[2010–12 Gib LR 291]

MARRACHE v. TRUSTEE OF THE PROPERTY OF MARRACHE

COURT OF APPEAL (Kennedy, P., Aldous and Parker, JJ.A.): March 9th, 2012

Bankruptcy and Insolvency—debtor's dealings and property—private examination—court has discretion under Bankruptcy Act 1934, s.24, to allow private examination of debtor to enable official trustee to trace and identify assets—risk of self-incrimination in parallel criminal proceedings avoidable by "stop order" preventing answers being placed on record, or other orders to prevent disclosure—not contrary to Constitution, s.8 right to fair hearing—judge in criminal trial able to exclude evidence affecting fairness of proceedings

An official trustee applied to the Supreme Court to have a bankrupt privately examined pursuant to the Bankruptcy Act 1934, s.24.

The appellant had been a senior partner in the law firm Marrache & Co. when the firm was wound up and joint liquidators appointed. He, together with his two brothers, was accused of misappropriating client funds and charged with conspiracy to defraud. The appellant was made bankrupt and the respondent, the official trustee, applied to the Supreme Court for him to be privately examined pursuant to the Bankruptcy Act 1934, s.24, in order to trace and identify the assets of his estate. Criminal proceedings were pending.

The Supreme Court (Prescott, J.) granted the respondent's application, rejecting the appellant's submission that it would violate his constitutional right to a fair trial by compelling him to incriminate himself in the criminal proceedings, as the examination would be private and the trial judge could prevent misuse of the information obtained. The appellant did not raise the matter of his possible cut-throat defence.

On appeal, the appellant submitted that (a) the Supreme Court had erred, as private examination would violate his constitutional privilege against self-incrimination and prejudice his ability to mount a cut-throat defence in the criminal proceedings, because his answers would probably come into the hands of the prosecution and his co-defendants; and (b) the cut-throat defence point, though not raised below, should be heard on appeal, as it was a serious matter potentially affecting the appellant's liberty and the charges in his indictment had undergone some change since the decision below.

The respondent submitted in reply that (a) there was no violation of the

appellant's right to a fair trial, as the court could prevent his answers from being placed on the court file or from being used in forthcoming criminal proceedings by imposing a "stop order," by refusing to make a special direction under the Bankruptcy Rules 1954, r.15, or by imposing terms upon those participating in the proceedings to prevent disclosure of the information and, through the discretion of the trial judge, prevent prejudicial evidence affecting the fairness of the trial from being admitted; and (b) the cut-throat defence point had not been raised below and could not be raised on appeal.

Held, dismissing the appeal:

(1) The Supreme Court had not erred in allowing the official trustee to examine the appellant privately about his estate and finances. As the examination would not be a precursor to criminal proceedings, but would be directed at tracing and identifying the appellant's assets, it would not violate his constitutional privilege against self-incrimination, nor prejudice the efficacy of a cut-throat defence. The examination would not be public and the court could prevent his answers from being placed on the court file or used in forthcoming criminal proceedings by imposing a "stop order," by refusing to make a special direction under the Bankruptcy Rules, r.15, or by imposing terms upon those participating in the proceedings to prevent disclosure of the information and, through the discretion of the trial judge, prevent prejudicial evidence affecting the fairness of the trial from being admitted contrary to the 2006 Constitution, s.8 (paras. 43–51; para. 53).

(2) Further, although an appellant would not normally be permitted to raise on appeal matters not argued below, a cut-throat defence was a serious matter potentially involving the appellant's liberty and the charges in his indictment had undergone some change since the decision below. In those unusual circumstances, the court would allow the point to be raised on appeal (para. 41).

Cases cited:

(1) *Arrows Ltd. (No. 2), Re*, [1994] 1 BCLC 355, followed.
(2) *Atherton, In re*, [1912] 2 K.B. 251, referred to.
(3) *Bennett, In re* (1877), 5 Ch. D. 145, referred to.
(4) *Cloverbay Ltd.* v. *Bank of Credit & Comm. Intl.*, [1991] Ch. 90; [1990] 3 W.L.R. 574; [1991] 1 All E.R. 894; [1990] BCC 414; [1991] BCLC 135, referred to.
(5) *Poulson (a bankrupt), In re*, [1976] 1 W.L.R. 1023; [1976] 2 All E.R. 1020, followed.
(6) *Rolls Razor Ltd., Re*, [1968] 3 All E.R. 698, followed.
(7) *Rolls Razor Ltd. (No. 2), In re*, [1970] Ch. 576; [1970] 2 W.L.R. 100; [1969] 3 All E.R. 1386, referred to.
(8) *Rottmann, In re*, [2009] Bus. L.R. 284; [2008] EWHC 1794 (Ch), *dicta* of Judge Kaye, Q.C., applied; on appeal, [2010] 1 W.L.R. 67;

[2009] Bus. L.R. 1604; [2009] EWCA Civ 473, *dicta* of Ward, L.J. applied.

(9) *Saunders* v. *United Kingdom* (1997), 23 EHRR 313; [1997] BCC 872; [1998] 1 BCLC 362, referred to.

(10) *Shannon* v. *United Kingdom* (2006), 42 EHRR 31, distinguished.

Legislation construed:

Bankruptcy Act 1934, s.24: The relevant terms of this section are set out at para. 6.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.8: "If any person is charged with a criminal offence . . . the case shall be afforded a fair hearing . . ."

Bankruptcy Rules 1952 (S.I. 1952/2113), r.15, as amended: The relevant terms of this rule are set out at para. 29.

T. Kendal and *I. Massias* for the appellant;
N. Cruz and *Ms. C. Borrell* for the official trustee.

1 **PARKER, J.A.:**

Introduction

This is an appeal by Mr. Isaac Marrache, a bankrupt, against an order made by Prescott, J. on October 7th, 2011. By her order, the judge granted the application of the official trustee, pursuant to s.24 of the Bankruptcy Act 1934, that the appellant be privately examined.

Background

2 The background to the bankruptcy proceedings is well known, and I can summarize it shortly. On February 15th, 2010, provisional liquidators were appointed in respect of the law firm, Marrache & Co., of which the appellant was a partner with his brother Benjamin. A third brother, Solomon Marrache, was also concerned in the business of the firm, being designated as its "financial director." The appellant was the senior partner of the firm. On March 17th, 2010, the firm was wound up on the petition of a creditor, and joint liquidators were appointed.

3 On November 26th, 2010, the appellant was made bankrupt. The three Marrache brothers have since been charged with conspiracy to defraud, based upon alleged misappropriations of clients' funds and other alleged financial irregularities. Criminal proceedings are pending against them.

4 On March 21st, 2011, against a background of continuing non-co-operation by the appellant, the official trustee applied under s.24 of the Bankruptcy Act for an order that the appellant be privately examined

before the court in relation to his estate, and for the disclosure of documents relating to his finances and his financial dealings.

Section 24 of the Bankruptcy Act 1934

5 Section 24 of the Bankruptcy Act 1934 provides as follows (so far as material):

> "(1) The court may, on the application of the official trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor . . . [or other specified persons] . . . and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings and property.
>
> . . .
>
> (3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property."

6 It is to be noted that the structure of the Bankruptcy Act differs in this respect from that of the English Insolvency Act 1986 ("the 1986 Act"), in that the 1986 Act deals separately with public and private examinations, whereas the only relevant section of the Bankruptcy Act is s.24. In the 1986 Act, public examinations are dealt with by s.133 (in relation to corporate insolvency) and s.290 (in relation to individual bankruptcies); whereas the jurisdiction to order a private examination is conferred by s.236 (inquiries into a company's dealings and property) and s.366 (inquiries into a bankrupt's dealings and property). Section 366 of the 1986 Act corresponds to s.24 of the Bankruptcy Act.

The events leading up to the hearing of the official trustee's application

7 On January 21st, 2011, the official trustee wrote to Massias & Partners, the solicitors for the appellant, with a list of questions concerning the contents of a particular file, and notifying them that unless replies were forthcoming within 14 days the official trustee would apply for the appellant to be privately examined. No reply was forthcoming from Massias & Partners until 4.36 p.m. on the deadline date of February 4th, 2011. Moreover, the reply was not a substantive reply but a request for sight of the file in question. On the same day, the official trustee wrote to the appellant saying that his failure to meet the deadline was unacceptable. On March 21st, 2011, the official trustee filed the present application seeking an order that the appellant be privately examined. The application notice was served on the appellant on July 25th, 2011, notwithstanding that no date for the hearing of the application had as yet been provided by the Supreme Court Registry. On September 6th, 2011, Massias & Partners

were informed that the return date for the hearing of the application would be Monday, September 26th, 2011. By a letter dated September 20th, 2011 (which was delivered by hand and also sent by fax), the official trustee asked Massias & Partners whether the appellant would be opposing the application, and if so on what grounds. There was no reply to that letter, but late on Friday, September 23rd, 2011, skeleton arguments were served on Cruz & Co. (the official trustee's solicitors), thereby indicating for the first time that the application was opposed, and the grounds of that opposition.

The judge's judgment

8 The judge delivered a full and careful judgment. She began by relating the events leading up to the hearing of the official trustee's application, as summarized above.

9 She then turned to s.24 of the Bankruptcy Act, and set out the relevant provisions of that section.

10 The judge went on to cite the well-known passage from the judgment of Browne-Wilkinson, V.-C. (as he then was) in *Cloverbay Ltd.* v. *Bank of Credit & Comm. Int.* (4), in which he referred to the need for the court, in exercising its discretion whether to order a private examination, "to balance the requirements of the liquidator against any possible oppression to the person to be examined." As Browne-Wilkinson V.-C.'s reference to "the liquidator" makes clear, the application with which the court was concerned in *Cloverbay* was an application for a private examination under s.236 of the 1986 Act in relation to the affairs of an insolvent company.

11 After referring to *Cloverbay*, the judge continued: "The *raison d'être* of s.24 [of the Bankruptcy Act] is clearly to provide the official trustee with a supplemental avenue through which to obtain information which he considers may be pertinent."

12 She then quoted from the judgment of Buckley, J. in *Re Rolls Razor Ltd.* (6), where he described the purpose of the court's power to order an examination in the context of a company insolvency as being to enable the liquidator ([1968] 3 All E.R. at 700)—

> "as effectively as possible and, I think, with as little expense as possible . . . to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation."

Plainly the same applies, *mutatis mutandis*, to a private examination in bankruptcy proceedings.

13 The judge then addressed a submission by Mr. Massias that the appellant would not be able properly to answer questions put to him by the official trustee at a private examination without access to documentation in the hands of the official trustee. The judge rejected that submission. She regarded that as an insufficient reason to prevent questions being put to the appellant, not least because he could not be certain how far he would be impeded by lack of documentation in answering questions being put to him until he knew what the questions were. In this context the judge referred to a passage from *In re Rolls Razor Ltd. (No. 2)* (7) in which Megarry, J. ([1970] Ch. at 596) recognized that it was a matter for the court's discretion whether notice of questions was given to the proposed examinee in advance of the examination. However, he went on to observe that the prior submission of written questions "may hamper or delay the process."

14 The judge in the instant case continued:

> "In this case the bankrupt has provided some answers to the questions posed under cover of [the official trustee's] letter dated January 21st, 2011, but has done so some eight months after those questions were first raised. His response appears to have been dilatory and, by natural inference, evasive. I am of the view that to provide him with written questions in advance will 'hamper or delay the process' further."

15 The judge went on to point out, rightly in my judgment, that enthusiastic co-operation by the bankrupt was not a pre-requisite of success so far as the official trustee was concerned, and that it was a matter for him whether and to what extent the information obtained by him in the course of the examination would be useful. In this context she quoted a passage from the judgment of James, L.J. in *In re Bennett* (3) (5 Ch. D. at 148).

16 The judge then turned to the second ground advanced by Mr. Massias in opposition to the official trustee's application, *viz.* that given that the appellant is currently facing criminal charges, in respect of which a criminal prosecution is pending, it would be unfair to put him in a position where he is compelled to answer questions which might incriminate him. In support of that submission, Mr. Massias cited a passage from the judgment of Phillimore, J. in *In re Atherton* (2) for the proposition that the practice in London, at that time, where the debtor was facing criminal charges, was to adjourn his public (I emphasize "public") examination until after the criminal trial. (Nowadays, the English court is given specific power to do this by r.6.175(6) of the English Insolvency Rules 1986.)

17 The judge observed that, later in his judgment, Phillimore, J. stressed that the rule was only a rule of convenience and that there might be

occasions where it would be desirable not to follow it. She regarded the instant case as such a case. She went on:

> "For the size and history of Gibraltar the liquidation of Marrache & Co. is a most substantive liquidation and I am informed that most of the claims relate to client moneys which it is alleged have been misapplied by the partners of the firm. Numerous individuals are claiming substantial losses and the official trustee argues and it is a matter of pressing public interest that a full, thorough and expeditious investigation is carried out. I balance all this against the degree of oppression which might be caused to the bankrupt by losing his privilege against self-incrimination in the face of pending criminal proceedings."

18 The judge then referred to *Re Arrows Ltd. (No. 2)* (1), for the proposition that the court has a discretion whether to allow a private examination to proceed notwithstanding that criminal proceedings are pending against the examinee and in particular to a passage in Steyn, L.J.'s judgment where he said this ([1994] BCLC at 362):

> "For my part I am willing to accept that, if the examination proceeds, the appellant will be deprived of the valuable tactical advantage of silence in the criminal proceedings. But the risks mentioned do not by themselves endanger the fairness of the criminal proceedings."

19 The judge continued:

> "It shall be for the trial judge to ensure the fairness of the criminal proceedings and it will be for him in the exercise of his discretion and, in the knowledge of the precise nature of the evidence in question, to rule upon whether any such evidence obtained in the course of the private examination ought to form part of the case for the prosecution. The time to consider the impact upon the criminal trial of any answers given in the course of the private examination must, by virtue of logic alone be at the criminal trial and by natural extension of argument such a consideration must be carried out by the trial judge and not this court."

20 In support of that view, the judge cited a passage from the judgment of Stuart-Smith, L.J. (as he then was) in *In re Arrows (No. 2)* (1), in which he pointed out (*ibid.*, at 360) that it would be a matter for the judge at the criminal trial whether or not to admit a particular piece of evidence, pursuant to the discretion conferred on him by s.78 of the English Police and Criminal Evidence Act 1984. Prescott, J. observed that although that Act was not on the statute-book in Gibraltar, it "is very much part of our jurisprudence and the criminal courts have close regard to it."

21 Referring to the judgment of the European Court in *Saunders* v.

United Kingdom (9), on which Mr. Massias relied in support of his submissions, the judge said this:

> "The crucial issue, it seems to me, which arises from that judgment is the use which is made by the prosecution of the information obtained . . . However, the judgment suggests no bar to examination of a person who faces [a] criminal trial; the bar relates to the use that is made by the prosecution of the information elicited, and that brings me full circle to the filter that is the trial judge."

22 The judge accordingly rejected Mr. Massias' second ground of opposition to the official trustee's application.

23 Finally, the judge noted that what was proposed was a private, as opposed to a public, examination of the appellant. She referred to the additional protection which could be afforded to an examinee in a private examination by virtue of the closed nature of the process, as illustrated by *In re Rottmann* (8) ([2009] Bus. L.R. 284, at para. 31, *per* Judge Kaye, Q.C., and in the Court of Appeal).

The appellant's grounds of appeal

24 The appellant advances two grounds of appeal. His first ground of appeal is that a private examination at this stage would infringe his constitutional right to a fair trial pursuant to art. 8 of the 2006 Gibraltar Constitution (which reproduces art. 6 of the ECHR).

25 The second ground of appeal is that in exercising her discretion as to whether to make an order for the appellant's private examination the judge failed to take any, or sufficient, account of five particular factors, as follows:

(a) that the appellant is facing criminal charges which raise "the self-same issues upon which the private examination is to be based";

(b) that the appellant will have no right to silence at such an examination, so that his right against self-incrimination will be fundamentally undermined;

(c) that any evidence obtained as a consequence of the private examination will, in all likelihood, be provided not only to the Royal Gibraltar Police but also to the appellant's co-defendants in the criminal proceedings;

(d) that there is what the appellant describes as "a substantial and entrenched cut-throat defence" being run by the appellant and the co-defendants in the criminal trial; and

(e) that there is no rule of evidence which would permit the judge at the

criminal trial to prevent the appellant's co-defendants introducing evidence obtained during the private examination.

26 It is contended that in the light of those factors, a private examination of the appellant would be oppressive.

The arguments on this appeal

27 In his helpful oral submissions, Mr. Kendal concentrated on one point only, *viz*. that the order for private examination is oppressive in that it will probably, if not certainly, result in the appellant's co-defendants in the criminal proceedings having access to information to which they would not otherwise be entitled, thus creating a serious risk of prejudice to the appellant's defence in the criminal trial and a consequent infringement of his constitutional right to a fair trial. I will refer to this point as "the cut-throat defence" point.

28 Mr. Kendal was constrained to accept that the cut-throat defence point had not been raised before the judge, but he submitted that in a case of this seriousness, potentially involving the liberty of the subject, this court should nevertheless allow it to be argued. He pointed out that the charges in the indictment had undergone a degree of change since delivery of the judge's judgment, suggesting that this was another reason why it would be appropriate for this court to hear argument on the cut-throat defence point, notwithstanding that it is a new point.

29 Turning to the substance of the cut-throat defence point, Mr. Kendal relied on r.15 of the Bankruptcy Rules 1952, which provides as follows (so far as material):

> "(1) All proceedings of the court shall be kept and remain of record in the court . . .
>
> (2) The trustee, the debtor, and any creditor who has proved, or any person acting on behalf of the trustee, debtor, or creditor, and, by special direction of the judge or registrar, any other person, may at all reasonable times inspect the file of proceedings."

30 Whilst accepting that in the absence of a special direction the co-defendants had no entitlement to inspect the court file, Mr. Kendal submitted that once the transcript of the private examination had been placed on the court file there would inevitably be a serious risk that the information which it contained would find its way into the hands of the co-defendants.

31 Mr. Kendal informed us that the official trustee and the special manager would in all likelihood be called as witnesses by the prosecution. He submitted that in these circumstances any order made by the court in an attempt to restrict access to information revealed at the private

examination would almost certainly be circumvented. He further submitted that given the competing interests of the defendants in the criminal proceedings, the judge presiding over the criminal trial would be bound to allow the evidence in question to be put before the jury. In that respect, he submitted, the co-defendants would be in a different position from the prosecution. The prosecution would be unable to use the evidence in question, but the same could not be said of the co-defendants.

32 When it was put to him that the court might, by means of a "stop order," prevent the transcript being placed on the court file, at least until the appellant's discharge from bankruptcy, Mr. Kendal submitted that such an order would not be effective to remove the risk of the appellant's defence at the criminal trial being undermined.

33 Although Mr. Kendal did not refer to them specifically in his oral submissions, a number of further submissions were made in the helpful written skeleton argument provided by Mr. Massias. Thus, it is submitted that the proposed private examination would amount to no more and no less than a cross-examination of the appellant on the criminal charges. Reliance is also placed on the decision of the European Court in *Shannon* v. *United Kingdom* (10).

34 In *Shannon*, the applicant was the chair of a registered social club in Belfast. In May 1997, the police raided the club's premises and removed a quantity of documents. In January 1998, he was required to attend an interview with a financial investigator appointed under the Proceeds of Crime (Northern Ireland) Order 1996 and he answered all the questions put to him. In April 1998, he was charged by the police with false accounting and conspiracy to defraud. In June 1998, a further notice was served on him under the 1996 Order requiring him to attend a further interview with financial investigators. The appellant's solicitors responded by seeking a written guarantee that no information or statement obtained during the interview would be used in criminal proceedings. That guarantee was not forthcoming, and accordingly the appellant refused to attend the further interview. A summons was then issued charging the applicant with the statutory offence of failing to attend the interview without reasonable excuse. The applicant was duly convicted of that offence by the magistrates' court and fined. His appeal by way of case stated was successful, but his conviction was subsequently confirmed by the Northern Ireland Court of Appeal. The criminal proceedings were later struck out on grounds of delay. The applicant then claimed just satisfaction in the European Court on the ground that the conviction and fine for failing to attend an interview with financial investigators about specific offences, where he had already been charged with those offences, infringed his right to a fair trial. The European Court upheld his claim.

35 The European Court observed (42 EHRR 31, at para. 27) that there

was nothing objectionable under art. 6 in requiring the provision of answers or information where that is done for use in an extra-judicial inquiry, and that the question whether the use made of evidence in a subsequent trial was compatible with art. 6 depended on the circumstances of the case. It observed (*ibid.*, at para. 44) that the privilege against self-incrimination did not *per se* prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned. In the instant case, however, the applicant (*ibid.*, at para. 38)—"was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid." The court accordingly concluded (*ibid.*, at para. 41) that

> "the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in connection with events of which he had already been charged with offences was not compatible with his right not to incriminate himself."

36 In sum, it is submitted on behalf of the appellant that had the judge conducted the balancing exercise properly and had she been alerted to the cut-throat defence point, she would have reached the conclusion that the official trustee's application should fail.

37 In relation to the cut-throat defence point, Mr. Cruz reminded us of the reluctance of an appellate court to interfere with a discretion exercised by the lower court on a point which was not raised in the lower court.

38 Addressing the general thrust of the submissions made on behalf of the appellant, and with particular reference to the cut-throat defence point (should we allow the point to be argued), Mr. Cruz stresses the closed nature of the private examination process and the powers of the court to prevent use being made of the appellant's answers to questions in the criminal proceedings. He points out that, by r.15(2) of the Bankruptcy Rules 1952, only the official trustee, the debtor and proving creditors (which do not include the appellant's co-defendants) are entitled to inspect the court file: others need the court's leave to do so, by means of a "special direction." He also relies on the extra-statutory "stop order" procedure (referred to with approval by Walton, J. sitting in the Chancery Division in *In re Poulson (a bankrupt)* (5) ([1976] 2 All E.R. at 1029–1030)) whereby the court can withhold the transcript of a private examination from being placed on the court file until, if necessary, the debtor's discharge from bankruptcy.

39 Mr. Cruz also referred us to the decisions in *Rottmann* (8) as confirming the extent of the court's powers to prevent access to information disclosed in the course of a private examination.

40 Mr. Cruz submits that the judge carried out the balancing exercise properly and that the cut-throat defence point is in any event of no substance.

Conclusions

41 As to the cut-throat defence point, it is indeed the case that, as a general rule (and absent any relevant change of circumstances), an appellate court will not interfere with an exercise of discretion by the lower court on a ground not advanced to the lower court. However, I regard the instant case as somewhat unusual, and in the particular circumstances of this case I would allow the cut-throat defence point to be argued in this court, notwithstanding that it was not raised before the judge.

42 That said, in my judgment it has no more substance than the other points raised on behalf of the appellant.

43 In my judgment the crux of the matter is that the examination is to be a private examination as opposed to a public one. As Judge Kaye, Q.C. and the Court of Appeal recognized in *Rottmann* (8), in the context of a private examination the court can ensure that the examinee's privilege against self-incrimination is properly protected. As Judge Kaye, Q.C. said ([2009] Bus. L.R. 284, at para. 31):

> "In a private examination, it seems to me that the court could control the transcript and the use of the transcript and copies of the transcript, if necessary, in a most draconian way, for example, by ensuring that no copy of the transcript was placed on the court file."

44 To similar effect, Ward, L.J. in the Court of Appeal said this ([2010] 1 W.L.R. 67, at para. 14):

> "The Bankruptcy Court has control over the use to be made of these proceedings [*i.e.* the private examination] since they are proceedings in private. It will, I believe, be a contempt of court to reveal the information in chambers without permission of the court."

45 Ward, L.J. also said (*ibid.*, at para. 16): "It is for the judge dealing with the bankruptcy matter to exercise his discretion in allowing or not allowing incriminating questions to be put to and to be answered by Mr. Rottmann."

46 In my judgment, the situation in *Shannon* (10) was materially different from that which obtains in the instant case. In *Shannon*, the interview with the investigators was, in effect, part and parcel of the criminal process, in that the applicant's answers were the precursor to the charges subsequently laid against him. The focus of the interview and of the criminal proceedings were the same. In the instant case, by contrast,

the focus of the official trustee at the private examination will not be on the question whether the appellant has committed criminal offences; rather its focus will be on the need to trace and identify assets forming part of the appellant's estate for the benefit of his creditors.

47 I accordingly reject the submission that the private examination will amount to no more nor less than cross-examination directed at establishing the criminal charges.

48 In the second place, in *Shannon* (10) there were only limited powers for the court to prevent use being made of the applicant's answers at interview in the criminal proceedings. In the instant case, by contrast, the court has unfettered control over the extent to which use can be made in other proceedings of answers given by the appellant at a private examination (see *Rottmann* (8)). In that context, the position of the appellant's co-defendants is no different from that of the prosecution, so far as use of information disclosed in the course of the private examination is concerned.

49 As *Rottmann* illustrates, it will be open to the judge presiding over the private examination to make a "stop order," the effect of which will be to prevent both the prosecution and the co-defendants gaining access to the transcript of the private examination. In addition, it would in my judgment be open to the judge to impose terms on the official trustee and his staff, and indeed on anyone else participating in the private examination, preventing them from revealing information about the private examination in the criminal trial without the further leave of the judge.

50 In short, the fact that the examination is to be a private examination ensures, in my judgment, that the appellant's constitutional right to a fair trial pursuant to art. 8 of the 2006 Gibraltar Constitution will be in all respects preserved.

51 As to the balancing exercise carried out by the judge in relation to the points argued before her, I can for my part find no fault with it. Indeed, like the judge, I have no doubt that the use of the private examination procedure in the instant case represents a wholly justifiable attempt by the official trustee to progress the bankruptcy process as effectively as possible for the benefit of creditors.

52 I would dismiss this appeal.

53 **KENNEDY, P.:** I agree, and add a few words of my own in relation to the cut-throat defence point because, as has been explained, that point was not argued in the court below. I do not need to rehearse the safeguard which can be provided in relation to the private examination to try to ensure that nothing is said or recorded which will jeopardize the rights of the bankrupt to a fair criminal trial. This court is entitled to conclude that

the safeguards will be effective, but if, as postulated, some question were to be asked of a witness by counsel appearing on behalf of a co-defendant which, if answered, would render the applicant's trial unfair because it would reveal something prejudicial to the interests of the applicant said by him at a time when his right to silence was curtailed, then it would be the duty of the judge presiding at the criminal trial to act to ensure that the applicant's rights were not infringed. Precisely how he would exercise his powers would depend upon the circumstances, but the powers of that judge constitute an additional safeguard for the applicant, and so support the conclusion reached by Prescott, J. in the court below.

54 **ALDOUS, J.A.** concurred with both judgments.

Appeal dismissed.

[2010–12 Gib LR 304]

VIALES v. GIBRALTAR HEALTH AUTHORITY

COURT OF APPEAL (Kennedy, P., Aldous and Parker, JJ.A.): March 9th, 2012

Civil Procedure—pleading—amendment—amendment to be sought promptly after was or should have been identified as necessary—delay prejudicing fairness of trial brings balance of justice down in favour of disallowing amendment—delay of 2½ years no automatic bar to amendment

Civil Procedure—pleading—amendment—omission/removal of limitation defence not clear and unequivocal statement that will not rely upon it in future—no estoppel or waiver precluding amendment to resurrect limitation defence

The appellant brought an action in the Supreme Court seeking damages from the Gibraltar Health Authority for failing to diagnose her diabetic retinopathy.

Since her childhood, the appellant had suffered from diabetes and, during her minority, had attended a paediatric diabetic clinic in Gibraltar. The clinic had sent reports to her general practitioner, Dr. Beguelin, with whom the appellant continued to have appointments before leaving for