

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCiv App Side**

**2014  
No. 35**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
BETWEEN:**

**BIMINI BLUE COALITION LIMITED  
And**

**THE RT. HON. PERRY G. CHRISTIE, Prime Minister of the Commonwealth of  
The Bahamas ( in his capacity as the Minister Responsible for Crown Lands)  
First Respondent**

**THE HON. PHILIP E. BRAVE DAVIS, Deputy Prime Minister of the  
Commonwealth of The Bahamas ( in his capacity as The Minister of Works and  
Urban Development and the Minister Responsible for Building Regulation)  
Second Respondent**

**TOWN PLANNING COMMITTEE**

**Third Respondent**

**RWBB RESORTS MANAGEMENT LTD**

**Fourth Respondent**

**RWBB MANAGEMENT LTD**

**Fifth Respondent**

**BIMINI SUPERFAST CHARTER LIMITED**

**Sixth Respondent**

**RAV BAHAMAS LIMITED**

**Seventh Respondent**

**Before:** The Hon. Mrs. Justice Allen, P.  
The Hon. Mr. Justice Conteh, JA.  
The Hon. Mr. Justice Adderley, JA.

**Appearances:** Ms. Courtney Pearce Counsel for the Appellant/Applicant  
Mr. David Higgins with Mr. Gary Francis and Ms. Melissa  
Wright Counsel for the First to Third Respondents  
Mr. Brian Moree Q.C., with Mrs. Nicole Sutherland King  
Counsel for the Fourth to Seventh Respondents

**Dates:** 16, 19 May, 5 June 2014, 18 July 2014

Civil Appeal – Judicial Review - Security for Costs – Conservatory Order – Costs - whether quantum awarded appropriate in all the circumstances –

In late 2013 the appellant was ordered to pay security for the respondents' costs. The appellant's appealed the quantum ordered.

Held:- appeal allowed, quantum ordered by the learned trial judge set aside, global sum of \$315, 000.00 as security for costs ordered, security to be paid within 30 days of the date of this judgment, costs of the conservatory order proceedings are split between the appellant and respondents

**per Allen, P**

Estimating the quantum to be awarded for security for costs is not an exact science. Having regard to the difference between the figures asked of the trial and the figures presented in the estimated Bills of Costs filed in this Court, the appellant's observations on the draft Bills, the general principles detailed in the case law, the nature of the appellant's case and the conduct of the case by the appellants thus far, I estimate that the appropriate award is a global quantum of \$315,000.00; being made up of \$100,000.00 for the government's costs and \$215,000 for the developers' costs.

In relation to the appropriate Costs order in the Conservatory matter, we set aside the order of the learned trial judge and order that the following costs are the appellant's, to be taxed if not agreed :- 1. preparation of and appearance before the Court of Appeal on the 16<sup>th</sup> & 19<sup>th</sup> May 2014 2. preparation of and appearance before the Privy Council on the 22<sup>nd</sup> & 23<sup>rd</sup> of May 2014. The following costs are the respondents to be taxed if not agreed 1. preparation of and appearance before Justice Longley from the 26<sup>th</sup> May 2014 – 30<sup>th</sup> May 2014 2. preparation of and appearance before the Court of Appeal on the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 11<sup>th</sup> of June 2014.

**per Adderley, JA**

As correctly observed obiter by Nelson CCJA in *Knox v Deane and others* [2012] CCJ 4 at [42] "...Security for costs is an important derogation from the principle of access to justice." No issue of *locus standi* having been raised by the respondents, the appellant has accessed the system, and having done so is subject to the rules and principles governing the determination of quantum of security. In accordance with principle a balance must be struck between the quantum being oppressive so as to stifle the appellant's claims, and not allowing the impecunious appellant to put unfair pressure on the Developers, a prosperous company.

To be considered for relief from granting security for costs the issue raised must be a point of law of public importance, and the effect of making the order would be to prevent the point of law in question being decided. While, like most environmental matters raised by judicial review, this case may be of public importance and has an element of public interest, it does

not raise any points of *law* of general public importance. The issues raised are issues of construction of statutes based on the facts of this case, and there is no claim that any statutes are ambiguous and need special interpretation to guide the public generally in the future. Therefore, I would not exercise my discretion to grant a nominal quantum for security as this would in effect derogate from the security itself already ordered.

The court has no basis upon which it should bifurcate the security for costs order as between the Government respondents and the Developers. Having regard to all the circumstances and the authorities, and working on the current practice of taking 2/3<sup>rd</sup>s of the estimated party and party costs as an estimate of what is required to indemnify the respondents against their party and party costs, I agree with the estimate of a global sum of \$315,000.00 being made up of \$215,000.00 in respect of the Developer's costs and \$100,000.00 in respect of the Government respondents costs. This works out to approximately 50% of the solicitor/own clients costs in the projected draft Bills reduced by one third.

***Authorities applied***

*Bolton Metropolitan District Council and others v Secretary of State for the Environment* [1996] 1 ALL ER  
*In re Eastwood, decd. Lloyds Bank Ltd v Eastwood and ors* 1975] 1 Ch (C A)  
*Keary Developments v Tarmac* (1995) 3 ALL ER 534)  
*Knox v Deane and others* [2012] CCJ 4

***Authorities mentioned***

*Harbour Lobster Fish Co v AG* [1998 BHS J No 15],  
*Illawarra Residents for Responsible Mining Inc v Gujarat NRE Coking Coal Limited*  
[2012] NSWLEC 259  
*Pearson v Naydler* [1977] 3 ALL ER 531).  
*Pointes Protection Association v Sault Ste, Marie Region Conservation Authority* 2013  
ONSCV 5323

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## J U D G M E N T

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**Judgment Delivered by The Honourable Mrs. Justice Allen:**

1. This is an appeal against the decision of learned senior justice Hartman Longley given on December 19<sup>th</sup> 2013 granting to the 1<sup>st</sup> – 3<sup>rd</sup> respondents security for costs in

the amount of \$250,000.00 and to the 4<sup>th</sup> – 7<sup>th</sup> respondents security for costs in the amount of \$400,000.00. Justice Longley further ordered that should the appellant fail to pay the stipulated sums within 21 days the respondents were at liberty to apply to the Court for an order dismissing the action. Leave to appeal the decision was granted by the learned judge.

2. The appellant did not file the requisite Notice of Appeal Motion in time and attempted unsuccessfully to gain an extension of time from the learned trial judge. In late February 2014, this court granted the appellant leave to appeal against the quantum award of \$650,000 only.

3. By way of an amended Notice of Appeal the appellant claimed the following re: the government:

“2. the sum of \$250,000.00 ordered by the learned Senior Judge in favour of the Government Respondents was excessive and irrational for the following reasons:

a. The office of the Attorney General is not a private legal practice. The Attorney General is representing the Government Respondents in their official capacities. This is not a case where the Government Respondents have, or the Attorney General (acting on their behalf) has instructed private legal counsel. Accordingly, the Government Respondents are under no obligation nor are they liable to pay any costs (including disbursements) for the services rendered by the Attorney General in defending the Judicial Review Action on their respective behalf.

b. In addition, the attorneys in the office of the Attorney General are remunerated by way of salary, payment of which is unaffected by the existence of and the Attorney General's participation in the Judicial Review Action.

c. The sum ordered as security for the Government Respondents' costs therefore exceeds the amount they would otherwise be entitled to receive by way of security for costs.”

4. In relation to the developers the appellant claimed the following :

“The sum of \$400,000.00 ordered by the learned Senior Judge in favour of the Developers was oppressive, arbitrary, excessive and irrational for the following reasons :

- a. The developers are no longer a necessary party to the judicial review proceedings and as such any costs incurred by them lay at their own feet
- b. the defence to the judicial review action is capable of being adequately dealt with by the Government respondents [as] the interests of the Government Respondents and the Developers are aligned.
- c. the learned judge erred in concluding that the directors members and supporters of the appellant should be prepared or able to raise the sum of \$650,000 in the time allowed.
- d. the learned judge erred by not giving proper weight to 1. the appellant's prospect of success and 2. the fact that the proceedings raise issues of such gravity and importance that they transcend the private interest of the parties before the court"

5. The appellant claimed, in relation to both awards, that the amounts awarded were not in accordance with the scale of fees generally awarded in the Supreme Court, the amounts awarded were not supported by any evidence; neither were they calculated on a party to party basis. It was further posited by the appellant that the learned trial judge failed to give adequate weight to the point that the substantial amount of the orders was highly likely to have the effect of preventing the appellant's judicial review application from proceeding; thereby preventing the ventilation of their concerns and sets a precedent for access to the courts to be denied in future cases brought in the public interest.

6. In response to the appellant's claims the developers assert the following:-

1. The appellant can not arbitrarily decide that a named defendant is no longer necessary to the case. At this stage in the proceedings, and in accordance with Order 21. r. 3 of the Rules of the Supreme Court, the appellant would require the leave of the court to withdraw its case against the developers. This leave is unlikely to be granted as the outcome of the judicial review proceedings directly affects the proprietary and pecuniary interests of the developers. Further, they posit, it is their right in accordance with Order 53 r. 9 of the Rules of the Supreme Court to be heard by the learned trial judge.
2. The learned trial judge properly directed himself as to the relevant factors to be taken into account when determining the appropriate quantum.
3. There is no principle that the presentment of a draft bill of costs is a prerequisite to the Court exercising its discretion to order a sum to be paid as security for a defendant's costs. The grant of and the amount of security for costs is a matter for the exercise of judicial discretion. In order for an appellate court to interfere with the exercise the appellant would need to show that on the whole of the material before the learned judge his decision was one which no other

reasonable person acting judicially and properly instructed as to the relevant facts and law could have reached.

4. The learned judge correctly found that the appellant had offered no evidence of the fact that an order for security costs would have the effect of stifling the judicial review action. The burden is on the appellant to prove that its claim would be stifled.
5. The interests of the government respondents and the developers do not coincide. The government respondent's interests are in defending the fairness of procedure and decision-making and the protocols applicable to approving developments. The developers have an interest in defending their approvals and permits, protecting an exceptionally large investment and ensuring the continuity of the development.

### **Crown's Entitlement to Costs**

8. Section 15 of the Crown Proceedings Act is pellucid and provides that in civil proceedings the Crown can be awarded costs. The section states,

**"In any civil proceeding to which the Crown is a party, the costs of and incidental to the proceedings shall be awarded in the same manner and on the same principles as in cases between subjects, and in the court or arbitrator shall have power to make an order for the payment of costs by or to the Crown accordingly"**

Judicial Review proceedings are civil proceedings. In light of the section, the appellant's assertions that the Government is not entitled to its costs in the matter fails.

### **Developers No Longer Necessary Parties to the Proceedings**

9. I can not agree with the appellant's contention that security of costs should not be awarded against the developers because, in their view, the developers are no longer necessary parties to the proceedings. The outcome of the judicial review proceedings directly affects the developer. The appellant seeks numerous declarations that at the end of the day will directly affect the developers' proprietary and pecuniary interest. The appellant willingly brought the developers to the table. They can not, now that they are faced with securing the developers costs, unilaterally decide that their presence at the litigation table is no longer needed.

### **Interests of the Government & Developers Aligned**

10. The appellant put before the Court, the House of Lords decision in **Bolton Metropolitan District Council v Secretary of State for the Environment 1 W.L.R**

1176. The appellant focused on page 1178 of paragraph G of Lord Berwicks unanimous judgment. Therein he stated,

**“ 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 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.”**

The appellant uses this paragraph as the basis for contending that as it is unlikely that the developers will be awarded their costs at the end of the review, there is no need to provide security for the same before judicial review proceedings begin.

11. Paragraph G, which the appellant focused on, must be placed in the context of the entire case. The House of Lords determined the following :-

**“ ... 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 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 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 crystallized and the extent to**

**which there are indeed separate interests should have been clarified.**

- (4) An aware of a third set of costs will rarely be justified, even if there are in theory three or more separate interests.”**

12. The House went on to determine that in the case before them there were a number of special features present that warranted the developer being awarded its costs. They considered the fact that the case raised difficult questions of principle arising out of a change in government policy, that the Secretary of State was concerned not only to support his decision but also to explain and defend his wider policy. The developers on the other hand were only concerned with the outcome of the particular appeal. The House also considered that the exceptional size and weight of the scale of the development and the importance of the outcome for the developers were special features of the case that entitled the developers to their costs; not only to the costs below but also on appeal.

13. The present case contains all of the special features pointed out by the House of Lords. The Government in the present case is concerned with defending the decision making process as it relates to approving large scale development projects, especially the approval process relating to the issuance of dredging permits. The developers wish to ensure that their investments and expenditures to date are protected having regard to the scale of the development and the substantial amount of money invested in the same which increases the weight and the importance of the outcome for them.

14. In light of the above points, the developers have a strong case for arguing that they will be awarded their own costs. In any event, we are at the security for costs stage. Any monies paid in respect of a security for costs order will not be automatically given to the respondent. If at the end of the trial it is determined by the learned trial judge that the developers, in the interests of justice or for any other valid reason, should not be awarded costs the money held on security for the benefit of the respondents can and will be returned to the appellant.

#### **Whether the award stifles the appellant's claim?**

15. The United Kingdom Court of Appeal in **Keary Developments v Tarmac Construction [1995] 3 All ER 540** laid out in detail the principles governing an award of security for costs. Considering the importance of the present case and the public's interest in the matter I think it prudent to set out these principles in detail. Lord Gibson, writing the unanimous judgment of the court stated at pg 539:-

- 1. As was established by this court in Sir Lindsay Parkinson & Co. Ltd v Tripalm Ltd [1973] 2 All ER 273, the court**



has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security ( see *Okotcha v Vost Alpine Intertrading GmbH* [1993] BCLC 474 at 479 per Bingham LJ whome Steyn LJ agreed)...
3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.
4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure. In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer of payment into court, indicative as it may be of the plaintiff's prospects of success, But the court will also be aware of the possibility that an offer or payment may be made in acknowledgement not so much of the prospects of success but of the nuisance value of a claim.
5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security,

provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.

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. ... 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. ...
7. The lateness of the application for security is a circumstance which can properly be taking into account. But what weight, if any, this factor should have and in which direction it should weigh must depend upon matter such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred.

16. Before embarking on an analysis of the above points it must be remembered that the present appeal is a narrow one. It is an appeal against the quantum awarded by the learned trial judge and not an appeal against the actual award of security for costs. With that said, for the purpose of the present appeal, the guidelines enunciated above must be seen in that light.

17. The learned senior Justice in considering the award of the security and the amount to be ordered clearly and properly considered the guidelines stated by the United Kingdom Court of Appeal in *Keary*. In his judgment Senior Justice Longley opined:

**“The second question is would the respondent be unable to pay that amount or any costs if the respondents succeed. I am satisfied on the evidence that having regard to the time when the company was formed and the absence of any known assets and the absence of any evidence that the company is**

**commercially oriented or is trading in any way that would be unable to pay the costs associated with the action if the respondents succeeded. That is not contested.**

**Is the company's impecuniosity in any way attributable to the action of the respondents ? The answer is a resounding, no. Would the inability to pay the costs drive the applicant from the judgment seat and is the action motivated by oppression? I am satisfied that there is no improper motive. There are genuine concerns [by the respondent] that the applicant does not have a strong case; the expenses are likely to be considerable and the company was only formed days before it commenced this action. I am not satisfied that the motive behind the application is to drive the applicant from the judgment seat or to stifle a genuine claim.**

**Would an order for security for costs in the amount indicated have the effect of stifling the claim ? While that would appear to be a contradictory question it is in fact not the case. A company may be unable to pay its debts or to pay the costs from its own assets, but it may have friends who are willing to assist... In this case the applicant claimed in its application that it has the support of a number of persons from different parts of the community, from visitors, and from persons from different walks of life who are committed to the preservation of the environment of Bimini. It is unthinkable that they would not come to the aid of the applicant to save the action. In similar circumstances Justice Rose said, " it is highly likely that resources will be found if those who are behind this application wish the matter to proceed before the court.**

**I therefore think it highly unlikely the applicant will be driven from the judgment seat. Noteworthy is the fact that notwithstanding that counsel for the applicant has submitted the applicant would be driven from the judgment seat if security for costs were ordered he did not produce evidence to support that contention. The onus is on him if he wished the Court to believe that to be the case. In this regard he has failed."**

18. As shown in the **Keary Developments** case, it is for the appellant to demonstrate that it is more probable than not, that its claim will be stifled if the amount awarded remains. It is also for the appellant to establish that it is unable to raise the funds

needed either from its members or from any interested parties. The only evidence placed before the judge was an Affidavit indicating that the Plaintiff was a nonprofit organization and as such unable to raise the funds within the stipulated time frame. This claim, as Kearny shows, without more, is not enough; the appellant has to demonstrate either directly or indirectly that it cannot raise the funds from either its members or from any interested parties. This they have not done. In fact, before us, Counsel for the appellant indicated in open court that he may be so inclined to loan the appellant the funds needed to cover a costs order. Nothing has been shown that this cannot be done albeit by a different party in relation to securing payment of the security.

### **Issues raised transcend private interest of the parties**

19. In support of this point the appellant laid before this court a 2010 case from Ireland **Digital Rights Ireland Limited v The Minister of Communications, Marine and Natural Resources et al [2010] 3 IR 251**. In this case, similar to the present case, both parties accepted that security for costs was a matter of the court's discretion with the defendants relying on the impecuniosity of the plaintiff and their raising of a bona fide defence, whereas the plaintiff heavily asserted the overriding public interest in allowing the case to proceed.

20. In **Digital Rights** the court opined at paragraph 104 of the judgment :-

**"104. One of the recognized "special circumstances" which a court may take into account in refusing an order for security for costs is that the case involves questions of fundamental public importance. Morris J in Lancefort Ltd v An Bord Pleanala [1998] 2 IR 511 at pg 516 in this regard notes :-**

**'I have considered the Supreme Court authorities in Midland Bank Ltd v Crossley-Cooke [1969] IR 56 and Fallon v An Board Pleanala [1992] 2 IR 380. I consider in the context of the applicant's opposition to the application these are the relevant authorities and in particular that part of the judgment of the Chief Justice where he says at p 384, the second mandatory condition, as it were, laid down in the judgment is that the Court should not ordinarily entertain an application for security for costs if it is satisfied that the question at issue in the case is a question of law of public importance.'**

**105. The above decision of Morris K was considered by Laffoy J in Village Residents Association Ltd v An Bord Pleanala (No 2) [2000] 4 IR 321 and p 333 where she stated, “ ... I am of the view that the criteria for determining whether a question of law of public importance exists ... can be extrapolated from the judgment of Morris J in Lancefort Ltd v An Bord Pleanala – whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases [ security of costs should not be ordered ] .**

21. In response to this point the respondent placed before the court the United Kingdom case of **R v Leicestershire County Council ex p Blackfordby and Boothcorpe Action Group Ltd [2001] Env LR 2**. The Leicestershire case while informative does not assist on the point as it is a case considering whether standing should be granted to an company limited by guarantee and incorporated for the purpose of limiting the liability of its members against costs in judicial review proceedings.

22. The respondent additionally submitted the cases of **Pointes Protection Association v Sault Ste. Marie Region Conservation Authority (2013) ONSC 5323** and **Illawarra Residents For Responsible Mining Inc v Gujarat NRE Coking Coal Limited [2012] NSWLEC 259**. These cases, the respondent submits, demonstrate that other common law jurisdictions have rejected the proposition that due to the nature of the public interest litigation an entity like the appellant should be entirely exempted from providing security for costs. The Ontario Superior Court of Justice held in **Pointes Protection** as follows:

**“[26] I agree that the developer appears to have a greater capacity to bear the costs of this litigation. However, this does not mean that in every situation where one of the parties is in a better financial position, that party should not be entitled to costs. If that were the case, our courts would be even more congested than they are currently. There must be some deterrent in any type of litigation. Parties should seriously consider the consequences**

of engaging in any litigation especially one that can be as complicated, protracted and expensive as this one.

[27] If its members are that convinced of their position, then they should proceed as any other litigant and be exposed to costs if not successful.

[28] The developer has submitted a projected bill of costs of approximately \$65,000.00. That amount is on a total indemnity basis. It is not likely that total indemnity would be awarded in this situation if successful. Even on a partial indemnity basis, one might expect a range of between \$30,000.00 and \$40,000 in costs.

[29] In assessing costs ... [t]he overriding consideration is fairness and ability to pay. Considering the limited financial resources of the PPA, the sum of \$20,000.00 ought to be pledged as security for costs, within 15 days."

23. Similar reasoning was applied in the **Illawarra Residents** case from New Zealand. The court balanced the right of the developer to be protected from a costs order rendered nugatory by the applicant's apparent inability to pay and the applicant's legitimate claim for judicial review of a matter that was both of public importance and affected their private rights. In the **Illawarra** case, as in **Pointes Protection**, the order for security for costs was granted but in an amount significantly less than that claimed by the developers.

24. While I am of the opinion that this matter concerns the proper administration of public and environmental law, and that the issues of interpretation, which are raised, are important; the question of how these matters affect whether or not an order for security of costs should be granted is no longer open for discussion. As already stated, this is an appeal against the quantum awarded by the learned trial judge and not an appeal of the learned trial judge's decision to order security for costs. While the appellant's case may very well fit into the definition of public interest litigation; to order security for costs in a nominal amount, as the appellant argues the public interest element of the case warrants, would make a mockery of the decision of the learned trial judge to so order and would, through the back door, render nugatory the decision to grant the same.

25. At the end of the day what we are concerned with is whether the award of \$650,000.00 is fair and reasonable in the circumstances of the case. In coming to that figure the learned judge opined :

**“The first question I pose is if security were ordered what in all the circumstances would be a reasonable amount? No draft bills of costs have been produced as is the practice. Rough estimates of bills of costs in other Judicial Review actions have been referred to and the respondents ask respectfully in the amount of 500,000 and 750,000 for a total of 1.25 million. The applicants take issue with these figures as oppressive and unjust. However they offer no alternative. It seems to me the court is in position from its own knowledge of these matters to declare a sum which it considers reasonable. The amounts put forward I think are on the high side. This application is not likely to be as involved as the others to which reference was made but it will be costly. The lawyers appearing are not junior lawyers, they are seasoned practitioners. I would therefore conclude that security in the amount of \$250,000.00 for the first through third respondents and \$400,000.00 for the fourth through seventh respondents for a total of \$650,000.000 would be reasonable.”**

26. Post the orders for security for costs, the respondents have filed, in this Court, estimated Bills of Costs. The government estimates that its costs will amount to \$267,000 while the developer's estimate that their costs will amount to \$675,000.00. After Mr. Smith took the court through what can only be described as a partial taxing exercise, Mr. Wilson, counsel for the respondent, was constrained to admit that the estimated costs provided in the developers' draft Bill of Costs was on the high end of the scale.

27. There is a significant difference between the quantum requested before Longley J and the figures contained in the draft Bills of Costs; a difference of \$308,000.00 to be exact. Though the figures awarded by the judge are half of what the respondents requested; it is unclear whether the figures quoted by the respondents were considered by the learned trial judge as he determined the quantum to be ordered.

28. Estimating the quantum to be awarded for security for costs is not an exact science. Having regard to the difference between the figures asked of the trial and the figures

presented in the estimated Bills of Costs filed in this Court, the appellant's observations on the draft Bills, the general principles detailed in **Keary Developments**, the nature of the appellant's case and the conduct of the case by the appellants thus far, I estimate that the appropriate award is a global quantum of \$315,000.00; being made up of \$100,000.00 for the government's costs and \$215,000 for the developers' costs.

29. In the premises, we allow the appeal and order that the appellant pay security for costs to the respondents in the sum of \$315,000.00. If the said security is not paid within 30 days of the date of this judgment, the extant judicial review proceedings stand dismissed. Each party is to bear its own costs of the security for costs application both here and in the court below.

### **Costs – Conservatory Order Proceedings**

30. On May 23<sup>rd</sup> 2014, at the conclusion of the hearing of the application for a Conservatory Order the Privy Council ordered that "the costs of the application for conservatory orders be dealt with by the Court of Appeal of the Commonwealth of the Bahamas or (if an application is made under paragraph 2(ii) above) by the Supreme Court or as those courts direct."

31. On May 30<sup>th</sup> 2014, upon conclusion of the discharge hearing, the learned trial judge ordered that, costs before him and in the Privy Council are to be paid by the appellant to the respondents to be taxed if not agreed.

32. On the 5<sup>th</sup> June 2014 we reserved, until the conclusion of the security for costs appeal, our decision on the May 30<sup>th</sup> costs order made by Senior Justice Longley in the Conservatory Order Proceedings. In relation to that matter, we set aside the order of the learned trial judge and order that the following costs are the appellant's, to be taxed if not agreed :-

1. Preparation of and appearance before the Court of Appeal on the 16<sup>th</sup> & 19<sup>th</sup> May 2014
2. Preparation of and appearance before the Privy Council on the 22<sup>nd</sup> & 23<sup>rd</sup> of May 2014

The following costs are the respondents to be taxed if not agreed:-

1. Preparation of and appearance before Justice Longley from the 26<sup>th</sup> May 2014 – 30<sup>th</sup> May 2014
2. Preparation of and appearance before the Court of Appeal on the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 11<sup>th</sup> of June 2014.



**The Honorable Mrs. Justice Allen, P**

**Judgment Delivered by The Honourable Mr. Justice Conteh, JA**

1. I agree that the appeal against the quantum of the security for costs ordered by the learned judge should be allowed.
2. I also agree as proposed by the learned President at paragraph 28 of her judgment that, in the circumstances of this case, the appropriate award of security for costs should be the global quantum of \$315, 000, made up of \$100,000.00 for the government and \$215,000.000 for the Developers. I further agree the costs order made by the learned President at paragraph 32 of her judgment.

**The Honorable Mr. Justice Conteh, JA**

**Judgment Delivered by The Honourable Mr. Justice Adderley, JA:**

1. I have had the opportunity of reading in draft the judgment of the learned President. I concur with her reasons and disposition of the matter, including the costs orders, but consider it helpful to add additional comments of my own.

**THE JUDICIAL REVIEW PROCEEDINGS (“THE JR”)**

2. At the outset I will set out the issues in the JR because they will have a direct bearing on the time it will take the court to dispose of the matter. They were briefly summarized in my judgment dated 19 May and so I quote from that judgment:

**“41....The complaint in its notice for judicial review is that the Prime Minister as Minister responsible for crown lands and the seabed, the Deputy Prime Minister as Minister responsible for the Town Planning and Subdivision Act 2010 (which came into force in Bimini on 1 October 2011) and the Building Regulation Act, and the**

**Town Planning Committee, in granting the approvals and permits, did not properly consider or consider at all the applications in accordance with the mandates contained in the applicable statutes including, *inter alia*, the adverse effect of the development on the environment of Bimini.**

**42. The appellant contends in its judicial review application that the decisions were irrational, and that no reasonable authority would have granted the approvals and permits after such consideration, and seeks orders of certiorari to quash the decisions as being an ultra vires exercise of their power, and further seeks orders of mandamus to direct the Ministers and authorities under those statutes to carry out their statutory duty. These duties include a mandate to act, which may require, *inter alia*, stopping the development, causing the developers to tear down structures, and requiring them to restore the land to its original use and condition.”**

3. In addition the appellant seeks a declaration against the Developers that its dredging and construction works at North Bimini contravene section 36 of the Planning and Subdivision Act; and/ or Section 4(1) of the Building Regulation Act.

4. In its skeleton arguments filed 16 May 2014 BBC claimed that *“this is not a case (as is more usual in judicial review proceedings) where an Appellant is seeking to challenge a substantive decision to grant permits where the court would need to look at what consultation took place, what matters were taken into account, whether the decision was rational etc.”* On that basis counsel predicted that this is unlikely to require much by way of detailed or complex evidence or argument. Clearly from my summary above, that statement is not consistent with the case as drafted and so we would expect that the hearings might last longer and be less straightforward than counsel appears to suggest.

## **PRELIMINARY OBJECTIONS**

5. The Developers took preliminary objections to the “new” issues now raised by BBC relating to the public interest, constitutional breach, and parties, on the ground that they had not been raised in the court below. I think there is force to these objections. However, since the new matters were raised and answered by the respondents we have briefly dealt with the alleged constitutional breach and the public interest issue.

## **ACCESS TO JUSTICE**

6. The appellant contends that the quantum ordered by the learned judge is oppressive and is sure to stifle the proceedings, is unconstitutional and goes against settled authority in effectively denying the applicant and other public interest groups access to the courts.

7. This court is not the proper place to initiate a constitutional challenge. Under Article 28(2) of the constitution the original jurisdiction for constitutional challenges is the Supreme Court. Under the proviso to Article 28(2) such a challenge would not be allowed if an adequate means of redress was or had been available to BBC under any other law. The issue therefore ought to have been raised below to give the defendants an opportunity to be heard on the matter and to give the court below an opportunity to rule on it.

8. Nevertheless, I offer a view. In *The Bahamas* access to justice is guaranteed under Article 20(8) of the Constitution of The Bahamas. In the *Harbour Lobster Fish Co v AG* [1998 BHS J No 15], referred to by Mr Smith, Gonsalves-Sabola P gave a purposive interpretation of the Article:

**“52 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’.**

**53. It is a fair and purposive reading of that paragraph to say that the words “where proceedings for such a determination are instituted by any person before such a court” are under-girded by an implied acknowledgment of the right of that person to institute those proceedings, in other words, the right of access to the courts. If an Act of Parliament denies this right it would certainly be of doubtful constitutional validity.”**

9. This is not a case where access to the courts has been denied. I would concur with the obiter remarks made by Nelson CCJA in *Knox v Deane and others* [2012] CCJ 4 at [42] where he stated “...*Security for costs is an important derogation from the principle of access to justice.*” No issue of locus standi having been raised by the respondents, the appellant has accessed the system, and having done so is subject to the rules and principles governing the determination of quantum of

security for costs. The general principles and authorities are discussed in *Keary Developments v Tarmac* (1995) 3 ALL ER 534 as set out fully in the learned President's judgment. Appropriate to this case as stated in *Keary*, a balance must be struck between the quantum being oppressive so as to stifle the appellant's claims, and not allowing the impecunious appellant to put unfair pressure on the Developers, a prosperous company (see *Pearson v Naydler* [1977] 3 ALL ER 531).

#### THE PUBLIC INTEREST ELEMENT

10. Bearing in mind that the threshold of providing security *per se* has already been crossed and only quantum falls to be determined, no authority was provided to show that there is a principle under common law that in exercising its discretion to decide on quantum the court should take into consideration that it is dealing with a public interest case, such as for example, the environment.. The Bahamas, unlike the 47 countries including the European Union, is not a signatory to *The Aarhus Convention* 1998 which guarantees to the public, rights of access to information, public participation in decision-making, access to justice (Article (9)) in environmental matters, and the guarantee of a procedure that is free of charge or inexpensive to review a decision of an authority relating to a request for information.

11. Mr Smith did, however, provide authority from the High Court of Ireland which he said supports his contention that in public interest cases security for costs ought not normally be given. In *The Digital Rights* Case referred to in the Learned Presidents Judgment MCKechnie,J refused the defendant's application for security for costs because he concluded that it raised a question of law of public importance. He relied on several cases which ultimately relied on the Irish Supreme Court judgment in *Midland Bank Limited v David Crossley-Cooke*- [1969] IR 56 .

12. In *Midland Bank* Walsh J speaking for the Court (Walsh, Budd and FitzGerald JJ), after a review of the authorities on the grant of security for costs under their rules reached conclusions consistent with our jurisprudence as follows:

**“Four points emerge clearly from these cases. They are, first, that the Court was free to order security in any type of case. Secondly, that poverty alone was not sufficient to warrant the making of such an order. Thirdly, that poverty, or insufficiency of assets on the part of the appellant, was an essential prerequisite for the making of an order. Fourthly, if a point of law of public importance was in issue, that the Court would not make such an order, even if all the other circumstances existing in the case would themselves have ordinarily caused the Court to make the order, if the effect of making the order would be**

to prevent the point of law in question being decided..."[underline for emphasis.]

13. And so, on that authority, to be considered for relief from granting security for costs the issue raised must be a point of *law* of public importance, and the effect of making the order would be to prevent the point of law in question being decided. Neither of those apply in this case. While this case, like most environmental matters raised by judicial review, may be of public importance and has an element of public interest, it does not raise any points of *law* of general public importance. That can be clearly seen from the summary of the issues in paragraph 2 above, and the declaration in paragraph 3 sought against the Developers. The issues raised are issues of construction of statutes based on the facts of this case, and there is no claim that any statutes are ambiguous and need special interpretation to guide the public generally in the future.

14. Furthermore, there is no evidence that even if there was a point of law of general public importance, that making the order for security for costs or in this case not making the quantum negligible, would prevent it from being heard. Although not authority for this Court, in both of the environmental cases submitted by Mr Wilson in reply namely, *Pointes Protection Association v Sault Ste, Marie Region Conservation Authority* 2013 ONSCV 5323 in the Divisional Court of the Ontario Supreme Court, and *Illawarra Residents For Responsible Mining Inc v Gujarat NRE Coking Coal Limited* [2012] NSWLEC 259, security for costs was ordered. Nothing turns on their outcome in our context because in the latter case Court Rules expressly provided that the court could refuse granting security for costs if it was satisfied that the action was brought in *the public interest*. Our Rules have no such provision. Even in those cases, however, security for costs was granted because they were not determined to be public interest cases. In the former case security of \$65,000.00 requested was reduced to \$20,000.00, and in the latter \$75,000.00 requested was reduced to \$40,000.00 taking into account, *inter alia*, the means of the plaintiff..

15. To award nil or negligible security for costs as urged by Mr Smith would derogate from the security Order already granted.

## CONCLUSION

16. On the issue of granting security to the Government respondents, s 15 of the Crown Proceedings Act gives the Government the right to pursue costs in civil litigation. On the authorities the acceptable method of taxing a bill where the Secretary of State [Attorney General] is making use of salaried attorneys is to calculate the party and party costs of the salaried attorneys in the same manner as if they were instructing independent Attorneys or law a firm. (see *In re Eastwood, decd. Lloyds Bank Ltd v Eastwood and ors* 1975] 1 Ch. In that case Lord Justice Russell stressed

the impracticability and wrongness and uncertainty of requiring a total exposition and breakdown of the activities and expenses of the department with which the salaried Attorneys were employed to prove that the damnification principle is not infringed. He concluded at page 132 at letter F by stating::

**“To adopt a passage from the judgment of Stirling J. in *In re Doody* [1893] 1 Ch 129, 137, to make taxation depend on such a requirement would, as it seems to us, simply be to introduce a rule unworkable in practice and to push abstract principle to a point at which it ceases to give results consistent with justice.”**

17. It was therefore reasonable for the learned judge to have granted a quantum of security for costs in respect of the Government respondents as if they were instructing independent attorneys or a firm and I will not disturb that aspect of his decision.

17. I am also of the opinion that it was reasonable for the learned Judge to reject the contention that costs should not be recovered by both the Developers and the Government respondents. The court has the discretion to order costs to both (see *Bolton Metropolitan* Case), if it is satisfied that their interests are different. At this stage it is apparent that the Developers and the Government respondents have different interests and in my judgment the learned judge properly exercised his discretion in that regard. The definite determination of that issue can, of course, only take place after the respondents reply to BBC's originating statements, after there is discovery and filing of evidence, and the learned judge hears the JR application.

## **ESTIMATE OF QUANTUM**

18. The Caribbean Court of Justice gave practical guidelines in *Knox*(supra) where Saunders JCCJ speaking for the panel (Sir Dennis Byron, P, Nelson, Saunders, Anderson, and Witt JCCJ's) suggested a common sense starting point to quantifying security for costs where he stated:

**“[64] If a court has to make an order securing some or all of a litigant's costs, it is difficult to see how it could go about this task in a vacuum, without a consideration of what would be actual or likely costs the receiving party could obtain in the underlying or substantive proceedings....”**

**Wit, JCCJ, agreed:**

**“[75] The first limitation concerning this topic should lie in fixing a proper ceiling for the security for costs of the**

**appeal. Before a court can embark on deciding the amount of security for costs that “appears just”, it should know what the legal costs will or might be....”**

19. There is no schedule of prescribed costs in our Rules of the Supreme Court, as in some jurisdictions, to serve as a guideline for fixing a maximum quantum.

20. The Government respondents have requested a sum of \$267,000, and the Developers \$675,000 based on solicitor/own clients costs. Draft detailed estimates of Bills of Costs on a lawyer/own client basis based on costs incurred to date and projected into the future were placed in evidence to support those figures. Mr Smith went through an exercise of “taxing down” those estimates by identifying what he indicated were overcharging, duplications of charges, duplication of brief fees, and projected fees which he sought to show were unreasonable. In some cases his observations were *prima facie* justified, at least at this stage. BBC did not itself file any evidence on quantum nor any evidence of its financial position, but said it had no assets.

21. I am unable to ignore the events which have happened over May and June of this year where BBC has been back and forth to the JCPC twice on interlocutory matters, and the evidence at the hearing on 23 May, 2014. At that hearing counsel for BBC represented before the JCPC that the payment of costs is not necessarily a problem for BBC. She stated:

**“...But on Lord Toulson’s point, it is not necessarily the case that my clients would not be able to honour a costs order, it is simply that they would not be able to offer any undertaking of damages, of the order [\$168,000.00 per day] that is suggested here.”**

It need not be stated that going before the Privy Council *prima facie* requires funds.

22. Having regard to all the circumstances and the authorities, and working on the current practice of taking 2/3<sup>rd</sup> of the estimated party and party costs as an estimate of what is required to indemnify respondents against their party and party costs, I agree with the estimate of a global sum of \$315,000.00 being made up of \$215,000.00 in respect of the Developer’s costs and \$100,000.00 in respect of the Government respondents costs. This works out to approximately 50% of the solicitor/own clients costs in the projected draft Bills reduced by one third

23. I have no basis upon which to accede to BBC’s application to bifurcate the original Order agreed and signed by the parties in the Supreme Court.

24. I would therefore order that BBC pay security for costs in respect of the respondents in the sum of \$315,000.00. If BBC fails to provide such security in the time limited above, this action shall stand dismissed.

25. Should the action proceed I expect an expedited hearing of the JR application as has already been ordered by the court.

**The Honorable Mr. Justice Adderley, JA**