



IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION

CAUSE NO: G 207 OF 2021

BETWEEN:

THE QUEEN

On the application of  
NATIONAL CONSERVATION COUNCIL

Applicant

AND

THE CENTRAL PLANNING AUTHORITY

Respondent

AND

CAYMAN PROPERTY INVESTMENTS LTD

Interested Party

ON THE PAPERS

Before: Mr. Justice Alistair Walters J (Actg.)

The parties: Mr. Christopher Buttler QC and Ms. Kate McClymont of Nelsons for the Applicant

Mr Ian Paget Brown QC and Mr Samuel Jackson and Ms. Selina Tibbetts of Jackson Law for the Respondent

Mr Tom Lowe QC and Mr Michael Alberga of Travers Thorpe Alberga for the Interested Party

Draft circulated: 13 September 2022

Judgment on Costs  
Delivered:

21 September 2022

HEADNOTE

*Costs, GCR Order 62 - exercise of discretion - extent to which appropriate to make an order for costs as between two Government entities - extent to which costs might be awarded against intervener.*

JUDGMENT ON COSTS



1. The trial of this matter concluded on 15 June 2022. I handed down my judgment on 23 August 2022 (the “Judgment”). I invited the parties to file written submissions in relation to costs, which they have now done.
2. The Judgment dealt with the Applicant’s application for judicial review of the decision of the Respondent granting planning permission to the Interested Party in relation to a property on Boggy Sands Road (the “Property”). The Applicant sought an order quashing the decision and a declaration that a direction to an originating entity under s.41(5)(b) of the National Conservation Act (“NCA”) is not a “directive”, meaning it can be delegated by the Applicant to the Director of the Department of Environment (the “Director”) under s.3(13) of the NCA. For the purposes of the hearing, it was conceded by the Applicant that the direction that had been made by the Director to the Respondent in relation to the Property was not valid because the power to make a direction under s.41(5)(b) had not actually arisen in this case.
3. For the reasons set out in the Judgment, I did make an order quashing the decision of the Respondent. As mentioned above, although argued fully the issue of delegation was not ultimately relevant to my decision. At the request of the parties, I did deal with the question of what, in my view, “direct” means under s.41(5)(b) along with a number of other issues relating to the delegation of powers by the Applicant to the Director. The parties made it clear that these issues were material to both entities and that they would benefit greatly from some clarity. Those issues were also resolved in favour of the Applicant.
4. The Interested Party supported the position of the Central Planning Authority (“CPA”), filed detailed written submission and, as indicated by the case heading, was represented by Leading Counsel. Generally, its position reflected that of the CPA. It did raise some additional points which I set out in the Judgment but none of those resulted in a material diversion from the primary issues in the case and none were immaterial.
5. When raising the question of costs, I did make it clear to the parties that I was conscious that the dispute was primarily, and, somewhat unusually, between two Cayman Islands Government entities and that both parties had sought the Court’s guidance on the issues relating to delegation. Both the National Conservation Council (“NCC”) and CPA retained private legal representation so the costs implications were quite clear to each entity.



6. Order 62, rule 4 of the Grand Court Rules (“GCR”) sets out the general principles on costs in the Grand Court. Rule 4(2) states:

*“The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.”*

7. GCR Order 62, rule 5 provides:

*“If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when 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.”*

8. There is no doubt that the Applicant is the successful party in relation to the order quashing the decision of the Respondent and also in relation to the additional issues in relation to which I provided my opinion. The questions that arise are:

- 8.1 whether the fact that both parties are Government entities; or,
- 8.2 that the court was asked to deal with additional, non-determinative issues, the resolution of which was of mutual benefit to the parties should displace the normal rule that costs follow the event; and,
- 8.3 the extent to which the Interested Party should be liable for any costs that may be ordered in favour of the Applicant.

9. The Applicant’s position in relation to the question of costs is as follows:

9.1 As the successful party, it should get its costs. It is invariably the case that the respondent to judicial review proceedings is a government entity and that is no bar to an adverse order for costs.

9.2 The current position in England is that a costs order will be made in favour of a claimant in judicial review proceedings if it obtains the relief sought in the application, even if the claim is compromised before the hearing. In relation to the question of costs as between two public bodies, Pill LJ in the English Court of Appeal case of *R (Bahta) v SSHD*<sup>1</sup> commented as follows:

*“Moreover, a culture in which an order that there be no order as to costs in a case involving a public body as a Defendant, because a costs order would only transfer funds from one public body to another is in my judgment no longer acceptable.”*<sup>2</sup>

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<sup>1</sup> [2011] EWCA Civ 895.

<sup>2</sup> Paragraph 61.



The judge also made it clear that:

*“When relief is granted, the Defendant bears the burden of justifying a departure from the general rule that the successful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the Claimant has, and the Defendant has not, complied with the Pre-Action Protocol.”<sup>3</sup>*

- 9.3 Although the parties did agree that the resolution of the delegation issues was to their mutual benefit, the Applicant’s position is that all issues were strongly contested all the way to trial.
- 9.4 The Applicant had made it clear from the outset that it would be seeking its costs and the Respondent made no effort to limit the issues to just those that were determinative of the Applicant’s claim.
- 9.5 In relation to the Interested Party, the Applicant says that its costs were increased by the involvement of Interested Party by having to respond to the arguments that it made at the hearing. The Applicant says that the Interested Party should be ordered to pay those increased costs<sup>4</sup>.
10. In relation to the latter point, one of the cases cited in the extract from *Fordham* is *R (London & South Eastern Railway Ltd) v British Transport Police Authority*<sup>5</sup>. When considering the question of the potential liability of costs for intervenors the judge said:

*“25) The question then is whether NMF or HEX or both should contribute to those costs. Mr Fordham on behalf of NMF has made some general submissions that it would be wrong for the court to penalise intervenors who had a proper basis for coming to court and who properly would regard it as the norm that they neither pay nor receive simply because they raised some arguments which, in the end, did not find favour because that would be to adopt an approach which would go into the matter in detail and to apportion in a way which was not appropriate. I do not accept that it is right to say that that is the way in which the court would apply the matter in the circumstances of this case.*

*26) The reality is that NMF raised a delay issue which was not originally relied on albeit the defendant - perhaps not altogether surprisingly - sought to benefit from it in due course, and also what has been described as a claw-back issue; that is to say, even if the position was unlawful nonetheless the statutory provisions enabled, in subsequent years, the authority to claw*

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<sup>3</sup> Paragraph 65.

<sup>4</sup> See e.g. Fordham, Michael, *Judicial Review Handbook* 2020, paragraph 18.2.8

<sup>5</sup> [2009] EWHC 1255 (Admin).



*back the losses and thus obtain from the claimants what they were not able to receive from them immediately. That argument also failed. Those were substantial arguments.*

*27) It seems to me that it is right that a percentage of the costs payable by the defendant should fall upon NMF to reflect that part of their involvement which led to failure.*

*28) The question is: what is the right percentage? I bear in mind and recognise that sadly the bulk - and perhaps a very significant proportion - of the costs will be costs incurred before the matter actually reached the hearing before this court. That is something one must bear in mind in deciding what the correct percentage should be. It will be a small percentage. It seems to me that in all the circumstances - bearing that overall position in mind - I would assess it at 10 per cent of the costs payable by the claimant.*

*29) Heathrow Express is, in my judgment, in a different position. It is true that it embellished the arguments relied on by the claimants in certain respect. Really it added very little, if anything, to the substance of the hearing. In those circumstances it seems to me that it is not appropriate to make Heathrow Express pay anything. Thus they will neither receive nor pay anything by way of costs."*

11. The Applicant's submissions on costs were supported by the second affidavit of the Director, Ms Gina Ebanks-Petrie dated 17 August 2022. The Respondent has objected to some of the contents of this affidavit and has indicated that if I intend to place any weight on it then they would wish to cross-examine Ms Ebanks-Petrie before I take my decision on the question of costs.
12. Ms Ebanks-Petrie explains that the Applicant's expenses are funded by the Department of Environment. This includes legal and technical services funding for the 2022-2023 budget period of C\$100,000 with \$50,000 being approved for use in each budget year. She says that the costs incurred in this case have already exceeded the budget for 2022 and are likely to also exhaust the budget for 2023. Without that funding the NCC will have to wait until the 2024-2025 budget period to receive additional funding for legal and technical services. That, she explains further, will leave the NCC and the Department of Environment unable to discharge satisfactorily their obligations during the balance of the 2022-2023 period. Apparently, efforts were made to resolve the differences between the Applicant and Respondent without recourse to litigation but, to no avail. On that basis, she says that the NCC should be awarded its costs.
13. I have summarized what Ms Ebanks-Petrie says in her affidavit but, for the reasons set out below, I am not placing any weight on it.



14. The Respondent takes the view that as both of the primary parties are Government entities, presumably (it says) funded by the public purse, and that it was in the public interest to determine the various issues between the parties, it would serve no purposes to make an order for costs against the Respondent and that doing so would just increase overall costs for no purpose.
15. The Respondent makes no comment about the liability of the Interested Party in relation to costs.
16. The Interested Party's position is relatively straightforward. It says that no adverse costs order should be made against it. It says that it was not at fault, it was not the subject of the judicial review, it had a supporting role only and this was public interest litigation between public bodies.
17. The Interested Party submits that an intervenor pays its own costs and is not normally entitled to recover adverse costs from other parties save than in exceptional circumstances as referred to *Bolton MDC v SoS for the Environment*<sup>6</sup> and by the Honourable Chief Justice in *Axis International v CICA*<sup>7</sup> which dealt with the extent to which a regulated party might recover its costs in judicial review proceedings involving decisions taken by a regulatory authority. The Chief Justice said<sup>8</sup>:

*"Accordingly, the regulated party 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 to be covered by counsel for the regulator (here the CAACI); or unless he has an interest which requires separate representation. The mere fact that he is the regulated party will not of itself justify a second set of costs in every case."*

18. The Interested Party says that the converse must be true in cases where the intervenor is unsuccessful.
19. It argues that there are no such exceptional circumstances in this case and says that its approach is consistent with the *UK Administrative Court: Judicial Review Guide (2021)*, which, although not binding on this court, is a useful approach to the question of intervenor's costs. The Guide states:

*"24.4.3 Section 87 of the Criminal Justice and Courts Act 2015 sets out the conditions under which the Court must order the intervenor to pay any costs"*

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<sup>6</sup> [1995] 1 WLR 1176.

<sup>7</sup> 6 November 2014, Cause 56 of 2012.

<sup>8</sup> Paragraph 13.



*specified in an application by a claimant or defendant incurred by them as a result of the intervener's involvement in that stage of the proceedings.*

*This applies where:*

*24.4.3.1 the intervener has acted, in substance, as the sole or principal applicant or defendant; or*

*24.7.3.2 the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court; or*

*24.7.3.3 a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or*

*24.7.3.4 the intervener has behaved unreasonably."*

*If the intervener becomes a party, the costs provisions above no longer apply and are treated as never having applied."*

20. There is no equivalent statute in the Cayman Islands dealing with the costs of intervenors but it seems to me that the principles set out in the Guide are clear and consistent generally with those applied by the Chief Justice in the *Axis* case.

21. Considering then the questions posed above:

21.1 Should the fact that both parties are Government entities make any difference to the question of costs? There does not appear to have been any attempt by the CPA to compromise these proceedings in any material way. All points of substance have been argued to trial. Consistent with the approach of Pill LJ in *Bahta*, it seems to me that the fact that both parties are Government entities does not of itself mean that no order for costs should be made in this case. I also do not think that it assists the court to attempt to investigate the different sources of funding for the NCC or CPA or how their budgets are set. I don't think that is a factor to take into account in this case when exercising discretion in relation to the question of costs. That is why I place no weight on the affidavit of Ms Ebanks-Petrie. Whilst the proceedings may involve judicial review, this is litigation with a clear and undoubted costs risk from the outset. In my view, the NCC has been successful and is entitled to its costs and the CPA is liable for those costs subject to any contribution from the Interested Party. In my view, the CPA has not displaced the burden on it to show why the normal order that costs follow the event should not be made.



21.2 Should the fact that the court was asked to deal with additional, non-determinative issues, the resolution of which was of mutual benefit to the parties should displace the normal rule that costs follow the event? The additional, non-determinative issues were argued in full. The extent to which they were of mutual benefit is questionable because unless the parties had agreed that my decision would be finally determinative of them, then they are as much at risk of being the subject of continued litigation as the substantive issues. In my view, costs should also follow the event in relation to the additional issues.

21.3 Should the Interested Party be liable for any costs that may be ordered in favour of the Applicant, and, if so, to what extent? Parties should not be discouraged from intervening in judicial review proceedings. However, as mentioned above, such proceedings are litigation with potential cost consequences. As can be seen from the *London & South Eastern Railway Ltd*, the *Guide* and the *Axis* case, the general approach is that intervenors will not be ordered to pay costs or be entitled to receive them other than in exceptional circumstances. It seems clear that where, for example, an intervening party goes beyond embellishing or supporting the position of one of the parties, raises substantive issues that are of no assistance to the court or acts unreasonably then it might become liable to pay or receive costs depending on the circumstances. The court always retains a discretion. In this case, I am satisfied that the Interested Party is in a similar position to that of Heathrow Express in the *London & South Eastern Railway Ltd* in that it did not do much more than embellish and support the position of the CPA. In such circumstances, I do think that that it would be fair to make an order that it meets any of the costs of the NCC.

22. In summary, therefore, and in the exercise of my discretion, I order that the CPA should pay the costs of the NCC, to be taxed if not agreed. The Interested Party is to bear its own costs.

A handwritten signature in blue ink, appearing to read "A. Walters", written over a horizontal line.

**Honourable Mr. Justice Alistair Walters, (Actg.)  
Judge of the Grand Court**