[2015 Gib LR 261]

R. v. ROBINSON and WOOD

SUPREME COURT (Dudley, C.J.): July 31st, 2015

Criminal Procedure—abuse of process—stay or dismissal of proceedings—principles to determine whether stay necessary because fair trial impossible: (i) exceptional circumstances required; (ii) defendant to show serious prejudice making fair trial impossible; (iii) permanent stay exceptional even if unjustifiable delay by Crown; (iv) no stay if delay caused by complexity of case; and (v) no stay if prejudice averted through trial process, e.g. jury directions

Criminal Procedure—abuse of process—stay or dismissal of proceedings—online publication of unanonymized judgments potentially leading juror to discover prejudicial material against accused insufficient for stay—jury questionnaires to be used to filter out any individual who read judgments

The defendants were charged with false accounting contrary to s.425(1)(b) of the Crimes Act 2011.

The charges were brought against the defendants in respect of their activities as members of the firm of accountants engaged by the law firm Marrache & Co., the partners of which had been convicted of conspiracy to defraud through misappropriation of clients' funds.

The defendants applied to have the criminal proceedings against them stayed as an abuse of the process of the court on the grounds that (a) a combination of unjustifiable delay, prosecutorial misconduct and serious disclosure failure, and/or (b) the publication of various judgments in the Marrache prosecutions on the Gibraltar Courts Service website meant that they could not have a fair trial.

On the first ground, the defendants submitted that (a) the five-year delay between the start of the investigation and the trial date meant that they could not receive a fair trial; (b) the defence case was vulnerable to the effects of delay because it was dependent on the defendants' memories of routine events which had occurred several years before and of which no written record had been made; (c) there was an absence of specificity as to what might be material to the defence case; (d) the first defendant had suffered mental health problems as a result of having this matter hanging over him for many years; and (e) the Crown had failed to disclose important information including material from Marrache & Co.'s central hard drive, a disclosure management document, material demonstrating the Marrache brothers' propensity to tell sophisticated lies, and material relating to the forensic accountant who was an expert witness for the Crown.

On the second ground, the defendants submitted that the publication of judgments in the Marrache litigation in which their names were not anonymized meant that a fair trial was not possible. The judgment of Grigson, Ag. J. that found the Marrache brothers guilty of conspiracy to defraud included factual findings that the defendants had engaged in false accounting. Their names were anonymized in that judgment, but a number of other judgments in the Marrache litigation were published online without anonymization and could easily have led to a juror identifying the defendants as the individuals against whom Grigson, Ag. J. made findings of false accounting.

Held, dismissing the application:

(1) The application would be dismissed because the defendants had not proved, on the balance of probabilities, that the way in which the Crown had conducted the case against them meant that it would be impossible for them to receive a fair trial. There were two categories of abuse of process which could justify a stay of proceedings: (a) when it was impossible to give the defendant a fair trial; and (b) when a stay was necessary to protect the integrity of the criminal justice system. The first category was applicable here and the relevant principles were that (i) a stay was only to be imposed in exceptional circumstances; (ii) even if there was unjustifiable delay, a permanent stay was the exception rather than the rule; (iii) a stay would not be granted if the delay arose out of the complexity of a case; (iv) a stay would not be granted unless the defendant showed that he would suffer serious prejudice to the extent that no fair trial could be held; and (v) a stay would not be granted if the court could alleviate any

prejudice through the trial process, *e.g.* through jury directions (para. 7; paras. 9–11).

(2) The delay between the start of the investigation against the defendants and the trial date did not give rise to prejudice which would result in their not receiving a fair trial because (a) the Crown's case strongly suggested that, shortly after the collapse of Marrache & Co., the defendants were aware of the issues that arose and how those issues could impact on them and this was therefore not a case in which the thrust of the allegations was raised years after the relevant events took place; (b) there was an absence of specificity as to what might be material to the defence case, but any issues arising from this could be dealt with by providing an appropriate direction to the jury; and (c) the fact that the first defendant had suffered mental health problems as a result of having this matter hanging over him did not afford a basis for a stay (paras. 15–18).

(3) Similarly, none of the Crown's shortcomings with regard to disclosure meant that the defendants could not receive a fair trial and the proceedings would therefore not be stayed. As proper disclosure was a crucial part of a fair trial, the court had an inherent jurisdiction to stay the case if errors in the Crown's disclosure process gave rise to a real risk that the fairness of the trial might be compromised. The fact that the defendants could remedy such errors by making an application for disclosure under s.249(2) of the Criminal Procedure and Evidence Act 2011 was irrelevant because the court had to ensure that a fair trial was achieved even if the defendants did not take advantage of procedures which could assist them. The Crown's failures in relation to the Marrache hard drive had been dealt with by Prescott, J. in previous proceedings and it had accepted and complied with her rulings. It should have provided a disclosure management document, but this failure did not amount to an abuse of process resulting in unfairness. It failed to disclose evidence demonstrating the Marraches' propensity to tell sophisticated lies, but this factual issue was so self-evident that it did not constitute a critical area of disclosure which could render the trial process unfair. Finally, it failed to disclose material relating to the evidence of its forensic accountant but this evidence was of limited significance and neither of the defendants disputed its contents (paras. 19–20; para. 22; paras. 25–28).

(4) Likewise, the fact that judgments that could have led to a juror identifying the defendants as the individuals against whom Grigson, Ag. J. made findings of false accounting were uploaded to the Gibraltar Courts Service website without being anonymized did not necessitate a stay. The fairness of the trial would only be compromised if a juror had actually read those judgments; jury questionnaires could be issued to identify if any potential juror had done so and such an individual could then be barred from being a juror for the defendants' trial, thereby averting any unfairness (paras. 29–30).

(5) The digital records of emails between the Marrache brothers contained on the Marrache hard drive should be searched using the following additional terms: "Robinson," "KAR," "KR," "Ian," "IW" and "Wood." The court could not direct the Crown to search the hard drive using those search terms, but failure to do so could result in serious prejudice to the defendants and a stay of the proceedings (para. 24).

Cases cited:

(1) *Att. Gen.'s Ref. (No. 1 of 1990)*, [1992] Q.B. 630; [1992] 3 W.L.R. 9; [1992] 3 All E.R. 169; (1992), 95 Cr. App. R. 296; [1993] Crim. L.R. 37, applied.

(2) *R.* v. *F(S)*, [2012] Q.B. 703; [2012] 2 W.L.R. 1038; [2012] 1 All E.R. 565; [2011] 2 Cr. App. R. 28; [2012] Crim. L.R. 282; [2011] EWCA Crim 1844, applied.

(3) *R.* v. *Marrache*, 2013–14 Gib LR 540, referred to.

(4) *R.* v. *Maxwell*, [2011] 1 W.L.R. 1837; [2011] 4 All E.R. 941; [2011] 2 Cr. App. R. 31; [2010] UKSC 48, applied.

(5) *R.* v. *O*, [2012] Crim. L.R. 535; [2011] EWCA Crim 2854, referred to.

(6) *R.* v. *S(SP)*, [2006] 2 Cr. App. R. 23; [2007] Crim. L.R. 296; (2006), 170 J.P. 434; [2006] EWCA Crim 756, considered.

(7) *Roylance* v. *General Medical Council (No. 2)*, [2000] 1 A.C. 311; [1999] 3 W.L.R. 541; [1999] Lloyd's Rep. Med. 139; (1999), 47 B.M.L.R. 63, distinguished.

J. McGuiness and *K. Tonna* for the Crown;
J. Barnard and *R. Gokani* for the first defendant;
T. Hillman and *J. Wahnon* for the second defendant.

1 **DUDLEY, C.J.:** There are eight counts on the indictment, all of which allege false accounting contrary to s.425(1)(b) of the Crimes Act 2011. Ian Wood ("IW") is charged with the eight counts whilst Kenneth Robinson ("KR") is jointly charged with IW in respect of Counts 3–8 inclusive. The alleged offences are linked to the collapse of the law firm Marrache & Co ("M & Co."). The three Marrache brothers and another were prosecuted and faced two counts alleging conspiracy to defraud. The trial was held before Grigson, Ag. J., who, at a relatively early stage, discharged the jury and proceeded to hear the case by himself. For the reasons contained in a judgment handed down on July 2nd, 2014 (*R.* v. *Marrache* (3)), Isaac Marrache was found guilty on one count whilst Benjamin Marrache and Solomon Marrache were found guilty on both. The fourth defendant was acquitted on both counts.

2 The Crown's case against KR and IW is set out in a 69-page opening note and will be well known to the majority of those that read this ruling, and it is unnecessary to summarize the allegations.

3 On behalf of KR, it is submitted that the proceedings should be stayed as an abuse of the process of the court under two separate heads:

(a) a combination of unjustifiable delay, prosecution misconduct and serious disclosure failure which should lead the court to stay the proceedings because the accused cannot have a fair trial; and that

(b) following the publication of various Marrache judgments on the Gibraltar Court Service website, a fair trial cannot now be had.

4 Mr. Hillman does not advance any distinct submissions in respect of IW but limits himself to adopting those of Mr. Barnard.

5 Mr. Barnard's written submissions, which include a detailed factual matrix, run to 36 pages, and his response to the Crown's 25-page skeleton to a further 23 pages. Counsel's time estimate of one day was unrealistic and the compression of oral submissions into that timeframe did not assist the court when dealing with what are detailed multi-faceted arguments. Because of this, in summarizing the competing arguments, I may fail to do them justice.

The law

6 The burden of establishing that pursuing these criminal proceedings amounts to an abuse is on the defendants, to be established on a balance of probabilities (Archbold, *Criminal Pleading, Evidence & Practice*, at para. 4–102 (2016 ed.)). That said, the judgment of Rose, L.J. in *R* v. *S(SP)* (6) ([2006] 2 Cr. App. R. 23, at para. 20) is instructive:

> "In our judgment, the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. It is, therefore, potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof, which is more apt to an evidence-based fact-finding process."

7 There are two distinct categories of abuse of process in which the court can stay proceedings: (a) where it is impossible to give the defendant a fair trial; and (b) where a stay is necessary to protect the integrity of the criminal justice system (*R.* v. *Maxwell* (4) ([2011] 1 W.L.R. 1837, at para. 13)). The Crown has proceeded on the basis that the defendants exclusively advance Category (a) submissions.

8 For my part, I have to admit to some confusion. Whilst the parties are essentially agreed on the applicable law, at para. 30 of his defence response, Mr. Barnard states:

> "The prosecution repeatedly seeks to characterise its failings as 'delay *rather than* misconduct' [Emphasis supplied—prosecution

> skeleton, at paras. 22 and 24]. It would appear that the prosecution believes that negligence, even gross negligence, is incapable of amounting to misconduct and that misconduct can only be established through deliberate bad faith . . . That is a serious misunderstanding of the legal principle of misconduct. It may, however, go some way to explaining why the prosecution has always appeared so unconcerned by its repeated and continued misconduct—it simply does not recognize it as such."

Thereafter, there is no reference to any authority in support of that proposition nor was it developed in oral submissions. There is also no unambiguous statement as to whether the application is also advanced as a Category (b), protecting the integrity of the criminal justice system, case. Subsequently, Mr. Barnard has, through the Registrar, made available *Roylance* v. *General Medical Council (No. 2)* (7) as an authority which could be of assistance on the definition of "misconduct." *Roylance* is a decision of the Privy Council on appeal from the Professional Conduct Committee of the General Medical Council, in which it considered the meaning of "serious professional misconduct" in the Medical Act 1983, and, in my view, is of very limited assistance.

9 If what is suggested in para. 30 of the response is that, irrespective of whether there can be a fair trial, of themselves the prosecution failures amount to misconduct whereby the proceedings should be stayed, then that submission fails. This is not a case in which the prosecution failings, which undoubtedly exist, can be categorized as amounting to prosecutorial misconduct so as to justify a stay. It is not, adopting the words of Dyson, JSC in *R.* v. *Maxwell* (4) ([2011] 1 W.L.R. 1837, at para. 13), prosecutorial conduct which "offends the court's sense of justice and propriety to be asked to try the accused . . ."

10 In my view, allegations of prosecutorial misconduct/failings are relevant in Category (a) cases to the extent that the conduct, irrespective of bad faith, impacts upon the fairness of the trial process (*R.* v. *F(S)* (2) ([2012] Q.B. 703, at paras. 40 and 48)).

11 The applicable principles in Category (a) can be derived from the decision of the English Court of Appeal in *Att. Gen.'s Ref. (No. 1 of 1990)* (1). In summarizing these principles, I draw liberally from the headnote and from Mr. McGuiness's skeleton:

(a) a stay for delay or any other reason is to be imposed only in exceptional circumstances;

(b) even where the delay is unjustifiable, a permanent stay is the exception rather than the rule;

(c) a stay will not be granted where the delay arises because of the complexity of a case;

(d) no stay should be imposed unless the defendant shows he will suffer serious prejudice to the extent that no fair trial can be held; and

(e) in assessing whether there is likely to be prejudice and, if so, whether it can properly be described as serious, a stay will not be granted where the court can, through the trial process itself, remedy or alleviate the prejudice, for example, by excluding evidence or giving appropriate directions to the jury. Issues arising from delay are to be placed before the jury with an appropriate direction.

Part 1

Delay

12 The following is but a brief overview of what, in the written submissions, is a detailed forensic analysis of the manner in which the investigation and prosecution against the defendants has proceeded. The evidence was seized in May 2010. The defendants were not interviewed until May 2013 and they were not charged until November 2013. On April 15th, 2014, the trial was set down for January 19th, 2015. On November 7th, 2014, Prescott, J. directed that disclosure by the Crown of item 192 be provided in a searchable format. (Item 192 is a copy of the hard drive of the Marrache server which exceeds 1TB as it appears on EnCase forensic software and becomes 4TB when the contents are extracted.) On November 20th, Prescott, J. reiterated her order. Because of concerns relating to both disclosure and IW's representation, the trial was moved to February 16th, 2015. However, on January 9th, 2015, Prescott, J. made a further ruling (in proceedings reported at 2015 Gib LR 104), this time in relation to material within item 192 which was subject to legal professional privilege ("LPP"), as a consequence of which the material is now being reviewed by independent counsel to exclude LPP material. The upshot was that the trial date was vacated and re-listed to October 19th, 2015. It is properly said for KR that he has done nothing whatsoever to delay matters.

13 In my view, time cannot be said to start to run from the time that the evidence was seized in May 2010. That evidence was seized for the purposes of the case against the Marrache brothers. As I understand it, the investigation proper against KR and IW started in March 2012. Undoubtedly, there has been unjustifiable delay by the Crown since then (some of which is accepted). Whilst the deployment of resources in the Marrache case provides a credible explanation, it does not amount to a justification. Mr. Barnard suggests that there has been a breach of art. 6 of the European Convention of Human Rights ("ECHR"). In this jurisdiction, that submission (which is not elaborated in a substantive manner) needs to be considered from the perspective of s.8 of the Constitution, but, whether viewed from that perspective or the application of common law principles,

the issue is whether the defendants have shown that they will suffer serious prejudice to the extent that no fair trial can be had.

14 It is said by Mr. Barnard that the defence case is vulnerable to the effects of delay because it is dependent upon what IW was told by the Marraches eight years ago to trigger his movement away from the M & Co. client ledgers, whilst similarly it is said that KR's delegation to IW was the continuation of an established practice which did not require detailed capture by written record and is therefore largely a matter of memory.

15 In the absence of a defence statement, the assessment of whether the delay will result in serious prejudice to the extent that no fair trial can be had has to be undertaken on the basis of the prosecution case and the interviews under caution of the defendants. For the Crown, it is said that it relies upon Baker Tilly working papers which are inconsistent with the signed reports, that these documents were generated at about the time of the alleged commission of the offence, and that the defendants would have been aware of them at the time. As I understand it, it is also said that the defence advanced by KR at interview is inconsistent with what he put forward for the purposes of the investigation by Deloitte on behalf of the Financial Services Commission. Moreover, contemporaneous material including emails between the defendants is available. In my view, the prosecution case strongly suggests that, shortly after the collapse of M & Co., the defendants were aware of the issues that arose and how it could impact on them. Evidently, this is not a case in which the thrust of the allegations are only raised years after the event.

16 Beyond the generic assertion as to potential conversations between the co-accused and/or either of them with one or more of the Marrache brothers, there is an absence of specificity as to what may be material to the defence case. In my view, issues that may arise in that regard and which may impact upon the fairness of the trial process can, if necessary, be dealt with by providing the jury with an appropriate direction.

17 The other prejudice arising from the delay which is prayed in aid is that the defendants have had this matter hanging over their heads for many years and that, in KR's case, this has had a deleterious effect on his mental health. There is no suggestion that, at present, he is not fit to stand trial and, whilst one can sympathize with the defendants' predicament, it does not afford a basis for staying the proceedings.

18 In the circumstances, and without hesitation, I am of the view that the defendants have failed to establish, on a balance of probabilities, prejudice arising from delay which would result in them not receiving a fair trial. Put another way, and adopting the language in *R* v. *S(SP)* (6), in the exercise of my discretion, in my judgment, delay does not prevent the defendants from having a fair trial.

Prosecution misconduct

19 Undoubtedly, there have been shortcomings in the way that the prosecution has dealt with this case. By way of example, the Crown should not have served item 192 wholesale and in a format that was not accessible. Moreover, the way in which the prosecution sought to re-categorize item 192 is indicative of a desire to avoid what may accurately have been seen as very onerous disclosure obligations. More recently, the Crown also failed to take account of LPP material when undertaking its disclosure obligations. But those were matters which were dealt with by Prescott, J. (in proceedings reported at 2015 Gib LR 104), and the Crown has accepted the rulings and acted accordingly.

20 There is merit in Mr. Barnard's submission that the Crown should have provided a disclosure management document in accordance with the English *Attorney General's Guidelines on Disclosure* of December 2013. However, that is not a failing which brings this case into abuse of process territory.

21 That said, certain aspects of the way in which the prosecution has handled the case which remain unresolved are capable of impacting upon the fairness of the trial process. I do not focus on past failings but limit myself to dealing with the issues that remain for the purpose of determining whether a fair trial is possible.

Disclosure

22 On January 29th, 2015, Prescott, J. ruled that, by virtue of s.249 of the Criminal Procedure and Evidence Act, this court does not have jurisdiction to order disclosure at the behest of a defendant unless a defence statement has been provided. I respectfully agree with her conclusion. However, proper disclosure is undoubtedly a crucial part of a fair trial and this court has an inherent jurisdiction to stay a case if shortcomings in the Crown's disclosure process give rise to a real (as opposed to fanciful) risk that the trial process may be compromised. That the defendants can remedy the position by providing a defence statement is, in my view, an incomplete answer because this court has to ensure that a trial is fair even if a defendant, for tactical reasons, does not take advantage of procedures which may avail him. I am therefore of the view that the disclosure issues that remain need to be considered to ascertain whether they are capable of resulting in serious prejudice to the defendants.

23 To the extent that I focus upon this issue from the perspective of disclosure, I remind myself that, particularly in a case such as this where the volume of digitally stored searchable material is monumental, the

exercise to be undertaken has to be focused, reasonable and not disproportionate (*R.* v. *O* (5) and English *Attorney General's Guidelines on Disclosure* of December 2013).

(i) *Material from item 192*

24 I have been provided with a list of search terms which have been used by the Crown, which was extended following representations by KR's lawyers. From a letter dated May 14th, 2015 from the Attorney-General's Chambers to Hassans, I identify 60 additional search terms sought. The fundamental purpose for which further disclosure is sought is that the defence being advanced is that the Marraches were deliberately feeding false information to Baker Tilly, IW and KR, and there may be reference or coordination in respect of such lies and misinformation in email traffic passing between the Marrache brothers. Against that backdrop, I am of the view that, out of the 60 additional search terms, it is reasonable and proportionate for the following also to be used: Robinson; KAR; KR; Ian; IW; and Wood. I cannot direct the Crown to undertake the search, but failure to do so may result in serious prejudice to the defendants, and may consequently lead me to stay these proceedings.

(ii) *Material from the Marrache case used*

25 On the basis that Prescott, J.'s ruling was made explicitly without consideration of the merits of the application for disclosure, Mr. Barnard simply refers to earlier skeletons with limited reference being made to those issues in his oral submissions. In the skeleton of January 8th, 2015, the first paragraph reads:

> "This is a defence application for a ruling on whether the prosecution should disclose prosecution material which shows the Marraches' propensity to lie and, in particular, the Marrache partners' ability, propensity and determination to tell sophisticated, long-term, significant lies to everyone around them, including family, colleagues of many years, court officers and regulators in a convincing and credible manner."

It is self-evident from the Marrache convictions and the way the Crown put its case that the Marraches had a propensity to lie and that these were long-term significant lies to clients, colleagues and regulators. It is almost inconceivable that, with a modicum of reasonableness and common sense, the parties to this litigation cannot agree this as fact in a manner which allows for it to be put to the jury simply and objectively. This factual issue is so self-evident that, on any view, it is not a critical area of disclosure which could render the trial process unfair. If the defendants wish to make a formal disclosure application, that is evidently a matter for them; at that

stage, I would consider the issue, but evidently, in the absence of a defence statement, the court does not have jurisdiction.

(iii) *Material in relation to the prosecution expert*

26 In setting out the factual background to this issue, I draw from Mr. McGuiness's skeleton. On January 9th, the defence requested material relating to the forensic accountant, Mr. Steadman. By way of attachments to two letters sent by the Crown on January 22nd and 27th, 2015 to Mr. Robinson's lawyers, the following items were provided: (a) copies of written instructions to the expert (with appropriate redactions); (b) other material provided to the accountants; and (c) working notes and papers.

27 The position taken by the Crown was that some of what was requested was privileged, for example, notes of any conferences between the forensic accountants and the Royal Gibraltar Police, the Attorney-General's Chambers and/or counsel. After receiving the first of the Crown's letters referred to above, Mr. Robinson's lawyers wrote on January 22nd, 2015 stating that they disagreed with the Crown's assertion that the further documents requested were not disclosable because of legal privilege, but went on to say "there appears to be little point in setting out our objections before we have received the material you intend to disclose. It is entirely foreseeable that examination of that material will give rise to further matters." Five days later, the Crown sent further material attached to a letter dated January 27th. According to the Crown, almost four months then passed. There were no "objections" received from Mr. Robinson's lawyers and no "further matters" raised following examination of what was disclosed—until, that is, the Crown was faced with the accusation in the Robinson skeleton that the above exchanges were evidence of a failure to disclose of such seriousness that the defendant cannot now receive a fair trial.

28 This issue undoubtedly raises an important matter of principle, namely whether legal professional privilege extends to communications between an expert witness and Crown prosecutors, and, if that principle exists at common law, whether it was abrogated by s.239 of the Criminal Procedure and Evidence Act 2011. As with para. 25 (ii) above, it is not one which I need determine. This is an abuse application in which the touchstone is whether or not the defendants can receive a fair trial. It is apparent that matters touching upon the opinion and conclusions of Mr. Steadman are of limited significance. Although self-evident, it is nonetheless worth noting that he is not a witness of fact, but rather of opinion. It is apparent that neither defendant intends to call his own expert to disagree with Mr. Steadman's opinion and conclusions, and I accept Mr. McGuiness's submission (which was not materially challenged) that it is apparent from the interviews of KR and the statements by IW that both defendants take no issue with either the true financial state of Marrache &

Co. spoken to by Mr. Steadman or the falsity of the documents that are the subject of Counts 1–5 which Mr. Steadman's evidence also addresses. The defendants' relief, should they want this issue addressed, is to file a defence statement and thereafter make an application pursuant to s.249(2) of the Criminal Procedure and Evidence Act.

Part 2

Publication of the Marrache judgments

29 It is submitted by Mr. Barnard as a further and separate basis for a stay that there has been such publicity in relation to this matter that a fair trial is not possible. The thrust of his submission is this. During the Marrache trial, presided over by Grigson, Ag. J., he made the following order pursuant to s.479(8) of the Crimes Act 2011: "Publication of the following parts of the proceedings is postponed until further order of the court: any report of the proceedings which names, or would lead to the identification of, Kenneth Robinson or Ian Woods." It is cogently submitted that the order was made because it was necessary to avoid a substantial risk of prejudice to the trial of KR and IW. It is, however, further submitted that the position changed substantially when the jury was discharged and Grigson, Ag. J. became the tribunal of fact and thereafter, in his judgment, he made the following findings (*R.* v. *Marrache* (3) (2013–14 Gib LR 540, at paras. 47–49)):

> "47 The Crown originally described this evidence by YZ as 'cooking the books,' a phrase which has been adopted by others. The two people responsible at YZ for the M & Co. accounts were W and his subordinate X. Both are to stand trial for false accounting. It is unnecessary for me to determine whether one or both was responsible. I shall refer to them collectively as YZ.
>
> 48 I am satisfied as to be sure—
>
> (i) that YZ did indeed 'cook the books'; and
>
> (ii) that they did so for the benefit of M & Co. There was no benefit to YZ.
>
> 49 In my judgment, it is inconceivable that they would have done so without informing the partners and SM."

The anonymized judgment of Grigson, Ag. J. was uploaded to the Gibraltar Courts Service website on May 7th, 2015. Unfortunately, other rulings which he had handed down in the Marrache trial which were also uploaded were not anonymized and could easily lead to the identification of KR and IW as "W" and "X." The point was well made by Mr. Barnard that jurors and potential jurors who access the Courts Service website, which is specifically "designed to support the needs of all court users"

including jurors and potential jurors, would find the "Jury Service" tab next to the "Court Results" tab and could have accessed the judgment and rulings with no more than a few clicks of the mouse. I am grateful to Mr. Barnard because, the matter having been brought to my attention at the hearing of this application, I directed their removal. Given that no summonses have been issued for this trial, that real risk has been averted.

30 The more generic point advanced is that the specific, unequivocal adverse finding by Grigson, Ag. J. against one or other or both defendants on the very matter in issue is deeply prejudicial. The short answer is that this is only so if a juror has read the judgment of Grigson, Ag. J. Gibraltar is a small jurisdiction and undoubtedly most professionals providing legal, accounting, banking and financial services will be alive to the Baker Tilly, KR and IW connection to the Marrache trial. Fortunately, the jury list extends well beyond that limited cadre of professionals to include (subject to some statutory exceptions) all those aged between 18 and 65 eligible for registration as an elector or ordinarily resident in Gibraltar for five years. I fail to see how knowledge of the Marrache connection, of itself, can be said to make a fair trial impossible. The moment that the jury panel is provided with questionnaires (as no doubt they will) to ascertain whether they have any connections with the Marrache debacle or any detailed knowledge of that case, it will become apparent to them that this is a related matter. It could be that the fairness of the trial process might be compromised if a juror had read the judgments of Grigson, Ag. J., but that is a matter which is easily capable of being addressed in the jury questionnaire.

31 Save to the extent identified at para. 24 above, the application fails.

32 The trial is listed to start on October 19th, 2015. Jury summonses will have to be issued shortly. In the Marrache case, some 700 individuals were summonsed and the jury selection process, which involved questionnaires, took five days. This case has been subject to far less publicity than the Marrache case, but, unless counsel seek to persuade me otherwise, I shall direct the Registry to send the same number.

33 I shall hold a PCMH on Monday, September 21st at 2.30 p.m. By that date, the following needs to be accomplished:

(a) A jury questionnaire is to be drafted. My strong tentative view is that it should follow the model of that used in the Marrache case with such further questions as may be necessary, no doubt to include whether they have read the judgments of Grigson, Ag. J. A first draft of the questionnaire should be produced by the Crown by September 4th, 2015. The parties should thereafter seek to agree any amendments. Any amendments not agreed and proposed by the defendants should be included in a tracked document in red for KR and in blue for IW.

(b) The parties are to agree a final list of witnesses that are to testify.

(c) A trial timetable (if possible, agreed) should be produced and I shall deal with any professional clashes that counsel may have.

At the PCMH, I shall also consider whether we should have reserve jurors and, if so, whether they are to remain as part of the substantive jury or segregated.

Orders accordingly.
