

# XY v The Chief Officer of the States of Jersey Police

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Sir William Bailhache
<b>Judgment Date:</b>	23 January 2023
<b>Neutral Citation:</b>	[2023] JRC 20
<b>Court:</b>	Royal Court

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## Text

Between  
XY  
First Applicant  
A Limited  
Second Applicant  
and  
The Chief Officer of the States of Jersey Police  
First Respondent

[2023] JRC 20

Before:

Sir William Bailhache, Commissioner

ROYAL COURT

(Samedi)

Costs

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**Authorities**

*Official Solicitor v Clore* 1984 JLR 81.

[\*Re Gibson's Settlement Trusts\*, \[1981\] 1 All E.R. 233](#)

**Advocate J. N. Heywood for the First Applicant.**

**Advocate P. G. Nicholls for the Second Applicant.**

**Advocate S. A. Meiklejohn for the First Respondent.**

**EX TEMPORE JUDGMENT****THE COMMISSIONER:**

- 1 Judgment has just been handed down on the basis of taxation of costs incurred by the First and Second Applicants in challenging the lawfulness of search warrants obtained by the Respondent, the Chief Officer of the States of Jersey Police.
- 2 The question of the basis on which those costs were to be calculated is set out in a Consent Order which was made on 9 November 2022. The terms of the Consent Order were these:

*“BY CONSENT IT IS ORDERED THAT:*

*A. The Search Warrants shall be declared unlawful.*

*B. The Search Warrants shall be formally quashed.*

*C. The States of Jersey Police shall pay damages to the Applicants in accordance with the terms of the Confidential Schedule appended to this Order.*

*D. The States of Jersey Police shall pay the Applicants' costs of and incidental to these proceedings. The Parties shall seek agreement on the basis (standard or indemnity) and/or the quantum of such costs failing which the same shall be referred to the Royal Court on 16 December 2022 for determination as to the basis of such costs, to be taxed if not agreed.*

*E. Subject to paragraphs C and D above, the proceedings shall be irrevocably discontinued.”*

- 3 In the decision just handed down, I ordered that the basis of costs should be standard and not indemnity for the reasons set out in that judgment. At the hearing in December the Applicants had urged me to make an order for indemnity costs for various reasons and Advocate Meiklejohn for the Respondent had urged me to make an order for costs on the

standard basis. So, on the usual principles that costs follow the event, one would say that the Respondent had been successful in defending the application which had been made. The question that I am now asked to address though is whether, because of the terms of the Consent Order, I should not take into account that the Respondent was successful in resisting the application for indemnity costs and instead should order the costs up to today, because the terms of the Consent Order in November had been for the Respondent to pay the Applicants' costs of and incidental to these proceedings.

- 4 In support of that Advocate Nicholls and Advocate Heywood say that this is what they always anticipated. That is not entirely helpful because Advocate Meiklejohn tells me that is not what he anticipated and so it is to some degree a question of construction of the agreement and the Act of the Court.
- 5 Advocate Heywood and Advocate Nicholls rely on the case of *Official Solicitor v Clore* 1984 JLR 81 and in particular reference has been made by Advocate Nicholls to the comments of Neil JA which are to be found at page 98 of the report where he refers to [\*Re Gibson's Settlement Trusts\*, \[1981\] 1 All E.R. 233](#) and he says that

***“The substance of it is that the words “incidental to” are words of extension and not restriction and are intended to widen the scope of what would otherwise be within the scope covered by “costs of the action”.”***

And then Neil JA quotes a particular passage in saying this:

***““I think that from the setting in which this provision occurs, it is plain enough that the words ‘costs reasonably incurred’ refer to ‘the costs of and incidental to’ the proceedings in question. However reasonably incurred, costs which are neither costs ‘of’ the proceedings nor costs ‘incidental to’ them cannot be awarded under the order for costs. It is thus important to identify the proceedings. This involves not only taking the correct stage of the proceedings as is shown by *Wright v. Bennett* but also determining the nature of those proceedings. Only when it is seen what is being claimed can it be seen what the proceedings are to which the costs relate.””***

- 6 Having looked at the decision in *Clore* in more detail it seems to me that there are two points in particular that can be made from it. The first is that that case is not concerned with the timing of an Act of Court. What that case is concerned with is an identification of what costs might be incidental to the proceedings; and it is interesting, and this is the second point that comes out of the report, it is interesting to see that the bill of costs that was prepared pursuant to the Order that had been made by the Royal Court on that day ran to the 30 September which was the date on which the Court then made the Order which was referred up to the Court of Appeal. So even though work was done after the event that was not part of the claim for costs.
- 7 My first reading of the Act of Court embodying the Consent Order in this case was that it

extended only to the costs incurred to the date of the Order and I would accept that would include some costs immediately post the date of the Order in the sense that one would expect the parties lawyers to communicate to their clients and say "here is the judgment, this is the order that is being made" and so for my part I accept that a nominal amount of work post the date of the order might fall within "costs of and incidental" to the order but on the face of it, it would not include any form of major argument after the date of the Order in question. It is very unusual for a court to make an order which in effect gives a party *carte blanche* to raise whatever arguments they want at the expense of their opponents and so the natural construction of the Order seems to me to be that the costs agreed to be paid at that time were only the costs up to that date.

- 8 I am fortified in conclusion that by looking at some of the correspondence that followed the date of the Order where both Advocate Heywood and Advocate Nicholls sent communications to the Law Officers Departments marked "*without prejudice save as to costs and the costs of taxation*". Now it is said by Advocate Heywood and by Advocate Nicholls that that does not mean anything because all it was doing was protecting the right to the costs of the taxation if that were argued. I can see that that argument might run for the use of the language "*save as to the costs of taxation*" but it does not run, it seems to me, for the first part of the language "*without prejudice save as to costs*" because if Advocate Heywood and Advocate Nicholls are right in what they say, they already had the costs "in the bag" and therefore there was no need to mark that correspondence "*without prejudice save as to costs*".
- 9 So I find on those two grounds that the agreement that was made and reflected in the Act of Court is that an agreement to pay costs which would run only to the date of that Order, and the question is what conclusions I should draw from that.
- 10 The usual order of costs would be in favour of the Respondent where there has been a distinct self-contained argument, as was the case here. On the other hand, I take into account here that it was the Respondent's unlawful activity which started these proceedings going in the first place and had that not been the case there would have been no proceedings and no costs would have been incurred at all. I also take into account what I consider to be the completely genuine objections from Advocate Heywood and Advocate Nicholls that they did not understand the order that they were making to be as has been construed by Advocate Meiklejohn also acting in good faith (and as I have found it to be). Having regard to those competing considerations I have resolved that the right course is to make no order for costs following the 9 November 2022 and it follows that each party will have to bear their own costs after that date.