Hilary Term
[2023] UKPC 2
Privy Council Appeal No 0061 of 2020

JUDGMENT

Responsible Development for Abaco (RDA) Ltd (Appellant) *v* The Right Honourable Perry Christie and others (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Sales
Lord Hamblen
Lord Leggatt
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
31 January 2023

Heard on 16 and 17 November 2022

Appellant
Richard Clayton KC
Frederick Smith KC
Ruth Jordan
Rowan Pennington-Benton
Thomas Elias
Roderick Dawson Malone
(Instructed by Sheridans)

Respondents (The Rt Hon Perry Christie and others)
Aidan Casey KC
(Instructed by Charles Russell Speechlys LLP (London))

Respondents (Abaco Club Investments and others)
Peter Knox KC
Oscar Johnson KC
Robert Strang
Tara Archer-Glasgow
(Instructed by Sinclair Gibson LLP)

Interveners
Daniel Feetham KC
(instructed by Madison Legal Services)

Respondents:

(1) The Rt Hon Perry G Christie
(2) The Hon Philip E Brave Davis
(3) The Hon Glenys Hanna-Martin
(4) The Hon Kendred Dorsett
(5) The Town Planning Committee
(6) South Abaco District Council
(7) Charles Zonicle
(8) Richard Hardy
(9) Marques Williams

Respondents:

(10) Abaco Club Investments LLC
(11) The Abaco Sporting Club Ltd
(12) Winding Bay Development Ltd

LORD SALES AND LORD HAMBLEN:

Introduction

1. This appeal concerns the proper approach to applications for security for costs by defendants to public interest environmental judicial review claims, including by developers joined as additional defendants.

2. The judicial review claim relates to the proposed development of marina facilities in Little Harbour on the island of Abaco in The Bahamas ("the development").

3. The claimant and appellant ("RDA") is a Bahamian registered company incorporated in 2009 with the objective of ensuring that developments in Abaco are sustainable, environmentally sound, ecologically responsible, and take account of the legitimate interests of Abaco's residents, homeowners and visitors.

4. The 1st to 9th respondents are various executive or ministerial persons concerned with the grant of the permissions and approvals ("the permits") required to proceed with the development ("the Government respondents").

5. The 10th to 12th respondents are the owners of the Abaco Club resort at Winding Bay, Abaco, who wish to develop the marina at Little Harbour ("the Developers").

6. RDA's judicial review claim challenges the Government respondents' alleged decision to withhold information and alleged failure to carry out a proper consultation before taking decisions relating to the permits, which it is said deprived locally and directly affected persons of their statutory rights and/or defeated their legitimate expectations to contribute to lawfully required consultation processes.

7. On 22 November 2017, Hanna-Adderley J ("the judge") ruled that security for costs be provided in the total sum of $250,000 ($100,000 for the Government respondents and $150,000 for the Developers). On 14 August 2019, the Court of Appeal gave judgment dismissing the appeal. On 29 September 2021, the Privy Council granted special leave to appeal.

8. The principal grounds of RDA's appeal are that the Court of Appeal erred in principle in making the order for security for costs (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 RDA's 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 co-respondents, were entitled to security for costs although the interests of the Developers and the Government respondents are identical.

9. On 17 October 2022 the Privy Council granted the application of the Open Society Justice Initiative and the Environmental Law Alliance Worldwide to intervene by way of written submissions only. They are both US-based, international, non-profit organisations advocating on various issues including human rights and environmental justice. Those submissions were put forward "to offer broader insight into the right to access justice and the need to remove financial barriers to public interest litigants". Various decisions from Caribbean and Commonwealth countries were cited which were said to show "a growing trend towards reducing financial barriers for public interest litigants".

The factual background

10. RDA was incorporated in 2009. It has an authorised share capital of 5000 shares of $1 each. To date, only two shares have been issued. These are 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, Clint Kemp (its president), David Pitcairn (its vice-president) and Matthew McCoy (its secretary).

11. Evidence filed by RDA in these proceedings explains that the issued shares are held on trust for approximately 75 persons who are either residents and/or landowners in The Bahamas, including Mr McCoy. It is not explained 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. All that is said in this regard in the affidavit of Mr Pitcairn filed in support of RDA's application for leave to seek judicial review is that he has a personal interest in this matter, as he is the owner of a residential property immediately adjacent to the plot of land on which the Abaco Club wishes to construct a car park as part of the development. Mr Pitcairn says that RDA is funded "by a large number of, generally anonymous, individuals who have donated sums (mostly under $500) in return for T-shirts and bumper stickers" and that a small amount ($1,700 from 16 donors) has been raised through a crowd-funding website.

12. As stated on RDA's website, it is run as a non-profitmaking organisation, open to all residents of Abaco and The Bahamas to support, and is to be named as plaintiff in

any court actions, rather than any members, with the effect that "[t]here will be no liability to any of the members". Accordingly, it appears that RDA has been established with the object of bringing claims to challenge unwelcome development proposals, such as that in the present case, while shielding its supporters and those with legal and beneficial title to its shares from the ordinary costs consequences which might otherwise follow from the bringing of an unsuccessful claim for judicial review.

13. The Abaco Club is a high-end resort with a golf course built in 2004 and owned by the Developers. The Club has no marina for its guests. The Developers wish to extend the facilities of the Club to include a 44-slip private dock at Little Harbour, together with a supplies shop, private restaurant, 6,000 square foot covered car park, generator, desalination plant and waste treatment facility.

14. Little Harbour is a small, shallow harbour approximately three miles from the Club. Its surrounding terrain is rugged and unspoilt. It has a solar-powered only residential community of 60 homes, private docks, moorings for guest boaters, a pub and an art gallery. Access to Little Harbour is through a narrow and shallow channel. If, as is proposed, a commercial marina for the accommodation of 44 boats up to 60ft is constructed in Little Harbour, RDA claims that regular dredging of the existing channel is likely to be required.

15. A local petition signed by many people explained their concerns:

> "Little Harbour is a remote off the grid community on the island of Abaco in The Bahamas. Its strong community has worked hard to have as little impact on the environment as possible. All home owners use solar energy, collect rainwater, and are careful with the environment we cherish.
>
> Just south of Little Harbour is the Abaco Club at Winding Bay, a high-end resort with a golf course on 540 acres. Southworth Development has recently purchased the resort, as well as a couple of private houses in Little Harbour. They plan to put in a 44-slip marina, snack bar, 6000 sq ft of covered parking, and a beer and bait shop on their Little Harbour property. The Abaco Club members come to The Bahamas for a scant couple of weeks a year, but want to damage our harbour forever.

> The amenities they plan to build will only be available to Abaco Club members, and will not only destroy the character of the harbour, but will also heavily impact the endangered wildlife (green turtles, manatees, piping plovers). This harbour is also an essential anchorage for those sailing throughout The Bahamas and this overbuilding will severely limit the number of boats that can find safe haven in this small and treasured harbour."

16. In or around December 2014, an Environmental Impact Assessment ("the EIA") was prepared to evaluate the likely impacts of the development taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse. The EIA was not made public at that time, despite, RDA claims, promises by the Developers to the contrary. The EIA was submitted to The Bahamas Environment Science and Technology Commission ("BEST") on 30 January 2015.

17. On 1 February 2015, 63 residents of Little Harbour subscribed to a letter addressed to BEST asking it to place the EIA and dock plans on their website to enable the various stakeholders to have some input. Numerous further letters were also written during this period by concerned residents, including to The Tribune newspaper, to the Prime Minister and to the Developers.

18. In about mid-February 2015, representatives from the South Abaco District Council agreed to hold a town meeting to discuss the development. By a letter dated 30 April 2015, 44 Little Harbour residents put their names to a letter to the Chief Councillor, Jacquelyn Estevez, raising concerns about the development, and claiming that the Developers were ignoring local residents.

19. On 22 September 2015, after various delays and postponements, a public meeting was held at Cherokee, Abaco. Neither the plans for the development, nor the EIA, were available at or prior to that meeting. At the meeting it was acknowledged by the representatives of the Developers that they would require a generator, a pump-out station and waste treatment facility, and a reverse osmosis desalination plant.

20. On or around 28 September 2015, the EIA was made available for public inspection by the South Abaco District Council. The development as outlined by representatives of the Developers at the town meeting on 22 September 2015 is said to have been substantially different from that originally set out in the EIA. In particular there was no mention in the EIA of a permanent generator, a reverse osmosis desalination plant, or a waste treatment facility.

21. By a letter dated 4 October 2015, 60 people jointly wrote to BEST, copying in various newspapers and persons. In that letter, it was stated that the EIA no longer accurately reflected the intended development and could not be relied upon.

22. By the end of November 2015, the Developers had placed a very large dumpster on their property in Little Harbour. In February 2016, vegetation was cleared alongside the fence abutting the Developers' property. It therefore seemed that preparatory works were underway.

23. In December 2015, RDA's attorneys wrote letters to various of the Government respondents which requested information as to whether permits or approvals had been issued with respect to the development, and copies of any such permits or approvals. The Government respondents were asked to confirm when, if at all, the local people were going to be consulted about the development. By January there had been no response. Further correspondence from RDA's attorneys in February 2016 expressly sought reassurance that there would be proper consultation before any relevant decision was made.

The procedural background

24. On 22 March 2016, RDA issued its application for judicial review. The application claimed that the Government respondents had acted unlawfully by deciding against any proper consultation before taking decisions relating to the permits required before the development could be constructed. In addition, RDA alleged that the Government respondents withheld information from RDA so as to deprive it of its common law right to consultation and its statutory rights under the legislation pursuant to which permits must be granted such as the Conservation Act and the Port Authorities Act and to defeat the legitimate expectations created by the Government respondents that the public would contribute to the decision-making process.

25. The application sought (1) a declaration that RDA had an entitlement to be "meaningfully included" in the decision-making process relating to the permits and the development; (2) an order of prohibition enjoining the Government respondents from granting any of the permits without first conducting a proper process of public consultation, including providing RDA with adequate notice and copies of relevant papers so that it had the opportunity to make informed representations at a formative stage of each decision-making process; and (3) an order of certiorari quashing any decision taken without proper and adequate consultation having taken place.

26. As mentioned above, the application was supported by an affidavit of David Pitcairn, dated 25 April 2016. This was 22 pages long. It explained RDA's interest in bringing proceedings and set out the full background to the claim.

27. At an inter partes hearing on 24 May 2016 the judge granted RDA leave to bring the judicial review claim. She also directed that the Developers be given notice of the claim.

28. On 2 June 2016, RDA filed the Originating Motion for judicial review. It was served on the Government respondents on 6 June 2016. In accordance with RSC Ord 53 r 6(4) the Government respondents were required to file any affidavit within 6 weeks of service – ie by 19 July 2016.

29. RDA sought to serve the Developers as interested parties and on 9 June 2016 wrote to the Developers' attorneys, Higgs & Johnson, notifying them of the claim and asking for their addresses for service. Higgs & Johnson did not respond.

30. On 18 July 2016, the Government respondents sought an extension of time for service of their evidence and an extension of 3 weeks was agreed – ie to 8 August 2016. No evidence was served by the Government respondents by that deadline.

31. On 10 August 2016, RDA's attorneys wrote to the court requesting the case be set down for trial. A trial date of 28 to 30 November 2016 was proposed and on 24 August 2016 the Government respondents confirmed that these dates were convenient.

32. On 25 August 2016, RDA again served Higgs & Johnson with the papers and advised them that it was in the process of obtaining a trial date. Higgs & Johnson declined to respond. On 2 September 2016, RDA wrote and informed Higgs & Johnson that the trial was listed for 3 days on 28 to 30 November 2016. Again, there was no response.

33. On 7 November 2016, the Government respondents requested an adjournment of the trial which RDA refused. On 23 November 2016, the Government respondents applied for security for costs and an adjournment, as a result of which the trial was adjourned until 23 to 24 February 2017, with the hearing for the security for costs application listed on 14 December 2016.

34. The Government respondents' application for security was supported by an affidavit of Ashley Sturrup, assistant counsel at the office of the Attorney General. This exhibited a draft bill of costs totalling $304,600. Security was sought in the sum of $150,000.

35. The Government respondents also served two affidavits dated 25 November 2016 responding to the substantive claim: a 6-page affidavit of Philip Weech, filed on behalf of the Minister of Environment and Housing, and a 5-page affidavit of Jaquelyn Estevez, Chief Councillor for South Abaco. The only exhibits were some newspaper articles. An order extending time to regularise the service of that evidence was made retrospectively on 28 November 2016.

36. On 13 December 2016, the Developers applied to be joined as respondents under RSC Ord 15 r 6 (2)(b) and for security for their own costs in the sum of $350,000. The applications were supported by affidavits of Karen Brown dated 16 January and 2 February 2017. At this stage no detail regarding the Developers' likely costs was provided.

37. The security for costs applications on behalf of the Government respondents and the Developers were opposed by three affidavits of Crispin Hall of RDA's attorneys, Callenders & Co, dated 25 November 2016, 14 December 2016 and 25 January 2017. In his evidence Mr Hall denied the suggestion that RDA would be unable to satisfy a costs order made against it at the end of proceedings and positively asserted that it would be able to do so. In support of this he pointed out that by the date of filing its application for judicial review RDA had already raised $35,000 to assist with costs. He also claimed that the late applications for security for costs were oppressive and made in bad faith, in the sense that they were intended to stifle RDA's claim. Mr Hall also made a series of ten specific criticisms of the draft bill of costs exhibited to Ms Sturrup's affidavit in support of RDA's claim that it was grossly excessive for a straightforward judicial review claim involving very little evidence.

38. On 3 February 2017, the Developers were joined as respondents. RDA sought to appeal this decision, but the judge refused leave to appeal. The significance of joinder of the Developers as respondents to RDA's claim for judicial review was that they then qualified as defendants to the claim (as distinct from being merely interested parties entitled to be heard), which meant that they were able to make an application under section 285 of the Companies Act to seek security for their costs.

39. On 16 February 2017, the judge heard the two security for costs applications. At the hearing the Developers sought to adduce a further affidavit of Karen Brown dated

15 February 2017 which exhibited a draft bill of costs, but the judge refused permission to do so given its late service. There was therefore no draft bill of costs from the Developers, nor any detailed explanation at all, to support the $350,000 claimed by way of security.

40. At the end of the hearing the judge said that she would give her decision on 10 March 2017, which meant that the trial was again adjourned. In the event, she gave her oral ruling on 22 November 2017, ordering RDA to provide security of $100,000 in respect of the Government respondents' costs and $150,000 in respect of the Developers' costs. On 30 November 2017, the judge gave a written judgment. This provided no reasons for her decision to grant security for costs and only addressed quantum. It did so in very summary terms.

41. RDA appealed to the Court of Appeal on various grounds. RDA submitted that no order should have been made by the judge to award security for costs in favour of either the Government respondents or the Developers and also contested the quantum of the amount of security which she ordered to be provided. The hearing before the Court of Appeal was listed to commence on 19 February 2019. The day before the listed hearing, the judge provided reasons for her decision made on 22 November 2017. The appeal was then adjourned to 20 May 2019. The Court of Appeal excluded from its consideration the reasons given by the judge on 18 February 2019, holding that they were provided too late. In its judgment dated 14 August 2019 the Court of Appeal dismissed the appeal.

The judgments below

42. The dispositive part of the judge's ruling was set out in a single paragraph as follows:

> **"Disposition**
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> 6. To echo the words of President Anita Allan, President of the Court of Appeal in *Bimini Blue Coalition Limited v Rt Hon Perry G Christie et al* No 35 of 2014 SCCiv App Side on which I relied heavily in coming to the decision in this application: 'Estimating the quantum to be awarded for security for costs is not an exact science.' Having read the voluminous pleadings filed in this application for security for costs by the parties; having read and heard the thorough submissions

> made by the parties; having considered the disparity in the figures proposed by the Respondents and suggested by the applicant as reasonable in the event that the Court should be minded to grant the application by the Respondents; having reviewed and considered the draft Bill of Costs presented by the 1st through the 9th Respondents [ie the Government respondents]; and taking into account my own experience in over 30 years of preparing, defending and opposing numerous Bills of Costs and hearing and determining similar applications; having considered the general principles detailed in the case law; having considered the nature of the Applicant's case and the conduct of the case by the Applicant thus far I estimate that the appropriate award is a global quantum of $250,000.00 being made up of $100,000.00 for the costs of the 1st through 9th Respondents and $150,000.00 for the Developer's costs. Such security to be provided by cash, bond or letter of credit from a commercially licensed bank within The Bahamas within 30 days and the action is to be stayed pending payment of the said sum."

43. The lead judgment in the Court of Appeal was given by Sir Michael Barnett JA, with whose judgment Isaacs and Jones JJA agreed.

44. The judgment addressed a number of matters which are no longer in issue. In particular, RDA no longer disputes that the court has jurisdiction to grant security under section 285 of the Companies Act on the grounds that the company's assets may be insufficient to pay the respondents' costs. Section 285 provides:

> "Where a limited liability company is plaintiff in any action, suit or other legal proceedings, a judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant is successful in his defence the assets of the company may be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

45. The Court of Appeal criticised the judge for her delay in giving judgment and for failing to give any reasons why she had decided to accede to the applications for security for costs, apart from in relation to quantum. The Court of Appeal decided that

it was in a position itself to exercise the court's discretion whether an award of security for costs should be made. It proceeded to consider that question afresh and concluded that security for costs should be awarded in favour of both the Government respondents and the Developers. Having made that ruling, on the question of quantum the Court of Appeal did not make a fresh determination but simply reviewed the decision of the judge to see whether she had made any error.

46. In relation to the issue of stifling, the Court of Appeal referred to the decision of the English Court of Appeal in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 ("*Keary*") in which Peter Gibson LJ summarised the relevant principles to be applied in six numbered paragraphs at pp 539-40. These were set out in the Court of Appeal's judgment.

47. The Court of Appeal also relied on the recent English High Court decision of Farbey J in *R (We Love Hackney) v Hackney London Borough Council* [2019] EWHC 1007 (Admin), [2019] Costs LR 463 ("*Hackney*"), which refers to *Keary* and the Supreme Court's decision in *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ* [2017] UKSC 57, [2017] 1 WLR 3014 ("*Goldtrail*"). In the *Hackney* case Farbey J accepted (paras 60-61) the submission that "in order to demonstrate that the claim would be stifled, the burden rested on the claimant to show that there did not exist third parties who could reasonably be expected to put up security for the defendant's costs".

48. Directing themselves in accordance with these authorities, the Court of Appeal held that RDA's affidavit evidence "does not suggest that any order requiring the applicant to provide security would likely stifle the claim of the applicant". It further observed:

> "51. The applicant in this case [RDA] is a limited liability company who is pursuing this application for no benefit to itself and although it may have no assets of its own, it is reasonable to infer that it is being funded by the persons who claim that they would be adversely affected by the proposed development and could be expected to provide the security required to pursue the claim."

49. In relation to the issue of the public interest, the court held:

> "44. Like many applications for judicial review it has a public interest element in it, but that in itself is insufficient to

> immunize the applicant from being required to provide security and effectively pursue this claim without any meaningful risk as to costs if it is unsuccessful in its claim. This is particularly so in circumstances where the applicant is itself not prepared to forego a claim to costs in the event it is successful."

50. In relation to whether an order for security should be made in favour of the Developers the Court of Appeal held:

> "53. The Developers have applied to intervene and be joined as respondents. The Developers are clearly 'a person' who would be adversely affected by any orders requiring that permits granted to them be quashed and by any order which would cause a protracted delay in the considerations of their application. This was obvious to the hearing judge who required an undertaking from the applicant to serve the Developers with notice of this application."

51. With regard to the quantum of the security ordered, the Court of Appeal set out the judge's written ruling and then stated as follows:

> "68. The published decisions of the Court show that security for sums in excess of $100,000 have been ordered by this court. In *Save Guana Cay* [*Save Guana Cay Reef Association Ltd v The Queen* Civil App No 70 of 2006 - '*Save Guana Cay*'] this Court ordered the security in the sum of $100,000 with respect to an appeal in a judicial review application. In the *Bimini Blue Coalition* case [*Bimini Blue Coalition Ltd v The Rt Hon Perry G Christie* SC Civ App No 35 of 2014 – '*Bimini Blue'*] to which the judge referred the amount of the security was much larger.
>
> 69. As the challenge is primarily to the conduct of the Government respondents it is not clear why the costs of the Developers as intervener should be higher. It would seem that the amount of the security for the costs of the Developers should not be more than the costs of the Government respondents. However in *Bimini Blue* this Court required the applicant to pay a higher amount on account of

> the costs of the Developers in that action. In the result, we cannot say that the judge was wrong in the exercise of her discretion to award security for costs on the basis that the costs of the Developers were higher than that of the Government respondents."

The issues

52. The principal issues which arise on the appeal are whether the Court of Appeal erred in law:

(1) by requiring security for costs in the sum of $250,000 to be provided within 30 days, which it is said could not realistically be achieved, thereby stifling RDA's claim and breaching its constitutional right of access to the court under the common law and under article 20(8) of the Constitution;

(2) by requiring security for costs of $250,000 be provided notwithstanding that the judicial review challenge is a public interest claim as established by *R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600 ("Corner House")* and raises issues of general public importance which the public interest requires to be resolved; and

(3) by holding that the Developers were entitled to security for costs although the interests of the Developers and the Government respondents are identical and therefore RDA should not be made to pay the Developers' costs in accordance with the principles set out in *Bolton Metropolitan District Council v Secretary of State for the Environment [1995] 1 WLR 1176 (HL) ("Bolton")* ("the *Bolton* principles").

53. In addition, RDA contends that the Court of Appeal's decision reflects a troubling trend of Bahamian case-law whereby important public interest environmental cases have been stifled through public bodies and developers (often in tandem) obtaining orders for security for costs so as to prevent the ultimate trial of such cases and that the Court of Appeal erred in following this trend.

Issue (1): Did the orders for security for costs stifle RDA's claim and thereby breach its constitutional and common law right of access to the court contrary to Article 20(8) of the Constitution?

54. An order to provide security for costs may only be made where it is just to do so and where it is compatible with the claimant's constitutional rights of access to the courts. The purpose of an order for security for costs is to protect the opposing party against the risk of not being able to enforce an order for costs that it may obtain, by requiring the claimant to pay money into court (or provide some other acceptable form of security) against which the opposing party can enforce any subsequent order for costs in its favour. It will only be just to make such an order where it is likely that the claimant would be liable to have a costs order made against it at the end of the proceedings, if it is unsuccessful in its claim.

55. The courts in The Bahamas have a general discretion regarding the award of costs: section 30(1) of the Supreme Court Act. This provides:

> "Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court … shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

This corresponds to the general discretion regarding the award of costs conferred on the courts in England and Wales under section 51(1) of the (UK) Senior Courts Act 1981. It is common ground that the general principles regarding the award of costs are the same in The Bahamas as under English law.

56. As between a claimant and a defendant the general rule is that costs follow the event, which means that the unsuccessful party pays the reasonable and proportionate costs of the other party; but the wide discretion of the court to make no order as to costs is preserved: see RSC Ord 59 r 3(2) ("If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall … order the costs to follow the event, except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs"). This provision applies in judicial review proceedings, where the general rule is modified to some degree as discussed under Issue (2) below. The general rule and the discretion to depart from that rule and make no order as to costs correspond with the position in England and Wales under the Civil Procedure Rules, Part 44.2.

57. The question whether a third party intervening in judicial review proceedings to support the defendant will recover its costs if the claimant is unsuccessful was, at the time of the decisions of the judge and the Court of Appeal, a matter for the exercise of the courts' general discretion as to costs and it had been recognised in earlier decisions of the Court of Appeal that this discretion should be exercised in accordance with the *Bolton* principles. This is discussed under Issue (3) below.

58. As appears from the discussion under Issue (3), the Board considers that RDA should not be ordered to provide security for the Developers' costs. The Board's principal concern in relation to Issues (1) and (2), therefore, is whether it was right that RDA was ordered to provide security for the costs of the Government respondents.

59. Article 15 of the Constitution, headed "Fundamental rights and freedoms of the individual", includes the right to "the protection of the law" (article 15(a)). Article 20 of the Constitution is headed "Provisions to secure protection of law". Article 20(8) provides:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

60. There is authority of the Court of Appeal of The Bahamas which might be taken to suggest that the relevant constitutional right of access to a court arises under article 15 rather than article 20(8): *Harbour Lobster and Fish Co v Attorney General of the Commonwealth of The Bahamas* [1998] BHS J No 15, 1995 No 34 (a case concerned with a challenge to the imposition of court fees on the grounds that they were set at a level which improperly impeded access to a court). It is unnecessary for the Board to pronounce upon this question in the present appeal because it is accepted on behalf of the Government respondents and the Developers that RDA has a constitutional right of access to the court, and it does not matter whether it arises under article 15 or article 20(8). In fact, for the purposes of the appeal the Government respondents accept that a constitutional right of access to the courts arises under article 20(8) and the Board will proceed on the assumption that this is correct. RDA does not suggest that it has any greater constitutional right of access to the courts at common law than it enjoys under the Constitution, so it is not necessary to examine the position at common law.

61. The right of access to a court under the Constitution is not absolute, but may be subject to a degree of regulation to promote countervailing legitimate aims by means which are proportionate to those aims and which do not destroy the essence of the right: compare *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, para 59, in relation to an order for security for costs and the corresponding right of access to a court under article 6(1) of the European Convention on Human Rights (in that case an order for security for costs in favour of one party was found to be compatible with the opposing party's right of access to a court). Accordingly, it is established that it is compatible with the Constitution for security for costs to be ordered in an appropriate case: see *Bimini Blue* and *Save Guana Cay*. This was accepted by RDA in the present case. In terms of a claimant's constitutional right of access to the courts, an order for security for costs may be made provided it does not have the effect of unfairly stifling the bringing of a properly arguable claim.

62. There is a link between the issue of the standing of a company such as RDA to apply for judicial review and the making of an order that it provide security for costs. As was pointed out by Richards J in *R v Leicestershire County Council, ex p Blackfordby and Boothorpe Action Group* [2000] Env LR 2 ("*Blackfordby*"), at para 37, the incorporation of a local action group ought not to be a bar to the bringing of a claim for judicial review on grounds of lack of standing, where in substance it represents interests of persons who do have a relevant interest. Where there is a concern that use of a corporate vehicle would allow those persons to escape the direct impact of an adverse costs order should the claim be unsuccessful, "[t]he costs position can be dealt with adequately by requiring the provision of security for costs in a realistically large sum." See also *Residents Against Waste Sites Ltd v Lancashire County Council* [2008] Env LR 27, para 19 (Irwin J).

63. RDA has been granted leave to apply for judicial review, so it is clear that it has an arguable claim. It is common ground that the relevant principles to be applied to determine whether RDA's claim has been unfairly stifled, in breach of its constitutional right of access to the courts, are those laid down in *Keary* and *Goldtrail*, as were also applied in *Hackney*.

64. Mr Richard Clayton KC, for RDA, sought to suggest that the Government respondents had no interest deserving of protection by an order for security for costs in their favour, on the grounds that the Constitution does not confer rights on public authorities. However, even if this point on the Constitution is correct (as to which the Board expresses no view), the suggestion cannot be accepted. The legal system operates so as to secure fairness for all litigants in the resolution of disputes and it is this principle which justifies the making of an order for security for costs in an appropriate case. Subject to what is said under Issue (2) below, there is no

fundamental difference between public authorities and private litigants in this regard. Public authorities have limited funds, which are supposed to be spent on promoting the public good. Absent good reason to the contrary, public authorities should not be exposed to expensive litigation which will leave them out of pocket in terms of costs if they are successful. They are also entitled to expect litigation against them to be conducted in a reasonable and proportionate manner, subject to the discipline which the costs regime is intended to impose.

65. *Keary* was concerned with the application of section 726 of the (UK) Companies Act 1985, which was the same as section 285 of The Bahamas Companies Act (for the equivalent current provision in the law of England and Wales, see now the Civil Procedure Rules, Part 25.12 and 25.13, in particular rule 25.13(2)(c)). Peter Gibson LJ set out the relevant principles at [1995] 3 All ER 534, 539-540, including the following:

> "… (6) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263). In the *Trident* case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.
>
> However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd's Rep 27)."

66. In *Goldtrail*, judgment had been given against a company at trial for a substantial amount. The company was granted permission to appeal to the Court of Appeal, at which point the respondent successfully applied for a condition to be imposed that the company pay the amount of the judgment into court. The company complained that the imposition of that condition would have the effect of stifling its appeal as it did not have the resources to pay. However, on the evidence it appeared the company was owned by a very wealthy individual who could easily afford to pay the sum involved. Lord Wilson, with whom Lord Neuberger and Lord Hodge agreed, said (para 23) that the criterion was: "Has the appellant company established on the balance of probabilities that no such 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?" Lord Wilson noted that the issue in relation to an order to provide security for costs would be similar: para 14. He observed that there was no doubt that the objection that the proposed condition would stifle the appeal was a contention which needed "to be established by the appellant and indeed, although it is hypothetical, to be established on the balance of probabilities: for the respondent to the appeal can hardly be expected to establish matters relating to the reality of the appellant's financial situation of which he probably knows little": para 15. This rationale for the approach to be adopted is the same as that explained by Peter Gibson LJ in *Keary*. However, bearing in mind the separate corporate personality of the company, which was the litigant, Lord Wilson also emphasised (para 18) that "[t]he question should never be: can the shareholder raise the money? The question should always be: can the company raise the money?" Since (speaking for the majority) he was not satisfied that the Court of Appeal had asked the proper question, the appeal was allowed and the case was remitted for further consideration.

67. As appears from *Keary* and *Goldtrail*, 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: see also *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB), per Eady J at para 32 (citing the judgment of Park J in *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch)) and paras 52 and 71; and on appeal at [2006] EWCA Civ 1123, [2007] 1 Costs LR 57, para 27 ("a claimant … who wants to ensure that any security he is required to put up is within his means must be full and candid in setting out what his means are") and paras 48-49; and *Hackney*, paras 60-61. The claimant has to show on a balance of probabilities that its claim will be stifled.

68. *Hackney* was a case in which a company set up as an association of local residents and business owners acted as the claimant in judicial review proceedings to challenge the decision of the defendant council to adopt a licensing policy which changed the licensing hours for premises serving alcohol. The claimant did not have significant resources of its own and proposed to fund the litigation by contributions

made to a crowdfunding website. Farbey J found that the claimant's directors and significant supporters had a commercial interest in the proceedings and would be able to fund the proceedings, if they chose to do so: paras 51-52. The claimant applied for a protective costs order on the grounds that there was a public interest for the claim to be brought and the council applied for security for costs. Farbey J dismissed the claimant's application for a protective costs order and then considered whether, applying the principles stated by Peter Gibson LJ, an order for security for costs should be refused on the grounds that it would stifle the claim. Observing that the claimant had "successful and resourceful backers who have the funds to provide security and to enable the claim to continue" and that the burden rested on the claimant, she concluded that the claim would not be stifled and so ordered that security should be provided: paras 59-62.

69. It is clear from the evidence in this case that RDA does not currently have in its hands the funds which would be necessary to meet a costs order made at the end of the proceedings in favour of the Government respondents, still less if a costs order were also made in favour of the Developers. This is the basis for RDA's acceptance that section 285 of the Companies Act is applicable.

70. In the Board's view, on the available evidence the Court of Appeal was both entitled and correct to find that RDA's claim would not be stifled. First, as set out above, Mr Hall's evidence on behalf of RDA positively asserted that it could obtain the funds necessary to meet any costs order made against it. It is difficult to reconcile this with the contention that RDA's claim would be stifled if an order for security for costs was made. Indeed, RDA did not assert in its evidence that its claim would be stifled, only that the Government respondents and the Developers hoped that it would be.

71. Secondly, and in any event, if RDA wished to avoid an order for security for costs being made against it, then as explained above the burden was on it to show on the balance of probabilities, and with full candour, that it had no realistic prospect of raising funds from its supporters to proceed and that its claim would therefore be stifled. Although it appeared that RDA's supporters included local residents and others who had an interest to oppose the development and who might be able to put RDA in funds to provide security for costs so as to enable it to proceed with the claim, RDA provided no information about them, their interest in the proceedings and their means, such as could support a conclusion that the claim would be stifled. Therefore, RDA failed to discharge the burden on it of showing that its claim would be stifled.

72. As to RDA's further submission that there is a troubling trend in the case-law of the local courts to order that security for costs should be provided in circumstances where this has the effect that valid claims for judicial review in the environmental field

are stifled, Mr Aidan Casey KC, for the Government respondents, took the Board through the authorities relied on by RDA with care: *Save Guana Cay*, *Bimini Blue* and *R v The Hon Romauld Ferreira MP, ex p Waterkeepers Bahamas Ltd* 2020/PUB/jrv/FP/00005, 17 February 2021, Hanna-Adderley J. The Board is satisfied that the authorities do not bear out RDA's complaint. In each case, the local courts properly sought to apply the relevant principles on the stifling of claims in the light of the evidence adduced before them. The mere fact that in some cases, after an order for security for costs was made, a claim was not pursued does not show that the courts failed to apply the proper approach. A party might have various reasons for deciding not to proceed with a claim, including simply that it does not wish to run the risk of an adverse costs order even though it could afford to pay it.

Issue (2): Did the Court of Appeal err by requiring security for costs of $250,000 be provided notwithstanding that the judicial review challenge is a public interest claim within the meaning of *Corner House* and raises issues of general public importance which the public interest requires to be resolved?

73. Apart from the constitutional right of access to the courts, which is delimited by the stifling principle, a court has a discretion as to the award of costs as set out above. There may be reasons why, in the exercise of that discretion, a court might decide not to award costs in favour of a public body when it is successful in defending a judicial review claim against it. In judicial review proceedings there is always a general public interest to uphold the rule of law and ensure that public bodies comply with their obligations under public law. In addition, depending on the circumstances of the particular case, the claimant often has a private interest of their own to seek to reverse an adverse decision taken by such a body. Also, although there is a general public interest to ensure that public bodies comply with the law, there is also a public interest that their limited resources should not be unduly depleted in meeting claims which it transpires have no merit. The existence of a requirement to obtain leave to apply for judicial review provides some protection for this aspect of the public interest, but it is not a complete answer to the problem, which is why the general approach of costs following the event is applied.

74. There is no hard and fast distinction between the general public interest in checking that the rule of law is upheld and a private interest in judicial review proceedings. Rather, there is a spectrum across which sometimes the general public interest in ensuring that public bodies comply with the law and sometimes the private interest is more predominant. Also, even allowing for the importance of the general public interest in ensuring that public bodies comply with the law, a reasonable balance has to be achieved with the other public interest that their resources are not unduly depleted in meeting unsuccessful claims.

75. The approach of the courts on the question of costs recognises this reality. Clearly, a readiness to award costs against unsuccessful claimants in judicial review claims will have a tendency to deter people from bringing such claims, which could leave the public interest in upholding compliance by public bodies with the rule of law less than fully protected. On the other hand, if costs are not awarded against unsuccessful claimants in routine cases, the competing public interest in ensuring that the resources of public bodies are available to be spent on carrying out their primary functions will also be less than fully protected. The solution which has been worked out is generally to rely on the incentive which a claimant has to bring a judicial review claim where they have a private interest in the outcome, even though they are at risk of a possible costs order against them if they are unsuccessful, while also accepting that in some cases it may be appropriate to remove that risk in advance or not allow it to materialise where there is a sufficiently strong public interest in checking that a public body has acted lawfully. That might be found to be appropriate, for example, if there is no individual or group of individuals with a sufficient private interest to bring or support proceedings, as sometimes occurs in environmental cases, where the claimant is a representative body which has raised money from public donations, maintains that it is in the public interest that the claim should be brought and is able to persuade the court that there is a sufficient public interest in this to justify taking such an approach. In such cases, if no costs or only limited costs are ordered in favour of the public body, even though it is or may be successful in defending the proceedings, the effect is that to that extent the cost of the vindication of that strong public interest is borne by the public purse (although, of course, the claimant will have to fund its own costs). Ultimately, in broad terms, the aim of the principles applicable to an award of costs is to maintain a fair balance between these two aspects of the public interest, and between the public interest and the private interest of the claimant.

76. In some jurisdictions the public interest in ensuring that public bodies comply with the law in the field of the protection of the environment is given legislative enhancement in relation to awards of costs. In the United Kingdom, for example, the usual costs rules and principles have been modified by the introduction of a cost capping regime for environmental claims pursuant to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998). But there has been no equivalent legislative intervention in the Bahamas, so the general costs rules and principles fall to be applied.

77. Where there is a sufficiently strong public interest in having the lawfulness of action by a public authority tested, so that the cost of achieving that ought to be borne to some degree by the public purse, there is scope to achieve that either in advance or at the end of proceedings. A claimant who maintains that there is a sufficiently strong public interest in the proceedings may seek a protective costs order in advance, to

limit the extent of their ultimate potential costs liability if they lose the case. In English law, the discretion to make such an order is now governed by sections 88 and 89 of the Criminal Justice and Courts Act 2015, as discussed in *Hackney*. Section 88 provides that a court may make a costs capping order in "public interest proceedings" (as defined in section 88(7)) in certain circumstances. Clearly, making a costs capping order in advance is likely to be the best way to ensure that a claimant is not deterred from proceeding with their claim, and thereby to ensure that the public interest to check that the public body has complied with the law is satisfied.

78. There is no equivalent provision in the law of The Bahamas. As a result, RDA and its advisers seem to have thought that there is no power in The Bahamas for a court to make a protective costs order. At the hearing before the Court of Appeal there was an exchange between Mr Frederick Smith KC, for RDA, and Sir Michael Barnett JA in which Mr Smith said as much; but Sir Michael expressed doubt about this. He was right to do so. Prior to the 2015 Act, it was established that the English courts had the power to make a protective costs order in the exercise of their general wide discretion as to costs under section 51(1) of the Senior Courts Act 1981 and what was RSC Ord 62, r 3: see *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347 ("*Child Poverty Action Group*"), 352-353 (Dyson J); *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin); [2003] CP Rep 28; and *Corner House*. The courts in The Bahamas similarly have power to make a protective costs order in an appropriate case, pursuant to the wide discretion under section 30(1) of the Supreme Court Act and the rules of court referred to above.

79. In *Child Poverty Action Group* Dyson J said (pp 353-358) that a protective costs order would only be made in judicial review proceedings which could be characterised as public interest proceedings, and even then only in the most exceptional cases. As he explained, "[t]he essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own." Even in relation to public interest challenges, ordinarily the general rule that costs follow the event should be applied since this encourages self-discipline and a sensible approach to the conduct of expensive litigation: pp 355-356. Moreover, it will usually be difficult for a court, at the preliminary stage when a protective costs order is sought, to be able to tell with confidence whether the proceedings really are brought in the public interest such as to merit a degree of public subsidy, or not; at the interlocutory stage, this is a matter to be determined on the basis of short argument; the court will be better placed to make an accurate assessment of this at the end of the proceedings, with full knowledge of the facts and after full argument at trial: pp. 357-358.

80. The approach in *Child Poverty Action Group* was approved in *Corner House*, another case which preceded the enactment of the 2015 Act, at paras 71 and following, subject to some elucidation and one caveat. The caveat was that the Court of Appeal considered that Dyson J's reference to the need to form a sufficient appreciation of the merits at the preliminary stage as a limiting factor was too restrictive: paras 71 and 73; instead, it is sufficient if the court considers that the claim for judicial review has a real prospect of success and that it is in the public interest to make the protective costs order. The Court of Appeal held (para 74) that such an order may be made at any stage of the proceedings provided that the court is satisfied that (i) the issues raised are of general public importance; (ii) the public interest requires that those issues be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; (v) 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 (para 76). The application for such an order should be determined on the papers or after short argument: para 79. It is clear that elaborate satellite litigation is to be firmly discouraged.

81. In the Board's view, the courts in The Bahamas have jurisdiction to make a protective costs order. The principles in *Corner House* are one way in which proper weight can be given to the public interest in the determination of judicial review claims, to the extent that public law litigation is to be distinguished from private law civil litigation: see *Corner House*, paras 69-70. Mr Casey for the Government respondents accepted that the *Corner House* principles would be likely to be followed by the courts in The Bahamas and submitted that reference to them supported the case that RDA was not entitled to costs protection, including by being exempted from having to provide security for costs. Mr Clayton for RDA also placed reliance on the *Corner House* principles, although he questioned the need for having no private interest in the outcome of the case.

82. As mentioned, RDA did not seek a protective costs order in this case. But seeking such an order would have been the most straightforward way in which it could have protected its position, including in relation to resisting an order that it provide security for the costs of the Government respondents. If RDA had been found to be entitled to costs protection by way of an order at the interlocutory stage, any security for costs to be given at this stage would have had to be limited to a similar extent. Conversely, if it can be seen at this stage that RDA would not be entitled (if it had applied) to a protective costs order, it is difficult to see why it should be entitled to

resist giving security for the Government respondents' costs which it would otherwise be expected to provide.

83. If, in accordance with the *Corner House* guidelines, to obtain costs protection in relation to its claim it is necessary for the claimant to show that it had no private interest in the outcome of the case, this requirement would not have been satisfied. In circumstances where RDA is a company set up to pursue claims such as the present one in the interests of local residents and supporters, and where it implicitly maintains at least in part that it has standing to sue on the basis of their interests (as the corporate vehicle did in *Blackfordby*), since otherwise it is hard to see why Mr Pitcairn would have mentioned them in his affidavit, RDA could not show that the claim is a public interest challenge in the relevant sense. It appears that RDA exists to promote private interests, at least in part, and its own interest cannot realistically be separated out from those of its supporters.

84. Further, RDA's lack of candour in its evidence about its supporters also leads to the inference that its interests cannot be regarded as distinct from theirs. The rationale for imposing on it the burden of proof to show that its claim would be stifled, namely that all the relevant information is within RDA's knowledge rather than that of the Government respondents (paras 65-66 above), also applies in relation to any requirement that RDA show that it is not acting to protect any private interest, as distinct from acting purely or predominantly to promote the public interest. In addition, in the absence of full and candid evidence from RDA, it cannot satisfy guideline (v) as set out in *Corner House* (para 80 above).

85. Another point is that, if RDA had applied for a protective costs order, it would have been expected to accept that its own recoverable costs, should it succeed in its claim, should also be limited. This is part of the way in which a fair balance between the competing interests of a claimant and a defendant public body is to be achieved. In the circumstances of this case, it is not just for RDA to seek to limit the usual costs consequences as against itself (including in relation to provision of security for costs) without some limitation of its own right to seek a costs order in its own favour should it succeed in its claim: see *Corner House*, para 76.

86. Mr Clayton submitted that the *Corner House* guidelines are in principle relevant to the question whether a claimant should be ordered to provide security for costs in judicial review proceedings. The Board agrees. However, it does not consider that the judge or the Court of Appeal can be criticised for failing to refer to *Corner House* in circumstances in which RDA based no argument upon it and where, as explained above, application of the guidelines in fact indicates that RDA was rightly ordered to provide security for the costs of the Government respondents.

87. Since RDA did not make out its claim for costs protection at the interlocutory stage and since RDA's supporters would only be likely to make donations to assist with its judicial review claim at a stage when it was hoped it would be successful, and not after the claim failed, it was just that an order for security for the Government respondents' costs should be made.

88. There was no separate challenge by RDA before the Board to the quantum of security ordered by the judge and upheld by the Court of Appeal. Before leaving this topic, however, the Board wishes to comment on another feature of the case which is striking, albeit in the event it was not the subject of any ground of appeal at this level. The draft bill of costs adduced by the Government respondents appeared formulaic. For example, it did not explain what costs had already been incurred and what costs were projected to be incurred. The figures for the individual items of work and the overall figure appeared very high for what was a very simple judicial review claim with minimal evidence. RDA made specific criticisms of the amount of costs being sought, but the judge dealt with this significant matter in a single paragraph of her judgment (para 42 above). The Board respectfully considers that this was inadequate as the reasoning to explain the judge's order. Where parties have joined issue on some point which requires resolution, it is part of the judicial function to explain why one side has won and the other lost. In an interlocutory dispute about the quantum of the sum claimed as security for costs the judge's reasoning did not have to be lengthy or elaborate, but she should have addressed the main points of contention between the parties and given short reasons why one side or the other prevailed.

Issue (3): Whether the Court of Appeal erred by holding that the Developers were entitled to security for costs although the interests of the Developers and the Government respondents are identical and therefore RDA should not be made to pay the Developers' costs in accordance with the principles set out in *Bolton*.

89. As explained above, there is a close relationship between the issue of whether an award of costs is likely to be made in favour of a defendant at the close of proceedings, if it is successful in defending the claim, and the issue of whether security for that defendant's costs should be ordered to be provided in advance. In *Bolton* the House of Lords considered the circumstances in which, at the close of proceedings, it may be appropriate to award a developer its costs of participating in judicial review proceedings where a challenge to a decision of the Secretary of State to grant planning permission in favour of a developer is unsuccessful. In the lead judgment of Lord Lloyd of Berwick, with which all their lordships agreed, the "proper approach" in the generality of cases was summarised as follows at pp 1178F-1179A:

> "(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. In so far as the Court of Appeal in the *Wychavon District Council* case [*Wychavon District Council v Secretary of State for the Environment* (1994) 69 P & CR 394] may have encouraged or sanctioned such a course, I would respectfully disagree.
>
> (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."

As a convenient shorthand, we have referred to these as the *Bolton* principles.

90. The *Bolton* principles were cited and applied by the Court of Appeal in *Bimini Blue*, a case concerned in part with an application by developers for security for their costs in respect of judicial review proceedings, at paras 10-14. In its judgment in that case the Court of Appeal observed (per Allen JA at para 12) that the House of Lords had determined in *Bolton* that there were a number of special features that warranted the developer being awarded its costs. It held that the *Bimini Blue* case contained "all of the special features pointed out by the House of Lords" (Allen JA, para 13), that "the developers have a strong case for arguing that they will be awarded their own costs" and that in all the circumstances it was appropriate for an order for security for costs to be made (Allen JA, para 14).

91. RDA relied in particular on para (2) of Lord Lloyd's summary of the relevant principles. It submitted that the Developers had not established that there was any "separate issue" on which they were entitled to be heard or an interest requiring separate representation. The mere fact that the Developers are interested parties who have a financial stake in the outcome of the judicial review challenge is insufficient. That may justify their joinder as interested parties or respondents but it does not establish an interest that is sufficiently separate to make it likely that they will be awarded their costs. Unless that can be shown, an order for security for costs cannot be justified.

92. RDA submitted that the Court of Appeal did not identify any separate interest of the Developers. It appeared to consider that it was sufficient that the Developers would be "adversely affected" by the relief sought. Further, although the Court of Appeal referred to the *Bimini Blue* decision, it did not identify any "special features" which might warrant the Developers being awarded their costs. Its decision did not therefore accord with the *Bolton* principles and was wrong in law.

93. Mr Peter Knox KC, counsel for the Developers, sought to uphold the order made by the Court of Appeal on five main grounds.

94. First, he submitted that while it is true that the Court of Appeal in its judgment did not expressly consider the *Bolton* principles, RDA is not justified in saying that the court thereby went wrong, because it did not raise the *Bolton* principles as an objection to security for the Developers' costs either at first instance or in the Court of Appeal.

95. The Board does not accept this submission on the facts, and it is unnecessary to consider whether it would have been open to RDA to raise this issue on appeal if it had not done so below. Both before the judge and in the Court of Appeal the framework for the rival contentions on each side was taken to be that which was clearly set out in *Bimini Blue*, in which the Court of Appeal considered the *Bolton* principles in detail and explained the relationship between them and whether security for costs should be ordered in favour of the developers: see para 10. Whilst it is correct to observe that RDA did not expressly refer to *Bolton*, it did submit that the Developers would not be entitled to costs and that security should not be ordered in their favour, having regard to what was said in *Bimini Blue*. In the Court of Appeal, RDA argued that the present case was to be distinguished from *Bimini Blue*, in which security had been ordered in favour of the developers upon consideration and application of the *Bolton* principles. Further, RDA's evidence and submissions were clearly rooted in the *Bolton* principles. So, for example, Mr Hall's third affidavit denied that there was any "lis" between RDA and the Developers and pointed out that RDA's challenge was not against the

Developers and that no relief was sought against them. Further, RDA's written submissions before the Court of Appeal pointed out that the Developers were "likely to have little, if any, evidence of relevance" and that there was no reason to think that they "will have anything of substance to add to the submissions that will be made". The Court of Appeal referred to *Bimini Blue* in its judgment at paras 29-32 and 68-69 and purported to follow it, which indicates that it understood that the argument proceeded with reference to what was said in that case. In these circumstances the Board is satisfied that it is open to RDA to rely on the *Bolton* principles in its appeal.

96. Although the submissions to the Court of Appeal were based on the framework in *Bimini Blue*, which incorporated the *Bolton* principles, the court did not give any reasons why, applying those principles, an order for security for costs should be made in favour of the Developers. The Court of Appeal did not carry out the evaluative exercise which was required. In the Board's view, the Court of Appeal failed to address properly the submissions which RDA had presented under Issue (3). This is an error which means that the Board must 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. Mr Knox implicitly accepted that this was the position and by his further submissions invited the Board to have regard to features of the case to which the Court of Appeal had not referred. The position of all the parties is that it is appropriate for the Board to deal with the issues in the appeal without remitting the case to the local courts.

97. Mr Knox's second submission was that a special feature in this case was that RDA's counsel, Mr Frederick Smith, had publicly demanded that the Developers take part and spend their own money defending their position. In this connection, he referred to an article in The Tribune newspaper dated 13 December 2016 which reported Mr Smith complaining about the Developers being at court hearings but not participating, stating that this highlighted that the Government and thereby the taxpayer was "footing the bill" on behalf of developers, and that it "is high time the Government called on all these developers to foot their own bill in defending their secretive, closed doors, behind-the-scenes deal they both concoct". These comments were put to the Developers on 12 December 2016. They had already drafted an application to be joined as a party and on 13 December 2016 they issued that application.

98. These provocative comments by Mr Smith enabled the Developers to argue that they had a particular interest to participate in the proceedings in order to defend themselves against these charges and that, applying the *Bolton* principles, RDA could not now complain about having to meet the costs of such participation. The issue, however, is not the participation of the Developers in the proceedings but whether

that participation is likely to lead to a costs order being made in their favour in accordance with the *Bolton* principles. This depends on whether they have a sufficiently separate interest in the proceedings, not on out-of-court comments which may have encouraged them to join the proceedings. The Board is not persuaded that the element of out-of-court challenge in this case was such as to give the Developers a sufficiently separate interest to justify a costs order in their favour pursuant to the *Bolton* principles. Mr Smith's comments could have been answered by out-of-court statements. They did not necessitate participation in the proceedings.

99. Thirdly, Mr Knox relied on the accusations in RDA's evidence and submissions of bad faith on the part of the Developers by seeking to use a last minute application for security for costs in a very large amount as a way to stifle RDA's claim. Mr Knox argued that the Developers had a separate and legitimate interest to participate in the proceedings to rebut this allegation of bad faith against them. However, in the Board's view, this contention cannot be accepted. The allegation of bad faith was part of a focused submission made in the context of RDA's argument to rebut the Developers' application for security for costs, which the Developers were in a position to and did meet by their own evidence and submissions in support of that application. The allegation did not require separate participation by the Developers in the substantive judicial review proceedings and could not justify a costs order in their favour pursuant to the *Bolton* principles.

100. Fourthly, Mr Knox submitted that a further special factor was that the Developers are accused by RDA of conducting their relations with local residents in bad faith and that this is a reputational issue which justifies separate representation. In this connection, reference is made to statements by Mr Pitcairn in his affidavit that the Developers broke a promise to provide residents with copies of the EIA, that they met with residents for show only and had had no real intention to consult properly with the people affected, and that they were ignoring local residents.

101. The judicial review claim itself, however, makes no allegations of bad faith or indeed any allegation against the Developers. Its focus is on the Government respondents' duty to consult based on statute and legitimate expectation. Resolution of the judicial review claim does not therefore require any bad faith claim against the Developers to be determined. Even if any such claim was nevertheless both sought and allowed to be maintained, which is doubtful, it is legally irrelevant. The Board does not consider that the way in which Mr Pitcairn expressed himself raised such serious imputations of disreputable conduct on the part of the Developers as would justify an order for costs in their favour pursuant to the *Bolton* principles.

102. Fifthly, and most importantly, Mr Knox submitted that the Developers do have separate interests in the judicial review claim to the Government respondents and that their interests are sufficiently distinct as to be likely to justify a separate award of costs. He submitted that, unlike many cases, this case does not involve a single decision by a public authority and a single remedy. Here, relief is being sought very early in the process before substantive decisions have been made, and there are a large number of possible permutations as to how and when the consultation process should take place in relation to each decision. Moreover, the Government respondents and the Developers may well take a different view as to the nature, degree and speed of consultation required. The Government respondents are likely to wish to be seen to be open and even-handed and therefore may be more inclined to accept that there should be a consultation process. By contrast, the Developers have their private interests to protect and are interested primarily in securing the grant of the permissions they need with the shortest delay and the least risk and expense to their project. Further, the likelihood that the Developers will reasonably want to make separate representations is all the greater because of the width and vagueness of the relief being sought, such as, for example, the need for RDA to be "meaningfully included" in the consultation process.

103. In order to justify an order for security for costs being made in favour of the Developers, the Board considers that it was incumbent on the Developers to show, as a minimum, that a costs order in their favour was likely to be made if the judicial review claim was ultimately dismissed. In accordance with the *Bolton* principles this meant establishing that there was a separate issue on which the Developers were entitled to be heard, which would not be covered by the Government respondents, or that they had an interest which required separate representation, and that this was likely to justify an order for a second set of costs. In most cases in which the *Bolton* principles are applied the issue of costs arises at the end of the proceedings and the court will accordingly be in a good position to determine those questions. In this case, however, the court was being asked to pre-judge the matter at an early stage of the proceedings. This inevitably involves a degree of speculation and makes it difficult for the Developers to establish the necessary likelihood of a costs order in their favour.

104. A similar point was made by Dyson J in *Child Poverty Action Group*, at pp 357-358, in the context of a claimant seeking a protective costs order to assist it to have access to court (para 79 above). In that context, the Court of Appeal in *Corner House* considered that to limit the availability of such an order, because of the difficulty of assessing at an interlocutory stage whether the court would decide to protect the claimant (if unsuccessful) from liability for costs at the end of the proceedings, would be too restrictive: para 80 above. But in the present context the point regarding the difficulty of assessing the costs outcome for a developer at the end of proceedings is an important one and is relevant. Unlike a protective costs order, an order requiring a

claimant to provide security for a developer's costs (ie a second set of costs) risks deterring the claimant from proceeding with its claim and hence is an impediment to gaining access to court. A court should only be willing to introduce that additional impediment regarding access to court for a properly arguable claim if it is confident that it will be just and appropriate to make an award of costs in the developer's favour at the end of proceedings, if the claim fails. The test is more demanding than that applicable in relation to an order for security for the costs of the public authority which is the primary defendant.

105. The uncertainty surrounding the future course of the proceedings in this case is reflected in the necessarily speculative terms in which the Developers put their case. They say, for example, that it "is unlikely that the interests of the Developers and the nine public respondents will always coincide"; that one "can readily see why there is no guarantee that the Developers' interests will be identical to those of all nine possible decision makers" and that "the Government Respondents and the Developers may well take different approaches to the claimed relief and the proposed involvement of the Appellant". The fact of the matter is that the Developers are unable at this stage to identify a relevant separate interest. All that they can say is that such an interest may emerge during the course of the proceedings. That is not a sufficient basis for an order for security being made now. There are in any event a number of other reasons for reaching that conclusion.

106. First, the Court of Appeal did not identify any separate interest on the part of the Developers, an interest requiring separate representation or the existence of special features. They recognised that the Developers may be adversely affected by the orders sought in the judicial review claim made, but that will almost invariably be the case where the challenge relates to a development. The normal position, however, is that a developer does not get a second order for costs and such orders are relatively rare. In general, in order to obtain such an order a developer needs to bring itself within the *Bolton* principles and this often requires proof of special features. These matters are not addressed by the Court of Appeal. The Board must make its own assessment.

107. Secondly, the Developers' evidence before the judge and the Court of Appeal did not identify any separate interest, an interest requiring separate representation or the existence of special features. Its focus was the impact on the financial interests of the Developers and the justification for their joinder. Mr Knox's detailed arguments on the Developers' alleged separate interest were not advanced below.

108. Thirdly, this is a relatively straightforward judicial review claim in which RDA relies on the well established *Gunning* principles for fair consultation – see *R v Brent*

London Borough Council, Ex p Gunning (1985) 84 LGR 168, 189 (Hodgson J) and *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947, paras 23 to 28 (Lord Wilson). It was set down for a two-day trial and there was very limited affidavit evidence. The claim was directed at the Government respondents alone. In the context of such a claim there is unlikely to be much which the Developers could usefully add either by way of submissions or evidence. They had the opportunity to provide evidence to the Government respondents to support their defence, if they wished to do so, without needing to play any substantial role in the proceedings. In fact, however, they did not attempt to do this in the long period which had elapsed by the time of the hearing of their application for security for costs, despite the case having originally been listed to be heard in November 2016.

109. Fourthly, as interested parties the Developers would have been entitled to be heard at trial under RSC Ord 53 r 9(1) and, as Mr Knox acknowledged, this would have included the right to seek to put in evidence on their own behalf. They did not apply to do so before either of the set trial dates. Mr Knox suggested that there were indications in the interlocutory proceedings of an intention to seek to do so once the issue of security was determined. Even if that is so, the nature of any such evidence has never been identified.

110. Fifthly, if RDA is successful in its judicial review and the Government respondents have to carry out a further consultation exercise, then in so far as the Developers' interests might be affected they will also have the right to seek to ensure that the Government respondents act in accordance with the law. If it turns out that the Developers are dissatisfied with the Government respondents' conduct of the consultation exercise, they would be entitled to seek to bring their own judicial review challenge. Clearly it would be premature to do so now, but the Developers are essentially seeking security from RDA for the costs of protecting their position should it prove necessary to do so, even though the defendants if the Developers did need to take action would be the Government respondents. So in effect the Developers are seeking a pre-emptive insurance policy against that possibility, the cost to be borne by the wrong person.

111. For all these reasons, having regard to the *Bolton* principles, the Developers are not able to say on the basis of the evidence available that there is any likelihood that at the end of proceedings they will be entitled to an order that RDA should pay their costs. That is sufficient to explain why they are not entitled to an order for security for their costs at this interlocutory stage. However, the Board also observes that it is in any event difficult to see how the security order made was justified, in circumstances where there was no draft bill of costs from the Developers in evidence, nor any other

evidence to explain or justify costs which they might incur in relation to the proceedings.

112. In the absence of that evidence, the Developers sought to rely on the draft bill of costs of the Government respondents to support their own application for security for costs. But the Government respondents were the primary defendants, whereas the Developers had no separate substantive role to play, so no inference could properly be drawn about the costs of the Developers by reading across from that draft bill of costs. Still less could it be said that a greater amount of security should be ordered in favour of the Developers. Nor did the fact that security in favour of the developers was ordered in *Bimini Blue*, nor the level of such security as compared with that ordered in favour of the government defendants in that case, justify the order made in this case. Each case must turn on its own facts and evidence.

113. For these reasons the Board is satisfied that the Court of Appeal erred in law in upholding the order for security for costs in favour of the Developers and considers that, upon a fresh exercise of discretion, the order made should be set aside.

Conclusion

114. For the reasons given above, the Board will humbly advise His Majesty that: (1) the appeal in relation to the order for security for costs in favour of the Government respondents should be dismissed; (2) the appeal in relation to the order for security for costs in favour of the Developers should be allowed; and (3) it should be determined that there should be no order for security for costs in favour of the Developers.