

[2019 Gib LR 57]

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 (Kay, P., Rimer and Elias, JJ.A.): April 3rd, 2019

Courts—Judicial Committee of Privy Council—appeal as of right—if appeal “as of right” under Gibraltar Constitution Order 2006, s.66(1)(b), applicant nevertheless to obtain formal leave to appeal from Court of Appeal—if applicant out of time under Gibraltar (Appeals to Privy Council) Order 1985, applicant to apply directly to Judicial Committee for special leave

The applicant sought to appeal to the Judicial Committee of the Privy Council.

The applicant’s brothers, Isaac and Benjamin Marrache, were partners in Marrache & Co. (“the firm”). Another brother, Solomon Marrache, was the firm’s financial director. The three brothers stole large sums from the firm’s clients. The firm was ordered to be wound up and the respondents were appointed as joint liquidators. Isaac, Benjamin and Solomon Marrache were adjudicated bankrupt and the second respondent was also the official trustee of their respective estates.

It was not suggested that the applicant had been party to or aware of his brothers’ frauds. However, the firm’s records showed the applicant to have received some £1.1m. from the firm for no apparent consideration. The respondents sued the applicant for repayment of that sum, alternatively they asserted that the money had been paid to him pursuant to an agreement between him and Benjamin and Isaac that in consideration of the payments the applicant would transfer to the firm his interest in the estates of his grandfather and mother. The respondents submitted that if that were correct, the applicant’s interests in the grandfather’s and mother’s properties were vested in the second respondent as trustee of Isaac and Benjamin’s estates.

On February 7th, 2018, Yeats, Ag. J. handed down his reserved judgment and made orders: (i) declaring the second respondent, as trustee of the estates, to be the absolute legal and beneficial owner of any interest the applicant had in properties devolved by the estates of his grandfather and mother; (ii) declaring that any interest the applicant had in such properties vested in the second respondent as such trustee; and (iii)

ordering the applicant to pay the respondents' costs. The vesting and costs orders were stayed until March 31st, 2018 or further order of the Court of Appeal.

On February 21st, 2018, the applicant filed separate notices of appeal in respect of each order of February 7th. On March 22nd, 2018, the Court of Appeal ruled as follows on various applications in relation to the appeals: (i) it declined to rule on the applicant's application for an immediate setting aside of Yeats, Ag. J.'s orders on the ground of alleged bias; (ii) the court stayed paras. (i) and (ii) of Yeats, Ag. J.'s main order (the declaration and vesting orders) pending determination of the appeals or further order; (iii) the court stayed enforcement of the costs order for the same period; (iv) it refused to stay Yeats, Ag. J.'s order on February 7th permitting the respondents to amend their claim form and particulars; and (v) it refused the respondents' application for security for the costs of the appeal.

Following delivery of the judgment of March 22nd, 2018, the applicant objected to a reference in it to part of the evidence he had voluntarily given to the court, asserting that it was confidential and its publication would be potentially embarrassing to him. The applicant wrote to the Registrar objecting to the inclusion of the evidence in the approved judgment and asking that the judgment not be published online. The court responded, stating that it saw no merit in the application but giving the applicant the opportunity to apply by a notice of motion for a direction restraining the publication of the judgment online.

On September 27th, 2018, three motions came before the Court of Appeal: (i) the publication motion; (ii) a notice of motion by the respondents seeking orders under r.54 of the Court of Appeal Rules 2004 that the applicant's two appeals should be deemed to have been withdrawn following his failure to file his grounds of appeal and the record of his appeals; and (iii) the applicant's notice of motion in response to the r.54 notice of motion, seeking an extension of time for filing the grounds of appeal and the records of his two appeals.

By its order of December 14th, 2018, the court (i) refused the applicant's application to restrain the publication of the judgment; (ii) refused his application for an extension of time in which to file his grounds of appeal and records of appeal in the appeals against the two orders made by the Supreme Court on February 7th, 2018; (iii) ordered, on the respondents' application, that both appeals be deemed to have been withdrawn; (iv) lifted stays ordered by the court on March 22nd, 2018 in respect of the orders of February 7th, 2018; and (v) directed submissions as to costs. The parties attended before Ramagge Prescott (sitting as acting Chief Justice) for the handing down of the judgment and the making of an order giving effect to it. There was some discussion of the applicant's wish to appeal to the Judicial Committee of the Privy Council but it was not clear what was said about leave to appeal. In skeleton argument, it was asserted for the applicant that he was entitled to appeal as of right. An oral application was made to Ramagge Prescott for leave to appeal. Even if an applicant had an appeal as of right, there was a requirement for the court formally to grant

such leave by way of endorsing the assertion that there was such a right. The parties appeared to agree that the case fell within s.66(1)(b) of the Gibraltar Constitution Order 2006. The judge's response was not clear. The final form of the court's order of December 14th, 2018 did not include the words: "Leave to appeal to the Judicial Committee of the Privy Council if required."

On February 22nd, 2019, the court decided that the applicant should pay the respondents' costs. The applicant indicated that he wished to appeal to the Judicial Committee of the Privy Council against the order of December 14th, 2018. The judge ordered the applicant to file an application for leave to appeal out of time.

On March 7th, 2019, the applicant issued a notice of motion asking for leave to appeal, if required, to the Judicial Committee of the Privy Council from the December 14th, 2018 judgment and, if required, time to be extended pursuant to r.8(1) of the Court of Appeal Rules 2004. The applicant also asked the court to re-impose the stays that it had ordered on March 22nd, 2018, which had been lifted by the order of December 14th, 2018.

Held, ruling as follows:

(1) The applicant's motion dated March 7th, 2019 would be dismissed. There was no appeal as of right to the Judicial Committee against the dismissal of the publication motion because an appeal against that order would not fall within s.66(1)(b) of the Gibraltar Constitution Order 2006. The court would not exercise any discretion to grant leave to appeal to the Judicial Committee against that part of the order of December 14th, 2018. The issue arising under the publication notice did not raise a question of general or public importance. It involved no more than the application of basic and well-established principles to a straightforward issue. It was improbable that the Judicial Committee would grant special leave to appeal on that issue and any appeal was likely to have no or no real prospect of success. In respect of the court's orders refusing the applicant's extension of time application and deeming his appeals to have been withdrawn, the court was inclined to agree that the applicant was entitled to appeal as of right against those orders. Section 66(1)(b) included the words "directly or indirectly" and it could be said that the appeal would at least indirectly involve a question respecting the disputed property. If the court were wrong that the proposed appeals could be pursued as of right, it would have no hesitation in refusing permission to appeal. The decisions were akin to case management decisions involving the exercise of judicial discretion and an appeal would have no or no real prospect of success. However, on the basis that the applicant was entitled to pursue appeals as of right, he nevertheless needed to obtain the court's formal leave to appeal to the Judicial Committee. The Gibraltar (Appeals to the Privy Council) Order 1985 provided that an application for the required leave to appeal must be made by motion or petition within 21 days of the order of December 14th, 2018. The appellant had not sought leave until March

2019. The 1985 Order conferred no jurisdiction on the court to extend time. An application to the Judicial Committee for leave had to be filed within 56 days from the date of the order (Judicial Committee (Appellate Jurisdiction) Rules 2009, r.11(2)). The court could not grant an extension of time under r.8(1) of the Court of Appeal Rules 2004. As the applicant was now irremediably out of time for obtaining the necessary formal leave from this court to pursue an appeal as of right, his only way forward was to apply directly to the Judicial Committee for special leave (paras. 23–29).

(2) The court would not re-impose the stays. The position that obtained in March 22nd, 2018, when the stays were ordered, was not necessarily the same as the position that obtained now. In addition, the applicant had been present, by his lawyer, on December 14th, 2018 when the stays were lifted but he apparently made no case for the re-imposition of the stays pending the disposal of his proposed appeal to the Judicial Committee. It was incumbent on a party against whom a judgment had been obtained who wished to restrain its execution by a stay to provide cogent evidence as to why a stay should be granted. Furthermore, the combination of the apparently weak nature of the applicant’s proposed appeal to the Judicial Committee and the absence of any current evidence as to why he claimed he should be entitled to the stays of execution militated against continuing the stays. The court would therefore, on the material currently before it, refuse to continue the stays. The applicant could, if so advised, renew his application for the re-imposition of any stay by a notice of motion properly identifying the nature of the stay sought, supported by affidavit evidence (paras. 30–39).

Cases cited:

- (1) *Ross v. Bank of Commerce (Saint Kitts Nevis) Trust & Savings Assn. Ltd.*, [2010] UKPC 28; [2011] 1 W.L.R. 125, considered.
- (2) *Schiller v. Att.-Gen.*, 1999–00 Gib LR 199, considered.

Legislation construed:

Court of Appeal Rules 2004, r.8(1): The relevant terms of this sub-rule are set out at para. 27.

r.54: The relevant terms of this rule are set out at para. 13.

Civil Procedure Rules (S.I. 1998/3132), r.40.12:

“(1) The court may at any time correct an accidental slip or omission in a judgment or order.”

Gibraltar (Appeals to the Privy Council) Order 1985 (S.I. 1985/1199), s.3:

The relevant terms of this section are set out at para. 25.

s.4: The relevant terms of this section are set out at para. 25.

s.6: The relevant terms of this section are set out at para. 25.

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Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.66: The relevant terms of this section are set out at para. 16.

Judicial Committee (Appellate Jurisdiction) Rules 2009, r.11(2): The relevant terms of this sub-rule are set out at para. 26.

A. Seruya for the applicant;
N. Cruz and *C. Wright* for the respondents.

1 RIMER, J.A.:

Introduction

The matters before the court arise in the aftermath of its order of December 14th, 2018 by which it: (i) refused the appellant’s application to restrain the publication of part of a judgment the court had earlier delivered on March 22nd, 2018 (reported at 2018 Gib LR 171); (ii) refused his application for an extension of time in which to file grounds of appeal and records of appeal in his appeals against two orders made by the Supreme Court on February 7th, 2018 (reported at 2018 Gib LR 19 and 2018 Gib LR 24); (iii) ordered, on the respondents’ application, that both appeals be deemed to have been withdrawn; (iv) lifted stays ordered by this court on March 22nd, 2018 in respect of paras. 1, 2 and 3 of one of the orders of February 7th, 2018; and (v) directed submissions as to what costs orders should be made in consequence of this court’s order of December 14th.

2 By a judgment of February 22nd, 2019, the court decided that the appellant should pay the respondents’ costs of the appeal on the standard basis, to be the subject of a detailed assessment, and ordered him to pay £15,000 on account within 28 days of the order also made on that day.

3 The appellant wishes to appeal to Her Majesty in Council (“the Privy Council”) against the order of December 14th, 2018. Yesterday afternoon we heard argument on his applications for an extension of time permitting him to ask this court for leave to appeal and for the grant of certain stays pending the disposal of his proposed appeal to the Privy Council, or at least pending the disposal of his application to the Privy Council for special leave to appeal thereto if he is not given leave by this court.

4 To understand how these questions arise, it is necessary to summarize the facts leading up to this judgment. In doing so, I have drawn on judgments of this court delivered on March 22nd and December 14th, 2018.

The proceedings in the Supreme Court

5 Isaac and Benjamin Marrache are brothers and were the partners in Marrache & Co., solicitors (“the firm”). Solomon Marrache, another

brother, was the firm's financial director. The three brothers stole large amounts of money from the firm's clients, for which offences they were convicted and sentenced to terms of imprisonment. The firm was ordered to be wound up as an unregistered company with a deficiency of some £28m. as regards creditors. The respondents to the appeals whose outcome I have described are Edgar Lavarello and Adrian Hyde. They are the joint liquidators of the firm. Isaac, Benjamin and Solomon have each been adjudicated bankrupt and Edgar Lavarello is also the official trustee of their respective estates.

6 The appellant, Raphael Marrache, is another Marrache brother, who appears to have done at least some work for the firm, but I make clear that there is no suggestion that he was a party to, or aware of, the frauds his three brothers were committing. The circumstance in which Messrs. Lavarello and Hyde came to issue Supreme Court proceedings against him were that their investigations of the firm's records showed that he had, over a period of years when the firm was insolvent, received about £1.1m. from the firm for no apparent consideration. They sued him for the repayment of that sum, alternatively they asserted that the money had been paid to him in pursuance of an agreement between Benjamin and Isaac on the one hand and the appellant on the other that, in consideration of the payments, the appellant would transfer to the firm all his interest in the estates of his grandfather, Abraham Samuel Marrache, and his mother, Reina Marrache. Under the grandfather's will, various properties in Gibraltar were left to his son for life, with remainder on his death to the latter's six sons (who include the appellant) in equal shares. On the mother's death, the family home at Fortress House, Gibraltar, was left to her six sons and her daughter, Rebecca, in equal shares. The respondents' alternative argument in their proceedings was that, if this latter contention was correct, the appellant's interests in his grandfather's and mother's properties had become and were vested in Mr. Lavarello as the trustee of Isaac's and Benjamin's estates.

7 The appellant defended the claims. He acted in person, assisted by his wife. The claims were tried by Yeats, Ag. J. On February 7th, 2018, Yeats, Ag. J. handed down his reserved judgment on the claims and made orders: (i) declaring that Mr. Lavarello, in his capacity as such trustee as aforesaid, was the absolute legal and beneficial owner of any interest the appellant had in the properties devolved by the estates of his grandfather, Abraham, and his mother, Reina; (ii) declaring that any interest the appellant had in such properties vested in Mr. Lavarello as such trustee; and (iii) ordering the appellant to pay the respondents' costs of the action save for the costs incurred on an application to amend their claim form and particulars of claim. The order also stayed the vesting and costs orders until March 31st, 2018, or further order of the Court of Appeal.

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8 On the same day, February 7th, 2018, Yeats, Ag. J. handed down a judgment on the respondents' application to amend their claim form and particulars of claim and made an order permitting them to amend those documents as asked.

The proceedings in this court

9 On February 21st, 2018, the appellant filed separate notices of appeal in respect of each order of February 7th.

10 On March 21st and 22nd, 2018, a panel of this court comprising Dame Janet Smith, J.A. and myself heard various applications in relation to the two appeals. In a judgment of March 22nd, 2018 delivered by Dame Janet, with which I agreed, the court ruled as follows on the applications (reported at 2018 Gib LR 171). First, it declined to rule on the appellant's application for an immediate setting aside of Yeats, Ag. J.'s orders on the ground of alleged bias. It held that the making of any such complaint had to be deferred to the hearing of the appellant's appeals against such orders as part of the appellant's grounds of appeal. Secondly, it dealt with the appellant's application for a continued stay of Yeats, Ag. J.'s main order pending the appeal, the particular concern expressed being that, without such a stay, Mr. Lavarello might proceed to sell Fortress House at what he asserted was likely to be an undervalue. For reasons explained in paras. 10–15 of the judgment, the court stayed paras. 1–2 of the order of February 7th, 2018 (the declaration and the vesting orders) until after judgment on the appeals or further order in the meantime. Thirdly, for reasons explained in paras. 16–21 of the judgment, whilst this court did not stay the *assessment* of the costs to which the respondents were entitled under Mr. Yeats's orders, it did stay for a like period the *enforcement* of payment by the appellant of any costs so assessed. Fourthly, as explained in para. 22 of the judgment, the court refused to stay Mr. Yeats's order of February 7th, 2018 permitting the amendment of the claim form and particulars of claim. Fifthly, for reasons explained in paras. 23–39, the court refused the respondents' application for the provision by the appellant of security for their costs of the appeals.

11 Following the delivery of the judgment of March 22nd, 2018, the appellant objected to the reference in its para. 17 to part of the evidence he had voluntarily, and unqualifiedly, given to the court. He asserted that it was confidential information and that its publication would be potentially embarrassing to him. The court had been sitting in public and the appellant had given no indication that the relevant evidence should not be referred to in any judgment of the court. Following the delivery by Dame Janet Smith of her oral judgment in public, at which the appellant was present, he also made no indication that he objected to the reference that Dame Janet had made in it to the relevant evidence. On May 29th, 2018, however, he wrote to the Acting Registrar of the court objecting to its

inclusion in Dame Janet's approved judgment and asked that the judgment should not be published online.

12 This court (by Dame Janet and myself) responded to the appellant's request by saying that, in the circumstances I have explained, it saw no merit in his application, which conflicted with the ordinary requirements of open justice. The court nevertheless gave the appellant the opportunity of applying by a notice of motion returnable on the hearing of his appeals for a direction restraining the publication of the judgment online; and it directed that in the meantime the judgment should not be so published. The appellant missed the original date for filing such a notice of motion but the court extended his time for doing so and that motion ("the publication motion") came on for hearing before the court on September 27th, 2018. The court comprised Sir Maurice Kay, P., Dame Janet Smith and myself.

13 On that day, two further notices of motion were also before the court. First, a notice of motion of September 4th, 2018 by the respondents seeking orders under r.54 of the Court of Appeal Rules 2004 that the appellant's two appeals "shall be deemed to have been withdrawn" following his failures to comply with the court's order of July 5th, 2018 requiring him to file his grounds of appeal and the record of his two appeals by August 31st, 2018, exercises he never performed. Secondly, a notice of motion filed by the appellant in response to the r.54 notice of motion and seeking an extension of time for filing the grounds of appeal and the records of his two appeals.

14 The outcome of the hearing of September 27th, 2018, for reasons explained by Dame Janet Smith, J.A. in a judgment with which Sir Maurice Kay, P. and I agreed was that the court disposed of the three motions in the way I summarized at the beginning of this judgment.

The order of December 14th, 2018

15 Following the sending to the parties on December 3rd, 2018 of a draft of the court's judgment on the three applications, on December 14th, 2018 the parties attended before Ramage Prescott, J., sitting as acting Chief Justice, for the handing down of the court's judgment and the making of an order giving effect to it. The appellant was represented, as he is on this application, by Mr. Aaron Seruya and the respondents were (as before and now) represented by Mr. Cruz and Mrs. Wright.

16 It is clear that there was some discussion about the appellant's wish to appeal against this court's substantive orders of December 14th, 2018 to the Privy Council, although the perfected order of that day made no reference to it. It is, however, not entirely clear what was said about leave to appeal. We have a copy of Mr. Seruya's skeleton argument of December 13th for that hearing. Most of it relates to costs, but it opened by making it

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clear that Mr. Marrache wished to appeal to the Privy Council against this court's decisions on the matters argued on September 27th, 2018. Reference was made in the skeleton argument to s.66 of the Gibraltar Constitution Order 2006, which provides materially:

“66.-(1) In the following cases, an appeal shall lie from decisions of the Supreme Court to the Court of Appeal and thence to Her Majesty in Council as of right, that is to say—

- (a) . . .
- (b) where the matter in dispute on the appeal is of the value prescribed by law or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value prescribed by law or upwards, final decisions in any civil proceedings;

. . .

(2) In the following cases, an appeal shall lie from decisions of the Supreme Court to the Court of Appeal with the leave of the Supreme Court or of the Court of Appeal and thence to Her Majesty in Council with the leave of the Court of Appeal, that is to say—

- (a) where the decision appealed against is a final decision in civil proceedings and, in the opinion of the court giving leave, the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Court of Appeal or to her Majesty in Council, as the case may be; and
- (b) in such other cases as may be prescribed by the Legislature.”

17 Mr. Seruya's skeleton argument asserted that the effect of s.66(1)(b) was that the appellant was entitled to appeal to the Privy Council as of right, and it referred to advice of the Privy Council in the decision of *Ross v. Bank of Commerce (Saint Kitts Nevis) Trust & Savings Assn. Ltd.* (1), in which Lord Mance said ([2010] UKPC 28, at para. 2):

“For reasons which follow, the Board concludes in relation to the first issue that, even in respect of appeals expressed to be as of right under the Constitution, it remains necessary either to obtain leave from the Court of Appeal or, that lacking, to obtain special leave from the Privy Council . . .”

In this connection, I would also refer to *Schiller v. Att.-Gen.* (2) (1999–00 Gib LR 199, at para. 7).

18 When the matter came before Ramagge Prescott, J. on December 14th, Mr. Seruya made an oral application to her for leave to appeal, since

even though he claimed that the appellant had an appeal as of right, he correctly recognized there was still a requirement for this court formally to grant such leave, by way of endorsing the assertion that there was such a right. Upon so giving leave, the court would also have to make a mandatory order against the proposing appellant requiring him to give the security for costs provided for by the Gibraltar (Appeals to Privy Council) Order 1985, to which I shall shortly come. When Mr. Seruya so raised the matter of leave, I understand that Mr. Cruz responded that his belief was also that the appellant was entitled to appeal to the Privy Council as of right. That was because he too regarded the case as falling within s.66(1)(b)—there is no dispute that the value of the property the subject of the Supreme Court’s declaration exceeded the current £50,000 Gibraltar-ian level. It is not, however, clear precisely what the judge’s response was. Mr. Cruz asserts that it was that, if it was agreed that Mr. Marrache had an appeal as of right, there was no need for her to consider the matter further. Mr. Seruya’s assertion is that the judge said words to the effect that if leave was as of right, then the appellant has a right of appeal; and that she confirmed in court that the appellant had an automatic right of appeal under s.66(1)(b).

19 The matter of leave to appeal then went silent until the court’s order of December 14th, 2018, in its perfected form as signed by the Registrar, was sent to Mr. Seruya on January 21st, 2019. On January 22nd, Mr. Seruya complained to both the Registrar and Mr. Cruz that the final form of order was incorrect inasmuch as it failed to include the words “Leave to appeal to the Judicial Committee of the Privy Council if required.” Mr. Cruz’s response, by an email of the same day, was to say that the judge—

“having heard both of us agree all matters save costs approved the order. She then made orders including ones relevant to submissions on costs for full court to consider. Your client has no need for leave to appeal to the JCPC because he has that right of appeal as the matter has a value in excess of £50,000. Hence the judge made no such order nor is the order incorrect.”

Mr. Seruya’s rejoinder, on January 24th, was that—

“In any event I as Counsel for the Appellant did not sign the draft order. It is my understanding that a draft Order must be signed by all parties before it becomes official. I also feel that the Order does not reflect the entirety of what was held in court that day as I raised the issue of ‘Leave to Appeal’ to the Privy Council. The Hon Judge confirmed that the Appellant has a right to appeal to the Privy Council and I would like this to be reflected in the Final Order.”

20 Nothing further happened in relation to that difference between counsel until February 22nd, 2019. On that day, Ramagge Prescott, J. handed down this court’s short judgment on the costs of the proceedings

upon which it had ruled on December 14th, 2018 and I have earlier summarized the essence of the order the court then made, although it has not yet been perfected. At that hearing, Mr. Seruya made an application for the costs of the issue between the parties in relation to the costs of the proceedings in this court culminating in the order of December 14th, 2018, on the basis that he claimed that the court had found in favour of the appellant on that issue. More importantly, it appears he also indicated that the appellant wished to make a formal application for leave to appeal to the Privy Council, the inference being that, even though he had earlier claimed that the judge had dealt with that matter on December 14th, 2018, he was no longer asserting that she had in fact then given the required permission. The judge then made an order whose effect, so far as material, was to direct the appellant either to file an application “for leave to appeal out of time by 4pm on 7 March 2019” or, as Mr. Seruya asserts, that “any application for Leave to Appeal out of time must be filed by the Appellant within 14 days.” As I have said, that order has not yet been perfected.

21 On March 7th, 2019, Mr. Marrache issued a notice of motion asking for “leave to appeal, if required, to the Judicial Committee of the Privy Council from the Judgment of the Court of Appeal for Gibraltar, dated 14th December 2018, be granted and, if required, time to be extended pursuant to Rule 8(1) of the Court of Appeal Rules 2004.”

22 That application is the main application before us. Mr. Seruya did not submit that we should hold that the necessary leave had already been given by Ramagge Prescott, J. on December 14th, 2018, nor has he taken the line, or even suggested, that the perfected order of that date might be susceptible to correction under the “slip rule” in CPR Part 40.12 so as to include the leave to appeal to the Privy Council that the appellant had sought on December 14th. I infer that he is no longer contending that Ramagge Prescott, J. did give such leave on that day. The main question argued before us was whether we could, and if so should, extend time for the appellant to apply to this court for leave to appeal to the Privy Council. In addition, whatever our decision on that question, Mr. Seruya asked us to re-impose the stays that this court ordered on March 22nd, 2018 either until the final disposal of any appeal to the Privy Council, or, if he did not obtain the necessary leave, at least until after the disposal of his application to the Privy Council for special leave. Those stays had been lifted by the order of December 14th, and the inference is that Mr. Seruya did not then submit that, far from being so lifted, they should remain in place pending the appellant’s proposed appeal to the Privy Council.

The issues on the application

23 The first point to notice is that Mr. Seruya’s assertion that the appellant has an appeal as of right to the Privy Council against all the material provisions of this court’s order of December 14th, 2018 is, I

consider, inaccurate. Apart from costs, the court's substantive order of that date included three main provisions, namely (i) the dismissal of the publication motion, (ii) the refusal of an extension of time for the filing by the appellant of his grounds of appeal and the records of appeal in his two appeals, and (iii) the order that the appellant was deemed to have withdrawn both his appeals. There is in my view no appeal "as of right" to the Privy Council against the dismissal of the publication motion because an appeal against that order would not fall within s.66(1)(b) of the Gibraltar Constitution Order 2006. Absent any such appeal "as of right," there would be no question of this court exercising any discretion it may have to give leave to appeal to the Privy Council against that part of the order of December 14th, 2018. The issue arising under the publication motion raised no question of general or public importance. It involved no more than the application of basic and well-established principles to a straightforward issue. It is not the sort of issue that the Privy Council ought to take time considering, it appears to me improbable that they would give special leave to appeal on that issue and in my view any appeal against it would have no or no real prospect of success.

24 Secondly, however, I am disposed to agree, although with less than total certainty, that the appellant is, as he asserts, entitled "as of right" to appeal against this court's orders refusing his extension of time application and deeming his appeals to have been withdrawn. Any appeal to the Privy Council will of course relate simply to whether he should be allowed to pursue his appeals in this court, and will not directly raise any question as to whether Yeats, Ag. J.'s orders relating to the entitlement to the disputed property were or were not correctly made. But s.66(1)(b) does include the words "directly or indirectly," and the "indirectly" no doubt enables it to be said that the appeal would at least indirectly involve a question respecting the disputed property. That said, if I am wrong that the proposed appeals can be pursued as of right, I would have no hesitation in exercising the court's discretion to refuse permission to the appellant to appeal to the Privy Council. Again, the court's decisions were not ones in respect of which I would regard the appellant as having any real prospect of overturning on an appeal. They were akin to case management decisions involving the exercise of judicial discretion. Appeals against such decisions are traditionally difficult, and an appeal against this court's decision would in my view have no or no real prospect of success. I add that, just as the appellant never produced any grounds of appeal for his appeals to this court, nor has he yet indicated any grounds on the basis of which he claims to challenge this court's orders in the Privy Council. This court has no idea on what basis he claims that its orders of December 14th, 2018 were wrongly made.

25 Thirdly, on the basis, however, that (the publication motion apart) the appellant is entitled to pursue appeals against the court's orders "as of

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right,” it is also well established that he still needs to obtain this court’s formal leave to appeal to the Privy Council: see again the *Ross* (1) and *Schiller* (2) cases. As to the way in which such leave must be sought, the answer is in the Gibraltar (Appeals to the Privy Council) Order 1985. Sections 3, 4 and 6 provide that:

“3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of this Order shall, in the first instance, be granted by the Court only—

- (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and
- (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think reasonable to impose.”

“6. Where the decision appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said decision to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of the Court for the due performance of such Order as Her Majesty in Council shall think fit to make thereon.”

26 The difficulty these provisions present to the appellant is that they prescribe that the application for the required leave to appeal must be made by motion or petition within 21 days of (in the present case) the order of December 14th, 2018. The appellant did not, however, issue his

notice of motion seeking leave until March 7th, 2019, some two months late. The 1985 Order confers no jurisdiction on this court to extend time. The inference is that, if the application is not made to this court in time, any application for leave must be made direct to the Privy Council; and r.11(2) of the Judicial Committee (Appellate Jurisdiction) Rules 2009 provides that “An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later).”

27 Mr. Seruya submitted, in line with the assertion in the appellant’s notice of motion of March 7th, 2019, that any necessary extension of time for applying for leave could be sought and granted under r.8(1) of the Court of Appeal Rules 2004. That provides:

“8.(1) The court or a judge may extend the time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in conjunction with any appeal, notwithstanding that the time limited therefor may have expired, and whether the time limited for such purpose was so limited by order of the court or by these rules or by order of the Supreme Court.”

28 I respectfully disagree with Mr. Seruya that that provision can be of any help to the appellant. The closing words circumscribe the nature of the time limits in respect of which r.8(1) gives the court jurisdiction to extend time. They do not include time limits imposed by an instrument such as the 1985 Gibraltar Order. The inference from that Order is that if the 21-day time limit is not observed, the only alternative course open to a proposing appellant is to seek special leave from the Privy Council.

29 In my judgment, therefore, the position as it stands today is that whilst it may well be that the appellant was entitled to appeal “as of right” against at least the main provisions of the order of December 14th, 2018, he has not, as he must, obtained the necessary formal leave from this court to pursue such an appeal, he is now irremediably out of time for obtaining such leave and there is no discretion in this court to extend his time for applying for such leave. His only way forward is to apply for special leave direct to the Privy Council. I would dismiss the appellant’s motion dated March 7th, 2019.

30 There remains the question of whether this court should, as asked by Mr. Seruya, and pending the disposal of any appeal to the Privy Council that the Privy Council may hereafter permit the appellant to make, re-impose the stays that this court imposed by its order of March 22nd, 2018 but which were lifted by this court’s order of December 14th, 2018 although later re-imposed by Ramagge Prescott, J. by her order of February 22nd, 2019 until after the disposal of the application now before us. The appellant’s notice of motion in fact included no application for the

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continuation of the stays, which is a surprising omission. Mr. Seruya's skeleton argument did, however, ask for their continuation, relying essentially on the assertion that as this court considered it appropriate to grant stays in March 2018, it follows that a continuation of the stays is equally justified now. With respect, it is not the function of skeleton arguments to make applications to the court. Their only function is to provide a succinct explanation of why the relief sought in an appropriate form of court application should or should not be granted. Strictly, there is no application before this court for a continuation of the stays ordered on February 22nd.

31 Leaving aside for the moment that formal consideration, the first question is whether this court in fact has any jurisdiction to order the stays requested. Mr. Seruya was unable to point to anything which might permit us to impose them and Mr. Cruz submitted that the language of s.6 of the 1985 Gibraltar Order pointed away from there being any jurisdiction in this court to grant a stay in the present circumstances. Section 6 in fact only applies in cases in which this court is granting leave to appeal, which this court is not, and it appears also only to apply to cases in which the appellant is appealing from a decision of this court that "requires the appellant to pay money or do any act" and it is said that the order of December 14th, 2018 does not so require the appellant, apart, I suppose, from its provision requiring him to pay costs.

32 Following the conclusion of the argument before us, however, and in the best traditions of the Bar, Mr. Cruz sent an email to the court in order to inform it that Mrs. Wright had since unearthed Privy Council Practice Direction 7 which, under the heading "Stay of Execution," provides:

"7.14.1 The filing of a notice of appeal or an application for permission to appeal does not in itself place a stay of execution on any order appealed from. A party seeking such a stay must apply to the court appealed from, not to the Judicial Committee: rule 39."

33 That certainly does suggest, as one might expect, that there is a jurisdiction in this court to order stays of execution of orders pending the disposal of applications for leave to appeal to the Privy Council. For my part, however, I would anyway decline at this stage, and on the exiguous information currently before the court, simply to re-impose the stays that the court ordered by its order of March 22nd, 2018.

34 First, the position that obtained then is not necessarily the same as the position that obtains now, and there is no warrant for the making of any presumption that it does.

35 Secondly, Mr. Cruz advanced an oral explanation as to why, as he asserts, the position in relation to Fortress House has materially changed,

although I am not sure that I understood it sufficiently to be able to explain the nature of the change.

36 Thirdly, the appellant was, by Mr. Seruya, present before the court on December 14th, 2018 when the order of that date was made and the stays were lifted. The appellant was already determining that he wished to appeal to the Privy Council, yet he apparently advanced no case that the stays should be re-imposed pending the disposal of his proposed appeal. He was instead apparently content to be unprotected by any stay for something over two months until the making of the order of February 22nd, 2019. If by then it had suddenly become important for the stays to be re-imposed, and then continued by this court's order today, I consider that it was incumbent upon the appellant to explain by way of evidence the change of circumstances that prompted his stay application to Ramage Prescott, J. on February 22nd and why he claims it is now necessary for the stays to be continued. The appellant should understand that courts ordinarily only make orders on the basis of evidence. If he wants the protection of a continuing stay, he should have provided up-to-date evidence explaining why. The granting of a stay upon the execution by the successful party of judgments it has obtained is not the norm, it is the exception. If the person against whom a judgment has been obtained wishes to restrain its execution by a stay, it is incumbent upon him to provide cogent evidence as to why a stay should be granted.

37 Fourth, for reasons I have given, I regard the appellant's prospects of success on his proposed appeal to the Privy Council, if the Privy Council is disposed to allow him to pursue it, as extremely poor. As I have said, the orders of this court that he wishes to challenge are orders by which this court was exercising discretionary powers akin to case management powers, and such orders are notoriously difficult to challenge on an appeal. What the appellant's argument on his proposed appeal might be I have no idea because he has not identified any proposed grounds of appeal, any more than he ever identified his grounds of appeal against Yeats, Ag. J.'s orders of February 7th, 2018. The combination of the apparently weak nature of the appellant's proposed appeal and the absence of any current evidence as to why he claims he should be entitled to the stays of execution for which he asks militate in my judgment against continuing the stays.

38 I would, therefore, at this stage, and on the material now before the court decline to continue the requested stays. I would, however, also make clear to the appellant that he is at liberty, if so advised, to renew his application to this court for the re-imposition of any stay by a notice of motion properly identifying the nature of the stay he seeks, supported by affidavit evidence explaining why he considers such stay should be ordered. Any such application would be assisted if the appellant would also explain his grounds of appeal against the order of December 14th,

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2018, with a view, if he can, to satisfying the court that he has at least an arguable basis for criticizing that order. Finally, however, I must add in this context that, as this court is about to conclude its current session in Gibraltar, any such application would have to be dealt with by the court on paper.

39 The result is that I would dismiss the notice of motion dated March 7th, 2019 and refuse the requested stays.

40 **ELIAS, J.A.**, I agree.

41 **KAY, P.**, I also agree.

Order accordingly.
