and liquidators have made a number of attempts to recover money on behalf of the firm's former clients and are involved in complex litigation. The current litigation is one such action. The respondents' investigations revealed that a number of payments totalling about £1.1m. had been made to the appellant either via the firm or via Isaac and Benjamin. They came to believe that this money had been transferred to the appellant in pursuance of an agreement whereby he, Raphael Marrache, the appellant, would sell his interests under his grandfather's and his mother's estates to the firm or possibly to Isaac and Benjamin. If that was so, when those brothers had been declared bankrupt the shares in the properties which had originally been Raphael's would belong to the trustee in bankruptcy, the first respondent. The respondents' action sought a declaration to that effect. It was strongly defended by the appellant acting in person. The action succeeded and resulted in the orders now under appeal.

The current applications

8 I shall deal with the appellant's current applications in what seems to me the most logical order. First, I shall take the application that this court should immediately declare that there had been a "mis-trial" and set the whole of the judge's order aside. This application was made as recently as March 16th, 2018. It is supported by an affidavit in which the appellant says that he was taken by surprise to find that Mr. Yeats, whose usual position is the Registrar to the Court of Appeal, was taking over the case as an Acting Judge of the Supreme Court. The appellant recounts an incident on the first morning of the trial when the judge drew the attention of the parties to the fact that, until 2013, he had been Senior Crown Counsel in the Attorney-General's department and, as such, had dealt with some administrative aspects of the prosecution of the three Marrache brothers. The appellant now complains that these circumstances gave rise to a perception of bias such that the judge ought to have recused himself. He alleges that the judge misled him as to the significance of his involvement with the Marrache case while working in the Attorney-General's department and concealed the gravity of the real conflict of interest with which he was now faced in hearing this matter. The appellant complains that he did not have time to consider the implications of the information he was given or to investigate it further and as a result he did not then object to the judge's continuing involvement in the case against him. On March 20th, the day before this hearing began, the appellant

served a transcript of the part of the proceedings before the judge that related to that incident.

9 The appellant's affidavit also contains a number of allegations of bias against the judge which are not at present at all particularized. It will be apparent from this that the respondents have not yet had the opportunity to respond to these allegations or to this application to allow the appeal, nor indeed has the Acting Judge had the opportunity to respond; he may be required to file an affidavit to more fully explain his association with the case against the fraudulent Marrache brothers. For that reason alone, it seems to me quite clear that this application cannot be dealt with today. Even if there had been more time for consideration of the issue, I do not think it is suitable for separate consideration. It is a part of the appeal and must be put off until the hearing of the appeal. The appellant is, of course, at liberty to pursue the allegations of bias if he so wishes at that time but it is neither practical nor appropriate for it to be considered today.

The stay on the substantive order

10 I turn to the application to continue the stay on the substantive order, that is the vesting order. This is based on the appellant's contention that, in his own words put in correspondence:

> "If the order is not stayed, the claimants will have the ability to carry out their stated intention to dispose of whatever is left of whatever remains of my inheritances immediately. The damage to myself and my other siblings would be disproportionate, irreversible and earth shattering."

In the course of his submissions to this court he has said that he wishes if possible to prevent the respondents from selling *Fortress House*. He believes that the respondents will sell it at an undervalue and that this will result in a substantial loss for himself if this appeal succeeds. He also says that there will be no loss to his innocent siblings whose shares in the proceeds of sale of *Fortress House* (and possibly in the house itself) remain intact. He tells us that he and possibly his innocent siblings have plans for the redevelopment of the site on which *Fortress House* stands and that this will produce far more than the sale contemplated by the respondents. Exactly how this project will be set in motion and financed is not clear but he says that there is a syndicate of people ready to take part. All that would become impossible if the respondents sell *Fortress House*.

11 The respondents oppose the application, submitting that there is no detriment whatever to the appellant if they are allowed to proceed immediately with their proposals to deal with the assets currently available to them and as augmented through further litigation which they intend to pursue. The respondents explained to the court that all the properties which devolved under the wills of the appellant's grandfather

and mother were charged to Jyske Bank Gibraltar ("Jyske") as security for loans to the firm. Jyske has sold all the properties save for *Fortress House* and the land in Spain and has kept the proceeds of sale in satisfaction or diminution of the firm's indebtedness to it. It appears that the reason that it has not sold *Fortress House* is that Rebecca Marrache, the appellant's sister, has rights of occupation in that house. So far as the land in Spain is concerned, there may be problems over its title, with the possibility of third-party claims against it. In any event, those assets have not been realized. The respondents contend that Jyske's charges were invalid *ab initio* and that they, as liquidators and trustees, are entitled to all the proceeds of sale of the properties which have already been sold and are also entitled to sell and retain the proceeds of the remaining unsold property. They have intimated a claim to Jyske who has said that it will oppose it. The effect is that the respondents face contested litigation before they can sell *Fortress House* or recover the proceeds of sale of any of the other properties in the estates or indeed distribute any of the proceeds.

12 At one stage it appeared that the respondents were saying that they would not be able to proceed with the litigation if there was a stay in place on the vesting order relating to the appellant's share. However, Mr. Cruz for the respondents accepted that there was nothing to prevent them from proceeding with the litigation. He also accepted that it is highly unlikely that the proposed litigation could be brought to a conclusion before the hearing and disposal of this appeal. So he accepted that there was, on the face of it, no real disadvantage to the respondents if the stay remained in place. However, he then suggested that it was quite possible that the respondents and Jyske will reach a compromise of the proposed litigation and that having control of the appellant's share of the assets will strengthen the respondents' hands in any negotiation. I confess that I cannot see how that could be so. Further, he submitted, there was a real possibility that the claim against Jyske might be settled quite soon and that the respondents would then be in a position to begin distribution of the funds recovered. They would on any view be entitled to keep and distribute the shares of Isaac, Benjamin and Solomon. The appellant's share will be theirs to deal with if there is no stay in place. If they distribute, they would, of course, have to give the appropriate shares to the three remaining siblings, those who I have described as the innocent siblings. Mr. Cruz told us that the respondents had offered to ring fence the appellant's share of the proceeds pending the outcome of this appeal. This could be done by keeping the money in a client account or by paying it into court. This offer was, however, refused by the appellant and has now been withdrawn. The appellant's submission to this court was that they wanted the stay to be lifted and for them to be free to deal with the appellant's share in the event that the Jyske litigation had been concluded.

Mr. Cruz submitted that there was no significant danger that the appellant's interest would be harmed in any way. There was no risk that the appellant would not receive his share of the proceeds of sale if his appeal succeeded.

13 I shall start consideration of this issue by reminding myself that it is not usual to impose a stay pending appeal and that a stay must be justified by the appellant showing that he will suffer an injustice if the order is not stayed. That is often difficult because in most cases there is an obvious advantage to the successful party below in being able to make use of whatever he has won. The appellant seeking the stay has to overcome that hurdle. In the present case, however, the advantage to the respondents in the lifting of the stay is hard to discern. They cannot distribute any assets until the litigation against Jyske is resolved. They are free to proceed with that litigation and I do not accept that they would be at any disadvantage in negotiating with Jyske if a stay were in place. The overwhelming likelihood is that this appeal will be determined well before the respondents are in a position to sell *Fortress House* or distribute any assets. To my mind, only in the unlikely event that the respondents were able first to negotiate a settlement of their claim against Jyske within the next few months, and also rapidly complete the technical formalities so as to be able to commence distribution, would the respondents be in any way affected by the presence of the stay.

14 I consider therefore that the usual starting point should not apply in the present case. It seems to me that it is more sensible and just to consider the balance of fairness as between the parties when considering the continuance of the stay. I consider the position of the appellant. In the first place it seems obvious that it is to his advantage that the respondents should progress their claim against Jyske. A stay makes no difference one way or the other to that. If, as the respondents think possible, the claim may be compromised quite quickly, then it seems to me that the appellant does face some risk of injustice. The respondents might be in a position to distribute the proceeds of the litigation and any other sums they have recovered. They would be bound to distribute to them the shares of the three innocent siblings but would be free to take the appellant's share and mix it with the funds to be distributed to the creditors of the firm. The respondents have withdrawn their offer to ring fence the appellant's share pending disposal of this appeal. I do accept that one would expect the respondents, as liquidators, to be able to satisfy the appellant's share if his appeal were to succeed but it is potentially quite a large sum and it is not fanciful to suppose that they might not be able to pay him out. I bear in mind that this litigation has been far from easy for the respondents. They have been involved in other difficult litigation which is not yet resolved and which has cost a great deal of money.

15 For that reason and because there is no obvious advantage to the respondents if the stay is discharged, I consider that it is fair and just to keep the stay on the substance of the judge's order in place pending the outcome of this appeal. For the avoidance of doubt I would suggest that the order of this court should record that the stay should apply to paras. 1 and 2 of the judge's order rather than only para. 2. I understand from Mr. Cruz that he could see no significant disadvantage to the respondents if that alteration were made.

The stay on costs

16 The judge's stay also covered the order that the appellant pay the cost of the trial, which we have been told will be of the order of £75,000. The appellant seeks to maintain that stay really because, he says, he cannot afford to pay it and may never have to. The appellant has always maintained that he is in grave financial difficulty (as evidenced by his inability to instruct lawyers for the substantive hearing) but, until yesterday, he had not filed any sworn evidence to that effect. We adjourned the hearing until today to give him the opportunity to put in evidence of his means and those of his wife.

17 This morning we received the evidence and it presents a dismal picture. The appellant is unemployed and has no obvious earning capacity. His wife has earning capacity but has not been working recently because she has been assisting her husband with this case. They have no assets at all and debts of the order of $200,000. They have a rented home in Israel on which the rent is paid up to June of this year but with no income with which to renew that lease. They are responsible for the welfare of a number of children, some of them still under the age of 18. They have borrowed through friends and family to make ends meet. We have seen a promissory note executed in June 2017 by the appellant and his wife whereby they borrowed $150,000 against the security of some pictures and household effects. The lenders are the in-laws of Mrs. Marrache's son. She spoke of her embarrassment at requesting this loan and her abhorrence at the idea of having to make any further requests. The debt has not been repaid although the time for doing so expired in December.

18 Also produced this morning were handwritten letters from friends (with passport photographs attached) asserting that the writers lent money to the appellant and his wife because they knew that they were in dire financial straits. Speaking for myself I found this evidence compelling.

19 The respondents draw attention to the usual position that a stay on a costs order will not be ordered unless there is some real risk of injustice to the losing party, in the sense that that party may not be able to recover the costs already paid in the event that the appeal succeeds. Here there is no real danger of that. Although the administration of this liquidation has not

been easy, it seems very unlikely indeed that the respondents would be unable to repay so modest a sum as £75,000 in the event that the appellant does pay it but then wins the appeal. On the other hand, there is or would be a real advantage to the respondents to be able to proceed with the recovery of their costs. That is an advantage that they should normally be entitled to take unless the appellant can show that this would put him at risk of real injustice. The problem is that there is no realistic prospect of the appellant being able to satisfy the order which would be made if the stay were lifted and a risk that he might be shut out from pursuing his appeal for non-compliance.

20 The timing of events is also relevant to the court's decision. If the stay is lifted, there would first have to be an assessment which would take some time. Then there would be an order for payment which would have to allow some time for compliance. Thereafter if the appellant had not paid, as I consider to be overwhelmingly likely, the respondents would have to enforce the order. As the appellant is ordinarily resident in Israel, that would not be an easy task, as the respondents recognize. By the time the respondents had obtained payment (very unlikely) or had obtained an order debarring the appellant from proceeding with his appeal for non-compliance, the appeal would be on for hearing or more likely even have been heard. It seems to me therefore that the imposition of a stay on the costs order would have little practical disadvantage or effect on the respondents.

21 What I would propose, if My Lord agrees, is that the respondents should be at liberty to have their costs assessed so that, in the event that they are able to pursue the costs, that step would already have been taken. But there should be a stay to prevent the respondents from enforcing payment of any sum of costs so assessed.

The amendment order

22 The appellant also sought a stay on the judge's order permitting the respondents to amend their claim form and particulars of claim at a very late stage of the action, indeed after all the evidence and submissions had been heard. The appellant may wish to pursue this aspect of the judge's decision on appeal and there is nothing to prevent that, but his request that the order should be stayed stems from a misunderstanding of what a stay is intended to achieve. A stay is intended to prevent the successful party from doing something immediately which the order would allow him to do. There is nothing that the respondents are able to do which a stay could prevent in respect of the amendment of the pleadings. The amendment order can only be undone if the Court of Appeal decides that the judge was wrong to allow the amendment in the first place. That application must be refused.

Security for costs

23 I turn now to the respondents' application for security of costs. This is supported by an affidavit of Mr. Lavarello, the first respondent, and exhibits a large number of documents. The respondents seek security for the costs of the appeal which they estimate could be in the order of £35,000. However they also seek security for the costs of the action below which they estimated at £75,000.

24 The application is made under r.55 of the Court of Appeal Rules 2004 of Gibraltar which provides:

> "The court or a judge may at any time, in any case where they or he thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs related to the matters in question in the appeal."

25 That rule must be read in conjunction with r.53 which provides as follows:

> "**Lodging appeal.**
>
> 53.(1) Subject to any extension of time, the appellant shall within twenty-one days after filing notice of appeal, or within twenty-one days after being notified by the Registrar that a copy of any judgment or transcript for which an application has been made under rule 49(1) or (2) is ready for collection, whichever is the later, lodge the appeal by filing in the Registry of the Court six copies of the grounds of appeal, and either lodging in court the sum of £120 as security for the costs of the appeal or entering into a bond for that amount to the satisfaction of the Registrar."

26 It appears on the face of the rules that the reference to further security for costs in r.55 is further to the £120 which has to be paid as a matter of course under r.53. The question arose as to whether the power to make an order for security for costs is unfettered (as is suggested by r.55) or is subject to the restrictions and considerations imposed by the Civil Procedure Rules (CPR). As to this, there is some relevant authority.

27 In the case of *Sagredos* v. *Cohen* (1) in this court in 2016, the question arose as to whether r.55 of itself gave rise to jurisdiction to make an order for security for costs without reference to the requirements of the CPR and in particular of CPR 25.12 and 25.13. At para. 3 of that judgment, Potter, J.A. said this:

> "The words 'further security' [in r.55] are to be interpreted as being the security over and above the obligatory security to be lodged with the Court under Rule 53(1). Whilst the wording of Rule 55 is unfettered, the Gibraltar Court nonetheless has regard to the

applicable material criteria provided for under the CPR when deciding whether or not to make an order for security. The applicable practice and procedure is therefore as provided for in CPR 25.12 ('Security for Costs') 25.13 ('Conditions to be satisfied') and 25.15(1) ('Security for Costs of an Appeal')."

28 It follows from that we must decide this application by reference to the requirements of CPR r.25.13 which provides as follows:

"(1) The court may make an order for security for costs under rule 25.12 if—

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b)

(i) one or more of the conditions in paragraph 2 applies, or

(ii) an enactment permits the court to require security for costs."

29 The respondents seek to rely on the first condition in para. (2) which provides as follows:

"(2) The conditions are—

(a) the claimant is—

(i) resident out of the jurisdiction, but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdictions and Judgments Act 1982."

30 The respondents submit that there can be no doubt that the appellant is resident in Israel and I would accept that submission. His stance is that he is resident in Gibraltar. He is indeed, as he protests, entitled to live in Gibraltar as he is a Gibraltarian. He has been staying here for the last five months while dealing with litigation. I am satisfied, however, that his home is in Israel and that is where he is resident. I say that because that is what he told the judge on the first day of the hearing. In the context of an application for an adjournment he said "I have a certificate here from the medical in Israel where I reside." Later, in the context of a discussion about legal aid for which he had indicated he wished to apply, the judge asked him "You live, you are resident in Israel aren't you?" to which he replied "Correct." The judge advised him that legal aid was only available to residents of Gibraltar to which the appellant said "I didn't know that."

He did not assert that he would therefore be entitled to it as a resident of Gibraltar.

31 It is accepted on both sides that Israel is not a Brussels Contracting State; nor is it bound by the 2005 Hague Convention; nor is it a Regulation State as defined in the Civil Jurisdiction and Judgments Act 1982. I have read an article from a journal called *Judgment Enforcement News* which is a review of a book called *Foreign Judgments in Israel Recognition & Enforcement*. The author is Haggai Carmon and there is a foreword by Rivlin, J., Deputy Chief Justice of the Supreme Court in Israel. This article demonstrates, to my mind with authority, the processes which must be gone through before a foreign judgment will be recognized and enforced in Israel.

32 In my judgment, the first condition of para. (2) of CPR r.25.13 is satisfied in the present case and there is jurisdiction in this case to make an order for security for costs. The question is whether it is fair and just to do so and, if it is fair and just to make any order, in what sum?

33 Mr. Cruz for the respondents submitted that this is just the kind of case in which an order for security for costs should be made. The appellant is resident in Israel and appears to have no resources to pay the existing costs order let alone an order for costs if the appeal should fail. It is only fair, he submits, that the respondents should be protected from at least the latter risk. I would accept that submission so far as it goes. However, this court has to consider the effect of such an order on the appellant and whether its imposition would cause injustice, in particular by stifling the appeal.

34 Mr. Cruz did not suggest that it would be easy for the appellant to comply with an order for security but he submitted that the appellant had not demonstrated that he would be positively unable to do so or that the imposition of an order would necessarily stifle the appeal. He suggested that the appellant plainly had friends and relations who had been prepared to assist him and his wife in the past and he had not demonstrated that they would not be prepared to do so again in the future so as to keep his appeal alive. There was, he said, no evidence that the appellant had made efforts to borrow more but had failed.

35 I have already described the evidence provided by the appellant as to his financial position. It is clear to me that he would be unable to satisfy any order for security without further borrowing. On the question of whether it would be possible for him to raise further loans, it is true, as Mr. Cruz asserted, that there was no direct evidence that he had asked his friends or relations for further loans. However it seemed to us that, as he was a litigant in person, he had not appreciated the need to produce such evidence. Accordingly we allowed his wife to tell us more of the family's financial situation and also to deal with the possibility of raising further

loans. Her evidence was to the effect that, so far as she could see, that would be quite impossible and she could not bear the thought of any further indebtedness. She gave the clear impression that the current degree of indebtedness had been and continues to be a very severe emotional burden upon both of them. She was unable to say that she had asked directly for further loans.

36 In my view we have to take a realistic view of this evidence. Taking account of everything I have heard, I think it is most unlikely that the appellant will be able to raise a further loan in any substantial sum. I also think it likely, although I cannot say with certainty, that this appeal would be stifled if an order for security were made even in the amount of £35,000 because I do not think that the appellant would be able to meet it.

37 Is there real injustice if this appeal were to be stifled? I do not wish to express any view as to the prospects of success of the appeal. Indeed the courts are discouraged from speculating on the likely prospects of success. I wish to say only that it appears to me that the only ground of appeal of which I am currently aware, namely the possibility of perceived bias, may at least be arguable.

38 In my judgment, it would not be just in all the circumstances to make an order for security for the costs of the appeal. That being so it must follow that it would be even less just to make the order as initially requested by the respondents to include the costs of the hearing below. At one stage during submissions, we questioned whether there was jurisdiction to make an order for the costs of the hearing below under r.55 and CPR r.25.12 but, after investigation by Mr. Cruz, we were satisfied that an order could be made under what is now CPR r.52.18, formerly r.52.9, whereby an appellant could be ordered to pay the costs below and even a judgment debt into court as a condition of pursuing his appeal. However it was clear from the CPR itself that an order should only be made in compelling circumstances and Mr. Cruz very sensibly recognized that this was not such a case. Accordingly, although he did not withdraw this part of his application, he did not press his request.

39 In all the circumstances and for the reasons that I have given, I would direct that the application for security for costs be refused.

40 **RIMER, J.A.:** I agree.

Orders accordingly.