XY v Chief Officer of the States of Jersey Police

Jurisdiction:	Jersey
Judge:	Sir William Bailhache
Judgment Date:	23 January 2023
Neutral Citation:	[2023] JRC 16
Court:	Royal Court

Text

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

[2023] JRC 16

Before:

Sir William Bailhache, Commissioner

ROYAL COURT

(Samedi)

Costs — re judicial review.

Authorities

Sanctions and Asset Freezing (Jersey) Law 2019.

Police Procedures and Criminal Evidence (Jersey) Law 2003.

Leeds United v Weston [2012] JCA 088.

Leeds United Association Football Club Limited and Another v The Phone-In Trading Post Limited T/A Admatch [2011] JCA 110.

C v P-S [2010] JLR 645.

Pell Frischmann Engineering Limited v Bow Valley Iran Limited and Others [2007] JLR 479.

Minister for Planning v Hobson [2014] JCA 174.

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

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

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

THE COMMISSIONER:

Introduction

1 This judgment concerns the costs of some judicial review proceedings commenced by an application for leave to apply for judicial review by XY on 16 th May 2022. The Second Applicant applied for leave to join the proceedings and apply for judicial review on 8 th July 2022. Leave was granted on 22 nd August. On 9 th November 2022, by a consent order, it was agreed that the proceedings should be irrevocably discontinued on the terms set out in the consent order. These included agreement that the Respondent would pay the Applicants' costs of and incidental to the proceedings but that the basis of the costs (standard or indemnity) was to be reserved and, which, if not agreed, would be referred to the Royal Court on 16 th December for determination. I heard argument that day and reserved my decision. This judgment contains that decision.

2 In the Caselines bundle there was uploaded an amount of email and other correspondence between the lawyers for the parties which Advocate Heywood submitted I should not look at. This correspondence was nearly all marked *'Without prejudice save as to costs and the costs of taxation'*. Advocate Heywood submitted that the correspondence was not relevant to the conduct of the parties in the litigation insofar as it referred to the quantum of costs claimed. Because this section of the correspondence did refer to the amount claimed, he said I should not look at it.

3 I was not prepared to accept that submission. First of all, the correspondence is marked *'Without prejudice save as to costs and the costs of taxation'*, and, on the face of it, correspondence so marked may be taken into account in considering an order for costs. Secondly, given that the proceedings had been agreed to be discontinued on 9 th November, any subsequent email traffic of this kind was capable of being relevant to the costs incurred after 9 th November. Thirdly, if any of this correspondence was not relevant, then as a professional judge, I was quite capable of excluding it from my thinking in relation to the orders which appropriately ought to be made. On the other hand, if it was relevant, I should see it.

4 For these reasons I rejected the submission that I should not look at that correspondence, and I have done so.

The background

5 On an application made by a Detective Sergeant (the "DS") in the States of Jersey Police force on 12 th April 2022, the Bailiff granted search warrants to enter, using reasonable force if necessary, domestic premises in the Island together with any associated outbuildings, communal areas and vehicles on such premises, and certain office premises in St Helier. The domestic premises were the home of XY, which he occupied with his family, and the office premises in St Helier were the premises of A Limited. I note that, on consideration of the papers filed on behalf of the First Applicant, Clyde-Smith Commissioner, ordered on 22 nd May 2022 that until further order the First Applicant should be referred to as XY, and that there should be no publication on any report of, or otherwise in connection with, these proceedings of the First Applicant's identity or any matter likely to lead to his identification. The Commissioner made a similar order on 12 th July 2022 in connection with the Second Applicant which is to be referred to as A Limited.

6 The search warrants were granted by the Bailiff on the strength of affidavits sworn by the DS. It is sufficient for the purposes of this judgment if I summarise the content of those affidavits in the following way:

(i) A criminal investigation into money laundering and breaches of the Sanctions and Asset Freezing (Jersey) Law 2019 (the "2019 Law") was being carried out by the Economic Crime and Confiscation Unit. The investigation concerned assets held through and managed by Jersey companies suspected to be relevantly connected to Roman Abramovich ("RA").

(ii) The DS described in brief detail some of the structures through which it was understood that RA held these assets.

(iii) Intelligence suggested that XY had been involved in discussions with directors regarding the sale of subsidiaries within the group under investigation and that he

and A Limited had taken steps which had or could have been in breach of the sanctions law and / or amounted to money laundering.

(iv) The primary focus of the search teams would be on electronic devices and specialist IT teams would accompany the officers on the search.

(v) Because XY was a legal professional it could be expected that some material on his devices would be covered by legal professional privilege. However, as set out in a contemporaneous application for a *saisie judiciaire* (or freezing order), it was considered that his role extended beyond giving legal advice, and extended to dealing with third parties on behalf of A Limited and being involved in dealing with assets. Thus it was said that his devices were expected to contain material, particularly communications external to A Limited, which would be crucial to the investigation.

(vi) However, because legal professional privilege issues might arise, a specialist London barrister would accompany the search team and once the devices had been seized and / or imaged, the police would follow her advice to ensure that legal professional privilege was properly protected.

(vii) Various potential objections to the granting of the search warrants were then set out with the DS giving his reasons why he considered these objections carried no weight.

7 The affidavit for the search warrants made it plain that the application was made under Article 15 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the 2003 Law"). The pro-forma section of the affidavit requires the deponent to mark the appropriate box, and below that instruction there are four boxes mentioned. These are:

(i) It is not practicable to communicate with any person entitled to grant entry.

(ii) It is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence.

(iii) Entrance to the premises will not be granted unless a warrant is produced.

(iv) The purpose of the search may be frustrated or seriously prejudiced unless an officer arriving at the premises can secure immediate entry.

8 All four boxes on the affidavits were completed by the DS. As the first two boxes are clearly mutually inconsistent, it is hard to see how he could properly have marked both of them. It is difficult to see the consistency between some of the other boxes as well. They are there because these are the access conditions referred to in Article 15(1) and (3) of the 2003 Law. I do not consider this defect in the affidavits to be critical for the purposes of the present application for costs, but it is not desirable that each of the four boxes should have been marked in the way they were. To proceed in that way is to confuse the basis upon

which the access conditions referred to in Article 15(3) are said to be satisfied.

9 The search was carried out on 12 th April. The following day, Crown Advocate Brown sent to Messrs Dickinson Gleeson, then instructed by A Limited, copies of the affidavits in support of the warrants. On 19 th April, Messrs Dickinson Gleeson confirmed that they were no longer instructed but Messrs Corker Binning (a firm of English solicitors) wrote to Crown Advocate Brown to confirm that they were instructed by XY, and that local Jersey representatives would be appointed shortly thereafter. Messrs Corker Binning sought copies of supporting material referred to in the warrants application and also in the contemporaneous *saisie* application which had been made, and set out to Crown Advocate Brown the issue concerning the lawfulness of the search warrants, namely that the warrants *'should not have been issued in circumstances where privileged and special procedure material were expected to be on the premises'*. On that basis Corker Binning requested that all review of seized items should cease immediately pending resolution of these issues, and that applied to all items seized whether or not subject to legal professional privilege because the warrant should never have been issued.

10 The response from Crown Advocate Brown was to the effect that legal professional privilege counsel were entirely independent and separate from the investigation team and their appointment on that basis would continue; but he did not otherwise address the substantive points made in the correspondence.

11 Following a complaint from XY who wrote directly to Crown Advocate Brown pointing out that he had not responded on the main issue in the Corker Binning letter as to the validity of the search warrant, the Crown Advocate responded to XY's email the following day to say that *'There is no basis for saying that the warrant was obtained unlawfully'*.

12 On 21 st April Advocate Heywood wrote to Crown Advocate Brown confirming that he had been instructed on behalf of XY and adopting the position taken by Messrs Corker Binning as to the unlawful issue and execution of the search warrant. The response to that correspondence was that the Law Officers' Department intended to undertake a review of the application for the search warrants and in the light of that, the investigation team would take no steps in relation to the material seized. None of that material would be accessed by anyone pending the Law Officers' Department's review. Furthermore, neither the Crown Advocate nor anyone else in the investigation had access to the location where the legal professional privilege review was taking place. The following day, the legal professional privilege counsel confirmed that they would suspend any further review pending the review of the warrants' application.

13 On 25 th April, Advocate Heywood wrote a very detailed letter to the Respondent setting out the proposed application for judicial review of the grant of the warrants both because there was no power to issue the warrants under Article 15(1)(a) of the 2003 Law as the material to be seized consisted of or at least included items subject to legal privilege,

excluded material or special procedure material, and secondly because the access conditions in Article 15(3) of the 2003 Law were not properly satisfied. Advocate Heywood requested that the warrant should be quashed, all seized material should be returned and that his client should be paid the costs of the judicial review proceedings. XY's rights to claim civil damages or any other remedy were reserved.

14 Crown Advocate Brown responded to Advocate Heywood on 27 th April indicating that:

> (i) XY's devices would be returned to him as soon as the provisions of the 2019 Law had been complied with – namely that a licence had been granted for that purpose by the Minister for External Relations.
>
> (ii) although XY was referred to as general counsel, and was an English solicitor, that did not necessarily mean that all his activities or correspondence were privileged. Privilege did not attach to activities by a lawyer when he acts as a man of business and it was also incapable in law of attaching to anything done for the purposes of or while carrying out a criminal offence. It was expressly said that XY remained a suspect and the investigation continued; and he pointed out that XY was an employee of an entity covered by the sanctions regime.

15 I will now refer to the question of the media statement issued by the Attorney General. The date it was issued is not clear from the document itself although it appears to have been issued on 13 th April. It was a general media statement in these terms:

> ***"Roman Abramovich***
>
> ***Search warrants were executed by the States of Jersey Police on Tuesday 12th April 2022 at premises in Jersey suspected to be connected to the business activities of Roman Abramovich.*** The Royal Court also imposed a formal freezing order on 12th April, known as a saisie judiciaire, over assets understood to be valued in excess of US$ 7 billion which are suspected to be connected to Mr Abramovich and which are either located in Jersey or owned by Jersey incorporated entities .
>
> ***No further comment will be made at this stage."***

16 Complaint was made about this media statement. For my part, I do not think that any such complaint is justified. RA, whether he likes it or not, is a controversial figure who inspires much public interest. His dealings both in Jersey and elsewhere have been the subject of media enquiry for some years as have his alleged links to the Russian President. The existence of sanctions against him was a matter of local and international interest and it was entirely appropriate for law enforcement authorities to make a brief statement as they did. The Law Officers were entitled to take such steps as they thought appropriate to protect the island's reputation and the integrity of the investigation and, for my part, I have no difficulty in accepting that there is a presumption of regularity and that there was no malice

in taking the steps they did. Nothing other than the complaint itself has been put before me about the issue of the statement to suggest otherwise.

17 As previously indicated, judicial review proceedings were subsequently issued.

18 It was contended by Advocate Heywood in his application for indemnity costs that Crown Advocate Brown's letter of 27 th April made it clear that the Respondent was aware as at that date that the search warrants had been unlawfully obtained, but nonetheless made no concession either in relation to leave being granted to bring the application for judicial review, or as to the unlawfulness of the warrants until many months later. In fact the Respondent conceded the issue of leave to bring an application for judicial review on 11 th August and ultimately conceded the unlawfulness of the search warrants on 26 th October, albeit on a more limited basis than had been contended by the Applicants. The press release remained on the Law Officers' website until the same date, when it was taken down.

19 In his submissions, Advocate Heywood contended that it was likely that the Respondent was aware as at the end of April that the search warrants had been unlawfully obtained; and that he must have been aware by 4 th August because in a letter marked *'Without prejudice save as to costs'*, a legal adviser in the Law Officers Department wrote to Advocate Heywood to indicate that the Respondent was willing to accept that the warrant had been obtained unlawfully. It was contended that as a public authority, there was a duty to concede leave and the question of unlawfulness as soon as that was understood to have occurred. In the present case the island should be concerned at the sloppiness of obtaining a search warrant improperly, and it was not to be forgotten that in this case, the search warrant involved the invasion of XY's home, which he shared with family, and was not a small thing at all given XY's reputation as a professional.

20 Advocate Nicholls contended on behalf of A Limited that the duty of candour had been breached. Indeed, it was not coincidental that the proceedings were compromised on the very day when the Court was invited to determine an application to cross-examination the DS on his affidavits. This was a case of a public authority accepting privately it had broken the law but publicly saying something different. He contended that the Respondent must have known by 8 th July, the date of A Limited's intervention making its own application for leave, that the warrants had been unlawfully obtained.

21 The judicial review application was fixed to be heard on 16 th December. Prior to that, on 9 th September 2022, Commissioner Clyde-Smith had ordered that the Respondent should file and serve an affidavit by 4pm on 3 rd October 2022 with leave being given to the Applicants to file supplementary affidavits in response. An affidavit was duly filed by the Respondent on 3 rd October and a supplementary one on 26 th October, following correspondence by Advocate Nicholls contending that the first affidavit did not comply with the duty of candour and listing questions to be answered. An application was made for the

DS to be summoned to appear at the final hearing for cross-examination. The underlying reason for this application was said to be a breach of the duty of candour on the part of the Respondent. In the event, this application was never heard because the overall judicial review proceedings were settled by consent, subject to determination of the basis upon which costs should be assessed. It became unnecessary to examine whether there had been a breach of the duty of candour as alleged. The Applicants continue to assert that the duty has been breached, and the Respondent continues to assert that it has not. In that connection, I have reviewed the relevant correspondence and both affidavits of the DS.

22 It was submitted that the Respondent must have known by 27 th April that it had acted unlawfully in its application for the warrants on 12 th April. Having reviewed the correspondence, I find that the Applicants have not satisfied me that this was so. Although I think he was wrong in his conclusions, there was a reasonable basis for the correspondence from Crown Advocate Brown and I do not conclude that he deliberately maintained the lawfulness of the conduct complained of, knowing that it was in fact unlawful. Furthermore, the affidavits of the DS (paragraph 41 of the first affidavit and 21/22 of the second affidavit) do not unequivocally or even necessarily point in the direction of a conclusion of known unlawfulness but are also consistent with a suspicion of possible unlawfulness, having regard to the detailed letter of Advocate Heywood challenging the obtaining of the warrants, and the need for a detailed review.

23 I accept that by 6 th July 2022 when A Limited had sought leave to join the proceedings the Respondent was aware that there were good grounds for believing that it had acted unlawfully. The tenor of the correspondence in July makes that clear. The Law Officers Department was opening up channels to ascertain the terms on which a seemly exit from the proceedings might be negotiated. Subject to argument in an appropriate case about exceptions for public interest immunity, the duty of candour certainly extended to everything said and done by and everything known to the Respondent at the time he took the challenged administrative action. I do not find that the duty of candour however required the Respondent in this case to make open concessions that it considered it had acted unlawfully in circumstances where there was an available argument, even if unconvincing, that it had not.

The law on indemnity costs

24 The correct approach to indemnity costs is not controversial and has been summarised in *Leeds United v Weston* [2012] JCA 088, in the judgment of Jones JA at paragraphs 4 – 7:

> ***"4. The circumstances in which it may be appropriate to award costs on the indemnity basis have been considered on a number of occasions by this Court. In*** *Dixon v Jefferson Seal Limited* [1998] JLR 47, ***Collins JA, with whom Harman and Southwell JJA agreed, concluded that there had to be 'some special or unusual feature in the case' to justify such an award (page 59). In*** *Marett v Marett* [2008] JLR 384, ***Pleming JA, Sumption and***

Nutting JJA concurring, said this:-

> ***'A Court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit, underhanded or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence.*** There are many examples in decided ***cases of the application of these broad principles (see*** (*Dixon v Jefferson Seal Ltd.* 1998 JLR at 52–53); *Macon v Querée (née Colligny)*; ***and*** *Jones (née Ludlow) v Jones (No 2)* ***noting the reference to 'some special or unusual feature' to justify the award of indemnity costs).*** There are also examples of cases where the Court has made an indemnity order even in the absence of culpability or abuse…relying on the Court's general discretion in England and Wales, under the CPR, R.44.3'.'"

25 In *Leeds United Association Football Club Limited and Another v The Phone-In Trading Post Limited T/A Admatch* [2011] JCA 110, at paragraph 11, the Court of Appeal pointed out that the limitation placed on the exercise of the Court's discretion by the use of the words *'only'* in the first sentence of the passage quoted above must be regarded as an error. In *C v P-S* [2010] JLR 645, the Court of Appeal rejected a submission that indemnity costs should only be considered where the actions of the paying party are malicious or vexatious. Beloff JA, delivering the judgment of the Court, said this:

> ***"We do not accept that it is appropriate to impose such a restrictive approach on the discretion of the Court to make an order for costs on the indemnity basis.*** The question will always be – is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct." (paragraph 11)

26 . As was said in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited and Others* [2007] JLR 479 paragraph 25, the Court seeks in making an award of indemnity costs on the ground of unreasonableness *'to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances'*.

27 I have applied these principles in my consideration of this application.

Discussion

28 The Applicants sought to make some mileage from the fact that before the DS applied for

the warrants the External Relations and Financial Services Minister had issued a Notice on 31 st March 2022 under the provisions of Article 33 of the 2019 Law, the lawfulness of which is not admitted, seeking substantial documents and information relating to numerous companies and trusts and in particular the work, among other things, of A Limited. That Notice was delivered to A Limited on 1 st April 2022. Thus I understood it to be said that the warrants were in any event unnecessary. The fact that such a Notice has been issued and documents produced as a result of it seems to me to be irrelevant to the issues I now have to consider. When the police investigate alleged criminal activity, they are not to be taken as prevented from following any particular line of inquiry simply because a different line of inquiry might be available or indeed might or has already produced some information. In my judgment, if the result were to be duplication in the information provided, albeit through different sources, that is unobjectionable. The Respondent placed some weight in its application for the search warrants on the fact that the directors of A Limited were sacked the same day as the day on which the Minister wrote a letter issuing a Notice as aforesaid. That is certainly coincidental, but I have no information as to why that took place, and I will not indulge in speculation in that respect. For these reasons I regard the existence of the Minister's Notice and the response to it as an invitation to travel down a by-way in this case and I do not accept it.

29 Much has been made by the Applicants of the unlawfulness of the Respondent's conduct, which I now address.

30 The Respondent has conceded that the application for the search warrants was unlawful. In submissions to me, Advocate Meiklejohn said this was because it was made under the wrong Article of the 2003 Law, namely Article 15. He conceded that there was at the time at least the possibility of special procedure material which carried with it the implication that the application should have been made under Article 16 of the 2003 Law. Indeed, I have been told that such an application has been made, albeit I have not heard the outcome of it. I do not have to determine – and indeed if there is a current application under Article 16 which is outstanding, I ought not to determine without argument – whether the grounds of unlawfulness which are set out by the Applicants would all be established. Thus I do not reach the conclusion that not only were the warrants unlawfully obtained but that they could never lawfully be obtained. In those circumstances, I proceed on the basis that the extent of the unlawfulness is the fact that the application was made by a middle ranking police officer using the wrong Article in the 2003 Law. Furthermore, I consider in those circumstances that the complaints of the Applicants that the ‘ *island should be concerned at the sloppiness of obtaining a search warrant which is a serious invasion of privacy*’ and that XY's home has been ‘invaded’ is an exaggeration of its true impact. I have not disregarded the fact that XY's family may have been present. That was an inevitable concomitant of a search warrant issued in respect of his home, but it would have been true if the application had been correctly made under Article 16 of the 2003 Law and a warrant expressly obtained from the Bailiff under paragraph 13 of Schedule 2. In my view, XY is likely to be more affected by the knowledge that he is or was a person under investigation for committing criminal offences of money laundering and sanctions breaking.

31 It was submitted for the Applicants that the unusual feature which should drive an award of indemnity costs order was the continued resistance to the grant of leave and to the judicial review proceedings generally after the time came when the Respondent was, or ought to have been, aware that the Warrants had been obtained unlawfully. I do not accept that as a general proposition although there may be cases where that will be found to be a fair argument. In my judgment, it was not unreasonable, within the ambit of this litigation, for the Respondent to try to negotiate an exit from it on the best terms he could. To find otherwise would often lead to a situation where an administrative body would not tackle the central issues of the lawfulness of its activity because the risk of an indemnity order would be increased if it did so. That would be against the public interest. I do not find that, having reviewed the correspondence in this case, the Law Officers' Department's conduct of the proceedings amounted to an unusual feature which would justify an award of indemnity costs.

32 I have also reviewed the affidavits made by the DS and the criticisms made of them by the Applicants. I do not think it is necessary to go into this in any detail. I do not accept those criticisms as showing any lack of candour or good faith on the part of the DS.

33 Accordingly, I find nothing out of the way in the conduct of the Respondent to this extent: it has acted unlawfully, as a result of which it must pay the costs which have been incurred, but there is no special factor which takes the issue into the territory where an order for indemnity costs would be appropriate.

34 When an administrative body acts unlawfully, it naturally must expect to pay the costs of any application to correct that lack of lawfulness. As was said in the Court of Appeal in the case of *Minister for Planning v Hobson* [2014] JCA 174 at paragraph 18:

> ***"…In my opinion there is a flaw at the heart of the Deputy Bailiff's reasoning, repeated in the submission that a Minister (or other public official) discharging a public function should be the subject of an indemnity costs award when his conduct is unreasonable.*** The flaw is that the test of unreasonableness (whether within Article 109 of the 2002 Law, or the higher hurdle imposed by the Wednesbury line of cases) can be a basis for a ruling that the decision of a public official is wrong, in the public law sense. There is a real danger, therefore, that if the costs award is based on unreasonableness in the decision making process, or the decision itself, rather than in the ***conduct of the litigation, not only will the case be lost by the public body, but there will be an additional costs burden imposed.*** This would be regrettable and, in my opinion, wrong in principle."

35 It is also clear that from an early stage the Applicants were aware that no action was going to be taken in relation to the material which had been seized. It is true that it was many months before the Applicants were given full details as to how their devices and documents were treated as a result of the execution of the warrants, but they had been told at an early stage that work on the devices and documents had stopped and indeed the original

devices were returned shortly after the letter of 27 th April.

36 Furthermore, by 6 th July, the Law Officers' Department had made it plain that not only had the items been returned and proceedings would be issued under Article 16, but also that it proposed to vacate the proceedings under Article 15 which, Advocate Meiklejohn asserted, served no practical purpose. It is true that at that stage there was no offer of costs, but there was a without prejudice communication asking what damages the Applicants would seek in respect of the wrongful application for the warrants. This offer was rejected on the basis that there was no clarity as to what had happened to the material, no admission of illegality, and no admission of misleading the Court. Subsequently, on 14 th July, XY indicated the level of damages which might ultimately be sought.

37 In a *'Without prejudice save as to costs'* letter of 4 th August, the Law Officers' Department confirmed to Advocate Heywood that it was accepted the warrants had been unlawfully obtained because of the likely presence of special procedure material, and Article 16 should therefore have been used. It was also confirmed that no copy of the materials in question had been retained. It was agreed that a sum in damages sought by XY, plus reasonable costs would be offered, albeit it was conditional upon the withdrawal of the judicial review proceedings, a similar agreement with A Limited, and Public Finance Law approval, which was necessary as a matter of internal procedures, because the sum was to be paid by way of voluntary settlement of the claim for damages.

38 In very broad summary, the responses both from Advocate Heywood and from Advocate Nicholls were to refuse the offer made unless:

(i) The search warrants were quashed.

(ii) The police admitted this publicly.

(iii) They gave a private apology to XY.

(iv) They paid damages.

(v) They gave proper confirmation as to what had happened to the material in question.

(vi) The Applicants should receive their costs; for XY these were stated to be in the region of £167,000.00 and XY invited the Respondent to make an offer in that sum; for A Limited, no indication as to current level was provided but the proposal was that those costs be assessed on the indemnity basis if not ultimately agreed.

39 I do not propose to go over the exchanges of correspondence between August and November in minute detail. Both parties moved their positions from time to time in the course of those exchanges. Both XY and A Limited ultimately provided more detailed

breakdowns of their legal costs. XY indicated that his costs were in the region of £170,000.00. A Limited indicated that its legal costs were in the region of £175,000.00.

40 I well understand why Advocate Heywood did not want me to look at this correspondence. The extent of the costs claimed to have been incurred on an indemnity basis is, in the modern phrase, eyewatering. Costs at this level would inhibit any normal litigant from going to Court and having access to justice. The risk of such a costs order might inhibit a public authority such as the police from doing their duty to investigate crime. If it is right, which it undoubtedly is, to expect the police and other public authorities to act competently and lawfully, it is also right to acknowledge that the courts should not lightly pursue policies in costs which would have the effect of deterring the police and other public authorities from and not encouraging them to carry out their duties. I will apply the usual rules in costs, and I do not take the view that the police should here be faced with an indemnity costs order simply because they are the police, or because their recognition of a mistake in their application and thus its unlawfulness was later than it might have been, or because the search warrant involved XY's home. The extent of the costs claimed leave me unsurprised that there has been no agreement as to the basis on which they should be awarded.

41 I add that for my part, if I were the taxing officer – and I am not and I do not pretend to make any findings in that respect – I would take some persuasion that, whether on an indemnity or on a standard basis, it was reasonable to incur costs at this level, particularly so given that it was plain and obvious from at least the first week of August that the lawfulness of the warrants could not be maintained. Indeed, that prompts the question as to why A Limited resolved that it would apply to intervene in the proceedings. One would have expected the Respondent to agree that if the warrant was found to be unlawful as against XY, then it would also be set aside as against A Limited. Be that as it may, it was said to me that there were separate interests which XY and A Limited had; but the arguments which they would both run were in large measure identical albeit the claims for damages could have been in a different amount.

42 I accept that the nature of the underlying business activities which were being investigated is such that there is a high degree of cross-border activity which may require the coordination of legal advice in different jurisdictions. However, these judicial review proceedings were capable not only of being self-contained in Jersey but also capable of being successfully managed within a narrow compass; and while it may turn out that the costs have been properly incurred, the extent of them suggests an enquiry as to whether the Applicants did not exercise much if any restraint in relation to incurring costs in the litigation or whether the costs claimed were expended on wider issues such as the effect and extent of the sanctions, the lawfulness of the Minister's order or the *saisie*. Whatever the explanation, that was their choice, and it was and is a matter between them and their lawyers. It was not a choice for which the Respondent should necessarily pay bearing in mind the only costs awarded are those of and incidental to the proceedings. On taxation, if costs cannot be agreed, it will be for the Assistant Judicial Greffier to strike the right balance in his award in the light of that consideration and the overriding objective.

43 The consent order means that as a minimum I must award standard costs to be paid by the Respondent to each of the Applicants up to the date of the consent order. This order I make.