

**ON APPEAL FROM THE COURT OF APPEAL  
OF THE COMMONWEALTH OF THE BAHAMAS**

**B E T W E E N :**

**THE QUEEN on the application of**

**(1) SAVE GUANA CAY REEF ASSOCIATION LIMITED**

**(2) MR AUBREY CLARKE**

**Appellants**

**And**

**(1) MR WENDELL MAJOR**

**(As Secretary to the National Economic Council)**

**(2) THE MINISTER RESPONSIBLE FOR CROWN LANDS**

**(In the person of the Honourable Mr Perry Gladstone Christie Prime  
Minister of the Commonwealth of the Bahamas)**

**(3) THE TREASURER OF THE BAHAMAS**

**(4) PASSERINE AT ABACO LIMITED**

**(5) PASSERINE AT ABACO HOLDINGS LIMITED**

**(6) BAKERS BAY LIMITED**

**(7) BAKERS BAY HOA LIMITED**

**(8) BAKERS BAY MARINA LIMITED**

**(9) BAKERS BAY FOUNDATION LIMITED**

**Respondents**

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**1<sup>st</sup> TO 3<sup>rd</sup> RESPONDENTS' SUBMISSIONS ON COSTS**

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**Introduction**

1 The 1<sup>st</sup> to 3<sup>rd</sup> Respondents respectfully seek orders:

(a) that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants pay the 1<sup>st</sup> to 3<sup>rd</sup>

Respondents' costs of the appeal to the Privy Council;

- (b) that the 1<sup>st</sup> and/or 2<sup>nd</sup> Appellants do disclose to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents the name(s) of those who have financed and/or controlled the litigation;
- (c) that those person(s) identified in accordance with paragraph (b) above be made jointly and severally liable to pay the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' costs of the appeal to the Privy Council.

### **Costs of the appeal**

- 2 The 1<sup>st</sup> to 3<sup>rd</sup> Respondents seek the costs of the appeal against the Appellants. There is nothing to displace the general rule that the costs of the appeal should follow the event.
- 3 It is not apparent that either the 1<sup>st</sup> or 2<sup>nd</sup> Appellants have assets to discharge any liabilities under such an order for costs. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents seek the additional orders below.

### **Order against non party**

- 4 The Privy Council has jurisdiction to order costs against a non party, see Dymocks Franchise Systems v Todd [2004] UKPC 39, [2004] 1 WLR 2807 (annexed at 1) and Suisse Security Bank & Trust v Francis [2006] UKPC 41 (annexed at 2). It is necessary to show that the involvement of the non party caused costs to be incurred, see Dymocks Franchise at paragraph 20. To justify the making of an order it is necessary to show: (1) that there are exceptional circumstances, which means in this context "no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense"; (2) that the non party is more than a "pure funder" (a person who has no personal interest in the litigation, does not stand to benefit from it, and does not seek to control its course); (3) that the non party not merely funds, but substantially controls the proceedings or at any rate is to be benefit from them, see Dymocks Franchise at paragraph 25.
- 5 There is no formal requirement to give prior notice of an intention to seek costs against a non party (it being "no more than a

material consideration”, see Dymocks Franchise at paragraph 31).

- 6 The shareholders of the 1<sup>st</sup> Appellant are (as appears from paragraph 10 of the judgment of Isaacs J. dated 26 May 2005) employees of Callenders & Co and reside in Grand Bahama. They are Beth Chatelain and Michelle Brown. They purport to hold the unissued shares under declarations of trust for those residents of Guana Cay whose names appeared on a petition exhibited to the affidavit of Troy Albury. Callenders & Co were the solicitors acting for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in the proceedings in the Bahamas.
- 7 The 1<sup>st</sup> to 3<sup>rd</sup> Respondents have requested details of those financing and controlling the litigation on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants (correspondence annexed at 3). The Appellants have not provided the information. It is plain that there is an individual(s) who: caused the costs to be incurred (because without financial backing this litigation could not have been pursued); had an effective interest in the outcome of the litigation; was funding the litigation; and hoped to benefit from the litigation.

[1/205  
at para  
10]

#### **Conclusion**

- 8 In these circumstances, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents request orders that: (a) the 1<sup>st</sup> and/or 2<sup>nd</sup> Appellants do disclose to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents the name(s) of those who have financed and/or controlled the litigation; and (b) that those person(s) be made jointly and severally liable to pay the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' costs of the appeal to the Privy Council.

**James Dingemans QC**

**Tom Poole**

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**Charles Russell LLP**  
5 Fleet Place  
London EC4M 7RD

Tel: 020 7203 5026  
Fax: 020 3023 8021  
Ref: JGA/PJR/3084/166

**Solicitors for the 1-3 Respondents**