Volaw Trust and Corporate Services Ltd; Mr Berge Gerdt Larsen v The Office of the Comptroller of Taxes

Jurisdiction:	Jersey
Judge:	H. W. B. Page
Judgment Date:	29 July 2013
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Text

[2013] JRC 148C

ROYAL COURT

(Samedi)

Before:

H. W. B. Page, **Q.C., Commissioner, sitting alone**.

Between
Volaw Trust and Corporate Services Limited
Mr Berge Gerdt Larsen
Appellants
and
The Office of the Comptroller of Taxes
Respondent

Advocate A. D. Hoy **for Volaw**.

Advocate J. Harvey-Hills **for Larsen**.

Advocate J. D. Kelleher **for the Comptroller**.

Authorities

Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008.

Volaw Trust and Corporate Services Ltd and Larsen -v- Comptroller of Taxes [2013] JRC 095 .

Civil Proceedings (Jersey) Law 1956 (as amended).

Watkins -v- Egglishaw [2002] JLR 1 .

In re Elgindata No. 2 [1992] 1 WLR 1207 .

A.E.I. Rediffusion Music Ltd -v- Phonographic Performance [1999] 1 WLR 1507 .

Société Anonyme Pecheries Osendaises -v- Merchants' Marine Insurance Company [1928] 1 KB 750 .

In re Gibson's Settlement Trusts [1981] 1 Ch. 179 .

Grindlays Bank Plc -v- Corbett [1987–88] JLR N2B .

Roach & Ors -v- Home Office [2009] EWHC 312 .

Wright -v- Bennett [1948] 1 KB 601 .

Fox -v- Foundation Piling Limited [2011] EWCA Civ 790 .

Dick -v- Dick [1990] JLR N2C .

Cotrel -v- Christmas [2013] JRC 101 .

Jersey Financial Services Commission -v- A.P. JFSC v. Black (Jersey) Limited & Ors. [2007] JLR 1 .

SGI Trust & Anor. -v- Wijsmuller & Ors [2008] JRC 078 .

Marange Investments -v- La Generale des Carrieres et des Mines 19th June 2013 (Unreported).

Bradford Metropolitan District Council v. Booth (2001) 3 LGLR 8 .

Baxendale-Walker v. Law Society [2006] EWHC 643 (Admin.) .

Southbourne Sheet Metal Company Limited [1993] 1 WLR 244 .

R (Perinpanathan) v. City of Westminster Magistrates' Court [2010] 1 WLR 1508 .

Company Directors Disqualification Act 1986.

Proceeds of Crime Act 2002.

Grimes v. Crown Prosecution Service [2004] 1 FLR 910 .

Magistrates' Courts Act 1980.

Solicitors Act 1974.

Taxation — final costs judgment.

THE COMMISSIONER:

1 On 16 th May this year the Court gave judgment dismissing appeals by Volaw Trust & Corporate Services Limited ("Volaw") and Mr Berge Larsen against the decision of the Deputy Comptroller of Taxes to serve a notice dated 28 th May, 2012, on Volaw ("the May 2012 Notice") under the Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008 ("the 2008 Regulations") requiring the production by Volaw of certain categories of documents and a small number of individually specified items said to be relevant to the tax affairs of Mr Larsen in Norway. The notice was served in response to a formal request for assistance made by the Norwegian Tax Authority ("the Tax Authority") in February 2010 ("the Request"). The matter of costs was left over for argument at a later stage and it is that subject with which I am now concerned.

2 Had the May 2012 Notice been the only notice of its kind served in response to the Tax Authority's request there would be little to argue about: the Comptroller would be entitled to his costs of the unsuccessful appeals on the standard basis of taxation — which is what the Comptroller asks for. In the event, however, the matter is complicated by the fact that the May 2012 Notice was only the last of a sequence of notices, all substantially in respect of the same matter, earlier notices having been served on Volaw by the Comptroller in April 2010, November 2011 and January 2012 and formal appeals having been lodged by Volaw (alone) against the November 2011 Notice and by both Volaw and Mr Larsen against the January 2012 Notice. No costs issue arises in connection with the April 2010 Notice as such because the notice was withdrawn before any appeal was launched.

3 It is convenient to reproduce the section of the Court's judgment of 16 th May this year which summarises the circumstances in which this sequence of notices came about:–

"22. On 26 th February, 2010, following the coming into force of the TIEA on 7 th October, 2009, the Tax Authority made a further approach, this time

in the form of a request under Article 4 of that agreement addressed to the then Comptroller of Taxes, Mr Malcolm Campbell. In the case of Norway, the "Competent Authority" for the purposes of making such a request for information is the Minister of Finance or his authorised representative. The Tax Authority is a subordinate agency of the Ministry of Finance, one of whose five regional tax offices is known as Skatt Vest (Tax West). The covering letter dated 26 February, 2010, came from the Tax Authority and was accompanied by a memorandum headed 'Norwegian Tax Administration' signed by a senior tax adviser on behalf of Skatt Vest. The memorandum was headed "Request for assistance in tax investigation of Mr Berge Gerdt Larsen and his closely related companies", was similar in form to the July 2008 request addressed to the Attorney General, and consisted of some seven pages of text accompanied by one hundred and twenty-one pages of attachments.

23–26. ……

27. Although a period of over two years was to elapse before the May 2012 Notice was served on Volaw by the Comptroller, it is the request of 26 th February, 2010, by the Tax Authority that remains the trigger and principal foundation for that notice. Three other notices were issued in the intervening period but, of these, two (dated 22 nd April, 2010, and 7 th November, 2011, respectively) were subsequently withdrawn and the third (dated 20 th January, 2012,) has been stayed pending the outcome of the present proceedings. Although these are now, in a sense, largely a matter of history a brief explanation of the course of events is necessary in order to understand what follows.

28. On 22 nd April, 2010, having received the Request from the Tax Authority, Mr Campbell issued a formal notice to Volaw requiring it pursuant to Regulation 3 to furnish "all information, documents, correspondence, financial statements, files and details of any other information concerned with or connected to the named subjects". The subjects in question were named as Mr Larsen himself together with three of the companies listed in the Request and a fourth the name of which plainly should have corresponded with the fourth company named in the Request but which was erroneously described. But the validity of this notice was challenged by Mourant on behalf of Mr Larsen on a number of grounds including in particular that it was incorrect for the Tax Authority to assert, as it did, that the request concerned "criminal tax matters", given that the Authority was only responsible for administrative tax matters, not criminal investigations or prosecutions. This and subsequent exchanges with Mourant led in due course to a protracted correspondence between on the one hand Mr Campbell and on the other the Norwegian Tax Authority, Ministry of Finance and Public Prosecutor and eventually, in September 2011, to withdrawal of the 22 nd April, 2010, Notice and, on 7 th November, 2011, to the issue of a new notice addressed once again to

Volaw ("the November 2011 Notice").

29. The November 2011 Notice required the production by Volaw, for the period 1 st January, 1996, to 31 st December, 2008, of — broadly speaking — documents relating to the four companies listed in the Request (the name of the of the fourth company now being correctly given).

30. However, various concerns about this new notice were again quickly raised, this time by Voisin on behalf of Volaw, the main point of objection being that the demand was said to be at odds with the views previously expressed by the Attorney General. Voisin called for a moratorium while the Attorney General was consulted, a suggestion that the Comptroller rejected on the basis that following the entry into force of the Jersey/Norwegian TIEA it was for him alone to decide whether to issue a notice in response to a request received under that agreement. Voisin then served a notice of appeal, citing as grounds that the notice was unlawful in that it sought information for a civil tax investigation rather than a criminal tax matter; that the demands of the notice were too wide and amounted to a fishing expedition; and that it was not formulated with sufficient detail. There followed, on 13 th January, 2012, a meeting attended by Voisins (for Volaw), Mourant (for Mr Larsen), Carey Olsen (for the Comptroller), the Comptroller himself and Mr Colin Powell of the Chief Minister's Department. Mourant and Voisins expressed concerns that the latest notice was unclear, that the Tax Authority appeared to be attempting to assess the tax liabilities of the companies rather than Mr Larsen's liability to income tax, alternatively that in reality the Tax Authority wanted the information for the purpose of assessing Mr Larsen's liability to wealth tax.

31. Shortly after that meeting, on 20 th January, 2012, the Comptroller issued what he described as an "amended notice" in substantially the same form as the previous one but with the addition of a number of significant words designed to clarify the information that was required to be produced ("the January 2012 Notice"). The Comptroller suggested that it would be unnecessary for Volaw to serve a fresh notice of appeal but Voisins and Mourant took a different view, each served new notices of appeal on behalf of their clients, and in March 2012 the Court set a timetable with a view to the consolidated appeals being heard in late July that year.

32. That timetable was, however, overtaken by events. On 28 th May, 2012, prompted by concerns expressed by the Tax Authority that the January 2012 "amended" notice had been too narrowly formulated and a complaint by Volaw that the terms of the notice were still unclear, and having had sight for the first time of the 2006 Production Notices (when they were exhibited to an affidavit sworn by Mr Larsen), the Deputy Comptroller, Mr Andrew Cousins, issued a further notice under Regulation 3 (Mr Campbell

having died earlier that month). This notice ("the May 2012 Notice") was described as "supplemental to" the January 2012 Notice and was designed in particular to make clear that the documents that Volaw was required to produce included all those that had been disclosed in response to the 2006 Production Notices issued under the 1991 Law. From this point onwards, unless otherwise specifically stated, we use the expression "the Comptroller" to mean the Comptroller or the Deputy Comptroller as the context requires."

4 Fresh notices of appeal against this new notice were filed by both Volaw and Mr Larsen. At a pre-trial review on 22 nd October, 2012, it was ordered that the earlier appeals against the January 2012 Notice be stayed pending the outcome of the appeal against the May 2012 Notice and it was on that basis that the matter came before this Court earlier this year. More recently, on 8 th July this year, immediately prior to the costs hearing, the Comptroller gave written notice that he had decided to withdraw the January 2012 Notice as he was satisfied that the May 2012 Notice captured everything required by the operative part of the Tax Authority's Request.

5 At the heart of the debate are divergent contentions of the parties as to how the three appeals — against the November 2011, January 2012 and May 2012 Notices — should be treated for the purposes of costs. The Comptroller, represented by Advocate Kelleher, argues that they need to be looked at in the round and that to the extent that costs were incurred by him in connection with the two earlier appeals which played a necessary and useful part in resisting the appeals of Volaw and Mr Larsen against the May 2012 Notice he is entitled to recover them as costs of and incidental to those later appeals. On the other hand, the appellants, represented by Advocate Hoy (for Volaw) and Advocate Harvey-Hills (for Mr Larsen), contend that each appeal should be treated as a stand-alone proceeding entirely divorced and distinct from the others and that the Comptroller, having withdrawn the November 2011 and January 2012 Notices and thereby rendered the related appeals unnecessary, Volaw in the case of the former and both Volaw and Mr Larsen in the case of the latter are entitled to recover their costs from the Comptroller on an indemnity basis in accordance with the normal practice where proceedings are discontinued. To this the Comptroller replies that even if the earlier appeals are treated as separate proceedings the Court is entitled and should have regard to the fact that the Comptroller is a public authority carrying out a public function, and that to allow the appellants to recover costs incurred in connection with their appeals against the November 2011 and January 2012 Notices would, as Advocate Kelleher put it, "in effect compensate them for the preparation and deployment of documents and arguments which ultimately failed to persuade the Court".

6 To my mind the approach advocated by the appellants requires the Court to adopt a view of events that is wholly artificial and to impose a limitation on the discretion with which the Court is invested for which there is no warrant.

7 The artificiality lies in treating what happened here, as regards the November 2011 and

January 2012 Notices, in the same way as would be appropriate in the case of actions launched but subsequently discontinued in ordinary civil litigation, whereas (i) the context of the appeals in question here is very different and probably *sui generis*; (ii) each of the successive notices was issued in response to a single request from the Tax Authority and intended to fulfil the same purpose; (iii) the fact that a number of successive notices was issued was in reality part and parcel of a single evolutionary process of dialogue between the Comptroller and both the appellants and the Norwegian authorities designed to try to ensure that the final 'requirement' made of Volaw was formulated in a way that took account of such of the multiple objections raised at earlier stages by Volaw and Mr Larsen as were considered legitimate while simultaneously satisfying, according to the Comptroller' judgment, the relevant statutory criteria; and (iv) the reality is that for the most part the grounds of objection raised by Volaw and Mr Larsen remained essentially the same from the outset and, as a result, much of the work that was done on each side in relation to the appeals against the November 2011 and January 2012 Notices was necessarily utilised in the one appeal that was eventually effective: as Advocate Kelleher put it, the earlier appeals became, in effect, rehearsals for the later appeal against the May 2012 Notice.

8 Article 14(4) of the 2008 Regulations provides that on an appeal against a requirement by the Comptroller for the provision of documents or information, the Royal Court "may confirm, vary or set aside the requirement to which the appeal relates, and may make such order as to the costs of the appeal as it thinks fit" (emphasis added). There is no Jersey authority on this specific provision. However, the width of the discretion conferred on the Court is similar to that laid down by Article 2(1) of the Civil Proceedings (Jersey) Law 1956 (as amended):–

> ***"Subject to the provisions of this Part and to rules of court made under the Royal Court (Jersey) Law 1948, the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid."***

The principles on which the Royal Court generally exercises its discretion under Article 2(1) have for some time now been widely accepted to be those suggested by the Royal Court in the case of *Watkins -v- Egglishaw* [2002] JLR 1, those principles having been endorsed by the Court of Appeal on more than one occasion. It was emphasised in that case that the discretion conferred on the Court was a wide one; that it ought not to be treated as fettered by any supposed rule or practice other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in the observations of the Court of Appeal in England *In re Elgindata No. 2* [1992] 1 WLR 1207 at 1213 and *A.E.I. Rediffusion Music Ltd -v- Phonographic Performance* [1999] 1 WLR 1507 at 1522; that the old rule of thumb that costs should ***"follow the event"*** can still be a useful starting point but it is a mistake to strain overmuch to label one party the ***"winner"*** and one the ***"loser"*** when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in those terms; and that ***"the court's task is to take an overview of the case as a whole and to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice"*** (paragraph 7). There is every reason to suppose that similar considerations are appropriate to the exercise of discretion

conferred on the Court by Article 14(4) of the 2008 Regulations.

9 That discretion appears to me to be amply wide enough to make it proper and appropriate for the Court, in awarding costs in relation to the several appeals in question here, to take full account of the considerations referred to in paragraph 7 above and I see no justification for cutting down that discretion in a way that obliges the Court to treat each appeal as a hermetically sealed compartment (as it was put) in the way that the appellants propose. It is common ground between counsel that an award of costs ***"of and incidental to"*** proceedings in the Royal Court can properly extend to costs incurred prior to the issue of proceedings: *Société Anonyme Pecheries Osendaises -v- Merchants' Marine Insurance Company* [1928] 1 KB 750 at 762, 763; *In re Gibson's Settlement Trusts* [1981] 1 Ch. 179; *Grindlays Bank plc -v- Corbett* [1987–88] JLR N2B. Furthermore, the Divisional Court in England in *Roach & Ors -v- Home Office* [2009] EWHC 312 expressly rejected the proposition that the costs of one set of proceedings could never be recoverable as costs of and incidental to another set of proceedings and accepted that costs of representation at an inquest could be recoverable as costs of and incidental to a subsequent civil claim. Davis J. recognised that this might not be permissible where another court had already ruled on the matter of costs in the earlier proceedings: ***"I can well see that where in one set of proceedings a court having power to order costs in terms declines to do so then such order cannot necessarily be trumped by seeking the self-same costs in subsequent proceedings as, purportedly, costs "of and incidental to" the subsequent proceedings***. *Wright -v- Bennett* ***(supra) can be taken as an illustration of that."*** (Paragraph 43). In *Wright -v- Bennett* [1948] 1 KB 601 the lower court had expressly disallowed the costs of the documents in question. That was not the case in *Roach* and it is not the case here. The present hearing is the first occasion on which the costs of any of the appeals has been considered other than the orders made on the directions hearings on 6 th July, 3 rd October and 22 nd October, 2012, that the costs associated with those particular hearings should be costs in cause.

10 Viewed in this way, it appears to me that the Comptroller's costs of and incidental to the appeals against the May 2012 Notice (to which he is entitled) may properly be ordered to include costs incurred by him at any earlier point in time in connection with the earlier two appeals if and to the extent that those costs, had they not been incurred at that stage, would probably have been incurred in any event for the purpose of resisting the appeals against the May 2012 Notice. And I accept Advocate Kelleher's submission that, on any view, those would include the costs of the preparation of the affidavit of Mr Cousins himself and the costs of Mr Drangsholt, the independent Norwegian law witness called on behalf of the Comptroller.

11 Nor is there anything in the appellants' submissions of law that would preclude such an order. Focusing on the earlier appeals, the appellants argue that the proposition that they are the winners and the Comptroller the loser, that by withdrawing the November 2011 and January 2012 Notices the Comptroller has rendered the related appeals nugatory, and that he must, accordingly, accept precisely the same consequences those attending any litigant who discontinues proceedings. I have already touched upon the artificiality of this view of

things given the particular circumstances with which we are concerned here. But it is also right that I should address a number of particular submissions of law advanced by the appellants in support of this thesis.

12 First it is said that there has been what was described in the appellants' skeleton argument as “quite significant push-back in some of the most recent English authorities against the trend to depart too often from the standard position that costs follow the event.” Reference was made to observations made by Jackson LJ in *Fox -v- Foundation Piling Limited* [2011] EWCA Civ 790, with whose judgment Ward and Moore-Bick LJJ agreed, to the effect that there had been “a growing and unwelcome tendency by first instance and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often” (that rule providing, as it does, that the general rule is that the unsuccessful party will be ordered to pay the costs of the unsuccessful party); a tendency that, while a striving for perfect justice, had in his experience resulted in huge additional costs, uncertainty for other litigants, numerous first instance hearings in which the only issue is costs and ***“a swarm of appeals to the Court of Appeal”*** (paragraph 62). It was, suggested Advocate Hoy, likewise time for a retrenchment from the principles of *Watkins -v- Egglishaw*. But, as Advocate Kelleher pointed out, there is nothing before this Court to suggest that the experience in this jurisdiction has been the similar to that described by Jackson LJ or that any change of approach or emphasis is called for.

13 Secondly, the appellants suggest that where proceedings are withdrawn there is a strict and invariable rule that the party discontinuing the proceedings pays the other party's costs on an indemnity basis. This, it is submitted, is the clear effect of two Jersey decisions. First, *Dick -v- Dick* [1990] JLR N2C, in which Le Quesne JA, giving the judgment of the Court of Appeal, said:–

> ***“Mr Scholefield has explained to us the circumstances which led the appellant to take this decision.*** We appreciate those circumstances but it appears to us that if for reasons of his own, whether good or bad, a party who has institutes proceedings subsequently decides to drop them before they come into Court, it is fair that he should pay for that conduct the price of compensating the other party by way of indemnity costs.”

And more recently, *Cotrel -v- Christmas* [2013] JRC 101 a decision of Clyde-Smith Commr. in the course of which he held as follows:–

> ***“The risk as to costs is one of the disciplines that applies to every plaintiff contemplating civil proceedings.*** I have to conclude that these proceedings were issued and interim injunctions obtained in haste, without proper investigation and as a result had to be withdrawn. The principle enunciated in *Watkins -v- Egglishaw* ***of doing justice between the parties must, in my view, mean doing justice in the context of the civil proceedings in which the cost orders are being sought, and not in some wider context.*** In the wider context the plaintiff has suffered a great injustice at the hands of the first and second defendants but in the context of these civil proceedings, it is the first defendant

who has suffered an injustice through the bringing of proceedings which have now been withdrawn.

A useful starting point in civil proceedings as made clear in *Watkins -v- Egglishaw* ***is that costs should follow the event and in the context of these civil proceedings there can be no question that the first defendant is the winner and the plaintiff is the loser.*** The first defendant is not legally aided and justice in the context of these proceedings must mean that he should be awarded his costs. The first defendant would be entitled to pursue the plaintiff for costs on the indemnity basis as made clear in *Dick -v- Dick* , ***but the first defendant seeks only his costs on the standard basis and that is the order that I make."***

14 There are two points here. As regards the Appellants' contention that the discontinuing party must *always* bear the costs of the other party, this is at variance with the decisions of the Royal Court in two cases: *Jersey Financial Services Commission -v- A.P. JFSC v. Black (Jersey) Limited & Ors.* [2007] JLR 1 and *SGI Trust & Anor.* -v- Wijsmuller & Ors [2008] JRC 078, in each of which defendants were to some extent denied their costs. Now it is true, as the Appellants point out, that in neither case does *Dick -v- Dick* appear to have been cited. But both cases were decided subsequent to the re-consideration of the Royal Court's approach to costs twelve years later in *Watkins -v- Egglishaw* and in each case the Court's decision made specific reference to and was evidently informed by *Watkins -v- Egglishaw*. In any event, in *Dick -v- Dick* the discontinuing party's submissions as regards costs appear to have turned exclusively on his *reasons* for withdrawing; and it is plain that in *Cotrel* the learned Commissioner was influenced by the fact that the reason for the withdrawal of the proceedings was that they had been issued and interim injunctions had been obtained ***"in haste"*** and ***"without proper prior investigation"***: in neither case were the circumstances of the kind that gave rise to the decisions in *JFSC -v- Black* and *SGI*. I do not accept therefore that the latter decisions are of doubtful authority as the Appellants contend they are. Even if *Dick -v- Dick* had been cited in those cases it is difficult to think that it would have led to any different conclusions. Other matters apart, it is plain from the report in *Cotrel* that had it been a case of the defendant bringing proceedings on herself, the result might have been different (paragraphs 20 and 28). And the fact that *Dick -v- Dick* was referred to by Commissioner Clyde-Smith again in his very recent decision in *Marange Investments -v- La Generale des Carrieres et des Mines* 19 th June 2013 (Unreported) is neither here nor there given that the only point in issue in that case was whether costs should awarded on the indemnity or the standard basis. It is also true that the circumstances of the present case are of a different kind again from those that arose in *JFSC -v- Black* and *SGI*, but they are, in my view, entirely legitimate considerations on the basis of the modern approach of the courts in this jurisdiction towards costs.

15 The second point made by the Appellants arising from the observations of Commissioner Clyde-Smith in *Cotrel* in the passage set out above is that the principle enunciated in *Watkins -v- Egglishaw* of doing justice between the parties means "doing justice in the context of the civil proceedings in which the costs orders are being sought, and not in some wider context"precludes the Court, when considering costs incurred in connection with

appeals against the November 2011 and January 2012 Notices, from having regard to what happened in relation to the appeals against the May 2012 Notice. But the situation in *Cotrel* was very different. It is evident that the ***"wider context"*** there was what the learned Commissioner spoke of when he started the ***"Decision"*** section of his judgment with these words: "The plaintiff is elderly and has lost a large proportion of her investments. I am inevitably sympathetic to her investments" (paragraph 24), whereas the context of each of the successive Notices and appeals in the present case was, in reality, one and the same for the reasons described earlier.

16 It appears to me, therefore, that however one approaches the matter of costs in the present case, whether by focusing on the appeals against the May 2012 Notice and asking whether costs incurred in connections with the appeals against the earlier notices are recoverable as costs of and incidental to the appeals against the May 2012 Notices (on the ground that they would have been incurred in any event), or by focusing on the appeals against the November 2011 and January 2012 Notices and asking what the proper order should be as regards costs that would have been incurred in any event in connection with the appeals against the May 2012 Notice, the answer is the same: an order of the kind sought by the Comptroller is within the Court's jurisdiction to make as a matter of discretion and is entirely just and appropriate in the unusual circumstances of the present case.

17 That leaves the question what award should be made as regards costs other than those discussed above — that is, costs incurred in connection with appeal against the November 2011 and January 2012 Notices that would probably *not* have been incurred in any event in connection with the appeals against the May 2012 Notice. Mr. Kelleher submits, on the authority of *JFSC -v- Black* and the English Court of Appeal decisions in *Bradford Metropolitan District Council v. Booth* (2001) 3 LGLR 8 and *Baxendale-Walker v. Law Society* [2006] EWHC 643 (Admin.), that the Comptroller being a public authority exercising a public function it would not be appropriate for any costs order adverse to him to be made. Mr. Hoy and Mr. Harvey-Hills submit that *JFSC -v- Black* was wrongly decided in that Jersey law follows — or should follow — English law in this area; that the defining English law decision was and is that of the Court of Appeal in *Southbourne Sheet Metal Company Limited* [1993] 1 WLR 244 in which the Court declined to recognise any special rule attaching to that public authorities as regards costs ("The Crown or a local authority must take its chance on costs, just like any other litigant in these courts", per Nourse LJ at 250-H); that the later English Court of Appeal cases of *Bradford* and *Baxendale-Walker* were decided without either court being referred to *Southbourne*; and that in *JFSC -v- Black* I should have followed *Southborne* (having been made aware of that case and noted the marked disparity between the decision there and the later decisions in *Bradford* and *Baxendale-Walker*). As it was, my conclusions, though not without some hesitation, were expressed in the following terms:–

> ***"(i) On any view, the idea that bodies engaged in performing public-interest functions must in all cases "take [their] chance on costs, just like any other litigant in these courts," as espoused by the members of the English Court of Appeal in*** (*Southbourne* [1993] 1 W.L.R. at 250), ***is at odds with the trend of thinking in the later cases discussed above and would***

appear to be difficult to reconcile with the decision of the Deputy Bailiff in this court in Ani(1). Its rigidity would, in any event, sit uneasily with the general approach of the Royal Court to the exercise of discretion in matters of costs and is not one that I would want to follow unless constrained to do so (which I am not).

(ii) The fact that the unsuccessful or discontinuing party has been engaged in the proceedings in furtherance of its public-interest functions must, to my mind, be* a relevant factor *on the issue of costs. But the matter is best dealt with simply on that basis-as one element relevant to the court's exercise of discretion in any particular case-rather than treating that body's status as automatically giving rise to a hard-and-fast special rule, or, for that matter, even a prima facie *rule.* I say this because, in terms of principle, the justice of the matter can be argued with equal force both ways, as the conflicting English decisions show, and it is quite wrong to be prescriptive on the issue.

(iii) The approach adopted by Lord Bingham in* Bradford *(3), understood in the way that I have suggested, is in my view the proper and fair one and is moreover in keeping with the governing principles in relation to the award of costs in the Royal Court, as summarized in* Watkins v. Egglishaw *(11) ([2002] JLR 1, ***at para. 7).”***

18 What I had said earlier about the approach adopted by Lord Bingham in *Bradford* was that taking his judgment as a whole, it seemed clear that what he was saying, in summary, was that the ordinary rule that costs follow the event does not necessarily apply in such cases; that it may, however, still be proper to order costs against a public authority, even though the authority has not acted unreasonably or in bad faith; that the award of costs remains a matter of discretion, in the light of the circumstances of each particular case; but that in cases such as those under discussion, a court should, among other circumstances, have regard to the two (often competing) considerations referred to by him in his third proposition, that is:–

> ***“Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.”***

It was important, I suggested, to note that Lord Bingham did not speak on any *prima facie* rule that a regulator or the like will not ordinarily be ordered to pay costs in such circumstances, only that it was right that a court, in exercising its discretion, should take into

account additional considerations peculiar to the nature of proceedings.

19 What the Appellants' argument fails sufficiently to acknowledge is that the difficulty of reconciling the decisions in *Bradford* and *Baxendale-Walker* with *Southbourne* was discussed at length in *R (Perinpanathan) v. City of Westminster Magistrates' Court* [2010] 1 WLR 1508, yet another decision of the Court of Appeal (Lord Neuberger MR, Maurice Kay, Stanley Burnton LJJ). The nature of the proceedings the subject of these four decisions varied from case to case. *Southborne* concerned proceedings in the High Court instituted but subsequently withdrawn by the Secretary of State for Trade and Industry under the Company Directors Disqualification Act 1986; *Bradford*, a successful challenge to the decision of a local authority vehicle licensing authority; *Baxendale-Walker*, partially unsuccessful disciplinary proceedings by the Law Society against a solicitor; and *Perinpanathan*, an application to magistrates by the Commissioner of Police for the Metropolis for a confiscation order under the Proceeds of Crime Act 2002 which was successfully resisted by the defendant. Burnton LJ, giving the lead judgment in *Perinpanathan*, referred to the difficulty of reconciling the ***"rejection of a special rule in public interest cases"*** in *Southbourne* with later decisions of the Court of Appeal and concluded that it ***"must, I think, be explained as resulting from the provisions of the applicable Rules of the Supreme Court.*** It is also to be noted that the Court of Appeal did not take the view that the Secretary of State had acted reasonably in commencing proceedings, as is made clear in the judgment of Beldam LJ" (paragraph 35). The Master of the Rolls agreed that the case was explicable on the basis that it involved an application to the High Court and that RSC Order 62 provided, much as CPR r. 43(2)(a) does, that the general rule in such proceedings was that the unsuccessful party should pay the costs of the successful party (as did another case, *Grimes v. Crown Prosecution Service* [2004] 1 FLR 910).

20 By contrast, the jurisdiction to award costs in *Bradford* and *Perinpanathan* lay in section 64 of the Magistrates' Courts Act 1980, which confers an unfettered discretion on the Court to make such order ***"as it thinks just and reasonable"***; section 47(2) of the Solicitors Act 1974, which was the source of the tribunal's costs jurisdiction in *Baxendale-Walker*, was to similar effect.

21 Having reviewed the authorities in some detail Burnton LJ accordingly summarised the propositions that could be derived from them as follows:–

> ***"(1) As a result of the decision of the Court of Appeal in Baxendale-Walker, the principle in the City of Bradford case is binding on this Court.*** Quite apart from authority, however, for the reasons given by Lord Bingham LCJ I would respectfully endorse its application in licensing proceedings in the magistrates' court and the Crown Court.
>
> ***(2) For the same reasons, the principle is applicable to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest: Baxendale-Walker.***

(3) Whether the principle should be applied in other contexts will depend on the substantive legislative framework and the applicable procedural provisions.

(4) The principle does not apply in proceedings to which the CPR apply.

(5) Where the principle applies, and the party opposing the order sought by the public authority has been successful, in relation to costs the starting point and default position is that no order should be made.

(6) A successful private party to proceedings to which the principle applies may nonetheless be awarded all or part of his costs if the conduct of the public authority in question justifies it.

(7) Other facts relevant to the exercise of the discretion conferred by the applicable procedural rules may also justify an order for costs. It would not be sensible to try exhaustively to define such matters, and I do not propose to do so."

Lord Neuberger MR appears to have been less certain that the decision in *Bradford* was strictly binding on the court in *Perinpanathan*, but he nonetheless regarded the Court of Appeal's reasoning in *Baxendale-Walker* as providing "very recent and highly authoritative support, in terms of both principle and practice, for the proposition that the Bradford case was rightly decided" (paragraph 72) and that "Lord Bingham CJ's three principles should apply where a regulatory body is reasonably carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle***that costs follow the event"*** (paragraph 73). Of the principles themselves he observed that they appeared to him "to be well founded, as one would expect bearing in mind their source. In a case where regulatory or disciplinary bodies, or the police, carrying out regulatory functions, have acted reasonably in opposing the grant of relief, or in pursuing a claim, it seems appropriate that there should not be a presumption that they should pay the other party's costs" (paragraph 76).

22 Given that in this jurisdiction the Royal Court's discretion in relation to costs is not qualified in the same way that the High Court's is, by CPR r. 43(2)(a), it does not seem to me (endeavouring to be as objective as I can be) that there is anything in *Perinpanathan* or in the Appellants' contentions on this aspect of the case that calls for a revision of the approach adumbrated in *JFSC -v- Black* as appropriate to questions of costs where a public body performing a public function is concerned. The fact that Lord Neuberger spoke in terms of ***"regulatory"*** and ***"disciplinary"*** bodies was clearly prompted by the facts of the particular cases that he had occasion to review and does not appear to me to warrant excluding the possibility of principles of the kind propounded by Lord Bingham CJ from applying to proceedings involving other types of public body engaged in the performance of a public function. Burnton LJ plainly contemplated that they might apply in contexts other than those with which *Bradford* and *Baxendale-Walker* were concerned depending on ***"the substantive legislative framework and the applicable procedural provisions"***. Nor is it obvious why in principle there should be any such limitation to **"regulatory"** and similar

bodies. On the other hand, I respectfully suggest that to say that where circumstances of the kind contemplated by Lord Bingham CJ arise ***"the starting point and default position is that no [costs] order should be made"*** (Burnton LJ's point (5)) is, as I ventured to suggest in *JFSC -v- Black*, to put the matter more starkly than *Bradford* itself warrants given that Lord Bingham himself did not propose any *prima facie* rule, only that the nature of the proceedings was *a* factor to be taken into account.

23 In the present case, while the Comptroller's role may, as Mr. Hoy submitted, more aptly be described as ***"administrative"*** rather than ***"regulatory"***, it clearly involves the performance of a public function; and, as the discretion conferred on the Court by Article 14(4) of the 2008 Regulations is an unfettered one, there appears to me no good reason why the ' Bingham' principles should not apply and every reason why they should. In any event, trying to categorise the Comptroller's functions according to conventional labels is not helpful: as indicated earlier, the context here is unusual, possibly *sui generis*. In my view, therefore, it is legitimate and proper in considering the matter of costs for the Court to have regard to the public nature of the Comptroller's function as one factor relevant to the exercise of its discretion.

24 How then should that discretion be exercised so far as concerns costs that would not inevitably have been incurred for the purposes of the appeals against the May 2012 Notice? The principal considerations that have informed my decision are these:–

(i) I do not consider that there was anything about the conduct of the Comptroller between the issue of the November 2011 Notice and the issue of the January 2012 Notice that could be regarded as unreasonable. The fact that he issued what he, for his part, would have regarded as no more than an "amended" notice in January 2012 did not of itself reflect any shortcoming on his part but simply a constructive response to one or two points made by on behalf of Volaw and Mr. Larsen. The changes did no more than make it clear that the documents that Volaw were required to produce were those *"held by you [Volaw]"* — which I would have thought was already implicit in the wording of November 2011 Notice — and that the correspondence required was only correspondence *"that the named taxpayer has had with you"*. Whether the Appellants' insistence on treating the January 2012 Notice as a completely new one rather than an amendment of the previous one was well founded is not something that has been fully argued in the present case. But the extent to which some facility to amend a TIEA notice is open to the Comptroller may require consideration on a future occasion. In any event it seems unlikely in the circumstances (and on the face of the schedule of Volaw's costs for this period supplied by Mr. Hoy) that there will have been much in the way of costs that could be said to have been thrown away as result of the substitution of the November 2011 Notice by the revised January 2012 one. In fact it looks to me as if this development worked almost entirely to the advantage of the Appellants, giving them more time to respond and, in the case of Volaw, allowing them to beef up their Notice of Appeal with additional grounds that had nothing to do with the additional words introduced into the January 2012 Notice. (Mr. Larsen did not file any appeal at that stage.)

(ii) Whether the Comptroller is open to criticism in finding it necessary, some four months after the January 2012 Notice, to issue yet another notice or in the way that he did so is difficult to say on the available evidence. For perfectly proper reasons he was not privy to the terms of the 2006 Production Notices until they were exhibited to the affidavit of Mr. Larsen received by the Comptroller on 11 th May, 2012, and he understandably took the opportunity to make it clear that the documents of which disclosure was required included those that had been the subject of the earlier 2006 Production Notices and to reproduce in the final version of the notice a verbatim description of those documents. On the other hand, when exactly the Tax Authority's concerns about the scope of the January 2012 Notice were made known to the Comptroller and why they had not been dealt with at an earlier point in time is unclear; it is possible, therefore, that there may be something in the Appellants' complaint that the Comptroller could and should have revealed well before he did in mid-May 2012 that there was going to have to be yet another revised notice and that, had he done so, matters could have been put on hold and further expenditure on legal costs suspended until such time as that further notice had been issued. Be that as it may, the fact that there were significant differences of wording between the January and May 2012 Notices clearly must have led to some degree of wasted costs on the part of the Appellants in having to take stock of things afresh in the light of the most recent notice. But, as Mr. Kelleher demonstrated, the changes to the affidavit evidence served by the Appellants on 11 th May, 2012 that had to be made as a result of the issue of the further notice a fortnight or so later were, as it turned out, fairly minimal; nor is this surprising given that the January and May 2012 Notices covered substantially — though not wholly — the same ground.

(iii) Where complaint may fairly be made by the Appellants about the course taken by the Comptroller is in his insistence on maintaining, after 29 th May, 2012, that the January 2012 Notice continued to be effective notwithstanding that to all intent and purpose it had been overtaken by the later notice, the scope of which comprehended and enlarged the earlier one. The reason for this stance was no doubt to try to preserve the timetable laid down by the Bailiff on the directions hearing of 8 th March, 2012 — a timetable which had been determined, at the time, by reference to the January 2012 Notice. But it undoubtedly led to significant procedural elaboration and confusion over the ensuing months that could have been avoided.

(iv) It is proper to acknowledge that the Comptroller was engaged here in the performance of a public function in an important international context: a function which, at the time, had not been the subject of scrutiny and guidance by the courts and which in the particular case in hand was vigorously and, for the most part, misguidedly challenged throughout by those concerned. As recognised in the Court's judgment of 18 th May this year, it is also plain that there was at times genuine difficulty and confusion on the Jersey side in trying to understand exactly how the unfamiliar Norwegian system worked and, on the Norwegian side, in endeavouring to explain their legal processes. Not altogether a straightforward task for the Comptroller, perhaps. But the fact remains that, for one reason or another, the process with which the Appellants were required to engage was one which, subsequent to 20

th January, 2012 at least, almost certainly resulted to some extent in duplication of effort and cost.

(v) Importantly, account must be taken, I think, of the fact that Article 8 of the TIEA provides that, while ***"ordinary costs"*** incurred in providing assistance shall be borne by ***"the requested Party", "extraordinary costs in providing assistance (including costs of engaging external advisers in connection with litigation or otherwise) shall be borne by the requesting Party"*** and it is reasonable to assume, therefore, that the Comptroller will recover much if not the greater part of his costs of the litigation that has taken place from the Norwegian authorities.

(vi) The case for making a costs order that recognises in one way or another that the Appellants have to some extent incurred costs that they would not have done but for the circumstances discussed above appears to me to outweigh considerations of the public interest nature of the Comptroller's function.

25 For these reasons, and having regard to the desirability of keeping costs orders as simple as possible, the fair order to make in my view is that the Comptroller's entitlement to recover his costs on the standard basis should be limited to 90% of those costs. There is no dispute that any order requiring Volaw and Mr. Larsen to pay costs should be on the basis that their liability is joint and several.

26 However, in view of the fact that the Appellants' appeal from the Court's decision of 18 th May, 2012 is due to be heard in the relatively near future and involves important issues in a field which, prior to the current proceedings, had not been the subject of judicial scrutiny, I do not think it right to accede to Mr. Kelleher's request for an interim payment (of costs) order in favour of the Comptroller. That application will therefore stand adjourned until after the result of the appeal is known.

27 There should, accordingly, be an order that the Appellants are liable, jointly and severally, to pay 90% of the Comptroller's costs of and incidental to the Appellants' appeals against the May 2012 Notice, taxed on the standard basis if not agreed; such costs to include so much of the Comptroller's costs incurred in connection with Volaws' appeal against the November 2011 Notice and Volaw's and Mr. Larsen's appeals against the January 2012 Notice as would probably have been incurred in any event in resisting the Appellants' appeals against the May 2012 Notice. The Comptroller's application for an interim payment order is adjourned pending the result of the Appellants' current appeal to the Court of Appeal. Counsel are invited to agree the precise terms of the order and submit them for my approval.