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Costs and Access to Justice

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Costs and Access to Justice

Responsible Development for Abaco (RDA) Ltd v Christie [2023] UKPC 2

A case from the Bahamas gave the Privy Council the opportunity to comment on issues affecting costs and access to justice.

Background and decision

The grant of permits for a marina development on the island of Abaco was challenged by judicial review on the grounds that the necessary consultation procedures had not been properly followed. The claimant was a company formed to take action to protect the local environment and funded by donations and sales of merchandise. The appeal was against the decision that the claimant was required to provide security for the costs of both the government, whose decision was being challenged, and the developers of the project, who had been joined in the case. Providing the large sums specified was said to be unrealistic in the time allowed and it was argued that this requirement for security in effect stifled the claim, denying access to justice.

The way in which the case had been argued and proceeded was unsatisfactory in many ways, with a lack of candour over the financial position of the company, uncertainty over the local courts' powers to grant a protective costs order and a lack of evidence and argument on certain issues. The Privy Council's decision was that in the circumstances security for costs could properly be required in relation to the government, but not the developers.

Comment

Given the presence in this country of the Aarhus Convention and the special rules based on it in relation to expenses in environmental cases, the precise issues in this case should not arise here. Nevertheless, there are some interesting observations from the Privy Council.

In terms of standing, it was noted that although formally a separate legal person, the incorporation of a local action group should not be an obstacle to recognising its standing where it does represent those with a relevant interest. Yet there was a legitimate concern in a corporate vehicle being used to escape the impact of an adverse costs order if the claim was unsuccessful. There may be good reasons for exceptions, but the costs regime ensured that cases were conducted in a reasonable and proportionate manner and that public authorities were not exposed to the costs of litigation even when they were successful. In assessing the position of a company as litigant, it was appropriate to look not just at its own resources but also at whether it could raise the money from various backers.

More generally, the Privy Council noted the need to balance the public interests both in ensuring that public bodies comply with the law but also that their limited resources should not be unduly depleted in meeting legal claims that are of no merit. The need to seek leave to apply for judicial review provided some protection but the costs regime also had a part to play. In most cases there will be a mix of public and private interest behind a claim and the courts had discretion to balance these. In particular it was noted that the public interest may justify adjusting costs in environmental cases where there may be no individual or group of individuals with sufficient private interest to bring the case and the claimant is a representative body which has raised money from public donations. Yet even here, a balance between different aspects of the public interest has to be struck. In the absence of more detailed provisions, principles to govern this were set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

On the issue of the developer's costs, reliance was placed on *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176 where it was said that the developer should be entitled to costs only where there is a separate issue on which they were entitled to be heard, that would not be covered by counsel for the public authority, or where there was a distinct interest requiring separate representation. No such distinct interests were established here.

The cost of litigation, including, but not limited to, the liability to meet the winning side's expenses if a case does not succeed, is long-running concern in arguments over access to justice. The existence of protective expenses orders and the special rules introduced to comply with the Aarhus Convention go part of the way to addressing this for environmental cases, but cost remains a major issue. Even within a special expenses regime, much depends on how the courts exercise their discretion in individual cases and that uncertainty alone may be an obstacle in many circumstances.

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