Tan Chi Fang v HM Attorney General

Jurisdiction:	Jersey
Judgment Date:	27 January 2020
Neutral Citation:	[2020] JCA 13
Court:	Court of Appeal

vLex Document Id: VLEX-900807303

Link: https://justis.vlex.com/vid/tan-chi-fang-v-900807303

Text

In the Matter of *Saisies Judiciaires* in Respect of the Realisable Property of Robert Tantular

Between
(1) Tan Chi Fang
(2) Jason Ray Tan
(3) Sandy Tantular
(4) Michelle Tantular
Appellants
and
(1) Her Majesty's Attorney General
(2) The Viscount
(3) HI Trust Company Limited
Respondents

[2020] JCA 13

Before:

James W. McNeill, **(President)**

John V. Martin, **Q.C., and**

Sir Wyn Williams

COURT OF APPEAL

Saisies Judiciaires — Costs.

Authorities

In the matter of Saisies Judiciairies in respect of the realisable property of Robert Tantular [2018] JRC 222.

In the matter of the realisable property of Robert Tantular [2019] JRC 245

Alsop Wilkinson v Neary and Others [1996] 1 WLR 122

Viscount v Attorney General [2017] 1 JLR 133

Trusts (Jersey) Law 1984

Civil Proceedings (Jersey) Law 1956

Court of Appeal (Jersey) Law 1961

Protection from Liability) (Jersey) Law 2018

Proceeds of Crime (Jersey) Law 1999

In the matter of the representation of O'Brien [2003] JLR 1

R (Henderson) v Secretary of State for Justice [2015] 1 Cr App R 29

Bennion on Statutory Interpretation (7th edition)

AXA General Insurance Limited and Ors v HM Advocate [2012] 1 AC 868

Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553

Warren and Five Others v Attorney-General [2009] JLR Note 44

Pothier, Traité du Contrat de Vente.

Customs and Excise Commissioners v Thorn Electrical Industries Limited [1975] 1 WLR 1661

International Co-Operation (Protection from Liability) (Jersey) Law 2018

Attorney General v Rosenlund and Another [2016] (1) JLR 348

Ministry of Law and Human Rights of the Republic of Indonesia

Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807

Aiden Shipping v Interbulk Limited [1986] AC 965

Planning and Environment Minister v Yates [2008] JLR 486

Willers v Joyce [2019] EWHC 2183 (Ch)

Travelers Insurance Company Limited v XYZ [2019] UKSC 48.

The State Immunity (Jersey) Order 1985

Civil Asset Recovery (International Co-Operation) (Jersey) Law 2007

Federal Republic of Nigeria v Doraville Properties Corporation [2017] (1) JLR 46

Tepe v Botas [2016] (1) JLR 218

Fox and Webb, The Sources of the Law of State Immunity (3rd edition)

Eagle Star Insurance Co Limited v Yuval Insurance Co Limited [1978] 1 Lloyd's Rep 357

Salomon v Customs and Excise Commissioners [1967] 2 QB 116

Arkin v Borchard Lines Limited [2005] 1 WLR 3005

Davey v Money [2019] 1 WLR 6108

Re Tantular [2015] (1) JLR 97

Advocate T. V. R. Hanson **for the Appellants**.

Advocate A. J. Belhomme **for the First Respondent**.

Advocate C. F. D. Sorensen **for The Viscount**

Advocate M. W. Cook **for the Third Respondent**.

JUDGMENT OF THE COURT

THE PRESIDENT:

1 This is the judgment on costs in relation to proceedings which came before us on appeal in relation to the determination of the Royal Court, (*In the matter of Saisies Judiciairies in respect of the realisable property of Robert Tantular* [2019] JRC 222) which gave rise to that appeal and in respect of two applications for stay pending appeal to the Privy Council, each of which we refused, (*In the matter of the realisable property of Robert Tantular* [2019] JRC 245).

2 The essential issues in relation to this determination relate to the nature of the proceedings and in consequence only a short rehearsal of the background facts is necessary.

3 Mr. Robert Tantular was prosecuted and convicted of serious criminal offences in the Republic of Indonesia in two sets of proceedings. He was sentenced to terms of imprisonment and was also made the subject of confiscation orders by the courts in Indonesia. Following conviction in the first set of proceedings, but before a confiscation order had been made, Her Majesty's Attorney General (the "First Respondent"), acting upon a request by the Government of Indonesia, applied to the Royal Court for, and obtained, a *saisie judiciaire* in respect of *"the realisable property situate in Jersey of Robert Tantular (whether moveable or immoveable, vested or contingent)"*. In September 2014 the First Respondent obtained a second *saisie*. Challenges were made to the granting of those *saisies* but each was dismissed.

4 In September 2018 Credit Suisse AG (the "Bank"), which had loaned funds to facilitate the purchase of a flat in Singapore (the "Property") in which Mr. Tantular had an interest, applied to the Royal Court for a variation of the terms of the two *saisies* to permit the Bank to exercise a power of sale under a mortgage over the Property. The application was approved. By judgment dated 4 September 2018 the Royal Court approved the variation.

5 The Property is owned by a BVI company the shares in which are a wholly owned asset of a discretionary trust governed by Jersey law (the "Jersey Trust"), the settlor being Mr. Tantular. The class of beneficiaries includes Mr. Tantular.

6 The Bank did not immediately seek to exercise its power of sale, but decided to explore the possibility of an assignment of its interest in the mortgage over the Property. The exploration of this possibility gave rise to the issues addressed in the appeal before us and in the determination below.

7 In the current proceedings the Appellants, whose residence in the Property gave them an interest, issued a summons dated 16 April 2019 in which they sought a declaration that the two *saisies* did not prevent the Bank assigning to a third party its rights under a credit facility and legal mortgage secured on the Property. The First Respondent contested the applications and, by Act of Court dated 18 June 2019, the Royal Court declined to grant the declaration or to vary the *saisies*.

8 By Act of Court dated 26 June 2019, each of the Appellants and the First Respondent were allowed to recover their costs of and incidental to the applications from the trust property of the Jersey Trust.

9 The Royal Court granted permission to the Appellants to appeal against the refusals to grant a declaration or allow a variation.

10 The Appellants, by their Notice of Appeal, invited this court to grant declaration or vary the *saisies* so as to permit assignment. They also sought that the order for costs in favour of the First Respondent be set aside and that the First Respondent pay the costs of all parties or pay an amount so as to indemnify the Jersey Trust for costs borne by it.

11 Albeit without leave from the Royal Court, and without making formal application to this court for permission to appeal against the cost orders, the First Respondent, by a Respondent's Notice, invited this court to quash the orders for costs made below, order that the Appellants be ordered to pay the costs of the First and Third Respondents and, further, that the Appellants be not awarded costs.

12 In our substantive judgment we determined that the Bank was entitled to assign its interests in the mortgage over the Property to a third party without prior approval of the Court and without the need for a variation of the terms of the *saisies*. Given that conclusion, and without determining whether we should decline jurisdiction to entertain an appeal presented without permission, we determined that the cross-appeal could not succeed and should be dismissed. We invited written submissions on costs issues. The Viscount, the Second Respondent, observed that she was entitled to recover her costs from the Jersey Trust under the terms of the *saisies* and noted that no attempt was made to unseat that entitlement.

13 For the trustee of the Jersey Trust (the “Trustee”) it was submitted that, to the extent that the Appellants were successful in their application for costs, the Trustee should have an equivalent order: without which there would be a potential detriment to the beneficiaries through the Trustee's right to indemnification from the trust assets. The Trustee had always been considered entitled to its costs from the trust assets and a number of previous orders had been made on the trustee indemnity basis. The Trustee had supported the Appellants as there was clear benefit in seeking to preserve the value of the primary asset of the Jersey Trust. The Trustee should therefore be entitled to its costs on the trustee indemnity basis and, in light of the Appellants' arguments having succeeded, the justice of the case would require the Trustee's costs to be paid by the losing party to the extent that this court considers that to be permissible and appropriate.

14 The principal arguments, therefore, were between the Appellants and the First Respondent. As these arguments fall into discrete chapters, we deal with each individually.

Indemnity from the Trust

15 The Appellants submitted that they and the Trustee should recover from the Jersey Trust the costs of and incidental to (a) the application to and hearing before, the Royal Court, (b) the appeal to the Court of Appeal, and (c) the Attorney's cross-appeal; to be taxed (if not agreed) on the indemnity basis in respect of the Appellants and upon the trustee indemnity basis in respect of the Trustee. Such recovery should include any fund or other assets

which may come into the hands of the Viscount from sale of the Property, or pursuant to any *saisie judiciaire* that has or may be granted in relation to the assets of the Jersey Trust. Further, the Appellants and the Trustee should be accountable to the Trust in respect of any double recovery that might arise from the orders for costs which might be made under other specific heads.

16 For the First Respondent, it was argued that the Appellants would only be entitled to costs from the trust funds in matters where the court was exercising its supervisory jurisdiction in relation to trusts. Under reference to the judgment of Lightman J in *Alsop Wilkinson v Neary and Others* [1996] 1 WLR 1220, at 1223–4, it was contended that supervisory proceedings were those brought by trustees for guidance or brought by someone other than the trustees raising a similar kind of point. A simple hostile claim against trustees or another beneficiary would be treated in the same way as ordinary common law litigation with costs usually following the event.

17 In the present matter, it was argued, the court was concerned with the scope and effect of a *saisie judiciaire* and with an application to vary a *saisie judiciaire*. The application was for declaration that an assignment could be made notwithstanding the existence of the *saisies*: it arose within the statutory process which was aimed at supporting the consequences of a criminal conviction. A *saisie judiciaire* divested the previous owner, vested the relevant property in the Viscount and prohibited those named in the Order from dealing with the property. In such circumstances the Viscount was neither a trustee nor did she have duties akin to a trustee; she administered the property in accordance with the statute, the terms of the *saisie* and the directions of the Royal Court: *Viscount v Attorney General* [2017] 1 JLR 133 at paragraph 62 (Pleming JA).

18 For the Appellants it was noted that whilst Article 53 of the Trusts (Jersey) Law 1984 (the "Trusts Law") made specific provision for the award of costs of and incidental to an application to the court under that Law, both the Royal Court under the Civil Proceedings (Jersey) Law 1956 (the "1956 Law") and this court under the Court of Appeal (Jersey) Law 1961 had full power to determine by whom and to what extent costs are to be paid. With that general power in mind it was pointed out that both in the representation of the Bank to vary the *saisie* and sanction sale and in the instant application before the Royal Court, two separate judges, each with exceptional experience of trust matters, had allowed costs from the Trust funds of the Jersey Trust on the indemnity basis.

19 As a matter of principle, therefore, it was argued, the Court enjoyed jurisdiction to order the Appellants' costs from the Trust and, given that the First Respondent's Notice had failed, it would be an exceptional situation for the Appellants to be deprived of the order for costs which they had already secured.

Discussion

20 Whilst we express some hesitation on this matter, we have decided that we should, like the court below both on the instant matter and on the application of the Bank, allow the Appellants their costs of the appeal and the cross-appeal to be recovered from the Jersey Trust on the indemnity basis in respect of the Appellants and upon the trustee indemnity basis in respect of the Trustee.

21 We note that the learned commissioner below (Clyde-Smith) expressed hesitation but had decided to treat the application before him in a manner consistent with the earlier order (Birt, Commissioner). We understand the hesitation. The present application, whether in itself or as part of the overall *saisie* proceedings, is not an application under the Trusts law. It is not an application to the supervisory jurisdiction of the court as envisaged by Lightman, J. As Lightman, J. indicated in the passage to which we have referred, the justification for allowing costs of all parties where necessarily incurred is that they are treated as necessarily incurred for the benefit of the estate. That substratum does not exist in a case such as the present where any benefit of the application is not for those interested in the estate but, rather, for those with an interest, or contingent interest, in the exercise of the power to assign or sell.

22 We are conscious, however, that the Respondent's Notice has failed and that, naturally, the Appellants do not seek to disturb the award of costs below in their favour. Equally, given that the First Respondent, below, was then seeking his own costs from the Trust fund, he would not have argued that the Appellants were not so entitled.

23 As it is conceivable that the issue might arise in different proceedings and be fully argued before the Royal Court, we express no further views on the matter.

Costs against the Attorney General on the standard basis

24 The Appellants sought costs from the First Respondent both in respect of themselves and the Trustee, to be paid until full recovery had occurred of the amounts due to them from the Jersey Trust fund and, in the event that the claim against the Jersey Trust fund was satisfied by the Jersey Trust, then in repayment by the Attorney General to the Jersey Trust.

25 As had been made clear at an earlier stage in the proceedings, any argument that the ordinary rule of costs following success should be applied was going to be resisted by reference to what was viewed as a statutory preclusion. This argument was presented to us on behalf of the Attorney General.

26 The First Respondent placed reliance upon the International Co-operation (Protection from Liability) (Jersey) Law 2018, Article 2. Insofar as material, Article 2 provides:

> ***"(1) ….. despite any other provision in any other enactment to the contrary, a public authority shall not be liable –***

…

…

(c) … for costs in legal proceedings ,

in respect of any act done in the discharge or purported discharge of the public authority's functions under any enactment specified in Schedule 1 or Regulations … made under such enactment which entitles the public authority to give assistance to a relevant authority of any country or territory outside Jersey unless it is shown that the act was done in bad faith." .

27 It is uncontentious that the Attorney General would fall within the definition of a public authority as set out in Article 1 of the Law, and the Proceeds of Crime (Jersey) Law 1999 (as modified) (the "1999 Law), which makes provision for the recognition and registration of external confiscation orders and by virtue of which the *saisies* were made, as listed in Schedule 1 of the 2018 Law. As it happens, the 2018 Law came into force on the day of the Royal Court's judgment on the merits which has given rise to the appeal which was before us in September.

28 The submissions for the First Respondent commenced with reference to the purpose of the 2018 Law as set out in the anterior *Projet* which included the indication that the provision of assistance to other jurisdictions should not be constrained by considerations "regarding the risk to public funds in Jersey arising from claims for costs, damages or consequential losses."

29 Reference was made to *In Re O'Brien* [2003] JLR 1 (at paragraphs 20 and 21) and *R (Henderson) v Secretary of State for Justice* [2015] 1 Cr App R 29 for the proposition that, in criminal proceedings, the scheme for legal aid was a rational approach to public funding of representation. By extension, it was argued on behalf of the Attorney General, the fact that the present proceedings were classified as civil proceedings for procedural purposes did not alter the application of these policy considerations.

30 The submissions for the First Respondent then suggested that the 2018 Law was clear in that the Attorney General should not be liable for costs in any proceedings of the present kind.

31 It will come as no surprise that the principal area of disagreement between the Appellants and the First Respondent was as to whether the date of coming into force of the statute gave rise to consideration of the principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively.

32 In the arguments on behalf of the Attorney General it was accepted that certain passages from Bennion on Statutory Interpretation (7th edition) at section 5.12–13 should be accepted, namely:

> *"5.12 (1) It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take place retrospectively.*
>
> *2) Legislation is retrospective if it alters the legal consequences of things that happened before it came into force.*
>
> *5.13 (1) Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.*
>
> *(2) The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect.*
>
> *(3) The greater the unfairness the clearer the language required to rebut the presumption.*
>
> *(4) Special considerations apply to procedural changes."*

33 For the First Respondent, the following were the material considerations. First, the statute had been in force for the entire period relevant to the appeal, throughout which there had been a prohibition against a costs order being made in relation to the costs of the appeal. Second, the Law was in force at the time when the Royal Court delivered its judgment on the merits; the Royal Court was therefore prohibited from making a costs order, and, by extension, the Court of Appeal was prohibited from making a costs order in relation to the Royal Court proceedings. Third, if Rule 5.12 of Bennion was correct, the 2018 Law fell within the principles outlined by Lord Reed in *AXA General Insurance Limited v HM Advocate* [2012] 1 AC 868 at paragraph [120] that the rule against retrospectivity did not affect legal relationships established before the changes in law occurred.

34 Fourth, any unfairness did not outweigh the otherwise clear intention of the statute (a) which was clear from the time when the 2018 Law was registered in October 2018, (b) in proceedings where there was no right in domestic or human rights law to recover costs, (c) where the purpose of the litigation was to enforce the consequences of very serious criminal offences and (d) where this court had decided the case on a narrow technical issue.

35 For the Appellants it was contended that a right was not to be taken away by conferring on statute a retrospective operation, unless such a construction was unavoidable: see *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553, 563B-E; *Warren v Attorney-General* [2009] JLR Note 44.

36 The question as to when a particular right had accrued would be answered according to

individual circumstances, but it was clear from *Warren* that procedural rights arose in criminal proceedings when the accused were brought before the court, and under the procedural rules then in force.

37 In the present circumstances, the Appellants had acquired a right to seek costs as soon as their proceedings were brought before the court. They had made their application by Summons dated 16 April 2019. A hearing took place on 26 April 2019 as a result of which directions were made, further consideration of the application was listed for 28 May 2019 and the matter of costs was left over. A contested hearing lasting a full court day took place on 28 May and judgment was reserved. The draft judgment was circulated on 10 June and handed down on 18 June at 9.30am. The specific determination of the court on 26 April 2019 that it ***"left over the matter of costs"*** indicated that a right to seek costs had been acquired.

38 In such circumstances, by the time when the 2018 Law came into effect on 18 June 2019, the Appellants already enjoyed the benefit of an asset, namely a contingent interest in future acquired property. This was more than a mere expectation of the operation of procedural rules: it was a future thing in action which could be assigned. See Pothier, Traité du Contrat de Vente at page 6, especially at paragraph 6: "On peut vendre une chose incorporelle, un être moral, une créance, un droit, etc."

Discussion

39 In our judgment the result for which the Attorney General contends requires the imposition of a retrospective operation on the 2018 Law, a construction which would deprive the Appellants of an accrued right, and a construction which is not required by the simple words of the statute.

40 In delivering the advice of the Board of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara*, Lord Brightman said (at 563B):

> ***"Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively, to a particular type of case, would impair existing rights and obligations.*** The plaintiffs assert that a limitation act does not impair existing rights because the cause of action remains, on the basis that all that is affected is the remedy. There is logic in the distinction on the particular facts of The Ydun because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, as distinct from curtailment, of the right to sue is equivalent to the loss of the cause of action. The Public Authorities Protection Act 1893 can be regarded as procedural on the facts of The Ydun case, but a slight alteration to those facts would have made it substantive. A limitation act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of

facts .

> ***In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural.*** It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable."

41 The note of the decision in *Warren* is to similar effect albeit, in the event, considering when procedural rights arose:

> ***"In general, legislation was presumed to take effect from the date on which it came into force.*** The principle against retrospective effect protected accrued rights or obligations from retrospective alteration, unless it were sufficiently clear that such an alteration had been intended. The strength of that presumption varied in different circumstances and it was not normally regarded as applicable to purely procedural provisions… New procedural enactments were normally applied to current proceedings, which did not normally involve any element of retrospectivity. Defendants were not entitled to a trial in accordance with the procedural rules in force at the time when they had committed an offence. Their procedural rights arose when they were brought before the court, under the procedural rules then in force."

42 As regards the costs of litigation, absent special circumstances, a party to litigation enjoys, from the outset of the litigation, a right to seek costs in respect of participation in the litigation either as a whole or in respect of individual elements. Similarly, and again absent special provisions, a party to a litigation is taken to be aware from the outset that there is a potential liability for costs. Whilst, in practice, successful parties often recover little more than half to two-thirds of actual expenditure, the discretion given to the court to award costs is part and parcel of the overall fairness of the system of civil litigation in a jurisdiction such as Jersey.

43 We see no reason to characterise the right to seek costs as anything other than an asset in respect of which there can be a valid assignment: a juristic act which is highly likely to be part of any agreement between a litigant and a third party funder.

44 The argument for the First Respondent, therefore, would deprive the Appellants of an asset, the accrual of which right is recognised in the Order of 26 April which, in general terms, left over consideration of liability for costs. That said, it must be borne in mind that someone acquiring an asset which, of its nature, will be subject to legislative controls as to the rights and responsibilities of the owners of such assets, or indeed to changes in the law as stated by the courts, may not be able to claim that she or he should be immune from changes in legal rules. This point was adumbrated by Lord Reed in his judgment in *AXA General Insurance Limited and Others v HM Advocate and Others* [2012] 1 AC 868 at paragraph 120 where his lordship cited changes in the law which might affect legal

relationships established earlier, for example, in relation to existing families, the ownership of property or the employment of a workforce.

45 Similar views were expressed by Lord Morris of Borth-y-Gest in *Customs and Excise Commissioners v Thorn Electrical Industries Limited* [1975] 1 WLR 1661 at 1672H:

> ***"The fact that as from a future date tax is charged upon a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed."***

46 Neither the considerations by Lord Reed nor those by Lord Morris of Borth-y-Gest affect the issue here. A specific right had accrued and the construction contended for by the Attorney General would deprive the Appellants of that right.

47 It is important, however, to deal with the point that, although the statutory provision was not brought into force until 18 June 2019 by virtue of the International Co-Operation (Protection From Liability) (Jersey) Law 2018 (Appointed Day) Act 2019 made on 18 June, the 2018 Law had been registered by the Royal Court on 19 October 2018, some six months before the present summons was made.

48 It can be said that, as from October 2018, the prospect of the Law being brought into force could be envisaged. Equally, however, both by reason of the statute not being given immediate effect, and as the months went by, it could be seen that there did not appear to be any great urgency in bringing the measures into force.

49 In the whole circumstances it seems to us that there is no compelling reason to confer retrospective effect upon the 2018 Law and we consider that, upon an ordinary construction, Article 2 relates to "any act done in the discharge or purported discharge of the public authority's functions under any enactment specified in Schedule 1" after the coming into force of the provision.

50 Upon that view, the stance taken by the First Respondent in opposing the claims by the Appellants before the Royal Court, all of which were concluded prior to 18 June 2019, are amenable to the discretion of the court to award expenses in adversarial civil litigation. The potential liability for costs for the Attorney General in certain aspects of *saisie judiciaire* proceedings was accepted in *Attorney General v Rosenlund and Another* [2016] (1) JLR 348 at paragraphs 7 to 12.

51 Turning to the proceedings before this court, all have taken place subsequent to 18 June 2019. In our judgment, however, the appellate proceedings are not affected by the provisions of Article 2 of the 2018 Law. To a great extent, the work of an appellate court is to appraise the determination and orders of the court of first instance and, where appropriate, to correct what, in its judgment, are errors in the determination; albeit there may

be occasions where new issues emerge. In allowing an appeal and correcting the determination below, the appellate court is setting out what should have been the determination below; and when, on occasion, the decision on appeal follows lines of argument different to those put before the court of first instance, it will usually be the case that those arguments ought to have been deployed below either by the parties or by the court itself.

52 Where a respondent fails on appeal to uphold the judgment of the court below, it has been shown that the stance of the respondent at first instance, in opposing the result contended for by the successful appellant, was ill-founded. The proceedings on appeal, in an ordinary case, are merely a restatement of the stances of parties at first instance. It is our judgment, therefore, that Article 2 of the 2018 Law does not operate to relieve the Attorney General of liability for the costs of the appeal as “any act done in the discharge or purported discharge of the public authority's functions” was not separate from, but merely a continuation of, the stance at first instance.

53 We would add that we find it difficult to understand the contention on behalf of the Attorney General that this court determined the appeal on a ***“narrow technical issue”***. As was made clear in our substantive judgment, we determined that the reasoning of the Royal Court contained, in our view, a fundamental flaw in conflating the ownership of the legal estate in the mortgaged property with the legal interest which a mortgagee enjoys in the mortgage over the property: see paragraph 54.

An issues based or proportional order

54 It is convenient at this stage to deal with the submission on behalf of the Attorney General that, if there was to be a costs order in relation to the appeal, it should be narrowly confined by way, either, of an issues based order or a proportional or percentage-based order. It was submitted that by far the largest amount of work, whether considering the Notice of Appeal, the correspondence, the various applications and the Appellants' supplemental contentions, concerned new arguments and fresh evidence especially in relation to issues regarding territorial jurisdiction.

Discussion

55 In our judgment the award of costs should be in relation to the appeal as a whole. Particularly cogent reasoning is required to enable a court to depart from ordinary practice and make an issues-based order. When such orders are made, practical complications in assessment typically arise and add both to irrecoverable costs and to the strains of litigation for the parties involved. It is only where it would be manifestly unfair to parties to grant an ordinary order for costs and where individual issues appear capable of being separated out with a reasonable degree of certainty that an issues-based order will be appropriate.

56 As regards proportional or percentage-based orders, different considerations often militate against the making of such orders, especially at appellate level. Without carrying out a mini-taxation, a court will rarely have sufficient information to make a percentage-based order which reflects the actual proportion of work, out of the whole, which a litigant has carried out for those parts of the appeal upon which success has been achieved. The conduct of litigation is an art, not a science, and it is almost the rule, perhaps increasingly so, that litigants and their representatives will deploy as many lines of argument as appear appropriate in order to persuade the tribunal in question. The result of a percentage-based order can often be to punish a successful litigant and, in broad terms, such a result should ensue only where a significant amount of time has been taken up with a discrete line of argument which had no prospect of success whatsoever.

57 The present appeal had a number of singular factors, which are set out in the substantive judgment; but it was the court itself which identified the particular issues to be dealt with in oral submission, the remaining aspects being dealt with on the written material. As we have already observed, we reached the view that there had been a fundamental error in the reasoning of the Royal Court which should have led to a determination in favour of the Appellants. In our judgment the Appellants are not to be criticised for considering the deployment, on appeal, of further arguments to support their position. We therefore decline the suggestion that an issues-based or percentage-based order should be made.

Orders for costs on the standard basis against the Indonesian Ministry

58 The Appellants also submitted that the Ministry of Law and Human Rights of the Republic of Indonesia (the “Ministry”) should be declared to have been a party to the proceedings before the Royal Court and before the Court of Appeal, being the party on whose behalf the Attorney General had appeared throughout those proceedings. In the alternative it was contended that the Ministry should be joined as a party, pursuant to the provisions of Article 2(1) of the 1956 Law for the purpose of making a costs order against it. Under either basis the Ministry should be ordered to pay the Appellants' costs, and the Trustee's costs to be taxed (if not agreed) upon the standard basis; payment to be made, as with the Attorney General's position, until full recovery and in repayment to the Trust.

59 As a result of the provisions of the 1999 Law and the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 (the “2008 Regulations”), provisions have been made for the representation of overseas authorities, in recognition or registration proceedings, by the Attorney General: see Regulations 6 and 16.

60 It followed that, as the Attorney General represented the Ministry, the inexorable conclusion was that the Ministry was a party, or vicariously a party: see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 at paragraph 25.

61 Separately, Article 2(1) of the 1956 Law conferred upon the Court a very wide discretion as

to making costs orders including as against non-parties who could be joined as a party for the purposes of a costs application. Relevant considerations had been discussed in *Aiden Shipping v Interbulk Limited* [1986] AC 965, *Planning and Environment Minister v Yates* [2008] JLR 486, *Willers v Joyce* [2019] EWHC 2183 (Ch) and *Travelers Insurance Company Limited v XYZ* [2019] UKSC 48.

62 The Ministry fell squarely within the reach of the principles considered in those authorities. It had initiated the Jersey proceedings by requesting the Attorney General to act upon its behalf. The Attorney had acted on its behalf and the Ministry, therefore, also ranked as a plaintiff, represented by the Attorney General. The Ministry had the principal interest in the proceedings and no doubt stood to share in any proceeds of recovery pursuant to any asset sharing agreement. There was no State Immunity. The State Immunity (Jersey) Order 1985 (the "1985 Order"), through its Schedule, applied the provisions of the UK State Immunity Act 1978 (the "1978 Act") to Jersey. By Section 2 of the 1978 Act, a State is deemed to have submitted to the jurisdiction of the local courts, among others, if it has instituted the proceedings or has intervened or taken any step in the proceedings. The Ministry fell within this provision.

63 The First Respondent opposed the applications. It was pointed out that the 2008 Regulations and the Civil Asset Recovery (International Co-Operation) (Jersey) Law 2007 (the "2007 Law") were Jersey's implementing legislation for the purposes of mutual assistance obligations in at least certain international conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the United Nations Convention on Transnational Organised Crime 2000, the United Nations Convention against Corruption 2003, and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism, 2005.

64 These Conventions, it was submitted, whilst containing different wording, created schemes with similar features involving requests from one sovereign State to another and in respect of which the requested State could refuse to comply with the request. There was nothing in any of the Conventions that envisaged that the requested State would act as the agent of the requesting State or that the requesting State would have any enforceable rights or obligations in the domestic law of the requested State.

65 The legal mechanism created by the 2008 Regulations was consistent with the international scheme for dealing with requests. The 2008 Regulations simply permitted the Attorney General to invoke domestic confiscation law provisions if he received a relevant request and the Attorney General is, and always has been treated as being, a full party to the proceedings in his own right. The requesting State obtained no title to, nor any rights enforceable in Jersey against relevant assets and would only receive any monies if Jersey decided, in its discretion, to enter into a State to State agreement to transfer assets under Article 24(8).

66 Further, Regulation 4 of the 2008 Regulations provided for a number of matters to be proved by certificate "… purporting to be issued by or on behalf of the appropriate authority of a country or territory outside Jersey …" Such a provision would be otiose if the legislature envisaged that the foreign State would be an ordinary party to proceedings, expected to establish its case by means of the usual rules that apply to any party to proceedings in the Royal Court.

67 Further, if Indonesia was a party to the proceedings under the 2008 Regulations, one would expect it to be able to acquire rights by reason of them. A similar issue had emerged in relation to the 2007 Law in *Federal Republic of Nigeria v Doraville Properties Corporation* (2017) (1) JLR 46 where it was found that notwithstanding the creation of a statutory scheme to recover assets, the United States would obtain an interest only if there was a later government to government asset sharing agreement: see paragraph 16.

68 As far as Regulation 6 of the 2008 Regulations was concerned, it did not provide that the proceedings were to be brought on behalf of the foreign State but, rather, that the foreign State was to be represented by the Attorney General. Regulation 6 was consistent with the international scheme previously referred to and explicable by reference to two principles of criminal justice: first, that criminal justice was a matter within the exclusive power of the Attorney and, second, that as a matter of international law one sovereign State did not interfere in the sovereign powers of another. Regulation 6 ensured that the Attorney General had control over the proceedings and prevented the requesting State from intervening as a separate party should it try to do so.

69 Regulation 16(1) and its introductory words required careful consideration. In referring to an application made by or on behalf of the Attorney General "on behalf of the government of a ***country or territory outside Jersey", the words "on behalf of"*** meant no more than *"at the request of"*. This interpretation would be consistent with the scheme within the treaties which the 2008 Regulations implemented.

70 In addition, the First Respondent indicated that Indonesia wished to claim State Immunity. The suggestion by the Appellants that a State is to be taken to have waived immunity by requesting mutual legal assistance would be inconsistent with the international scheme and have wide reaching consequences. Potentially there would be a stifling effect on mutual legal assistance which would run directly counter to the modern approach to investigating cross-border crime in a speedy and efficient manner.

71 The provisions deeming submission within Section 2(3) of the 1978 Act required care in assessing what might be covered. The decision of the Royal Court in *Tepe v Botas* (2016) (1) JLR 218 at paragraphs 61 – 66 emphasised that the principle of State Immunity under the 1985 Order protected the foreign Sovereign or State from proceedings against their will or without consent. Guidance could also be found in Fox and Webb, The Sources of the Law of State Immunity (3rd edition) at page 189–190. In particular, what constituted " *a step in the proceedings*" is to be judged on ordinary principles and any election must be

an unequivocal act done with knowledge of the material circumstances: see *Eagle Star Insurance Co Limited v Yuval Insurance Co Limited* [1978] 1 Lloyd's Rep 357 at 361.

72 The present case was one of a request for mutual legal assistance and there was nothing in the scheme which envisaged that such a request would constitute a waiver of State Immunity or a submission to the domestic jurisdiction. Such a request and any subsequent participation could not constitute an unequivocal act done with knowledge of the material circumstances.

73 Further, having regard to Section 2(7) of the 1978 Act the court would require to investigate whether the Ministry that made the request had the relevant authority to submit to the jurisdiction and waive state immunity.

74 The Appellants, in their written reply, submitted that the starting point for considering whether the Court might make an order for costs against the Ministry was the relevant Law rather than any international scheme. The terms of legislation which were clear and unambiguous must be given effect to whether or not they carried out treaty obligations. Only if the terms of legislation were reasonably capable of more than one meaning did the terms of an underlying treaty become relevant: see *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, at 143–144.

75 The provisions of Articles 5, 6 and 16, taken together or individually, showed that by appearing in court for the Ministry, and by certifying that the Ministry was the appropriate authority to make the request, the Attorney had made the Ministry amenable to the court's costs jurisdiction because of its initiation of the proceedings by making a request under Article 6 and by taking steps in the proceedings.

76 The provisions of the international obligations upon which the Attorney General placed reliance did not assist him. The construction for which the Attorney contended would constitute an immense intrusion into the sovereign jurisdiction regarding access to justice. It was one thing to allow governmental bodies to agree amongst themselves as to allocation of costs; it was quite different to deprive adverse parties from what, otherwise, might be a costs entitlement.

77 The reference to *Federal Republic of Nigeria v Doraville Properties Corporation* was misconceived. Liability for costs did not depend upon establishing a proprietary right to any particular asset. A litigation funder might merely have a contractual claim to share but that did not protect the funder from having a costs liability. By reference to the analysis by Lord Reed in the *Travelers* case, the true master of the litigation could be identified by considering whether a plaintiff would not have brought an action but for the instigation and countenance of another. Applied to the present case, it is inconceivable that the Attorney General would have lodged proceedings, and disputed the issues with the Appellants, but for the instigation and continuance by the Ministry.

78 The Appellants noted that, by email of 12 November 2019, the Attorney had indicated that it expected to enter into an asset sharing agreement with the Ministry. Whilst the likely terms have not been disclosed, it was not necessary for the Ministry to be the intended sole beneficiary of the benefit of any litigation. Reference is made to *Arkin v Borchard Lines Limited* [2005] 1 WLR 3005 and to *Davey v Money* [2019] 1 WLR 6108.

79 Turning to State Immunity, the Appellants submitted that Articles 5, 6 and 16 of the Law provided the answer to the issue. Clearly there had been a submission to the jurisdiction of the Jersey courts at the instigation of the Ministry. A claim to State Immunity was a claim to be immune from the jurisdiction of the foreign court. It was not open to the Attorney to pursue this point without denying the truth of the material which had been advanced as to his authority to conduct the proceedings; nor was it open to the Attorney, whilst representing the Ministry pursuant to the statutory provisions, to challenge, or to put in question, matters as to whether the Ministry had the requisite authority. There was no need to have concern for the need for knowledge of material circumstances and a willingness to participate in the proceedings concerned. Such was not a realistic concern in the present context where the Ministry was represented by the Attorney and had access, through him, to the fullest of legal advice as to the implications of the making of a request.

80 The Appellants also drew our attention to the involvement of the Ministry in practice. In their submission the reality of the instructions and involvement of the Ministry underlined its submission to the jurisdiction and, further, that it was, indeed, represented by the Attorney General.

81 There had been three Letters of Request on behalf of the Indonesian government expressly seeking confiscation of Trust assets and repatriation of them to the government of Indonesia. Particular emphasis was placed upon the fact that the director of the Ministry, Mr. C R Muzhar, had provided two Affirmations in support of the *saisies judiciaire* and one specifically against the Appellants' summons in the present case. Salient portions of the second Affirmation had been set out in the 2015 judgment (*In Re Tantular* [2015] (1) JLR 97 at paragraphs 15 – 22) which demonstrated the central involvement of the Ministry in the Jersey proceedings. It was clear from the Bailiff's account that the manner in which the proceedings have been conducted has depended upon the instructions and involvement of the Ministry. In the instant proceedings, Mr. Muzhar filed a third affirmation in which he specifically asked for relief from the Royal Court on behalf of the Indonesian Government, stating that he was duly authorised to make the affirmation on behalf of the Government. In the concluding paragraph he made clear that, in light of the matters to which he had drawn the attention of the court, he requested, on behalf of the Government of Indonesia, that the Royal Court refused to declare that the *saisie judiciaire* did not prevent the proposed assignments and refused to vary them.

Discussion

82 In our judgment the determination of this issue turns upon the appropriate characterisation as a matter of law of the request made by the Ministry, taken together with the agreement of the Attorney General, to make the applications which have led to these proceedings. If the proper characterisation is that the Republic of Indonesia, through the Ministry, has instituted the present proceedings, it follows that it has submitted to the jurisdiction of the courts of Jersey and is not immune from liability arising out of those proceedings.

83 The 1978 Act, as applied in this jurisdiction through the 1985 Order, provides:

> ***"1(1) A State is immune from the jurisdiction of the courts of [the Bailiwick] except as provided in the following provisions of this Part of this Act*** .
>
> ***(2) …***
>
> ***2(1) A State is not immune as regards proceedings in respect of which it has submitted to the jurisdiction of the courts of [the Bailiwick]*** .
>
> ***(2) …***
>
> ***(3) A State is deemed to have submitted –***
>
> > ***(a) if it has instituted the proceedings"*** .

84 In submissions to us, the parties have referred to the underlying factual circumstances as requests for *"mutual legal assistance"*. This exact phrase is not found in the statutes and orders with which we are principally concerned but is used in certain of the Conventions to which the First Respondent referred us. An example is found in Article 18 of The United Nations Convention on Transnational Organised Crime 2000 (the "Palermo Convention"):

> ***"Article 18 Mutual legal assistance***
>
> ***1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in Article 3 …"***

85 Turning to the 1999 Law, as modified by the 2008 Regulations, it is clear that the overriding purpose is to allow the 1999 Law to permit the enforcement of ***"external confiscation orders"*** and ***"the enforcement of proceedings that have been or are to be instituted in a country or territory outside Jersey and may result in an external confiscation order being made there":*** see Regulation 2 of the 2008 Regulations

86 By Section 1 of the 1999 Law:

> ***'"external confiscation order" means an order made by a court in a country or territory outside Jersey –***

(a) for the purpose of recovering property obtained as a result of or in connection with criminal conduct;

(b) for the purpose of recovering the value of property so obtained; or

(c) for the purpose of depriving a person of a pecuniary advantage so obtained' .

87 Accordingly, when a relevant request is made to Jersey, it will be for the purpose of giving force in Jersey to an order made in the courts of another sovereign State in order to recover property, recover the value of property or deprive a person of pecuniary advantage.

88 In other words, an order has been made in a court of competent jurisdiction but cannot be enforced because the relevant property, its value or those controlling it are subject to the jurisdiction of the courts of a different State. The principal interest in recovering the proceeds of crime will be the authorities of the State in which the criminal conduct has occurred. Almost invariably, that State cannot use its own criminal legislation in the courts of another state and, accordingly, there are provisions of mutual legal assistance.

89 It is also important to reflect on the point that, insofar as regards Jersey legislation, the power of the Attorney General to take proceedings in reliance of an external confiscation order depends upon a request at the instance of the external State. It is no part of the ordinary powers and duties of the Attorney General to take notice of external orders and to seek to use them in Jersey for the purpose of recovering property. Such steps as are available to the Attorney General depend upon the detailed provisions of the Laws and Regulations to which we have been referred. It is therefore unsurprising that Article 16 of the 1999 Law restricts the power of the Court to instances of an application by the Attorney General "on behalf of the government of a country or territory outside Jersey." Reference may also be made to Regulations 3, 4 and 5 of the 2008 Regulations which give detailed provision as to proof of external orders, evidence of what has happened in external proceedings and the identification of the authority appearing to the Royal Court to be the appropriate authority of the external country in question for the purposes of the 2008 Regulations. It is against that background that Regulation 6 provides:

"(1) In any proceedings in the Royal Court under the [1999] Law, the government of a country or territory outside Jersey shall be represented by the Attorney General .

(2) In any such proceedings in the Royal Court a request for country or territory outside Jersey shall, unless the contrary is shown, constitute the authority of the government of that country or territory for the Attorney General to act on the government's behalf."

90 In our judgement it is all but incontrovertible that the commencement of this process should be characterised as an institution of proceedings by the Ministry, albeit with the assistance of the Attorney General. As we have indicated, the Attorney General could not have instituted such proceedings on his own mere motion or caprice. Further, as the Conventions make clear, whilst mutual legal assistance may be refused, the relevant circumstances are restricted as, otherwise, the likelihood of true mutuality could readily be defeated.

91 Nor do we consider it an obstacle to this characterisation that the requesting state might not necessarily share in a distribution of any assets recovered. The purpose of the legislation and Regulations is to enforce external confiscation orders: that is, to achieve confiscation. Whilst, in the State in which it has been made, it will have sought recovery of property, proceeds or control, the underlying purpose of the Conventions is to control and defeat criminality which has international dimensions and that will, at least in part, be achieved by achieving confiscation.

92 Whatever arrangements may have been made for asset sharing in respect of confiscated property as between Jersey and any other sovereign State, the principal interest in instituting these proceedings is that of the Government of Indonesia, through the Ministry.

93 Were it necessary to do so, we find the account given in the 2015 Judgment (*Re Tantular* [2015] (1) JLR 97) of the actions of the Director for International Law and Central Authority, Ministry of Law and Human Rights, Indonesia, Mr. Muzhar, to be a clear indication of the direct interest of the Ministry. Mr. Muzhar and other Indonesian officials came to Jersey in August 2014 for the purpose of the hearing to take place before the Royal Court, gave detailed instructions to the Crown Advocate including as to whether to seek an adjournment and, when it became clear that there were difficulties with the application, engaged in telephone discussion with the Indonesian Attorney General to obtain consent to the making of a supplementary request based upon further information. In ordinary characterisation, the Crown Advocate was giving assistance to the Ministry in the presentation of the applications and the Ministry was directly involved in deciding how the applications were going to be progressed.

Orders

94 We therefore propose to make the following orders.

95 The Appellants will be allowed reimbursement of their costs both of the appeal and the cross appeal from the Jersey Trust on the indemnity basis. The Trustee will be allowed its costs of the appeal and the cross appeal from the Jersey Trust on the Trustee indemnity basis. No order is to be made in respect of the Viscount, who is entitled to recover her costs from the Jersey Trust under the terms of the *saisies judiciaires*.

96 The Attorney General shall pay the Appellants' costs of the appeal and cross appeal and the Trustee's costs of the appeal and cross appeal upon the standard basis; to be taxed, if not agreed. In the event that the Appellants and the Trustee have received full recovery from the Jersey Trust, payment of this liability will be made by the Attorney General to the Jersey Trust. In respect that the Viscount has expressed neutrality as to whether an order should be made against the Attorney General in respect of the amount of her costs paid by the Jersey Trust under the terms of the *saisies judiciaires*, we make no order. The power of the Viscount to obtain reimbursement depends upon the terms of the *saisies judiciaires* and are not claimed as litigation expenses.

97 The Indonesian Ministry shall be liable along with the Attorney General for the costs of the Appellants and the Trustee in respect of the appeal and cross appeal, on the standard basis.

98 The Appellants also sought an interim award of costs at the level of 50 per cent or such other percentage or sum as might be determined by this court. Given the fact that we allow recovery of costs from the Jersey Trust assets and given the identity of the First Respondent, we do not envisage such singular circumstances that the Appellants will have to wait an undue amount of time to obtain their satisfaction.

99 As regards the stay applications, each has been refused and, having regard to the views which we have expressed in this judgment, we see no reason why costs should not follow success in the ordinary way and similar orders will be pronounced in respect of recovery from the Jersey Trust, and liability on the part of the First Respondent and the Indonesian Ministry.