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PRIVY COUNCIL LAYS DOWN PRINCIPLES FOR SECURITY FOR COSTS

On 31 January 2023 the Privy Council gave important guidelines on security for costs principles in *RDA v Christie*. This appeal concerned applications for security for costs in public interest environmental judicial review claims, including an application by the Developers to join the proceedings as additional defendants- so they could then seek security.

A judicial review challenge was launched against the proposed development of marina facilities in Little Harbour on Abaco, an island in the Bahamas. RDA is a Bahamian registered company incorporated with the objective of ensuring that developments in Abaco are sustainable, environmentally sound, ecologically responsible, and to take account of the legitimate interests of Abaco's residents, homeowners and visitors. The defendants to the judicial review were various Government bodies responsible for granting permissions and approvals plus the Developers of the marina, which became defendants to apply for security for costs.

RDA were granted permission to seek judicial review. Shortly before the scheduled trial, the Supreme Court judge ruled that RDA pay security for costs totaling about US $250,000 ($100,000 to the Government and $150,000 to the Developers). RDA unsuccessfully appealed to the Court of Appeal and then obtained leave to appeal from the Privy Council. The case, itself, ground to a halt.

RDA argued that the Court of Appeal erred in principle (i) by requiring security for costs in the sum of $250,000 to be provided within 30 days, which could not realistically be achieved, thereby stifling its claim, (ii) by failing to recognise that the judicial review challenge is a public interest claim, and (iii) by holding that the Developers, as interested parties and defendants, were entitled to security for costs- even though the Developers' interests and the Government's were identical.

RDA was incorporated in 2009. It has authorised share capital of 5000 $1 shares. Two shares have been issued held by a bookkeeper and a receptionist in the office of RDA's attorneys. RDA's entry in the register of companies in the Bahamas records that its directors are three businessmen. RD's evidence explained that the issued shares are held on trust for approximately 75 persons who are either residents and/or landowners in the Bahamas. But RDA's evidence did not identify who these 75 persons are, what their interest in these proceedings might be, what financial resources are available to them, or what support they might be willing to provide for the proceedings to be maintained.

The Government applied for security under s 285 of the Companies Act on the grounds that the company's assets may be insufficient to pay the respondents' costs. The Developers applied to be joined as defendants so they too could be awarded security under s 285.

The Court of Appeal upheld the Judge's order for security, relying on the Court of Appeal decision in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 and *R (We*

Love Hackney) v Hackney LBC [2019] EWHC 1007- which referred to *Keary* and the Supreme Court's decision in *Goldtrail Travel v Onur Air* [2017] 1 WLR 3014.

The Court of Appeal held that RDA was a limited liability company pursuing the claim for no benefit to itself. Although it may have no assets of its own, it was reasonable to infer that it is being funded by individuals who claimed to be adversely affected by the proposed development and could be expected to provide the security required to pursue the claim. The Court of Appeal also decided that, like many applications for judicial review, the case had a public interest element. But that, in itself, was insufficient to immunize RDA from provided security which would allow it to pursue its claim without any meaningful risk of incurring costs, if unsuccessful.

The Court of Appeal, therefore, upheld the security for costs ordered in favour of both the Government and the Developers.

Before the Privy Council the Government accepted there was a constitutional right of access to the courts under the Bahamas constitution. However, the Privy Council took the view the question of whether RDA 's claim was stifled must be decided in accordance with the *Goldtrail* principles – RDA had to show on the balance of probabilities that no funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition. However, as Lord Wilson stressed in *Goldtrai*l itself, where the litigant was a company with a separate corporate personality, the "*question should never be: can the shareholder raise the money? The question should always be: can the company raise the money?*"

The Privy Council decided to apply the *Keary* and *Goldtrai*l principles: the burden is on an impecunious corporate claimant to show that there are no third parties who could reasonably be expected to put up security for the defendant's costs. The Privy Council found that RDA had not demonstrated (with full candour) that it had no realistic prospect of raising funds from supporters. RDA, therefore, failed to prove its claim would be stifled.

The Privy Council also confirmed, however, that the Bahamas courts could make protective costs orders along the lines of *Corner House* [2005] 1 WLR 2600 provided that the court is satisfied that:

1. the issues raised are of general public importance;
2. the public interest requires that those issues be resolved;
3. the applicant has no private interest in the outcome of the case;
4. having regard to the financial resources of the applicant and the defendant(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
5. if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

The purpose of a protective costs order will be to limit or extinguish the liability of the applicant if it loses, "and *as a balancing factor*" the liability of the defendant for the applicant's costs if the defendant loses should be restricted to a reasonably modest amount.

The application for such an order should be determined on the papers or after short argument. Elaborate satellite litigation should be firmly discouraged.

The Privy Council next considered whether that the Developers were entitled to security for costs- although their interests and the Government were identical. The Bahamas courts apply the principles developed by the House of Lords in ***Bolton*** [1995] 1 WLR 1176:

> *(1) The Secretary of State, when successful in defending his decision, will normally be entitled to the whole of his costs. He should not be required to share his award of costs by apportionment, whether by agreement with other parties, or by further order of the court….*
> *(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.*
> *(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issues should have crystallised, and the extent to which there are indeed separate interests should have been clarified.*
> *(4) An award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests.*

RDA submitted that the Court of Appeal did not identify any separate interest of the Developers. The Court of Appeal appeared to conclude that it was sufficient that the Developers would be "adversely affected" by the relief sought.

The Privy Council held that the Court of Appeal failed to address properly RDA's submissions. That legal error meant that the Privy Council should, itself, address afresh the question of the exercise of the court's discretion whether security for costs should be ordered in favour of the Developers, having regard to the ***Bolton*** principles. It then rejected the Developers' submissions that they had separate interests.

The Privy Council ruled that for Developers to justify an order for security for costs, they must show, as a minimum, that a costs order in their favour was likely to be made if the judicial review claim was ultimately dismissed at trial. All that the Developers could argue is that a separate interest may emerge during the course of the proceedings. The Privy Council, therefore, ruled that this was not a sufficient basis for an order for security being made.

Richard Clayton KC represented RDA before the Privy Council. The link to the judgment is https://www.jcpc.uk/cases/docs/jcpc-2020-0061-judgment.pdf