

[2018 Gib LR 24]

**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) v. R. MARRACHE**

SUPREME COURT (Yeats, Ag. J.): February 7th, 2018

*Civil Procedure—judgments and orders—declaratory judgment—declaration that defendant had been paid by his brothers' firm for his shares in estates of grandfather and mother according to agreement to purchase shares*

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

The defendant 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 defendant 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 defendant'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 defendant'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 large and appeared to be successful and well regarded. However, the brothers had been misapplying and appropriating clients' moneys. In 2010, a winding-up petition was presented against Marrache & Co. The claimants were appointed as liquidators and in that capacity they were the first claimants in these proceedings. Isaac, Benjamin and Solomon were also adjudged bankrupt, and the second claimant 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 claimants discovered a series of ledgers evidencing, amongst other things, payments made to its partners and other family members. Those ledgers showed payments to the defendant amounting to approximately £1.1m. It was believed that the payments related to an agreement between Isaac and/or Benjamin and the defendant whereby the defendant sold his entitlement in the respective estates of his grandfather and mother. The

claimants produced a document, “the balance sheet,” which appeared to show a running balance of expenditure against the application of values ascribed to diverse properties. They also relied on a draft agreement from 2008 between the defendant on the one hand and Isaac and Benjamin on the other setting out that the defendant “will sell” and Isaac and Benjamin “will buy” the interests in the estates. The claimants also produced an email sent by Solomon to the defendant in November 2008 informing him that the firm would no longer pay overdrafts on behalf of the defendant. Solomon confirmed that when he wrote the email he understood that the defendant had been paid for his shares in the estates.

The claimants sought a declaration that the £1.1m. was consideration paid by Marrache & Co. for the sale by the defendant of his shares in the estates of his grandfather and mother, and an order vesting the shares in the claimants. Alternatively, the claimants sought a declaration that the transfers to the defendant of the £1.1m. were void pursuant to the Fraudulent Conveyances Act 1571 or the Bankruptcy Act 1934, that the transactions be set aside and an order that the defendant pay to the claimants that sum or such other sum as the court might determine.

The defendant denied that he had entered into such an agreement and asserted that any moneys he had received arose in the course of his employment with the firm and, insofar as two specific payments were concerned, formed part of the payment of a deposit for the purchase of a house in Jerusalem. He denied that all of the moneys attributed to him were for his benefit or were in fact received by him.

**Held**, ruling as follows:

(1) The court would make a declaration that the defendant had been paid by Marrache & Co. for his shares in the estates of his grandfather and his mother (para. 116).

(2) The court made the following findings of fact:

(a) The ledger showing payments made to the defendant by the firm was accurate.

(b) In the period from January 1st, 2005 to January 5th, 2010, the defendant was paid a total of £1,060,836.47 by the firm. The sum of £36,591.65 was paid in an unknown period immediately prior to January 1st, 2005.

(c) The defendant was not employed by the firm although he did provide some public relations and other services (the sum of £205,000 was attributable as remuneration for services rendered).

(d) Throughout the period that the payments were made, the firm was insolvent.

(e) The defendant sold his one-sixth interest in the properties devolved to him by the estate of his grandfather to the firm.

(f) The defendant sold his one-seventh contingent interest in the properties devolved by the estate of his mother to the firm (para. 118).

(3) The court was satisfied that on balance the claimants had proved that the agreement relating to the sale by the defendant of his interests in properties said by the claimants to form part of his grandfather's estate was made and completed. The court reached this conclusion on the following basis. The defendant received funds of approximately £1.1m. from the firm. Although a portion of those funds could, if necessary, be attributed to remuneration for services rendered, the parties were proceeding on the basis that the payments were being made in exchange for the interest in the estates. Part of the moneys paid were three payments totalling \$730,000. This lump sum could only have been made as a result of the agreement reached. The evidence of Solomon and Benjamin as to the existence and completion of the agreement was supported by documentation, including the balance sheet, the November 2008 email from Solomon to the defendant and the 2008 draft agreement. The funds were provided by the firm and it was therefore the partners, *i.e.* Isaac and Benjamin, who would own the defendant's one-sixth interest in the properties devolved by the grandfather's estate (paras. 90–96).

(4) It was necessary to consider the position with regard to the mother's estate separately. The court concluded that it was more probable than not that the agreement with the defendant (made before the mother's death) related to all of the family's property interests, including the defendant's potential future interest in the properties owned by his mother, including the valuable family home, *Fortress House* (para. 97; paras. 103–105).

**Cases cited:**

- (1) *Financial Servs. Auth. v. Rourke (t/a J.E. Rourke & Co.)*, [2002] C.P. Rep. 14, referred to.
- (2) *Rogers v. Hoyle*, [2014] EWCA Civ 257; [2015] Q.B. 265; [2014] 3 W.L.R. 148; [2014] 3 All E.R. 550; [2014] C.P. Rep. 30; [2014] 1 C.L.C. 316, considered.

*N.P. Cruz* and *C. Wright* for the claimants;  
The defendant appeared in person.

1 **YEATS, Ag. J.:** There has been a large number of proceedings before this court brought about by the collapse of the law firm Marrache & Co. (“the firm”). This is one such claim. The background is therefore well rehearsed but I will nevertheless set out a short summary.

**The background**

2 Isaac, Benjamin and Solomon Marrache were on July 2nd, 2014 convicted in this court of conspiracy to defraud clients of the firm. They are the defendant's brothers. There are three other siblings who I shall also refer to in this judgment. It is convenient to refer to them all by their first names.

3 In 1985, Isaac set up a legal practice and shortly thereafter entered into a partnership with his brother Benjamin. They continued in partnership until February 2010. Solomon was, for the most part and certainly during the period with which we are concerned, the finance director. Unlike his brothers, he was not legally qualified. The firm, relative to the size of other Gibraltar law firms, was a large one. It had offices in London and in Spain and had associated trust and company management arms. Overall it gave the appearance of a successful and well-regarded practice. However, all was not what it seemed. The brothers had been misapplying and appropriating clients' moneys. On February 12th, 2010, a winding-up petition was presented against Marrache & Co. (as an unregistered company). Edgar Lavarello and Adrian Hyde were appointed as provisional liquidators of the firm. Their appointment was confirmed by Dudley, C.J. on March 17th, 2010. In their capacity as liquidators, they are the first claimants herein. Subsequently, on November 26th, 2010, Isaac, Benjamin and Solomon were adjudged bankrupt by this court. Mr. Lavarello was appointed as the official trustee of the estates of the bankrupts. In that capacity, Mr. Lavarello joins as second claimant.

4 The three brothers were tried on charges of conspiracy to defraud clients of the firm. On July 2nd, 2014, Benjamin and Solomon were found guilty by Grigson, Ag. J. of two counts of conspiracy to defraud. Isaac on one. It had been the longest criminal trial in Gibraltar's history and the first in which defendants had been tried in the Supreme Court by judge alone after the jury was discharged early on into the proceedings. Having, as I have said, tried the case without a jury, the learned judge set out his findings in a judgment: *R. v. Marrache* (2013–14 Gib LR 540). The loss to clients is said to have been not less than £28m. Appeals against conviction (and in the cases of two of the appellants, sentence) were dismissed by the Court of Appeal on November 13th, 2014. Special leave to appeal to the Judicial Committee of the Privy Council was refused on November 11th, 2015.

#### **The claim**

5 In the course of their investigation into the affairs of the firm, the claimants uncovered a series of ledgers which had been kept by the firm evidencing, amongst other things, payments made to its partners and other members of the family. Those ledgers, say the claimants, show payments made by the firm to Raphael amounting to £1,109,148.02. No suggestion has been made that Raphael was a party to the criminal dishonesty. Rather, it is said that the payments relate to an agreement between Isaac and/or Benjamin on the one part and Raphael on the other, by which the latter sold his entitlement in the respective estates of their grandfather and mother. By these proceedings the claimants therefore seek a declaration that Raphael's shares in those estates vest in them. Alternatively, the

claimants claim that the payments were void as they were not for valuable consideration and were made to the detriment of creditors of the firm—the firm having been insolvent since before the relevant period.

6 Raphael denies that he ever entered into such an agreement and asserts that any moneys that he received arose out of the course of his employment with the firm and, insofar as two specific payments are concerned, that these formed part of the payment of a deposit for the purchase of a house in Jerusalem arising from an agreement with his brother Benjamin which was never completed. Further, he denies that all of the moneys attributed to him were for his benefit or were in fact received by him.

#### **The estates**

7 Abraham Samuel Marrache was the siblings' grandfather and Samuel Abraham Marrache their father. Abraham Samuel Marrache died in 1968. By his will, a part of his estate devolved upon trust to his son Samuel for life and then, upon his son's death, to his six grandsons. Each brother therefore had a one-sixth share in certain interests arising from this estate. Samuel Abraham Marrache died in 1993. By his will, his estate devolved to his wife Reina Marrache, the siblings' mother. Reina died intestate in 2008. Her estate devolved to all her children (six sons and one daughter) and they each therefore had a one-seventh share in the same.

8 The estates owned a number of properties including the property from which the firm carried on its business at 5 Cannon Lane and the family home, *Fortress House*. The amended particulars of claim also refer to 197, 199 and 201 Main Street. There is evidence that *Fortress House* devolved under the estate of Reina Marrache. The claimants are proceeding on the basis that the other properties form part of the estate of Abraham Samuel Marrache.

#### **The witnesses**

9 The claimants relied principally on the evidence of Adrian Hyde. As I have already referred to, he is one of the liquidators of the firm. He is an insolvency practitioner licensed by the Institute of Chartered Accountants with 25 years' experience in the field. He is also qualified as a solicitor. Mr. Hyde presented the documentary evidence upon which the claim is based. This included accounting ledgers, email correspondence and other relevant documents all of which had been recovered from the firm's records. He also presented copies of bank statements for Raphael's account with the Royal Bank of Scotland—which statements had been obtained directly from the bank. There followed an analysis of the ledger entries as against the bank statements and other documents relied upon by the claimants.

10 The claimants' only other witness was Solomon. His evidence largely supported the claimants' case that the ledgers accurately showed the payments made to Raphael as well as the contention that payments were being made as part of an agreement to purchase Raphael's shares in the family properties.

11 Isaac and Benjamin also gave evidence although they did so at Raphael's behest. The evidence of Isaac, Benjamin and Solomon was in some important aspects at odds with each other. None of them had filed witness statements. In analysing the veracity of the evidence they gave I cannot ignore that all three are convicted fraudsters. Isaac and Solomon had both been released on parole but remained on licence. At the time of the hearing in mid-November 2017, Benjamin remained in custody. Clearly, all are intelligent men. Inevitably, I have found it difficult to accept much of what they said unless it was supported by documentation.

12 Raphael himself gave evidence. As he too had not filed a witness statement I allowed him to adopt his defence as his evidence-in-chief. Raphael presented himself as having no academic qualifications and thereby being at a disadvantage as against his brothers. Having heard him give evidence and observed his conduct during the trial, I found him perfectly able and competent. There are however many aspects of his evidence which I have rejected for reasons which I will explain in the course of the judgment.

13 Raphael called a number of other witnesses dealing mainly with his employment with the firm and with the purchase of art in Jerusalem. He also called his sister Rebecca. I shall deal with my assessment of their evidence when I refer to it in the course of my analysis of the various issues I am determining.

### **The ledgers**

14 It is not in dispute that the firm used two accounting software packages during the period 2001 to the firm's collapse in 2010. These are referred to as "Sage" and "Liberate." (In 2005 they incorporated the Sage program into their accounting system. There was then a period when the firm moved to the Liberate program but that did not work out because of deficiencies in how it tracked foreign currencies and so they reverted to Sage once again.) The software allowed the firm to keep track of all of the firm's accounting. What is in dispute is the origin, purpose and accuracy of the ledgers said to have been created on these systems.

15 Solomon's evidence was that the ledgers had been created at Benjamin's insistence to record all drawings attributable to the family members and other family expenses—such as the upkeep of the family home, *Fortress House*. They needed to keep track of what was being drawn out of the firm by all family members. He asserted that the ledgers were

accurate. As he pointedly stated in the course of his evidence: “One thing we did right was record everything in detail.” All entries in the ledger in both the Sage and Liberate accounting systems were copied onto an Excel spreadsheet by Mr. Hyde to facilitate analysis.

16 Raphael’s ledger is entitled “Raffi.” It shows an opening balance of £36,591.65 as at December 31st, 2004. These appear to be drawings attributable to Raphael in a period prior to the recording of data on Sage. There is no documentation for that and the claimants rely simply on the general accuracy of the ledgers to support the accuracy of that entry. The ledger then has numerous entries. The first is dated January 1st, 2005. The last is January 5th, 2010. Entries can be divided into three types. The first are entries totalling £554,136.66 being amounts paid by the firm to Raphael’s Real account with the Royal Bank of Scotland, account number [. . .]. (The term “Real” is the name given by the bank to the particular type of account.) The second is a set of three payments with associated bank charges, two in US dollars and one in pounds sterling totalling £456,618.30 (as per the exchange rates applied at the times of the transactions). These are said to relate to three transfers made to a lawyer in Jerusalem for the purchase of a property there. The third group of entries is what I will refer to as miscellaneous entries for which there is no backing documentation produced by the claimants (save for one of the entries). This third group of entries adds up to £61,801.42. Again, the claimants rely on the principle of general accuracy in support of these entries.

17 According to Solomon, postings on to the ledgers were made by the accounts staff in the firm. (He also explained that they engaged the services of a retired staff member to enter the payments into the system.) The postings would be based on instructions given by either of the partners or by Solomon himself. Mr. Hyde confirmed that this would be standard accounting procedure. Instructions on postings are given by someone with authority and these are effected by accounting staff. It barely requires stating that entries can of course be posted in error due to inadvertence.

#### **The payments to the Real account**

18 Mr. Hyde cross-referenced the payments in the ledger to the entries in the Real account bank statements. There are numerous payments which are either made directly from the firm’s accounts or through a company called Penzance Holdings Ltd. (“Penzance”). (Penzance was a company used by the firm to pay staff wages and to make payments to Isaac, Benjamin and Solomon. Solomon explained the process as being one devised to keep more than one bank happy. Channelling funds held in the firm’s accounts through Penzance meant that they could hold or transfer funds via two different banks when payments were made.) Payments do

not have the exact same dates but can be found entered within a few days of each other in the corresponding documents. This is easily explained by the fact that postings may not be entered on the same date or indeed cheques may not be presented to the bank on the date that they are issued.

19 All of the payments bar three totalling £11,010 are reflected in the bank statements. One of these appears to be a payment to Benjamin which has been mis-posted. Mr. Hyde could not provide an explanation for the other two.

20 Raphael suggested in his questioning of Mr. Hyde and of Solomon that Solomon was a joint signatory to Raphael's Real account and that moneys deposited there would also have been used by him and not exclusively by Raphael. Raphael did not in the event give evidence himself on this nor is it raised in his defence. Be that as it may, I reject the suggestion. I accept Mr. Hyde's response that there is no evidence that the Real account is or was a joint account. Further, in his experience Mr. Hyde has never come across an account in a single person's name which operates as a joint account. The suggestion was also denied by Solomon. As pointed out by Mr. Hyde, Solomon had his own Real account to which regular payments were being made.

21 In contrast to the questions he put to Mr. Hyde and Solomon in cross-examination, when giving evidence himself Raphael accepted that the funds had been received in the Real account and could be divided into two categories. Funds arising from his employment at £5,000 per month and funds sent by Benjamin for the purchase of art in Israel.

22 As I have referred to, the claimants obtained copies of the Real account statements directly from the bank. Earlier in the course of the proceedings Raphael had claimed that the bank could not provide these to him because of the passage of time. That proved to be incorrect and the claimants were able to obtain copies of the statements without much difficulty. The point was made by Mr. Cruz, who appeared for the claimants, that the purported inability to obtain copies of the bank statements was simply designed at being able to refute the accuracy of the ledger at trial. There is merit in the submission.

23 Considering in particular the analysis carried out by Mr. Hyde showing the corresponding entries in the ledger and the bank statements, I am satisfied that on balance the claimants have shown that a total of £543,126.66 was received by Raphael into his Real account in the relevant period (account having been taken of the three payments totalling £11,010 which do not appear in Raphael's bank statements).



**The payments for the Yemin Moshe property**

24 Mr. Hyde's evidence was that three distinct payments were made in relation to the purchase of a property in Israel. (It is accepted by Raphael that the property in question was a US\$2m. property in Yemin Moshe.) Two payments of US\$300,000 and US\$250,000 were made on February 21st, 2008 and April 14th, 2008 respectively from the firm's USD client account with Natwest number [. . .]. They both appear in the firm's USD account bank statements with the reference: "Raphael."

25 In relation to the first payment the claimants produced an email of March 11th, 2008 with a subject heading of "Yamin Moshe" sent by a Shyanne Almeida working with the firm to a Rabbi Moshe, who was dealing with the purchase of the property by Raphael in Israel. This confirmed that \$300,000 had already been forwarded. The email reads as follows:

"Dear Rabbi Moshe.

Can you let me know the exact numbers for Raffi's property purchase.

My calculations are the following: Bank provides 75% of 1.8 million, which equals—\$1.35 million.

We have already forwarded \$300,000—Balance necessary for completion is—\$150,000. Lawyers fees? Stamp duty fees?"

26 As to the second payment, the claimants have produced email exchanges of April 7th, 2008 and April 10th, 2008 between Benjamin and Rabbi Moshe entitled "Raffi's House." Following a query by Benjamin as to whether the sum of £200,000 or \$200,000 was required, the exchange is the following:

*Email of April 7th, 2008*

"Dear Benji

I told Miriam to answer your email whilst I was in London, she made a mistake and wrote \$ instead of pounds. The best would be to send the money to Raffi and he will then pay the rest. Alternatively you could send it to the lawyer's account as last time and he will do the job for Raffi.

Here is approximately the breakdown: Price \$1.9M. Paid \$300,000 at exchange, the bank will lend \$1.350M. balance \$250,000.

On top of it we must add: Stamp duty: \$87,000 (293,000 NIS) Lawyer's fees \$13,000 (including VAT) Raffi's agents fees (Raphael Marouani) 1% = \$19,000. Total \$369,000.

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According to the contract if the \$ falls below 3.63NIS to the \$, Raffi will pay the difference (3.64 now). This time send the money in sterling unless you already have it in \$.

The problem with Victor is that he will not pay the tax unless Tony finds a way to force him.

Kind regards, Rav Moshe”

*Email of April 10th, 2008*

“Dear Rav Moshe

I think that we will send the \$250,000 immediately and the balance thereafter within the next 7 days.

Kind regards

Benji”

(The reference to “Victor” and payment of tax is a reference to a different matter being discussed in earlier emails.)

27 Benjamin’s email confirming that the sum of \$250,000 was to be transferred was sent on April 10th, 2008. The transfer of \$250,000 appears in the bank statements with an April 14th, 2008 date.

28 The third payment was debited from the firm’s GBP client account with Natwest number [. . .] on May 16th, 2008. The sterling amount debited is £93,312.60. The reference on the bank statement is “Rafael to Alexande.” The accompanying payment request shows that it was for the sum of \$180,000 and was to be sent to Ramati Yehuda Alexander—the Israeli lawyer. Again, the claimants have produced email exchanges of May 15th, 2008 between Benjamin and Rabbi Moshe. The emails do not have a subject heading. The text of Benjamin’s email to Rabbi Moshe is the following:

“Dear Rabbi Moshe

We have to date transferred by electronic transfer \$180,000 to the account of Alex Ramati Yehuda.

Tell Mazal Tov to Rapphie.

I would be grateful if you could organise for Dina to sign any papers that need to be signed, or maybe nothing else needs to be signed until they get married. Thank you for all your help with Rapphie’s house. May it be a source of blessings for all of us.

Kind regards, Benji.”

(According to Mr. Hyde, “Mazal Tov” is a congratulatory phrase.)

29 Rabbi Moshe replies stating that he will keep Benjamin updated after completion and send him a breakdown of all expenses.

30 In his defence, Raphael refers to a payment of \$200,000 and another of \$300,000. At para. 18 of his defence Raphael stated as follows:

“I do not recognise any other accounts attributed to myself in this ledger except RSM REAL Account at the Bank of Scotland in Gibraltar. To that account, the firm or my brothers deposited funds for my salary and limited expenses and for my disbursements they would instruct me to undertake on their behalf pertaining to the firm and their personal affairs. My second account was in Israel which was always in overdraft as I personally struggled to make ends meet on my limited salary of 5000 pounds sterling per month. No funds were directly deposited into my Israeli account. There was only one other payment of \$200,000 sent to Israel on my behalf in order to purchase a home. I had been renting for a home until then. The funds were sent to the lawyer in charge of my offer to purchase the home. There are numerous other charges to the same lawyer that do not in any way pertain to me. I do know that my brothers also purchased homes in Israel. Those funds were understood to come from monies owing to me from my grandfather AS Marrache’s Trust of which I am a beneficiary . . .”

31 Whilst in this paragraph Raphael confusingly appears only to concede the payment of \$200,000, at para. 22 he states as follows:

“I am a beneficiary of two trusts. My brothers were the Trustees. They administered the Trusts out of the firm’s office at 5 Cannon Lane in Gibraltar. They did not separate their accounts as would be required by law and best accounting practices. The revenues attributable to my family were intertwined with the monies of the firm’s daily business. Neither I nor my siblings were aware of this. The funds used for the deposit to purchase my home, paid out in February 2008 (long before my mother passed away) and entered in the falsified ledger of \$300,000 US were funds owed to me by my brothers as funds that were earned by the family trust of my grandfather A.S. Marrache and later in 2008 my father’s trust via my mother, intestate, of which I remain a beneficiary.”

32 At trial he accepted that payments of \$300,000 and \$200,000 (not \$250,000) had been made for his benefit. He added that these were either being paid by the firm or by “the trust fund” if he did not do the deal.

33 In light of the bank statements, the contemporaneous emails produced by the claimants which I have set out above and Raphael’s concessions, there is no doubt that payments of \$300,000 and \$250,000

were made for his benefit and were applied to the purchase of the property in Yemin Moshe.

34 As set out in Rabbi Moshe's email of April 7th, 2008, following the initial deposit the amount of \$369,000 was required to complete the purchase. There then followed the transfer of \$250,000 leaving a balance in the sum of \$119,000. The reason why that balance increased to a final payment of \$180,000 was not broached at trial. The parties did however provide copies of correspondence which includes an email exchange between Rabbi Moshe and Benjamin of June 1st, 2008 in which Rabbi Moshe explains the differences as having accrued due to the dollar/NIS exchange rate fall in the period from when the sale was agreed to when it was finally completed.

35 Raphael's contention is that the entirety of the third payment was for Benjamin's own benefit as Benjamin was himself buying properties in Israel. Whilst Benjamin may well have been doing so, I consider that the contemporaneous emails which I have reproduced above together with the payment references set out in the bank statements lead me to the conclusion that it is more probable than not that the \$180,000 transfer was wholly related to the purchase of Raphael's property.

36 I therefore find that payments totalling \$730,000 were made for Raphael's benefit by the firm from its client accounts. Mr. Hyde's evidence that these, together with small amounts of bank charges, amount to £456,618.30 as per exchange rates applicable at the times of the respective transactions is undisputed.

#### **The miscellaneous entries**

37 At paras. 29 to 37 of his witness statement, Mr. Hyde refers to different categories of payments reflected in the ledger describing them as household bills, travel expenses and personal expenses. I have scrutinized the ledger. The payments are varied. By way of example there are payments for groceries, subscriptions to the synagogue, payment of parking tickets and other such entries. In total these add up to £61,801.42 over a five-year period.

38 Save for a payment of £3,260 for tuition fees for one of Raphael's sons, no documentation has been produced by the claimants to support these entries in the ledger. The claimants rely on the general accuracy of the ledger as evidenced by the accuracy of the payments to the Real account and the payments for the Yemin Moshe property to support the accuracy of these miscellaneous entries.

39 An analysis of the ledger suggests that postings were made carefully. For example there is a posting for the purchase of goods to the value of £128.39 in February 2006 which is re-entered in March 2006. The amount

was subsequently reversed with a credit and a narrative in the ledger explaining that the bill had been paid twice. There are other such examples.

40 Raphael's contention is that the ledger is a scam. Conceived by his fraudster brothers to minimize their own wrongdoing. That he only became aware of its existence after the collapse of the law firm. This was supported by Rebecca. She too said that she had never seen the ledger until after the collapse and that there were items included in her ledger which she could not recognize.

41 In the course of his examination of a number of witnesses, Raphael challenged particular entries. I would summarize his challenges as follows: (i) postings made in respect of his immediate family members for which he should not be responsible; (ii) a particular entry which clearly related to another family member; and (iii) various payments to "Solly's Restaurant" which should not be ascribed to him. I shall deal with these in turn.

42 There are numerous entries in the ledger relating to one of Raphael's children, Jonathan. They are all for relatively modest amounts. Jonathan is referred to by his initials, JJ. By way of example, there are the following entries (there are many more):

September 8th, 2006	Taxi to Malaga airport JJ	£100.00
September 29th, 2006	JJ/RSM Birthday present	£100.00
November 17th, 2006	JJ 2hrs work with RSM	£12.00
January 5th, 2007	Solly's JJ bills	£257.11
March 1st, 2007	JJ RSM instructions	£200.00
March 29th, 2007	Money for JJ	£20.00

43 Solomon gave evidence that he was close to JJ and that the latter had in fact spent some time living with him. It is clear from the ledger that he was looked after at the firm's expense. Raphael's position was that his children, when they undertook any work for the firm, were paid by the firm like any other employee and that he had not agreed to make himself responsible for these payments. That these entries therefore support his contention that the ledger was a fabricated document. I will return to the more fundamental question of whether the claimants can rely on the benefit of these payments in due course. However, in my judgment these entries do not have the semblance of being inaccurate or false. It seems to me that they reflect payments which were no doubt effected. Many of the entries relating to JJ are living expenses. So too are the entries for his other children.

44 A particular entry was highlighted by Raphael during the trial as being representative of the general inaccuracy of the ledger. This was a payment made on November 28th, 2006 in the sum of £709.91 and with

the following narrative: “INCOSOL pyt on behalf of Josh.” On the face of the entry it may well have been mis-posted. I do not however consider that this one entry of itself leads me to any particular conclusion as to the accuracy of the ledger.

45 The third type of payments complained of by Raphael were entries relating to payments to “Solly’s Restaurant.” Solly’s Restaurant was a joint venture between Isaac, Benjamin and Solomon on the one part and by Hilel Beriro Benchimol, a family friend, on the other.

46 Mr. Beriro Benchimol gave evidence via video link from Jerusalem. His evidence related principally to the agreement by the firm to employ Raphael and to the background to Solly’s Restaurant. As far as the payments to Solly’s Restaurant by the firm are concerned, the evidence of Mr. Bereiro Benchimol, which I accept, was that only Isaac, Benjamin and Solomon had credit. Everyone else had to pay. However, it seems to me that with these entries what we have are payments by the firm of small bills at the restaurant. They are not payments of what could be expected of a running tab repaid at the end of a specific period or to be taken from an owner’s profits. The presence of these entries in the ledger is therefore not inconsistent with the evidence.

47 In my judgment the claimants have proven the ledger’s accuracy as far as the payment to Raphael’s Real account and the payments relating to the Yemin Moshe property are concerned. I agree with Mr. Cruz’s submission that the general accuracy of the ledger can be inferred following such a finding of fact particularly when the accuracy of the ledger has not been displaced by Raphael’s assertions regarding the entries that I have gone through above. There may be a few posting errors but that does not make the ledger a false or inaccurate document. I conclude that the ledger is accurate.

48 I therefore find that from January 1st, 2005 to January 5th, 2010, Raphael benefited from the payment of £999,744.96, being what was paid to his Real account and what was paid for the Yemin Moshe property.

49 Furthermore, in that period payments totalling £61,091.51 were paid to his or his immediate family members’ benefit (I have discounted the obviously mis-posted entry of £709.91 referred to in para. 44 above). Following on from this finding, I find it more probable than not that the ledger’s opening balance of £36,591.65 accurately reflects payments made in an earlier period to Raphael or for his immediate family’s benefit. I do so on the basis of the conclusions I have reached on the ledger’s accuracy. I have noted Mr. Hyde’s evidence as contained in para. 28(vi) of his witness statement that Raphael’s Real account bank statements show credits of £30,414.32 prior to January 2005. That it is probable that these were deposits made by the firm. He reaches this conclusion on the basis that in the following five years’ deposits into the Real account were almost

exclusively made by the firm, with Raphael having no other apparent source of funds.

50 I also observe that the payments to the Real account and the payments relating to the Yemin Moshe property amount to approximately £1m. There can be no doubt that these payments were made. As I have referred to, Raphael contended that the ledger was a scam and was created by his brothers to minimize their misappropriation of client funds. But how likely is it that Benjamin, Solomon or anyone else would devise a plan to fabricate a ledger to add a further balance of approximately £100,000? It seems to me that this would be highly improbable. It would certainly not go very far in covering the firm's eventual shortfall of £28m.

51 Did Raphael know that these miscellaneous entries were being recorded by the firm? In my judgment whether he knew is not important. The more fundamental question is whether he wanted or required the firm to pay these expenses. Despite Raphael's protestations to the contrary I find it more probable that he did do so. Why else would the firm pay for JJ's tuition fees or his daughter's flights? Would his children unilaterally approach their uncles for these moneys? The more likely scenario is that this was an arrangement agreed to by Raphael. I also bear in mind that during this period Raphael was a frequent visitor to Gibraltar and would operate out of the firm. He had day-to-day contact with his brothers.

#### **Raphael's employment with the firm**

52 I accept without reservation the evidence of Mrs. Tanya Marrache Bitton to the effect that her father Raphael had an office in the firm and appeared to her to be in employment there. There is ample evidence that he did have such a base in the Cannon Lane premises. I also accept that he had a Marrache & Co. email address and that he appeared on the firm's website named as a consultant.

53 That said, Mr. Hyde's evidence was that there was no evidence of actual employment or any evidence of positive productivity. When Solomon was asked by Raphael as to whether the latter had been employed by the firm he replied with a terse: "Define employment?" Whilst this was at first a surprising reply, it represents what may be at the heart of the matter. Solomon accepted that Raphael did public relations work for the firm. (Isaac and Benjamin also gave evidence to that effect.) However he was not employed. There was no issue with payment for his work. The consideration for the services he was rendering was the money he was receiving arising from the agreement that had been reached.

54 Mr. Hyde took me through numerous examples of the payments to Raphael's Real account. They were sporadic random payments and not regular amounts as would be expected from a salary. Many payments were clearly designed to extinguish the amount by which the account had at that

moment in time become overdrawn by. The point was also made by Mr. Hyde that in the firm's accounting records the payments of wages to staff members were referred to as "salaries." Insofar as payments to Raphael were concerned they were however described as "drawings."

55 The claimants produced two letters written by the firm, apparently by Benjamin or on his instructions, setting out Raphael's salary. They were sent to the bank in Jerusalem to which the Yemin Moshe property was eventually mortgaged. The first is dated February 25th, 2008 and refers to Raphael earning £8,000 per month after tax from the firm. The second is dated March 26th, 2008 and states that Raphael's earnings were £16,000 per month after tax. As Mr. Hyde suggested, these letters could only have been conceived to obtain a mortgage by fraudulent means. (Although Raphael claimed not to have seen these letters he later accepted that the first of the letters had been copied to him by email at the time and he must have seen it.) Benjamin accepted that they had been written and were not correct. They do not therefore evidence Raphael's employment. Rather, they add to the litany of fraudulent acts carried on by the firm's principals. Conversely, I do not consider that of themselves they disprove Raphael's position that he was employed at the rate of £5,000 per month.

56 Raphael gave evidence that he was employed by the firm. He explained that this came about following Michael Nahon's suggestion that he approach his brothers to demand the benefit of his entitlement to the family interests. His employment was agreed following Mr. Beriro Benchimol's intervention. Raphael agreed with his brothers that he would be employed by the firm at a salary of £5,000 per month plus expenses. In return he would carry out public relations work and act as a personal assistant to Isaac, Benjamin and Solomon.

57 Benjamin stated that Raphael provided the firm with services and public relations. He recalled an occasion when Raphael had organized a visit for the architect who was involved with the Eastside project—a significant land and property development the firm was advising on. He could not recall what the salary was. When the schedule of drawings of all family members was put to him by Mr. Cruz, he confirmed that Raphael's drawings were higher than Solomon's because they reflected the payments made to him for the estates. Whilst there could have been an element of salary, the £1m. was to buy the shares agreed on, he said.

58 Michael Nahon became good friends with Raphael in 2003 or 2004. He was called to give evidence by Raphael. Seeing how Raphael appeared to be struggling financially he suggested that Raphael should obtain valuations and surveys of the properties belonging to the family so that he could demand his portion of the rents that should have been paid on these. That prompted Raphael to approach his brothers. He subsequently learnt that he had been engaged by the firm.



59 Mr. Beriro Benchimol's evidence as to the agreement was that he had seen how Raphael and his other brother Joshua were struggling financially in Israel. He convinced Isaac, Benjamin and Solomon to bring them back to Gibraltar and employ Raphael. He agreed with the brothers that Raphael would be paid £5,000 per month and would be provided with a small apartment and expenses.

60 Abraham, another of the brothers, was also apparently engaged as a consultant. He was involved in a significant project for the firm, namely the establishment of a bank. His drawings over the period we are concerned with were less than those received by Raphael. The point was made by Mr. Cruz that Abraham's earnings should logically have been higher than Raphael's as his contribution would have been more significant. Whilst there may indeed be some merit in the submission, I do not consider that I am able to make any meaningful determination on the evidence before me. There is insufficient evidence to compare their respective roles and/or productivity.

61 In my judgment, on balance, I find that Raphael was not an employee of the firm. In reaching this conclusion I have had particular regard to the manner, frequency and amount of drawings paid to Raphael and the absence of any documentary evidence relating to the employment. I have not discarded Mr. Beriro Benchimol's evidence. I find that what may have been intended at the point of his intervention did not necessarily come to pass in those exact terms.

62 That said, whilst I am satisfied that Raphael was not an employee of the firm there is evidence that he provided some services. He attended the offices regularly and gave the appearance that he had business there. It therefore seems to me that whatever the arrangements may have been, parts of the moneys that he received from the firm could, if necessary, be attributed as his remuneration for those services. The difficulty is establishing what that proportion should be. I am unable to simply carry out an assessment as to what I consider is a reasonable figure. In fact, I consider that it would be wrong of me to embark on such an exercise. The only way that I can resolve this issue is by applying the figure of £5,000 per month put forward by Raphael. This gives him the benefit of any miscalculation. I will apply this monthly sum to the period January 1st, 2005 to May 31st, 2008, a total of 41 months. (I shall explain the reasoning for the timeframe later on in this judgment.) This means that I determine that the sum of £205,000 is attributable as remuneration for services rendered to the firm.

63 I heard the evidence of Abraham Cohen and Ellie Cohen by video link from Jerusalem. Both gave evidence that Raphael had been a point of contact for Benjamin in relation to the purchase of art work. Mr. Abraham Cohen's evidence was that Benjamin paid by cheque although sometimes in cash. Mr. Ellie Cohen could not remember who settled the bills. There

was nothing controversial about what they said. However their evidence does not support the contention that Raphael was receiving cash through his Real account to be applied in Israel for the purchase of artwork for his brothers.

64 Raphael produced an email sent by Benjamin to a gallery in Israel on December 22nd, 2009. The thrust of the exchange was that he was buying a painting “through one of Raphael’s contacts” and a credit of \$3,000 in cash owed by the gallery was to be handed to Raphael. This he says evidences the fact that he dealt with Benjamin’s moneys in Jerusalem—thereby accounting for the moneys received into the Real account not being salary. No email or other evidence was produced by Raphael showing Benjamin requesting payment on his behalf or evidencing the depositing of moneys in Raphael’s Real account for that purpose.

65 Benjamin’s evidence in this regard was that he did not transfer funds to Raphael for the purchase of art. He further stated that he could not recall Raphael paying for anything on his behalf.

66 Mr. Hyde’s position on this matter was that he had not seen any evidence in the accounting records of payments or receipts for artwork.

67 Leaving to one side the weight that I can attach to Benjamin’s evidence in this respect, on balance, I do not consider that Raphael has shown that the moneys received by him in the Real account were in part related to the purchase of art on behalf of his brother. I have not found Raphael’s evidence on this and the other central issues credible.

### **The agreement**

68 At the heart of this case is the question of what agreement was made between the brothers as to the sale of Raphael’s interests in the estates. Solomon’s evidence was that the agreement was reached in the beginning, in 2005. (Later in cross-examination he stated that he could not be sure of the year.) It was Benjamin that had dealt with Raphael but it was Isaac that wanted everything to be documented.

69 Benjamin agreed and added that Isaac was concerned that Raphael would not sign anything even though he had been receiving the payments. Benjamin’s evidence was that the agreement did not extend to *Fortress House*.

70 Isaac denied having been involved with the making of any agreement and said that it was Benjamin who wanted to do this. He did not want to get involved because in the future Raphael’s children could turn to him and question what they had done. Isaac made it strikingly obvious that he felt that the misfortunes suffered by the firm, and by extension himself, were brought about exclusively by his brothers Benjamin and Solomon. He was working hard and bringing in wealth whilst his brothers schemed

and stole from clients. When it was put to him in cross-examination that he too had been convicted of conspiracy to defraud (albeit having been acquitted on a second count) Isaac replied that the judge's sentencing remarks made it clear that his involvement was different and was limited. That, in effect, his failing was not reporting his brothers when he found out what they were up to. He also disagreed with the proposition that the firm was insolvent, describing himself as one of the victims.

71 Isaac did concede in cross-examination by Mr. Cruz that he would have found it strange if Raphael had received £1m. from the firm.

72 Raphael's evidence was that an agreement was being talked about only in 2008. That he received the deposit for the property in Jerusalem but that as a result of the collapse, the agreement was not completed. He did not therefore sell his interests. The property in Yemin Moshe was repossessed in late 2010 by the bank in Jerusalem.

### The balance sheet

73 The claimants produced a document which I will refer to as "the balance sheet." It is a three-page document found in the firm's records entitled "Raffie" which appears to show a running balance of expenditure versus the application of values ascribed to diverse properties. I reproduce the first few entries:

"Proceeds from sale of 512 Neptune House Apartment	£34,213.84
Deduct funds loaned for Tania's wedding	£15,715.00
In your favour	<u>£18,498.84</u>
Expenditure from 1/1/05 to 19/12/05	£99,447.66
Less agreed £2,500 x 12 months	<u>£30,000.00</u>
Owed to M & Co	<u>£69,447.66</u>
	£69,447.66
	<u>£18,498.84</u>
To apply against 8 Cannon Lane	<u>£50,948.82</u>
Expenditure from 19/12/05 to 31/07/06	£92,553.77
Less agreed £2,500 x 7 months	<u>£17,500.00</u>
Owed to M & Co	<u>£75,053.77</u>
	£50,948.82
	<u>£75,053.77</u>
To apply against 8 Cannon Lane	<u>£126,002.59</u>
..."	

74 The balance sheet continues in the above manner applying expenditure for different periods as against values in properties. Once the value in one property is exhausted, the balance is applied to the next. The other properties referred to are 5 Cannon Lane, *Fortress House*, and 197/199 and 201 [Main Street]. The last entry refers to expenditure from April 21st, 2008 to July 8th, 2009 and shows a credit balance of £23,125.19.

75 I was not told that there has been any forensic examination of the balance sheet nor was Solomon taken through it in any detail. Solomon's evidence was that the balance sheet was updated as time went by. The property values were determined by professional valuers. It would be presented to Raphael every so often so that he would be aware of the state of play. This was vehemently denied by Raphael.

76 I remind myself that this document was discovered by the claimants in the firm's records. It was not created for the purposes of these proceedings. I accept Solomon's evidence that it is a document created at the time showing a running balance. It seems to me that I do not have to determine whether Raphael was shown it or not. I do find that it evidences the general nature of the agreement struck with Raphael, is a genuine record and is significant. I shall return to it.

#### **The draft 2008 agreement**

77 A draft of an agreement was found by the claimants in the firm's computer servers. It was an agreement between Raphael of the one part and Isaac and Benjamin on the other. It referred to the estates of Abraham Samuel Marrache, Samuel Abraham Marrache and Reina Marrache. It also referred to the estate of the siblings' aunt, Luna Benzecry. It is undated although the year 2008 is set out in the heading. It was obviously prepared after their late mother passed away in May of that year as her death is recited in the draft. It has many blanks but sets out the fact that Raphael "will sell" and Isaac and Benjamin "will buy" the interests in the estates. The price was left blank as was the amount of the deposit already said to have been paid to Raphael. It is clearly a document at a very early draft stage. Solomon's and Benjamin's evidence was that the draft agreement reflects what was being agreed. Benjamin went further to add that it was an agreement which was to put into effect a pre-existing agreement. He was however unable to help with the specific details.

78 Isaac denied having seen the draft until it was disclosed to him by the Royal Gibraltar Police with the material for the criminal trial. To support his contention that important matters were taking place in the firm without his knowledge or consent, he produced two documents. The first entitled the Marrache Foundation Trust dated February 13th, 1995. The second, The Fortress Settlement, dated January 11th, 1999. Although he is named

as trustee in both he did not sign either of them. They are however signed by his brothers.

79 Section 11(2)(b) of the (UK) Civil Evidence Act 1968, which applies to Gibraltar by virtue of it being listed in Part II of the Schedule to the English Law Application Act 1962, provides that, in a subsequent civil trial, any document which is admissible as evidence of a criminal conviction shall be admissible for the purposes of identifying the facts upon which the conviction is based. I consider that this applies to the judgment of Grigson, J. in the criminal trial. I agree with Mr. Cruz that in light of the findings of fact made by the learned judge, Isaac's denials do him no credit. I attach very little weight to his evidence.

#### **Solomon's email of November 14th, 2008**

80 An item of correspondence of some significance produced by the claimants was an email sent by Solomon to Raphael on November 14th, 2008. (The email was copied to both Isaac and Benjamin.) The email is mainly written in Spanish but was translated by Solomon at trial. His translation was as follows:

“Raphael

We can't carry on like this. The bank is really upset by the way you are using the account without a proper facility. It really hurts me but you have to fend for yourself. We can't carry on paying your expenses. We can't carry on as we were. The agreement was that we would pay the [big] amount [we gave you] and you would be financially independent in Israel.

We are being given 5 working days to cover the account. An example is that at the beginning of the week there was a balance of £11,960 [overdrawn] in your account and then in the middle of the week it went to £13,590 [overdrawn]. I sent £6,000 and they called me again saying that you were £12,000 over. Once again we are in the same scenario. This can't be specifically for the fitting out of the gallery [like you always say]. We are dealing with this on a monthly basis.

I know that Benjamin agreed £5,000 a month until you sold some of the works of art [but this clearly exceeds that amount]. I inform you that we are going to pay the £12,000 but next week we will just put £5,000 and will inform RBS that we will not make ourselves responsible for the rest. So I would ask you to keep tabs on your cheques and balances or else the bank will return your cheques.

This is not the type of email that I would wish to send before Shabbat but we have to be clear especially now with the financial crisis.”  
(Words in square brackets have been added by me.)

81 Solomon confirmed that at the point of writing this email, it was his understanding that whatever had to be paid to Raphael for his shares in the estates had been paid. It was put to Raphael in cross-examination that he had not complained or replied to this email. His reply was that he does not now have access to his emails as his email account had been blocked following the collapse of the firm in 2010. However, he did not assert that he had indeed replied or refuted the statements made by Solomon in his email at the time.

82 I consider this email to be highly relevant to the issues that I am determining in this case.

83 Mr. Cruz put to Raphael in cross-examination that he had been paid for his shares. The exchange was as follows:

*“Mr. Cruz:* Would you agree with one proposition I can put to you. If you had sold your interest in the family business 2004/2005 following your discussions with Michael Nahon and you negotiated a settlement and started getting paid out and ultimately your interest no longer existed would you agree therefore that you would not be entitled to anything for those years beyond what you have been paid out, the purchase price?

*Raphael:* I wasn't being paid out the purchase price. That's why the draft agreement does not . . . do you think that in 2008 when everything was collapsing Benjamin and Solly and Isaac would have come to me saying 'sign this document we need to move because they had mortgaged the properties'? They knew they couldn't do that because they hadn't paid me Mr. Cruz.

*Mr. Cruz:* What I am trying to explain to you is that if you had sold, as we suggest you did, your interest in 2004/2005.

*Raphael:* No I didn't, conversations started in 2007/2008, not 2004. We keep on disagreeing on this. The ledger is nothing to do with us.

*Mr. Cruz:* You say 2007/2008.

*Raphael:* Yes I say that in 2007/2008 we started discussing it yes.

*Mr. Cruz:* If there had been an agreement in 2004/2005 . . .

*Raphael:* Which there wasn't.

*Mr. Cruz:* Ok. I accept that that is your position . . . If there had been an agreement and a settlement, along the lines of the document we have seen articulating the values and the amounts, that would have resulted in you not seeking any further payments because there had been an agreement.

*Raphael*: If the ledger was accepted, yes, you would be absolutely right, but the ledger is not accepted.”

84 It seems to me that in posing the final question in this exchange Mr. Cruz was referring to the balance sheet. However, in his reply Raphael refers to “the ledger.” I cannot be certain whether Raphael had the balance sheet or the ledger in mind when he replied to the question by Mr. Cruz. I do nevertheless consider that Raphael made a significant concession in this exchange. Whichever document he was referring to, they both set out the fact that over a million pounds had been received by Raphael. That receipt of this sum would have resulted in no further payments.

85 Mr. Cruz suggested to Raphael that up until he was sent a demand letter by Mr. Hyde on October 20th, 2014, there had been no claim by Raphael to any share in any family interest. That this supported the claimants’ position that there was no such interest and that it is being raised in these proceedings as the only possible defence to the claim. Raphael’s evidence was that he had raised it at a meeting with Mr. Hyde early on following the collapse of the firm and the intervention by the liquidators. Mr. Hyde did not refer to it in evidence and it is certainly not referred to in any correspondence or other documentation produced by the parties.

86 I observe the following: That Raphael would unilaterally approach the liquidators to make a claim is at odds with a comment he made at a different point in the examination where he said that he had not made any claim because: “. . . I was so disgusted [by what had happened that] I didn’t want my share. I didn’t want anything to do with Gibraltar or the Marrache family.”

### **The Rebecca tapes**

87 Mr. Cruz referred me to two particular extracts of the transcripts of what were referred to during the criminal trial as “the Rebecca tapes.” These are transcripts of conversations between Benjamin, Solomon, Rebecca and Rebecca’s husband secretly recorded at, or near to, the time of the collapse of the firm. They were relied on by the prosecution in the course of that trial. When being questioned by Rebecca as to whether she still had a share of *Fortress House*, Benjamin said the following:

“You are not alone, you are not only [inaudible] I would have started to tell you that I agree with the shares be put in your name, so you would have had for your daughters—that’s one of things which I was [inaudible]. What I am saying to you is, if tomorrow for whatever *Fortress House* is sold, right? And we sell it for 4 million, 4.5 million what happens—2 million goes to the bank, which is my share, Isaac’s share and Soli’s share and the other 2 million goes to you guys—you and Abraham and Joshua.”

Rebecca then moves to comment on the potential value of the property.

88 Rebecca says: “They think you’ve got money stashed away?” Benjamin replies:

“Stashed away. And Isaac’s telling everybody that Benji lost . . . That he didn’t know about the million pounds I was giving to Rafi for the properties. Right, just given to Rafi and he said how can he say that?! If I’ve discussed it with him in the office and everything else. He doesn’t know about anything. He didn’t know about the Spanish office. Of course he knows about the Spanish office; he knows about everything . . .”

89 When Mr. Cruz put to Rebecca that she had not responded and mentioned Raphael in the first extract quoted above, she replied that it was obvious that Raphael had a share. I observe that it may be that if there had been only one point in the conversation where Raphael’s name had been omitted it could be taken as an unintended consequence in an exchange where emotions must have been running high. However, the second express reference to Raphael having been paid a million pounds for the properties takes it beyond any such possible explanation. That second statement did not elicit any remark from Rebecca or anyone else engaged in the conversations. There is a clear inference that the participants knew that Raphael had sold his shares. I therefore find that Rebecca would have been aware of an agreement with Raphael and that, as far as she was concerned, he had been bought out.

### **Discussion**

90 I am satisfied that on balance the claimants have proven that the agreement relating to the sale by Raphael of his interests in properties said by the claimants to form part of the estate of Abraham Samuel Marrache was made and completed. I reach this conclusion on the following basis.

91 Raphael received funds totalling £1,097,428.12 from the firm. Whilst I have determined that a portion of these funds could, if necessary, be attributable to remuneration for services rendered, the parties were proceeding on the basis that the payments were being made in exchange for the interest in the estates. The amount of moneys received exceeded the drawings or salary of anyone at the firm bar Isaac and Benjamin. Part of the moneys paid were three payments totalling \$730,000. This lump sum can only have been made as a result of the agreement reached.

92 The evidence of Solomon and Benjamin as to the existence and completion of the agreement is supported by documentation. The balance sheet provides evidence of the long term nature of the agreement. Raphael was being supported with payments by the firm which were being made



on the basis that he was divesting himself of his family interests. There then followed the larger payment.

93 The email of November 14th, 2008 by Solomon evidences the fact that the firm had complied with its side of the agreement. The email states: “The agreement was that we would pay the [big] amount [we gave you] and you would be financially independent in Israel.” There was no reply to the email.

94 I return at this point to my determination that the £5,000 a month for the services rendered to the firm should be applied to the period ending with May 31st, 2008. I reached this conclusion on the basis of Solomon’s email. It confirms that following the large payment Raphael would be financially independent in Israel. I consider that there is no question of Raphael being entitled to any remuneration after the point of payment for his property in Yemin Moshe. The last payment was made on May 16th, 2008. I have therefore extended the monthly figure of £5,000 to the end of that month.

95 Whilst the draft agreement dated 2008 is a very early draft, again it lends support to the existence of an agreement to buy and sell Raphael’s interest. Taken together with the other evidence I have considered, I find it more probable than not that it was an attempt at committing to writing the transaction that had already taken place.

96 The funds were provided by the firm and it is therefore the partners of the firm, Isaac and Benjamin, who would own Raphael’s one-sixth interest in the properties devolved by this estate.

97 It is necessary to consider the position with regards to the estate of Reina Marrache separately. The particulars of claim refer to an agreement made between 2005 and 2008 to purchase the shares in both of the estates. How can there have been an agreement to sell shares in the estate of Reina Marrache in that period if she had not by then passed away?

98 In a second witness statement dated November 6th, 2017, Mr. Hyde confirmed that the assets devolving under the estate of Reina Marrache include *Fortress House* and a plot of land in Spain in a location referred to as “Las Chapas.”

99 Whilst being unable to confirm what properties devolved under which estate, Benjamin stated that *Fortress House* was excluded from the agreement. That Raphael had wanted to keep his interest in that for his children. Further, Michael Nahon’s evidence was that Raphael had advised him that he was doing a deal to give up his shares except for *Fortress House*. I accept that Mr. Nahon was told that, although that of course is evidence of what he was told not of what the real position may have been.

100 The agreement to sell Raphael's interest must have been conceived at an early stage and certainly prior to 2008. The large payments of \$730,000 were made in March, April and May 2008—the latter within days of Mrs. Reina Marrache's passing. The evidence was that she died unexpectedly.

101 It is of course conceivable that the brothers saw themselves as the de facto owners of all of the family's interests. An attitude not beyond how they operated with regards to the misappropriation of their clients' moneys. They were after all maintaining *Fortress House* (where their mother lived), paying for the housekeeping costs and other expenses even before their mother's passing. They were also, together with Abraham, the executors and trustees of the estate of Samuel Marrache, their father. Their father left the entirety of his estate to their mother—see *Lavarello v. Marrache* (Supreme Ct., October 15th, 2015, unreported).

102 *Fortress House* is listed in the balance sheet. (The one-seventh share in the value of *Fortress House* is set out as £617,142.86—the property having been valued, on the face of the balance sheet, at £4,320,000.) I have already determined that this is a document I should have regard to.

103 Although the sale by Raphael of his interest in the estate of Reina Marrache is included in the draft agreement, *Fortress House* is not expressly referred to. It was, as far as I can determine, the single most valuable property owned by the family. It if was to be excluded from the agreement, why was this not stated in the draft? (I do of course remind myself that it is clearly a very early draft.)

104 As I have already referred to, Benjamin recalled in evidence that *Fortress House* was not included in the deal. However, that is at complete odds with his statements as recorded in the Rebecca tapes. A conversation that took place close in time to the events and which was recorded without his knowledge. In that conversation Benjamin excludes Raphael from having an interest in *Fortress House*. I consider that I should therefore ignore Benjamin's evidence at trial on this issue.

105 I conclude that it is more probable than not that the agreement with Raphael related to all of the family's property interests. That this also covered his potential future interest in the properties owned by his mother, including *Fortress House*.

#### **The other family businesses**

106 Much was made at trial by Raphael as to the fact that revenue from family businesses was being paid into the firm by the brothers without the other siblings' knowledge or consent. The businesses mentioned were "A.S. Marrache" the tobacco company, Swatch watch, a retail outlet, and other properties rented to third parties. There is certainly evidence from

Benjamin that some rental payments were received into the firm's account. It is also undisputed that the firm did not pay rent despite operating from a property belonging to the family. When Solomon was asked by Raphael as to why revenue was not accounted for separately, Solomon replied that there was an understanding in the family: "Everyone was happy if they were receiving money. Nobody would rock the boat."

107 Mr. Hyde's evidence, which I accept, is that there was no sign of income from the family businesses in the firm's accounts. When the liquidators intervened in 2010, the family businesses were not trading. The only income streams other than the legal practice were rents paid by a hairdressers and by the Newcastle Building Society. At the point of the liquidation, the building society paid £70,000 rent per annum.

108 It seems to me that the fact that moneys originating from family interests were paid into the firm is irrelevant to the matters which I have to determine. Whether Raphael or any of the other siblings has a potential claim against the firm for loss of profits in any other family business would have to be the subject of a separate action brought by them. It does not affect the fact that the payments made to Raphael as recorded in the ledger were paid by the firm.

#### **The firm's insolvency**

109 The claimants referred to the Steadman Report. Mr. Steadman is a forensic chartered accountant who was instructed by the Royal Gibraltar Police in the criminal investigation. His report was considered and accepted as accurate by Cobham Murphy Ltd., the forensic accountants jointly instructed by the defendants in the criminal trial. At para. 43 of his judgment, Sir Geoffrey Grigson quotes from paras. 86 to 89 of the Steadman Report. I reproduce these:

"86. At 30 June 2007 the following differences have been identified:

- (a) Totalling £10.3 million as between the amounts recorded in accounting ledgers as due to clients of Marrache & Co (£10,759,321—Schedule 4) and amounts held in client bank accounts (£486,185—Schedule 3.3).
- (b) Totalling £10.3 million as between the amounts recorded in accounting ledgers as due to clients of Marrache & Co (£10,759,321—Schedule 5) and balances reported as due to clients by YZ in Accountant's Report Forms required under Solicitors Accounts Rules (£464,947—Schedule 5).
- (c) Totalling £10.3 million as between the amounts of Client Bank Balances used in the compilation of the Financial Statements of Marrache & Co (£10,759,798—Schedule 5)

and balances reported as held in client bank accounts in the Accountant's Report Forms (£465,688—Schedule 5).

- (d) Totalling £9.4 million as between the total of the profits of Marrache & Co for the years ending 30 June 1998 to 2007 (£3,581,113—Schedule 1) and the total amounts recorded in the accounting ledgers of Marrache & Co as payments to Benjamin Marrache, Isaac Marrache, Solomon Marrache, family members and in respect of Fortress House over the same period (£12,950,845—Schedule 6).

87. In the period 2006 to 2007 a total of £4.4 million of drawings (Schedule 6) paid to Benjamin Marrache, Isaac Marrache, Solomon Marrache, family members and in respect of Fortress House have been disguised as arriving at the Financial Statements by means of journal entries, the effect of which is to overstate Client Bank Balances by £5.5 million (see paragraphs 83, 84). Additionally further journals totalling £4.8 million (see paragraphs 60, 65) were debited against revenue and had also the effect of overstating Client Bank Balances by this additional amount (a total of £10.3 million) and reducing drawings recorded in the Financial Statements.

88. No financial statements are available after 30 June 2007. As regards to the Four Alleged Victims, the difference between amounts due to them (as recorded in their respective client ledgers) and the total of all office and client bank accounts maintained by Marrache & Co at March 2010 was £11.5 million (Chart 3).

89. As an accountant I conclude that payments categorised as drawings in the accounting records of the Marrache Businesses and paid to or on behalf of Marrache family members were not paid exclusively from the available profits of the Marrache Businesses. By 30 June 2007 at least £10 million had been paid out of amounts held for clients.”

110 Mr. Cruz submits that I can rely on the Steadman Report. That it is admissible in these proceedings. He relies on *Rogers v. Hoyle* (2) where the Court of Appeal of England and Wales held that an experts' report containing statements of fact and expressions of the opinions of its authors is admissible in subsequent proceedings. That the rule that the findings of courts were inadmissible in subsequent proceedings did not apply to such reports. I accept the submission.

111 Mr. Hyde's evidence was that the firm had an average annual turnover in the relevant period of approximately £1.6m. In Mr. Hyde's cross-examination he gave as an example the fact that in 2008 the firm had a turnover of £1.8m. but yet had expenditure of £4m. The moneys to make up the shortfall had been taken from the client accounts. The eventual

shortfall in client moneys of approximately £28m. supports the assertion that the firm was insolvent since at least 2004 and probably earlier since 2001. Solomon agreed.

112 In my judgment it is more likely than not, considering the Steadman Report and the evidence of Mr. Hyde, which I accept, that the firm was indeed insolvent during the period in which Raphael received the payments.

### **Remedies sought by the claimants**

113 As set out in the re-amended claim form, the remedies sought are the following:

“The First and Second Claimants claim:

(1) A declaration that the transfers made by Marrache & Co (in liquidation) and/or Isaac Marrache and/or Benjamin Marrache and/or Solomon Marrache to the Defendant of £1,109,148.03 or thereabouts between the period 1 January 2005 to 5 January 2010 are void under the Fraudulent Conveyances Act 1571;

(2) The Second Claimant seeks a declaration that the said transfers are void pursuant to section 42(1) of the Bankruptcy Act 1934;

(3) An order that the said transactions be set aside;

(4) An order that the Defendant do pay the First Claimant and/or Second Claimant as the Court may determine the said sum of £1,109,14.03 or such other sum by way of restitution or damages as the Court may determine;

(5) Such vesting or consequential order as the court may deem fit;

(6) Further or other relief; and

(7) Costs.

Further or in the alternative, the First and Second Claimants claim:

(1) A declaration that the sum of £1,109,148.03 was the consideration paid by Marrache & Co (in liquidation) from its client account for the sale by the Defendant of his part or share in the estate of Abraham Samuel Marrache and in the estate of Reina Marrache (‘the Share’);

(2) An order vesting the Share in the First and Second Claimants

(3) Such consequential order as may be necessary; and

(4) Further or any other relief.”

114 Civil Procedure Rules r.40.20 provides: “The court may make binding declarations whether or not any other remedy is claimed.”

115 The court has a discretion as to whether or not to make a declaration and must consider whether it is appropriate to make such an order in the particular case—*per* Neuberger, J. in *Financial Servs. Auth. v. Rourke (t/a J.E. Rourke & Co.)* (1).

116 The claimants, through Mr. Cruz, made it clear that they were primarily seeking the declaration as to the payments made for the purchase of the shares in the estates even though in the claim form and particulars of claim that declaration was the alternative remedy sought. On the making of a declaration that Raphael was paid for his shares in the estates and that these now vest in the claimants, the claimants will then be able to exercise control of these as they would then have four-sixths and four-sevenths shares respectively. (I observe at this point that my determinations relate to interests only in the properties devolved by the estates.) In light of my findings and considering the basis for which it is sought, it seems to me entirely appropriate that I do make the declaration.

117 The alternative remedy pleaded by the claimants was for a declaration that the transfers made by the firm and/or by Isaac, Benjamin or Solomon to Raphael are void under the Fraudulent Conveyances Act 1571. Further, the second claimant sought a declaration that those transfers are void pursuant to s.42(1) of the Bankruptcy Act. In light of my conclusion on the primary declaration sought I need not make a determination on these alternative remedies.

### Conclusions

118 I have made the following findings of fact:

(i) The ledger showing payments made to Raphael by the firm is accurate.

(ii) In the period January 1st, 2005 to January 5th, 2010, Raphael was paid a total of £1,060,836.47 by the firm. The sum of £36,591.65 was paid in an unknown period immediately prior to January 1st, 2005.

(iii) Raphael was not employed by the firm although he did provide some public relations and other services.

(iv) Throughout the period that the payments were made, the firm was insolvent.

(v) Raphael sold his one-sixth interest in the properties devolved to him by the estate of Abraham Samuel Marrache to the firm.

(vi) Raphael sold his one-seventh contingent interest in the properties devolved by the estate of Reina Marrache to the firm.

119 I shall hear the parties as to the declarations that I should make and the orders that should follow.

*Ruling accordingly.*