[2015 Gib LR 410]

R. v. ROBINSON and WOOD

SUPREME COURT (Dudley, C.J.): December 18th, 2015

Criminal Procedure—adjournment—test for adjournment—adjournment refused if continuation of proceedings contrary to interests of justice, e.g. would undermine public confidence in criminal justice system—relevant factors listed and discussed—since "interests of justice" broader than "fair trial," adjournment may be refused even if fair trial possible

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 acting for the law firm Marrache & Co., the partners of which had been convicted of conspiracy to defraud through misappropriation of clients' funds.

After a 20-month delay between the start of the investigation against the defendants and the conclusion of interviews, the trial was adjourned twice and, in the present proceedings, the Crown applied for a third adjournment. It indicated that, if its application were refused, it would offer no evidence against the defendants.

Each of the Crown's applications for an adjournment was made in response to delays in the disclosure of material contained on Marrache & Co.'s central computer hard drive. Disclosure was necessary because the defendants argued that the partners of Marrache & Co. had deliberately fed false information to them and there could be documentary evidence of this on the hard drive.

The Crown waited for more than three months from the date of the defendants' committal before taking any steps in relation to disclosure, and there was then a further two-month delay before the Royal Gibraltar Police commenced a keyword search of the hard drive. That search took six months to complete as a result of disruptions caused by power cuts and system errors. In response to these disruptions, the Crown disclosed the contents of the hard drive to the defendants in full, in a format which was unreadable and without any software to enable them to search the material themselves.

The Crown then claimed that the material on the hard drive was not prosecution material, but the Supreme Court ruled that it was and it therefore had to be disclosed to the defendants in a searchable format as soon as possible. The Crown took no further steps for 10 days after the Supreme Court's ruling. It then agreed to pay no more than £31,250

towards the cost of software to enable the defendants to search the material.

The defendants pointed out that it was likely that disclosure of the material on the hard drive would violate the legal professional privilege of clients of Marrache & Co. and the Supreme Court ruled (in proceedings reported at 2015 Gib LR 104) that legal professional privilege would be waived in respect of clients who had deposited money in Marrache & Co.'s client account, but the Crown was required to notify those clients to enable them to make representations before their rights were extinguished. The Crown appointed independent counsel to review the material for legal professional privilege issues, but it attempted to evade the implications of the Supreme Court's ruling by contacting clients only after it had determined whether an item on the hard drive was privileged disclosable prosecution material, and it subsequently advanced legal arguments to minimize the impact of the ruling by seeking to narrow the scope of the case law on which it was based.

The Supreme Court (in proceedings reported at 2015 Gib LR 261) indicated that the hard drive should be searched using six new search terms, but the Crown delayed for a month before instructing new independent counsel to carry out that search. The Supreme Court also refused the defendants' application for a stay of proceedings on the basis that a fair trial was still possible despite the delays between the start of the investigation and the trial date and the Crown's failures in relation to disclosure. The Crown then applied for a further adjournment.

The Crown submitted that (a) the fact that a fair trial of the defendants was still possible was a relevant factor indicating that an adjournment would not be against the interests of justice; (b) the allegations against the defendants were of significant seriousness; and (c) of the 9,000 documents disclosed thus far, none was of any relevance. The defendants submitted that (a) it was open to the court to take account of the fact that a fair trial was still possible but it was not obliged to do so; (b) they had suffered significant prejudice as a result of the Crown's delays and failures, resulting in the first defendant suffering serious mental health problems; (c) they should not be required to spend thousands of pounds on software to enable them to search the material on the hard drive, particularly since it had been provided at a late stage after significant delays; (d) the Crown's attempt to limit its expenditure on this software to £31,250 was unprincipled and without foundation in law in light of its obligation to provide access to the material in a searchable format; (e) counsel instructed to review the material for legal professional privilege issues was not independent because the Crown had always intended that she would be assigned as an adviser to the RGP after completing the review; and (f) new counsel instructed by the Crown to search the hard drive using the six new prescribed search terms were not independent because they worked for government legal departments for which the Attorney-General was responsible and were therefore not independent of him.

Held, dismissing the application:

(1) The Crown's application for an adjournment would be refused and the court would direct a verdict of not guilty to be recorded against the defendants. It was not in the interests of justice to permit the proceedings to continue and in every case in which continuation of the proceedings would offend the court's sense of justice and propriety or would undermine public confidence in the criminal justice system, an adjournment would be refused. Relevant factors to be considered were (a) the gravity of the charges; (b) the denial of justice to the complainants; (c) any failures by the defence lawyers; (d) prejudice to the defendants; (e) the availability of other sanctions; (f) the waste of court resources and the effect on the jury; (g) the necessity for proper attention to be paid to disclosure; and (h) the nature and materiality of the Crown's failures. The ability to conduct a fair trial was relevant to the question of whether to grant an adjournment in that, if a fair trial could not be held, the adjournment would be refused and the proceedings would be stayed. However, the interests of justice test was broader than the question of the possibility of a fair trial, such that, even if a fair trial were possible, the adjournment could still be refused (para. 6; para. 8; paras. 53–54).

(2) The Crown's failures were fundamental. The relevant factors applied as follows: (a) although the charges against the defendants were serious, they were less serious than those for which the Marrache brothers had been convicted and would result in less severe sentences; (b) the Marrache brothers had already been tried and convicted and that judicial process had provided the victims with moral redress; (c) there were no failures by the defence; (d) an adjournment would prejudice the defendants in that they would continue to have criminal proceedings hanging over them for a protracted period, but it was not clear that the first defendant's mental health would worsen, since the medical reports he had produced did not comply with the Criminal Procedure Rules, Part 19 and were therefore of very little weight; (e) no costs sanction was available against the Crown, despite the significant extra expense incurred by the first defendant as a result of the Crown's failures; (f) although the aborting of the trial on three occasions had had minimal impact on the jury, it had had an impact on trial dates being offered to other defendants; (g) there were numerous failures indicating that the Crown had failed to pay proper attention to disclosure; and (h) these failures were very serious, as the delays in carrying out interviews and disclosure and the numerous errors in the disclosure process had led to three trial dates being vacated. The fact that none of the documents disclosed thus far was of any significance was irrelevant because a single document, *e.g.* a single reference in correspondence between the Marrache brothers to passing misinformation to the defendants, could substantially undermine the Crown's case (paras. 12–18; paras. 48–52).

(3) The Crown was culpable for the following failures in the investigation and disclosure processes: (i) its delay of 20 months between the start

of the investigation against the defendants and the conclusion of interviews; (ii) its failure to take any steps to commence the disclosure process until more than three months after the defendants were committed, in breach of the obligation in s.240 of the Criminal Procedure and Evidence Act 2011 to make disclosure "as soon as is reasonably practicable" after committal; (iii) the RGP's failure to commence the keyword search of the Marrache & Co. hard drive for a further two months and their failure to take adequate steps to prevent power cuts and system errors from disrupting the search; (iv) its decision to disclose the hard drive in full in a format that was both unreadable and unsearchable in breach of the English *Attorney General's Guidelines on Disclosure*; (v) its failure to make proposals for the proper disclosure of the material on the hard drive for a further 10 days after the Supreme Court's order to disclose the material in a searchable format as soon as possible and its unprincipled and unlawful attempt to limit its financial exposure to £31,250 in respect of software to enable the defence to search the hard drive; (vi) its failure to recognize issues relating to legal professional privilege (the fact that the defendants raised these issues in an attempt to terminate the proceedings rather than out of genuine concern for the protection of legal professional privilege was irrelevant); (vii) its attempt to evade the Supreme Court's ruling on legal professional privilege; (viii) its failure to notify the defence and the court that counsel appointed to review the material for legal professional privilege issues was not independent because the Crown intended her to start working with the RGP after finishing that task; (ix) its one-month delay in instructing independent counsel to search the hard drive using the six new search terms proposed by the Supreme Court; and (x) its decision to instruct counsel to search the hard drive who worked for government legal departments for which the Attorney-General was responsible and who were therefore not independent of the Attorney-General (paras. 20–23; paras. 26–27; paras. 32–33; paras. 36–37; paras. 41–47).

Cases cited:

(1) *C.P.S.* v. *Picton*, [2006] EWHC 1108 (Admin), followed.
(2) *R.* v. *Boardman*, [2015] 1 Cr. App. R. 33; [2015] Crim. L.R. 451; [2015] EWCA Crim 175, followed.
(3) *R.* v. *Central Criminal Ct., ex p. Francis & Francis (A Firm)*, [1988] 2 W.L.R. 627; [1988] 1 All E.R. 677; (1987), 87 Cr. App. R. 104; on appeal, [1989] A.C. 346; [1988] 3 W.L.R. 989; (1988), 88 Cr. App. R. 213, referred to.
(4) *R.* v. *Chaaban*, [2003] Crim. L.R. 658; [2003] EWCA Crim 1012, referred to.
(5) *R.* v. *Clarke*, [2008] 1 Cr. App. R. 33; [2007] EWCA Crim 2532, referred to.
(6) *R.* v. *Marrache*, 2013–14 Gib LR 540, referred to.
(7) *R.* v. *Maxwell*, [2011] 1 W.L.R. 1837; [2011] 4 All E.R. 941; [2011] 2 Cr. App. R. 31; [2010] UKSC 48, referred to.

(8) *R.* v. *Salt*, [2015] 1 W.L.R. 4905; [2015] 2 Cr. App. R. 27; [2015] Crim. L.R. 814; [2015] EWCA Crim 662, followed.

Legislation construed:
Criminal Procedure and Evidence Act 2011, s.239:

"(1) The prosecutor must—

(a) disclose to the defendant any prosecution material which has not previously been disclosed to the defendant and which might reasonably be considered capable of undermining the case for the prosecution against the defendant or of assisting the case for the defendant; or

(b) give to the defendant a written statement that there is no material of a description mentioned in paragraph (a).

(2) For the purposes of this section prosecution material is material which—

(a) is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the defendant; or

(b) in compliance with of a code of practice published under Part 29, the prosecutor has inspected in connection with the case for the prosecution against the defendant."

s.240: The relevant terms of this section are set out at para. 22.

s.288(3): "If a defendant arraigned on an indictment or inquisition pleads not guilty and the prosecutor proposes to offer no evidence against him, the court may, if it thinks fit, order that a verdict of not guilty be recorded without the defendant being given in charge to a jury, and the verdict has the same effect as if the defendant had been tried and acquitted on the verdict of a jury."

J. McGuiness, Q.C. and *K. Tonna* for the Crown;
J. Barnard and *R. Gokani* for the first defendant;
A. Cotcher, Q.C. and *T. Hillman* for the second defendant.

1 **DUDLEY, C.J.:** This is an application by the prosecution for a third adjournment of a trial date. The trial was originally listed for January 19th, 2015. Delay by the prosecution in providing disclosure of what almost euphemistically is described as "item 192" led to the trial date being vacated and relisted for February 16th, 2015. Thereafter, following further case management hearings when Prescott, J. made certain rulings in relation to legal professional privilege ("LPP") and the need for an LPP sift of item 192 (reported at 2015 Gib LR 104), the trial was adjourned for a further eight months to October 19th, 2015.

2 At a case management hearing held before me on September 24th, 2015, it became apparent that the prosecution would not complete the disclosure process on time. I vacated the trial date and directed that the

prosecution's application for an adjournment be dealt with on October 19th, 2015. This is the ruling on that application. It is common ground that this decision will determine whether the proceedings against the defendants will continue or will come to an end.

The law

3 In *C.P.S.* v. *Picton* (1), Jack, J., sitting in the Divisional Court of the Queen's Bench Division with Keene, L.J., reviewed the authorities in relation to the grant of adjournments and distilled the relevant considerations ([2006] EWHC 1108 (Admin), at para. 9):

> "(a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.
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> (b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.
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> (c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.
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> (d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.
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> (e) In considering the competing interests of the parties the magistrates should examine the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.
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> (f) The reason that the adjournment is required should be examined and, if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment.

(g) The magistrates should take appropriate account of the history of the case, and whether there have been earlier adjournments and at whose request and why.

(h) Lastly, of course the factors to be considered cannot be comprehensively stated but depend upon the particular circumstances of each case, and they will often overlap. The court's duty is to do justice between the parties in the circumstances as they have arisen."

Although it deals with adjournments in the Magistrates' Court, it is clear that the learned authors of Archbold, *Criminal Pleading, Evidence & Practice*, at para. 4–71 (2016 ed.) consider it as authority for the matters that need to be considered in relation to applications for adjournments generally.

4 In *R.* v. *Chaaban* (4), Judge, L.J., as he then was, said ([2003] EWCA Crim 1012, at para. 36):

"Virtually any adjournment produces inconvenience for someone. What used to be described as an adjournment culture, if it ever existed, is a thing of the past. Adjournments have to be justified. If at all possible, they must be avoided. Proper case preparation is required from both sides. When asked to consider an adjournment, the judge must closely scrutinise the application, and, unless satisfied that it is indeed necessary and justified, should refuse it. The decision whether to adjourn or not is preeminently a decision for the trial judge."

Later, in *R.* v. *Clarke* (5), as President of the Queen's Bench Division, Sir Igor Judge once again dealt with the question of adjournments of criminal trials and said ([2008] 1 Cr. App. R. 33, at para. 29):

"Time and time again in this Court emphasis has been laid on the simple proposition that case management decisions are made by trial judges, not by this Court. Adjournments are sought and refused, or granted, on very many grounds; sometimes at the behest of the prosecution, sometimes the defence. Sometimes the decision is insignificant. At others, as here, it is critical to the outcome of the case. But the decision is a decision for what is usually described as the discretion of the judge but it is in fact a decision which reflects his or her judgment on an overall balance of all the material, as it stands before him at the time when the decision has to be made."

5 Two recent authorities require more detailed consideration. *R.* v. *Boardman* (2) involved allegations of stalking by the defendant against various women. Having first appeared in the Magistrates' Court on November 25th, 2013, in May 2014 Boardman requested from the prosecution disclosure of call data and cell site analysis in respect of two different mobile telephones. The data had been listed by the prosecution as

exhibits but it did not produce it. In June 2014, a follow-up letter was sent to the prosecution and, in August, the request was repeated. The trial was listed for October 15th, 2014, but by October 7th, 2014 the prosecution had still not produced the data, although it indicated that it would be available by the trial date. Boardman sought an adjournment on the grounds that the material would require expert analysis. The prosecution agreed that it was appropriate to adjourn the trial. In the Crown Court, Dutton, J. refused what would have been an eight-month adjournment but, owing to the delay on the part of the prosecution, he ruled that the telephone data would, pursuant to s.78 of the Police and Criminal Evidence Act 1984, be excluded on the basis that it would be unfair. The effect of that ruling was to bring the proceedings to an end. Pursuant to certain statutory provisions, which may not have an equivalent in this jurisdiction, the Crown Prosecution Service applied for leave to appeal the terminating ruling. The Court of Appeal granted leave to appeal but dismissed the appeal itself. Although, narrowly construed, *R.* v. *Boardman* is a judgment on the exclusion of evidence pursuant to s.78 of the Police and Criminal Evidence Act 1984, the principles engaged relate to the grant of an adjournment. Sir Brian Leveson, President of the Queen's Bench Division, giving the judgment of the court, highlighted that the case was an example of the problems that arise when a case is not properly progressed. He considered the Crown's submissions that this was the first trial listing, that there was no prejudice to the defendant and that the effect of the terminating ruling was that eight complainants would not have their complaints aired. In relation to prejudice to the defendant and the pressure under which the Crown Prosecution Service operates, he had this to say ([2015] 1 Cr. App. R. 33, at para. 35):

> ". . . [I]t is beyond argument that the defendant would have suffered prejudice: this complaint (dating back to 2013) had been hanging over his head for many months and he was being asked to wait a further eight months before it would be resolved. Finally, whereas we have no doubt that the judge fully recognised the pressure under which the CPS was working, if effective case management is to mean anything that could never be an answer for it would effectively be to abnegate responsibility for trial progress and make it subject to the vagaries of CPS preparation."

6 *R.* v. *Boardman* was considered in *R.* v. *Salt* (8). The defendants, D and T, were brothers charged with rape, false imprisonment and assault by penetration. After three previous fixtures had been vacated, the trial was listed at the Crown Court in November 2014. There were grave failings in relation to disclosure. On the first day of the trial, material was provided which resulted in a revised schedule of unused material containing over 25 further items. Disclosure continued throughout the prosecution case and, by Day 7 of the trial, the schedule of unused material contained a further

53 items. On the eighth day of the trial, the judge discharged the jury on the basis that the interests of justice and a fair trial required that disclosure be completed for the prosecution witnesses to be properly cross-examined. Before the hearing of an application for a stay on the grounds of abuse of process, a further 23 items were added to the schedule of unused material. The judge considered whether there should be a stay and reached the following conclusion:

> "I have come to the conclusion that the failures in this case are so fundamental and far-reaching as to make this a truly exceptional and unique case. Notwithstanding the seriousness of the charges, I take the view that this abuse is so exceptional the court ought to mark its wholesale condemnation of the prosecution by allowing a stay and refusing the prosecution the right to pursue the case."

In the Court of Appeal, the appeal was allowed and the stay of proceedings was set aside. Lord Thomas, C.J., giving the judgment of the court, categorized *Boardman* as a case in which the prosecution failures were such "as to undermine confidence in the criminal justice system and to bring it into disrepute" ([2015] 1 W.L.R. 4905, at para. 44) and explained the link between the case before him and *Boardman* and the test to be applied (*ibid.*, at para. 43):

> ". . . [A]lthough the way in which the judge proceeded in *R.* v. *Boardman* was by refusing to admit the evidence under section 78 of PACE, and the present case involved a stay for abuse of process, the court should approach both types of application on the same basis, namely by balancing the material considerations and determining whether it was in the interests of justice, including the interest in the integrity of the criminal justice system, that the proceedings should be allowed to continue. It is *where continuation would offend the court's sense of justice and propriety or would undermine public confidence in the criminal justice system and bring it into disrepute* that a court should make an order which would have that effect." [Emphasis supplied.]

He then identified the factors that need to be considered when balancing the public interest in bringing to trial those charged with serious offences, the rights of complainants, the rights of the defendant, the fairness of the trial process, and the integrity of the criminal justice system. Those apposite in the context of the present application are:

(i) the gravity of the charges;

(ii) the denial of justice to the complainants;

(iii) the necessity for proper attention to be paid to disclosure;

(iv) the nature and materiality of the failures;

(v) the failures (if any) by the defence lawyers;

(vi) the waste of court resources and the effect on the jury; and

(vii) the availability of other sanctions.

It is apparent from *R.* v. *Boardman* that a further factor that can properly be taken into account is that of prejudice to the defendant.

7 Although counsel are essentially agreed that this court should apply the "interests of justice" test articulated in *R.* v. *Salt*, there is, however, a very narrow issue between them. Mr. McGuinness submits that the issue of whether there can be a fair trial is a very relevant factor that has to be taken into account by the court when exercising its judgment as to where the balance of the public interest ultimately falls. For his part, Mr. Barnard (whose submissions are adopted by Ms. Cotcher in their entirety) argues that, whilst it is open to the court to take account of a determination or concession that a fair trial can be had, it does not have to do so.

8 It is, I think, self-evident that, conceptually, the ability to have a fair trial has to form part of any analysis which touches upon the interests of justice. If no fair trial can be had, then no adjournment should be granted and/or the proceedings should be stayed because it would offend the first limb of the two categories of cases justifying a stay for abuse of process identified in the judgment of Lord Dyson in *R.* v. *Maxwell* (7) ([2011] 1 W.L.R. 1837, at para. 13). On July 31st, 2015, I ruled ("the Abuse Ruling," reported at 2015 Gib LR 261) that, subject to the Crown using a further six search terms in respect of item 192, an application to stay the proceedings on the basis that a fair trial could not be had failed. Delaying the trial by a further four to six months would not, in my view, materially alter the ability to have a fair trial. However, it is because a fair trial can be had that the broader "interests of justice" test has to be applied to determine whether a refusal of an adjournment is necessary to protect the integrity of the criminal justice system.

9 I turn to consider the factors identified above, albeit not in the same order.

The gravity of the charges

10 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. A person convicted of any such offence is liable to imprisonment for seven years. For the Crown, it is said that the allegations against the defendants are of significant seriousness. The case being advanced is that the defendants deliberately and dishonestly misrepresented the true financial position of a firm of lawyers in circumstances in which they knew that the apparent

honesty and integrity of the false information they provided would be accepted by others.

11 This is an unusual case in that in *R.* v. *Marrache* (6), a trial in which Grigson, Ag. J. discharged the jury because of multiple allegations amounting to jury tampering and thereafter continued without a jury, the judge made the following findings in respect of KR and IW, who are identified by the letters W and X respectively (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.
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> 48 I am satisfied as to be sure—
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> (i) that YZ did indeed 'cook the books'; and
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> (ii) that they did so for the benefit of M & Co. There was no benefit to YZ.
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> 49 In my judgment, it is inconceivable that they would have done so without informing the partners and SM."

The defendants did not participate in that trial, nor would the focus of the evidence have been on their conduct and, self-evidently, in the absence of a conviction, the presumption of innocence afforded by s.8(2)(a) of the Constitution prevails, but nonetheless the finding highlights that there is a strong *prima facie* case against them.

12 As aforesaid, the maximum sentence which could be imposed on these defendants, if convicted, is of 7 years (per count). It is, however, instructive to note that, whilst Benjamin Marrache was sentenced to 11 years' imprisonment, Isaac Marrache and Solomon Marrache were sentenced to 7 years. The involvement alleged against KR and IW by the Crown is not in the nature of their having actively participated or derived any financial benefit from the fraud but rather that they suppressed knowledge of the fraud and, in doing so, allowed it to continue for longer than would otherwise have been the case, possibly resulting in more Marrache & Co. clients being defrauded. Objectively, if proved, the criminality of these defendants would be less serious than that of the three Marrache brothers.

Denial of justice to victims

13 Although, undeniably, a failure to prosecute KR and IW would result in a partial denial of justice to the victims, the perpetrators of the fraud

itself have been tried and convicted and therefore, to a significant extent, victims have, through that judicial process, been afforded moral redress.

Failures by the defence lawyers

14 There is no suggestion of fault on the part of either defendant or their legal teams.

Prejudice to the defendants

15 Although evidence was seized in May 2010 for the purposes of the case against the Marrache brothers, the investigation proper against KR and IW started in March 2012. For the reasons set out in the Abuse Ruling, there is no serious prejudice to the extent that no fair trial can be had. However, it is clear from *R.* v. *Boardman* (2) ([2015] 1 Cr. App. R. 33, at para. 35) that, in the context of the present application, the concept of prejudice is wider and it is beyond argument that it includes having criminal proceedings hanging over one's head for a protracted period.

16 As regards KR, reliance is also placed on two very short medical reports produced by an English general practitioner practising in Spain. In the first, dated December 3rd, 2014, he opines that KR has been suffering from stress illness for some time and that it has become progressively more severe as a consequence of the delays being encountered in the case. He expresses concern that further delay could lead to "a mental breakdown, and the possibility of heart attack or stroke." In the second shorter report, dated October 12th, 2015, he expresses his alarm at the marked deterioration in KR's mental condition, which he says is predictable given "the extent of stress and particularly the length of time he has been subjected to it." Although, evidently, these reports have been obtained for a very limited purpose, they do not comply with the requirements of the Criminal Procedure Rules, Part 19, and, in particular, they do not contain a statement to the effect that the expert understands his duty to the court and that he has complied with it (see Criminal Procedure Rules, r.19.4(j)). That necessarily impacts upon their reliability and consequently I attach very little weight to them.

The availability of other sanctions

17 Counsel are agreed that it is not open to the court to impose upon the prosecution any sanction, including a costs sanction. In this regard, and allied to the issue of prejudice to the defendants, it is worth highlighting that KR is funding his defence and that evidently the aborted trials and the need for repeated case management hearings will undoubtedly have led to a significant increase in legal fees. For his part, IW now has the benefit of legal aid, albeit he only became entitled after spending his savings in legal representation.

The waste of court resources and the effect on the jury

18 Evidently, aborting a trial with a time estimate of some six weeks on three different occasions has had an impact upon the trial dates being offered to other defendants. As regards potential jurors, the impact has been minimal. Some 700 were summonsed for the October date, but when it became apparent that the trial was not going to proceed they were notified by letter that they did not have to attend.

The necessity for proper attention to be paid to disclosure

19 For the purposes of the hearing of this application, Mr. Barnard produced a document entitled "Particulars of Prosecution Faults" in which he identified 47 alleged faults, to which one further was added in his oral submissions, many of which were accepted as such by the prosecution. Whilst it is important to consider in some detail the prosecutorial shortcomings, Mr. Barnard's granular approach puts at risk the assessment of the overall picture by unduly emphasizing shortcomings which may have had a minimal impact upon the proceedings. I adopt a somewhat broader approach and deal with the failings which have significantly impacted upon the time that it has taken for this case to proceed, or amount to unreasonable conduct on the part of the prosecution.

20 Although much of the evidence against KR and IW was seized in May 2010, it was done for the purposes of the case against the Marrache brothers, with the investigation proper against these defendants not starting until March 2012. In the Abuse Ruling, I held that March 2012 is the operative date from which delay by the prosecution is to be measured (2015 Gib LR 261, at para. 13). It is undeniable that there was a delay of 14 months, from March 2012 to May 2013, in commencing the interviews and a further delay of some five months, until November 2013, in concluding them. In the Abuse Ruling, I went on to hold that, whilst the deployment of resources in the Marrache case provided a credible explanation for the delay, it did not amount to a justification and that that period of some 20 months during which there was minimal progress in the prosecution of this action is undoubtedly a serious prosecutorial failure (*ibid.*).

21 Thereafter, the delay is attributable to disclosure issues and, as I have alluded to earlier, at the heart of the problems encountered by the prosecution is item 192. 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. In the context of disclosure of documents, it is a vast amount of digital information.

22 Section 240 of the Criminal Procedure and Evidence Act 2011 ("the CPEA") requires a prosecutor to make disclosure of prosecution material "as soon as is reasonably practicable after . . . the defendant is committed

or sent for trial . . .” KR and IW were committed on December 9th, 2013 but it was not until March 24th, 2014 that the prosecution took any proactive steps in relation to disclosure, when it wrote to the defence informing it that the Royal Gibraltar Police (“the RGP”) would be undertaking a search of the data using keywords and inviting it to suggest further reasonable search terms. No justification has been given for that delay of 3½ months, which clearly runs counter to the “as soon as is reasonably practicable” statutory obligation.

23 On April 11th, 2014, defence search terms were provided to the prosecution on behalf of KR. The prosecution replied by letter dated April 14th, 2014 stating that the additional terms would be passed to the RGP but that, on initial consideration, they would result in a large mass of irrelevant material, and that it would respond further after discussing the matter with the RGP. On April 15th, 2014, at a plea and case management hearing when the trial was set down for January 19th, 2015, the prosecution made the court aware of its concern in relation to disclosure and said that it was possible that the issue would have to be considered by the court at a later date. Despite these concerns, it was not until May 19th, 2014 that the RGP commenced the keyword search.

24 From the defendants’ perspective, there was no progress whatsoever in relation to disclosure and, at a hearing on August 27th, 2014, Prescott, J. emphasized the need to deal with outstanding matters promptly to ensure that the January 2015 date was not jeopardized.

25 The lack of progress came about because of the difficulties which the RGP were encountering with item 192. According to the evidence of Police Const. Oton, on May 19th, 2014 the RGP commenced a keyword search. However, on May 30th, 2014, he found the forensic computer without power which had been caused by a general power cut on May 29th, 2014. That interruption then required a restart of the keyword search as opposed to recommencing where it broke off. On June 6th, there was another general power cut and the process again had to be restarted. These difficulties arose despite the forensic computer being attached to an “uninterruptable power supply” which should have maintained the computer’s power supply until the RGP emergency generator started. However, on both these occasions, the generator did not start. To make the search more manageable and reduce the impact of possible power cuts, as from June 6th, 2014, Police Const. Oton ran the searches on each individual item at a time, so that any completed search would, despite power cuts, be saved. On July 9th, 2014, the forensic computer suffered a system error; on July 28th, it was affected by another power cut when the emergency generator again failed to start and it suffered another system error on October 9th, 2014, with the keyword search process being completed by November 20th, 2014.

26 The failure by the RGP to put in place measures to ensure that the search was not repeatedly adversely affected by power cuts and that they were using robust software that would not suffer repeated system errors are matters for which they can properly be criticized.

27 It would appear that the delays generated by the RGP failures led to the prosecution finding itself in the horns of a dilemma. By letter dated September 18th, 2014 from the prosecution to KR's lawyers, the prosecution identified potentially disclosable material which had not already been disclosed, including item 192, which it described as "the contents of the Marrache & Co. server," and said that the material would be disclosed by Friday, September 26th, 2014 and that it was "a special decision taken in respect of this case, given the nature and quantity of the material and in order to allay any reservations that fair and proper disclosure has not been made." Initial disclosure and a schedule of unused material was served on September 26th, 2014, with item 192 described in the following terms: "The relevant material is: Hard drive containing all EnCase evidence files from Marrache computers and server." In a witness statement of September 26th, 2014, Police Insp. Tunbridge had this to say about item 192:

> "Item 192 relates to the EnCase files from hard drives seized as part of the investigation. The quantity of data held on these hard drives is such that it is impractical to search. Though search terms were agreed with defence counsel in an attempt to narrow down the information to be reviewed in this case for the purposes of disclosure, this has also proved impractical. The searches on this data with the agreed search terms have been ongoing for a number of months and are still not completed. A view has therefore been taken in consultation with counsel to disclose the said material as is."

One can surmise that the prosecution was concerned that it had not provided disclosure of material within item 192 and, to mitigate that failure, went on to provide it wholesale. Disclosing item 192 in that manner was in breach of the English *Attorney General's Guidelines on Disclosure*, at para. 3 (2013), which, albeit referring to the English Criminal Procedure and Investigations Act 1996, states:

> "Properly applied, the CPIA should ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources. Consideration of disclosure issues should be an integral part of a good investigation and not something that exists separately."

In a similar vein, the English *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court*, at para. 4 (2006 ed.) states that the overarching principle is that unused material only falls to be

disclosed if, and only if (subject to overriding public interest considerations), it satisfies the test for disclosure and then goes on to state (*ibid.*, at para. 31):

> ". . . [T]he larger and more complex the case, the more important it is for the prosecution to adhere to the overarching principle in paragraph 4 and ensure that sufficient prosecution resources are allocated to the task. Handing the defence the 'keys to the warehouse' has been the cause of many gross abuses in the past, resulting in huge sums being run up by the defence without any proportionate benefit to the course of justice."

That failure on the part of the prosecution was then compounded by the fact that (i) there was a "black hole" of some 300,000 documents which were unsearchable, and (ii) item 192 was served in a format which was unreadable. Both those matters require some more detailed consideration.

28 The evidence of Police Const. Oton is that, on November 20th, 2014, once the keyword search process was completed, he identified files with the .pdf extension and he exported these to be processed with software having Optical Character Recognition functionality. The criticism that can properly be levied against the prosecution is that the defence teams were not told of this in the September letters but were only informed on or about November 19th, 2014 when junior defence counsel visited the RGP in an effort to progress the proper disclosure of item 192.

29 When the prosecution served item 192 on the defence, it was provided in a format which could not be accessed. KR's legal team almost immediately took the matter up with the Royal Gibraltar Police and, on October 9th, wrote to the Attorney-General's Chambers. The second paragraph of the letter sets the scene:

> "We have set out in previous correspondence the difficulties that we are encountering in processing and searching the disclosed data. We had understood that the RGP were endeavouring to identify a solution which would assist us in our attempts to review the material in advance of the January trial. That included the possible option of having this data available on a web-based e-disclosure host so that all parties can have secure and private access to it in an easily searchable format. Prosecution counsel, Mr. Tonna, also indicated that he would try to assist. We have now been informed that, despite those ongoing efforts, leading prosecution counsel has directed that it is for the defence to make its own arrangements."

It then goes on to make the self-evident point that "disclosure of material in a format that is inaccessible to the defence (or only accessible upon payment of many thousands of pounds) cannot amount to proper disclosure" and later goes on to suggest that "in large cases, disclosure policy

documents are served, and access can be given to a disclosure suite which allows defence lawyers to perform electronic searches on material."

30 The reply from Crown Counsel came on October 15th, 2014 when he stated that "the Crown will assist in matters of disclosure but cannot be expected to fund software for a defendant to examine unused material" and he went on to state that he would extract and provide document files from the EnCase evidence files whilst pointing out certain limitations which would attach to that process.

31 By October 21st, 2014, the KR defence team had the data available in a readable format but issues as to the ability to search it remained, in that it could not be searched through the use of keywords, date ranges *etc.,* and it again raised the need for hosting software. It made the valid point that it failed to see why the defendant should have to pay thousands of pounds to enable him and his lawyers to search through masses of information provided at such a late stage.

32 The position then adopted by the prosecution was somewhat surprising in that, despite having repeatedly treated and referred to the material in item 192 as prosecution material, by letter dated October 22nd, 2014 it said that—

> ". . . the material contained on the EnCase image is not prosecution material as defined in the legislation. The Crown made this disclosure despite considering that it does not fall within the definition of 'prosecution material' in relation to the investigation of, or criminal proceedings against your client, but which, on a consideration of specific requests contained in the disclosure note of September 2014, it provided."

The matter came before Prescott, J. on November 7th, 2014 when the Crown submitted that it had previously categorized item 192 as prosecution material in error. In a detailed extempore ruling, she held that item 192 came within the definition of prosecution material in s.239 of the CPEA, and that it had to be provided in a searchable format and, no doubt concerned about the looming trial date, she said "clearly time is running, we have the Christmas period coming up and the matter must be done expeditiously." As I said in my Abuse Ruling, the re-categorization of item 192 is indicative of a desire to avoid onerous disclosure obligations (2015 Gib LR 261, at para. 19). In the event, to date almost 9,000 documents from item 192 have been disclosed to the defence. However broad the approach in applying the s.239(1) disclosure criteria, the 9,000 items disclosed presumably fall within the statutory test and therefore the prosecution must consider that they might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defendants.

33 Despite Prescott, J.'s admonition, the prosecution did not make proposals in relation to the manner in which item 192 was to be disclosed until November 17th, 2014. KR's lawyers considered these inadequate and returned to court on November 19th, 2014, when Prescott, J. observed:

> ". . . My only comment at this stage is that it's regrettable—and I address this to the prosecution—regrettable that this discussion didn't happen 10 days ago. That's 10 days lost. I'll wait to hear what you have to say tomorrow, but I expect there to be proper disclosure by no later than Monday 24th."

On November 20th, 2014, the prosecution agreed to pay for the use of Intella software, but in part only, and at a hearing on that day, Prescott, J. said:

> "My view is simple. I continue to say that the prosecution must make full disclosure, and provide you with the documents in a searchable format. Clearly that has to be done. I'm not going to start naming dates, but it has to be done now. And I've so ordered. If the prosecution doesn't do that because of spending this money and for whatever reason it won't do that, then on its shoulders be it. If as a consequence of that you make an application for abuse of process, then do so. There's not much more I can do at this stage other than say to the prosecution what I've already said—present these documents in a searchable format and do so by the end of next week . . . I'll reiterate to the prosecution that it's your responsibility to ensure that there's full disclosure, to comply with the order I made two weeks ago, in a realistically searchable format, and do so, so the matter can proceed on January 19th."

Despite the clear terms of the court order, the prosecution wrote to KR's lawyers on November 25th, 2014 in the following terms:

> "Despite the prosecution's view that it has satisfied its disclosure obligations following Prescott, J.'s ruling of November 7th, 2014 in funding £12,750 to prepare the said data and OCR'ing . . . it will nonetheless provide payment of the second element of the solution, namely indexing, maintenance, hosting, access, searchability and further functionality for both defendants at the additional cost of £18,500. This will benefit both defendants but is only to be made on the written assurance by Messrs. Hassans that the prosecution exposure will be limited to that, namely, the total sum of £31,250 and no more."

Given that the obligation to provide disclosure "in a realistically searchable format" was and remains squarely upon the prosecution, seeking to limit its financial exposure was unprincipled and, I agree with Mr. Barnard, with no foundation in law.

34 The upshot of the delays in providing proper disclosure of item 192 was that, on December 10th, 2014, the trial was moved to February 16th, 2015 when Prescott, J. said: "I wish to stress that this date [February 16th, 2015] has been set with every possible degree of finality, that trial date will not be moved." I also agree with Mr. Barnard that it is clear from that language, and, indeed, not surprising given the many failings by the prosecution in its disclosure duties, that the court was at the end of its tether.

35 Unfortunately, in the event matters became even more complicated. On November 25th, 2014, KR's lawyers wrote to the prosecution in the following terms:

> "We write in relation to the EnCase hard drive, item 192 on the schedule of unused material. Given that the EnCase image contains the server and workstations seized from the law firm Marrache & Co., we would be grateful if you could confirm that any necessary waivers of privilege have been obtained."

The prosecution replied by letter dated December 4th, 2014, saying:

> "On November 25th, you wrote requesting confirmation that waivers of privilege regarding the material on the EnCase servers had been obtained. None have been obtained as they are not needed due to the application of the criminal exception covering communications in furtherance of crime established in *R.* v. *Cox and Railton*."

Mr. Barnard submits that, in the absence of evidence to suggest that the prosecution had previously considered whether the fraud exception applied in blanket terms, the justification appears to have been retrospective. It is undoubtedly a possibility, but the absence of evidence is an insufficient basis upon which to necessarily draw such an inference. Indeed, in a ruling handed down on January 9th, 2015, Prescott, J. levied some criticism upon KR's lawyers when she said "it is regrettable that the first defendant, who has throughout been aware of the nature of the contents of the EnCase, has not taken the point sooner" (2015 Gib LR 104, at para. 3).

36 In a ruling handed down on January 9th, 2015, Prescott, J. did not accept the submission advanced by the prosecution that the court had no jurisdiction to consider the LPP issue. She held that the court has a supervisory role in any disclosure proceedings (*ibid.*, at para. 7) and ruled that the iniquity exception did not operate in the very broad manner advanced by the prosecution (*ibid.*, at para. 16). Of some significance, given how the disclosure process went on to develop, are the following paragraphs of her ruling (*ibid.*, at paras. 16–17):

> "16 In respect of those clients who suffered actual loss as well as those who deposited moneys, LPP is waived, but, in my view, not by

way of a blanket waiver. The waiver must be only to the extent envisaged by Lord Goff of Chieveley in *Francis & Francis* . . . and that is that the client's—

> '. . . privilege will only be excluded in so far as it relates to communications (or items enclosed with such communications, or to which reference is made in them) made with the third party's intention of furthering a criminal purpose. No other communication will be excluded from the application of the privilege; and the client's confidence will to that extent be protected.'

17 The first defendant relies on the speech of Lord Griffiths in *Francis & Francis* . . . for the proposition that proper procedure in cases where a client's LPP is about to be waived is for him to be put on notice of the same after the order is made but before his privilege is actually waived. No statutory provisions supporting this view have been brought to my attention, but, in any event, it seems to me that the procedure highlighted by Lord Griffiths is a sensible one to follow because the innocent individual who has been caught up in wrongdoing should be given the opportunity to make representations before his rights to LPP are extinguished."

37 I certainly doubt that the defence's motivation in raising the issue of LPP came about because of a principled concern for the LPP of former Marrache & Co. clients; rather, adopting the language in *Boardman* (2), it is possible that it was seen as a potential trap for the prosecution. But, although the defence may have hoped that the prosecution would fail to deal with LPP adequately thereby providing it with grounds upon which to make an application to bring the prosecution to an end, it was not a trap created by the defence but rather one identified by it. Irrespective of the defendants' motivation, protection of LPP is a fundamental tenet of our system of law, and they undoubtedly advanced a proposition of law which was correct, and responsibility for the failure to fully recognize and act upon the LPP issues in relation to item 192 falls squarely with the prosecution. The upshot at that stage was that the trial had to be adjourned once again, this time from February 16th, 2015 to October 19th, 2015.

38 It is noteworthy that, at the hearing on January 9th, 2015, the prosecution said this:

> ". . . [A]s each day passes, those documents that are not the subject of LPP can then be disclosed to the defence in a drip-feed fashion, daily or every other day, so that it doesn't have to wait 2–3 months to receive them. That would be intolerable and unacceptable."

Despite verbalizing such a robust view, the disclosure process was to take much longer and indeed has still not been completed.

39 The matter next came before Prescott, J. on January 29th, 2015, when she ruled as to the suitability of Mrs. Peralta to carry out the LPP sift. In an extempore ruling, the learned judge held that the mere fact that Mrs. Peralta had worked in the Attorney-General's Chambers for many years (but who at the time was with the Human Resources Department) was not sufficient to establish that her ability to discharge her role as independent counsel would be compromised.

40 Mrs. Peralta was not instructed until February 23rd, 2015 and, on March 27th, 2015, KR's lawyers wrote to the Crown expressing concern that, despite the prosecutor's comments on January 9th, 2015, little or no progress had been made. In the event, the first tranche of disclosure from item 192 was provided on May 29th, 2015 with a second and third tranche following on June 19th, 2015 and July 6th, 2015.

41 By letter from the Government Law Offices of August 27th, 2015, the defence was informed that Mrs. Peralta had completed her work in respect of the original search terms on or about June 26th, 2015, and that she had been assigned to duties advising the RGP and the view had been taken that it was no longer appropriate to have her undertake further LPP review of material on item 192. Crucially, at para. 26 of the prosecution response to defence skeleton, the following is said:

> "The reason Mrs. Peralta was assigned to duties advising the RGP is *that this was always intended to happen*, and her assignment had been deferred pending the undertaking of the LPP review. Once the LPP review of the items and documents produced by the original search terms had ended on June 26th, the deferred reassignment then became effective from the following week." [Emphasis supplied.]

The failure to inform the defence and the court that it was always intended to assign Ms. Peralta to duties advising the RGP was a very serious fault on the part of the prosecution and it is clear that this would have been highly relevant material which Prescott, J. would have taken account of when assessing Mrs. Peralta's suitability to undertake the role of independent counsel.

42 In the Abuse Ruling, I expressed the view that, out of 60 additional search terms which the defence wanted used against item 192, it was reasonable and proportionate for the following six to be used: Robinson, KAR, KR, Ian, IW, and Wood (2015 Gib LR 261, at para. 24). I ruled that, although I could not direct the Crown to undertake the search, failure by it to do so could result in serious prejudice to the defendants and consequently lead me to stay the proceedings. Notwithstanding that I found that there was little merit in the remaining 54 additional search terms, the Crown should never have resisted the application of these six terms which, given that they are the defendants' names or initials, are self-evidently relevant.

43 David Smith was re-instructed on July 22nd and Dina Suisi on July 27th, originally to review the material identified from two discrete IW search terms ("Ian" and "I Wood") that the prosecution had agreed with IW's legal team, and thereafter the additional terms identified in the Abuse Ruling. However, despite the fact that the Abuse Ruling was handed down at the end of July, it waited until August 28th, 2015 to instruct the first two independent counsel from Mr. McGuinness's chambers and until September 14th to instruct a third to assist with the review.

44 To compound matters, it turned out that there was a problem with Ms. Suisi's appointment in that she had worked at Marrache & Co. during the relevant period. It is said by Mr. Barnard and it is not challenged by the prosecution that her name appears in several prosecution exhibits. Although it is surprising that Ms. Suisi failed to identify the potential conflict, from the prosecution's perspective, the failure to establish the link can be described as a venial sin. What was highly unfortunate was its response when it was brought to its attention: "You have raised the query and we have answered it. It is a matter for you if you intend to do anything with the information provided."

45 In the event, the concerns arising from the appointment of Mrs. Peralta and Ms. Suisi as independent counsel were subsumed by a more fundamental issue. At the hearing before me on September 21st, 2015, Mr. Barnard asked that the counsel then instructed to undertake the LPP review, Mr. Smith and Ms. Suisi, should cease undertaking the review and that the work done by them since August 1st, 2015 should be reviewed by other counsel not employed by the Government of Gibraltar Law Offices. On August 1st, 2015, a new Government of Gibraltar Law Offices ("GLO") was created. The GLO consolidated all previous governmental law departments and the provision of legal services to the Government, and consists of four distinct legal offices, including what was the Attorney-General's Chambers, now re-designated as the Office of Criminal Prosecutions & Litigation ("OCPL"). Mr. Michael Llamas, Q.C. was appointed to the office of Attorney-General on May 19th, 2015; however, before that date he was the Chief Legal Advisor to the Government and was and remained (following his new appointment) responsible for the European Union and International Department ("EUID") and the Legislation Support Unit ("LSU"), before their re-designation and incorporation into the new structure. Mr. Smith and Ms. Suisi worked for these departments. The submission advanced for the defence was that the creation of the new structure, all of which comes under the general supervision and superintendence of the Attorney-General, meant that individuals within it could not be seen to be independent of the Attorney-General. For the Crown, it was submitted that the use of the word "superintendence" to reflect the relationship between the Attorney-General and the OCPL was not pure happenstance but rather echoed the

relationship between the English Attorney General and the principal prosecuting authorities in England. At the time, I expressed the very strong tentative view that, given the terms of s.59 of the Constitution, the statutory role of the Attorney-General was akin to that of the English D.P.P. and that, whilst the exercise of those prosecutorial powers could be delegated, he could not divest himself of them, that "superintendence" was a term of art in an English statute, and that there was no equivalent provision in Gibraltar. I went on to express the further view that the lack of independence of Ms. Suisi and Mr. Smith did not arise by virtue of the establishment of the GLO but rather, given Mr. Llamas's pre-existing and continuing headship of the EUID and of the LSU, came about upon his appointment as Attorney-General in May 2015. No ruling was required, and Mr. McGuinness conceded the point for the purposes of these proceedings. The effect of this was that most of the review by independent counsel of item 192 had to be redone and it became apparent that there was no prospect of the trial starting on October 19th, 2015.

46 Mr. Barnard criticizes the prosecution for failing to recognize the fundamental flaw in the review process brought about as a consequence of the appointment of Mr. Llamas as Attorney-General. In my view, it is unfair to expect the administration to direct its mind to any one particular prosecution when an individual is appointed to an office or when undertaking a systemic review and restructure of the various government law offices. But although moral blame may not attach, the fact remains that responsibility for the resultant delay falls squarely upon the prosecution. The prosecution is, however, susceptible to criticism for failing to properly acknowledge the significance of the issue when it was brought to its attention on August 17th, 2015. By letter dated August 27th, 2015, the prosecution asserted that the position of Mr. Smith and Ms. Suisi remained unchanged and was happy for the issue to remain unresolved until the case management hearing scheduled for September 21st, 2015, when, as aforesaid, it went on to concede the point.

47 There is another aspect of the LPP process in respect of which the prosecution showed poor judgment. Prescott, J. made clear that innocent Marrache & Co. clients should be given the opportunity to make representations before their rights to LPP were extinguished (2015 Gib LR 104, at paras. 16–17, set out at para. 36 above). Despite this clear determination, the prosecution in its skeleton for the September 21st, 2015 hearing, at para. 18, said: "At the disclosure stage, the issue of apparent privilege and the possibility of the iniquity exception applying are matters for the Crown, through trial counsel in the present case, to consider." Essentially, what the prosecution intended was to contact former clients of Marrache & Co. only after prosecuting trial counsel had determined whether an item met the s.239 disclosure test, was apparently privileged but possibly subject to the iniquity exception. Thereafter, at the hearing on September

24th, 2015, it sought to minimize the scope of its obligation by seeking to go behind Prescott, J.'s ruling and submitting that *R.* v. *Central Criminal Ct., ex p. Francis & Francis (A Firm)* (3) "could not be read across." As a matter of principle, it is clearly wrong that the prosecution should have sought to avoid the court's ruling.

The nature and materiality of the failures

48 At its most basic, the very slow progress of the investigation over a period of some 20 months had a commensurate impact on having the matter set down for trial, with this being compounded by the litany of failures in managing the disclosure process, the upshot being that three trial dates have been vacated.

49 At the hearing of this application, the prosecution properly acknowledged the unjustifiable delay for which it had previously accepted responsibility in June 2015 and which I found in the Abuse Ruling, and further accepted responsibility for the delay since July. Looking forward, should the application for an adjournment be granted, the prosecution would have to complete the LPP review. At the time of the hearing, some 28 independent counsel (junior barristers in English chambers) were undertaking the process. Former Marrache & Co. clients would then need to be given the opportunity of protecting their LPP which reviewing counsel consider to be excluded by the iniquity exception. At that stage, disclosure issues in respect of that type of material could be determined. Mr. McGuinness postulated February/March 2016 as a possible trial window. Adopting the language of investment, past performance is not necessarily indicative of future results and it may be that finally the prosecution has become alive to the need to properly resource this prosecution. Nonetheless, the review process has to be completed, and an unknown number of former clients contacted and given the opportunity to maintain their privilege. The defence has, in the past, asked the prosecution to provide a disclosure management document and, whilst I do not accept the submission that this of itself can be categorized as a prosecution fault, its absence means that there is no properly considered timetable against which to judge what may only amount to an aspiration. In those circumstances, Mr. McGuinness's estimate strikes me as somewhat optimistic.

50 In considering the materiality of the failures, I also need to address the issue of the relevance of the material to be disclosed. Mr. McGuinness submits that, so far, nothing of real relevance has in fact been disclosed. That may be so, but it is hard to reconcile that assertion with the fact that some 9,000 items have been made available to the defence. But assuming that to be the case, the fundamental purpose for which this disclosure is sought is that the defence being advanced is that the Marrache brothers were deliberately feeding false information to Baker Tilly, IW and KR and that there may be reference or coordination in respect of such lies and

misinformation in communications passing between them. On that premise, a single document could substantially undermine the prosecution case and there can be no element of certainty as to whether or not such an item exists without properly completing the disclosure process.

Conclusion on the balancing factors

51 Self-evidently, each case turns on its own facts, but if *R.* v. *Boardman* (2) and *R.* v. *Salt* (8) are used as comparators, it is apparent that the failings by the prosecution (even after taking account of the complexity of the disclosure process and the fact that the volume of material from which disclosable documents are to be extracted is vast) are both more serious and protracted than in *Boardman* and comparable to those in *R.* v. *Salt.* I do not ignore the seriousness of the charges, but they are of a completely different order from those in *R.* v. *Salt* and, unlike *R.* v. *Salt*, there have been no failings by the defence. Moreover, in contrast to these two cases, through the trial of the Marrache brothers, their victims have had the benefit of some moral redress.

52 At the heart of the failings may have been limited resources and an earnest desire to minimize cost, but this has resulted in a failure to deal with both investigation and disclosure obligations with any degree of expedition and an inclination to avoid what undoubtedly are onerous obligations. Despite the investigation having started in March 2012, the failings by the RGP and the prosecution have resulted in the Crown being unable to meet three trial dates. This is compounded by uncertainty as to whether a trial date in February/March 2016 can be met.

53 A fair trial can still be had and I evidently acknowledge the importance of the public interest in having those charged with serious offences tried, but the failures by the RGP and the prosecution are so fundamental that, balancing the relevant factors, it is not in the interests of justice to grant the prosecution an adjournment and vacate a trial date a third time.

54 The prosecution indicated at the hearing that, in the event that the application was dismissed, it would be offering no evidence. In the circumstances, pursuant to s.288(3) of the CPEA, I direct that a verdict of not guilty be recorded against each defendant in respect of the various counts.

Application dismissed.