

**IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL
THE COMMONWEALTH OF THE BAHAMAS**

The Queen on application of

- (1) **Save Guana Cay Reef Association Ltd**
- (2) **Aubrey Clarke**

Appellants

-And-

- (1) **Wendell Major
(Secretary to The National Economic Council)**
- (2) **The Minister Responsible for Crown Lands
(In the person of the Honourable Perry Gladstone
Christie, Prime Minister of The Commonwealth of The
Bahamas)**
- (3) **The Treasurer of The Bahamas**
- (4) **Passerine at Abaco Limited**
- (5) **Passerine at Abaco Holdings Limited**
- (6) **Bakers Bay Limited**
- (7) **Bakers Bay HOA Limited**
- (8) **Bakers Bay Marina Limited**
- (9) **Bakers Bay Foundation Limited**

Respondents

THE 4TH, 5TH, 6TH, 7TH, 8TH AND 9TH RESPONDENTS

SUBMISSIONS AS TO COSTS

Introduction

1. These submissions as to costs are made pursuant to the direction issued by this Honourable Court in paragraph 54 of the Judgment delivered on 17 November 2009 whereby their Lordships decided to humbly advise Her Majesty that this appeal should be dismissed.
2. The 4th – 9th Respondents (“the Developer Respondents”) seek an order that the 1st and 2nd Appellants (“the

Appellants”) do pay all costs incurred by them in defending this appeal before the Judicial Committee.

Submissions

3. Rule 43 (1) of The Judicial Committee (Appellate Jurisdiction) Rules Order 2009 reposes within the Judicial Committee a broad discretion to “...make such orders as it considers just in respect of the costs of any appeal...” heard before it.
4. In this instance, the Appellants’ case has failed in respect of every ground raised in their appeal.
5. Additionally, there is nothing in the manner in which the Developer Respondents conducted this appeal that would justify the Court refusing them payment of their costs.
6. It is therefore respectfully submitted that the costs of the appeal ought to follow the event.
7. The 1st and 2nd Appellants ought to be ordered to pay the cost of the appeal before the Judicial Committee.
8. In circumstances where there is multiple representation of respondents in judicial review proceedings, an unsuccessful party may be ordered to pay more than one set of costs if the Court is satisfied that recovery of further costs is justified having regard to the circumstances of the particular case:
Bolton Metropolitan District Council and others v Secretary for the Environment [1996] 1 All ER 184 at 186 b - 187 f per Lord Lloyd [TAB 1]:

“ Where there is multiple representation, the losing party will not normally be required to pay more than one set of costs, unless recovery of further costs is justified in the circumstances of the particular case.

There can, I think, be no doubt that in the past there has been a practice in the lower courts to award two sets of costs in certain types of planning appeal under s 288 of the Town and Country Planning Act 1990 and its predecessors, notably where a decision of the Secretary of State in favour of a

developer is challenged by the local authority and the Secretary of State successfully defends his decision. In such cases the developer has usually been regarded as having a separate interest which he is entitled to protect at the local authority's expense.

...

As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however, widespread and longstanding, must never be allowed to harden into a rule.

But the following propositions may be supported.

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 the 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."

[Emphasis Supplied]

9. The Developer Respondents are not seeking an order for costs in their favour due to the "*mere fact* " that they are developers.
10. It is respectfully submitted that there were separate issues in the proceedings below and this appeal on which the Developer Respondents were entitled to be heard and in respect of which separate representation was required.
11. It cannot be reasonably disputed by the Appellants that there were separate issues raised in these proceedings on which the Developers were entitled to heard and which required

separate representation. Indeed, in February of 2006, the Appellants applied to the trial judge, Mr. Justice Carroll, for the Developer Respondents to be joined as parties to the proceedings.

12. The Appellants' application for the Developer Respondents to be joined as parties to these proceedings was on made on the basis that the Appellants recognized that there were separate issues on which the Developer Respondents ought to have been heard.
13. Further, there are at least two cogent reasons that justified the Developer Respondents being separately represented in these proceedings, including this appeal, and that justifies a separate award of costs being made in their favour.
14. First, the Appellants applied for relief as against the Developers directly. In particular, the Appellants sought injunctive relief, discovery of certain documents within the possession of the Developer Respondents and leave to cross-examine Joseph Arenson, an officer of the Developer Respondents in the court below. It is clear that these matters were among the issues to be determined by the Judicial Committee.
15. Secondly, among the issues before the Judicial Committee was the crucial question of whether the Heads of Agreement was void. The Government of The Bahamas was a party to the Heads of Agreement. The Developer Respondents were the other party to the Heads of Agreement. This issue was one of the Appellants main grounds of appeal.
16. As a party to the Heads of Agreement, it clear that the Developer Respondents had a separate interest to be protected which required separate representation.

Conclusion

17. In addition to being ordered to pay of the costs of this appeal, it is respectfully submitted the Appellants ought to be ordered

to pay a separate set of costs to the Developer Respondents
in respect of this appeal.

HUGH SMALL, QC

ROBERT ADAMS

Appeal No.74 of 2006

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