

Jersey & Guernsey Law Review – June 2012

MISCELLANY

Costs in criminal cases

1 In 2011, a costs order obtained by the Attorney General against a party convicted in the Royal Court of serious sexual offences found itself at the forefront of local media reports when it emerged that enforcement of the order would inevitably lead to the loss of the family home of his dependents. For the criminal practitioner, the case was of particular interest since, outside prosecution for public law infractions (such as those under the Housing (Jersey) Law 1949, under various Planning statutes and Health and Safety statutes), it represented a rare example of an application by the Attorney General for the costs of a prosecution. That not seeking costs had hitherto been the general practice, if not policy, was reflected in the dearth of local authorities on the principles applicable to costs in such cases. The earliest example of a reported case on point was *Att Gen v Weston*,¹ though there costs were awarded against the convicted party by the court of its own motion and without an application by the prosecution. More recently, the issue of costs had received judicial consideration in the prosecution of Peter Michel, reported as *Michel v Att Gen*² and *Att Gen v Michel*.³ It was not until the convicted party in the aforementioned 2011 case appealed unsuccessfully against the costs order that Jersey law received some guiding principles on the costs jurisdiction following conviction, in the form of *X v Att Gen*.⁴

2 The recent case of *Att Gen v E*⁵ has provided an interesting insight into the costs position of a party convicted who then finds himself incurring legal costs in an appeal brought by the prosecution. It also gives food for thought about the position on costs generally for parties who find themselves prosecuted. After all, if the aforementioned 2011 case marked a change in policy by the Attorney General, and absent official guidelines on the point it is too early to say, a balanced jurisdiction ought to ensure an equality on the flip side of the coin.

¹ 1980 JLR 43.

² [2007]JCA009 and 2007 JLR N [13].

³ 2008 JLR 151.

⁴ [2011] CA 63.

⁵ [2012]JRC019A.

3 In *Att Gen v E*, the respondent had been convicted by the Magistrate's Court on charges of making indecent photographs of children contrary to art 2(1)(a) of the Protection of Children (Jersey) Law 1994. By virtue of art 3(1) of the Sex Offenders (Jersey) Law 2010, the respondent became subject to the notification requirements in art 6 which required him to notify an authorised officer of names he used, his address and any change of address. Article 5(4) envisages that the duration of the notification order should usually be at least five years. Although neither prosecution nor defence submitted that the duration of the notification order should be other than five years, the Magistrate imposed a time period for notification of one year. The Attorney General successfully appealed against the imposition of the shorter time period and a period of three years was imposed. The respondent had found himself in the peculiar position of facing an appeal against an aspect of the sentence imposed upon him which the prosecution considered inadequate, but which he had not argued for. He incurred legal costs in appearing at the appeal and, unsurprisingly, applied for his costs to be paid out of public funds.

4 Unfortunately for the respondent, the court found that it was powerless to grant him his costs, notwithstanding Commissioner Clyde-Smith observing that—

“if I did have powers to order the respondent's costs to be paid out of public funds, then I would have made an order in favour of the respondent. I accept, [the Crown Advocate] has submitted, the appellant acted reasonably and properly in the public interest in bringing the appeal and was successful in establishing that the period was unreasonably short. I also accept [the Crown Advocate]'s submissions about the serious financial implications to the Respondent of this prosecution.”

The reason for this unsatisfactory position was that the court found itself without express statutory power to award costs in these circumstances and unable to identify an inherent jurisdiction to do so. Following the Court of Appeal decision in *Channel Islands Knitwear Co Ltd v Hotchkiss*,⁶ clear authority is required for the payment of costs out of public funds as a matter of Jersey law. Here there was none. There are no express provisions within the 2010 Law which gives the court the power on appeal to order costs at all, let alone costs payable out of public funds. The wider jurisdiction under art 2 of the Costs in Criminal Cases (Jersey) Law 1961 only permits the Royal Court to award costs where a person is convicted, discharged or acquitted before it. It has no power under that Law to award costs on

⁶ 2001 JLR 570.

appeal to it from the Magistrate's Court. In addition, as the court noted, costs on appeals from the Magistrate's Court to the Royal Court are governed by the provisions of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. However the appeal was not brought under that law. It was also accepted, correctly, by both sides that the court did not have an inherent power to award costs payable out of public funds.

5 Article 2 of the Costs in Criminal Cases (Jersey) Law 1961 states—

“Power of Royal Court or Magistrate's Court to award costs

Subject to the provisions of this Article, where any person is prosecuted or tried before a court to which this Article applies, the court may—

- (a) if the accused is convicted, order the accused to pay the whole or any part of the costs incurred in or about the prosecution and conviction;
- (b) order the payment out of public funds of the costs of the prosecution;
- (c) if the accused is discharged from the prosecution or acquitted, order the payment out of public funds of the costs of the defence.”

On its face therefore, a person who is prosecuted may recover his costs only if he is discharged or acquitted. Equally, that person can only be ordered to pay costs if he is convicted. However the statutory language gives the court no flexibility in awarding a costs order which reflects the nuances of the case which has unfolded before it. For example, if the prosecution has inadvertently proceeded in a manner which has unnecessarily increased the legal costs incurred by the convicted party, the latter cannot recover costs thrown away. Worse, in a jurisdiction where the Royal Court is regularly invited to make a confiscation order under the Drug Trafficking Offences (Jersey) Law 1988 and the Proceeds of Crime (Jersey) Law 1999, these statutes are silent on the issue of costs. Whilst the prosecution on obtaining a confiscation order could make a realistic claim for costs under art 2, on the basis that confiscation falls within “costs incurred in or about the prosecution and conviction”, the convicted party could not do so where he had succeeded in defending himself against the confiscation order. That is because recovery of costs for a party prosecuted are restricted under art 2 to where the party is discharged or acquitted.

6 The case of *Att Gen v E* thus highlights the difficulties and unfairness that may arise from the introduction of an increasing number of criminal statutes which are not correlated with the central costs jurisdiction in the Costs in Criminal Cases (Jersey) Law 1961.

However it is clear, too, that art 2, drafted for an earlier age, itself could do with some rethinking. A good template would be that found in the civil context where art 2 (1) of the Civil Proceedings (Jersey) Law 1956 gives the Royal Court a wide discretion to achieve justice in costs awards.

Recent changes to the Trusts (Jersey) Law 1984

7 The Trusts (Jersey) Law 1984 (“the Law”) brought certainty and confidence to the establishment of Jersey trusts. Its success could be attributable to a variety of reasons but perhaps foremost amongst them is the sensible balance struck between the interests of beneficiaries and trustees and the clear, simple and unpretentious way in which the Law lays down its set of core principles. It has undeniably proved to be a highly attractive framework over the past three decades and, if imitation is the sincerest form of flattery, it has been heavily complimented by other offshore financial centres, including Guernsey, Malta and Belize. Due to the constantly evolving nature of trust laws at a global level however, the Law has necessarily been subject to amendments over the years. It has been amended four times, *inter alia*, to permit non-charitable-purpose trusts, to introduce settlor reserve powers and anti-forced-heirship provisions and to negate the application of foreign court judgments that fail to apply Jersey law.

8 On 3 November 2011 the States of Jersey passed the Trusts (Amendment No 5) (Jersey) Law 201– (“the Amendment”). The Amendment is expected to be in force by the end of 2012 once it has received the sanction of the Privy Council. It introduces a number of key enhancements.

1. Self dealing when acting as trustee of more than one trust

9 The Amendment introduces a new provision in art 31 of the Law and will confirm the validity and enforceability of inter-trust dealing by the same trustee (perhaps most likely a sole corporate trustee) wishing to contract in its capacity as trustee of, say, “Trust A” with itself in its capacity as trustee of “Trust B”. This provides a clear statutory exception from the usual “two party” rule which prohibits a party from contracting with itself. This change will be particularly useful in circumstances where a wealthy family might establish a private trust company (“PTC”) to act as trustee of several family trusts and the PTC may need to contract with itself to lend money from a cash rich trust it administers to itself as trustee of a different trust in need of liquidity.

2. Facilitating the provision of indemnities to former trustees

10 The Amendment provides statutory comfort that if an instrument of retirement and appointment of trustees is drafted to contain an express provision that the retiring trustee may enforce its security (often an indemnity) without being party to future security providing documents (*e.g.* indemnities given in its favour) then the retiring trustee may enforce that security in its own right despite not being a signatory to those future documents. The Amendment creates an exception to the usual privity of contract rule (*viz.* only the signing parties to a contract may enforce its terms). This should speed up the signing of future indemnities as it prepares the way for the unilateral granting of indemnities to former trustees who are owed indemnities as a result of chain indemnity provisions in instruments of retirement and appointment of trusteeship. This should save administration and legal costs, and increase efficiency on changes of trusteeship.

3. Prescription of claims

11 The Amendment amends art 57 of the Law and creates a new “longstop” prescription rule to bar claims against trustees for breach of trust after 21 years have elapsed since the date of the act or omission which purportedly resulted in the breach (other than for breaches of trust constituting fraud, or conversion claims which are never time barred). This longstop on claims is three years longer than in Guernsey to take account of the fact that time does not run against a minor, and that the minor arguably has three years from attaining his majority to bring his claim against the trustee. Before this provision time might run on until the expiry of three years from the date of delivery of final accounts of the trust to the beneficiary, or three years from the date upon which the beneficiary first had knowledge of occurrence of a breach of trust. It was felt reasonable that there should be some definitive longstop provision to prevent excessively remote claims.

4. Purpose Trusts

12 A definition of what constitutes a valid “purpose” is being introduced in art 1 of the Law so as to broaden potential uses of Jersey non-charitable purpose trusts. This definition provides that “purpose” means any purpose whatever, whether or not—

- “(a) involving conferral of any benefit on any person; or
- (b) consuming or capable of consuming the income or capital of the trust,

including without limitation the acquisition, holding, ownership, management or disposal of property and the exercise of functions.”

5. *Professional trustees of remunerationless trusts*

13 The Amendment will amend art 26 and provide that where a Jersey trust is silent as to trustee's remuneration, if that trustee is a JFSC licensed professional trustee, then it will be able to charge reasonable remuneration prospectively from the date of the Amendment coming into force. The change comes about to save the costs of an application to court by the trustee for an order permitting remuneration. The court has considered a number of these cases and it has become clear that the interests of the beneficiaries are overall better served by having the trust assets professionally administered and regularly accounted for within an environment of a "six eyes" supervisory span of control, including professional indemnity insurance. Compared with the alternative of leaving an unsupervised, unpaid, lay trustee with few resources and little experience in charge, this seems a preferable solution, despite the increase in cost for the trust.

6. *Extending anti-forced-heirship rules beyond the settlor's personal relations*

14 The Amendment will amend the definition of "personal relationship" in art 9(6) and extend for Jersey trusts the rule relating to the negating of foreign forced-heirship rules beyond those persons connected by blood, marriage or adoption to the settlor to all persons connected by blood, marriage or adoption to any beneficiary of the trust. This should assist in the ring-fencing of trust assets away from claims by spouses or issue of beneficiaries where it was not intended that such spouse or issue should ever benefit.

7. *The jealous application of Jersey law to Jersey-law-governed trusts*

15 The Amendment further amends art 9(4) of the Law so as to provide that no judgment of a foreign court or decision of any other foreign tribunal (whether in arbitration or otherwise) with respect to a Jersey trust shall be enforceable, *or given effect*, to the extent that it is inconsistent with the robust anti-forced-heirship provisions of art 9. Decisions such as *In re B Trust*¹ might now be differently decided.

¹ 2006 JLR 562.