

Taking on a Corporate Giant: David v Goliath Legal Cases

Professor Leslie Thomas QC



David with the Head of Goliath
Caravaggio

Public authorities and private companies as defendants

- Private law regulates relations between private individuals – e.g. contract law, tort law, law of unjust enrichment
- Private law applies both to public authorities and to private companies
- Public law controls and regulates the exercise of state power through judicial review
- Public law/judicial review only applies to public authorities, not private companies
- Human Rights Act 1998 makes it unlawful to breach rights under the European Convention on Human Rights
- Human Rights Act only applies to public authorities, not private companies

Judicial Review/ Human Rights Act



**METROPOLITAN
POLICE**

Claims challenging corporate power

- Tort claims against companies
 - Negligence
 - Product liability
 - Occupiers' liability
 - Nuisance
 - Vicarious liability for employee misconduct
- Employment claims
- Discrimination claims
- Judicial review of planning decisions
- Land rights litigation
- Inquests





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The Barbuda litigation: historical background

- Barbuda was once owned by the Codrington family, who were leased it in 1685 by the British Crown
- They brought African slaves to the island, who were emancipated in 1834
- Barbuda became a dependency of Antigua in 1858 and the Codrington lease ended in 1898
- Barbudans developed a tradition of communal land ownership
- But this was not reflected in law – the Barbuda Ordinance 1904 vested all Barbudan land in the Crown and declared the inhabitants to be tenants of the Crown
- The Barbuda Council was established in 1976
- The Barbuda Land Act 2007 recognised Barbudan communal land rights for the first time



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Erosion of Barbudan land rights

- Following a change of government in 2014, the Antiguan Parliament passed the Paradise Found (Project) Act 2015, which leased land to Paradise Found LLC for a resort and disappplied the Barbuda Land Act 2007 in respect of that land
- The constitutionality of that action was challenged by islanders McKenzie Frank and Trevor Walker



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The Barbuda airport litigation

- Hurricane Irma devastated Barbuda in September 2017
- Thereafter the Government began clearcutting forest for an airport, without obtaining the proper planning approval and without obtaining an adequate Environmental Impact Assessment (EIA)
- John Mussington and Jacklyn Frank challenged the airport construction by judicial review, represented by me
- The airport has caused damage to the Barbudan ecosystem and is being built on cavernous karst limestone
- The EIA has never been disclosed to the claimants, the Court or the public
- We lost our case before the Court of Appeal in 2021 (John Mussington v Development Control Authority [2021] ECSC J0429-1) and it is under appeal to the Privy Council

Further erosion of Barbudan land rights

- The Barbuda Land (Amendment) Act 2017 repealed much of the 2007 Act and abolished Barbudans' land rights altogether, returning them to the status of mere tenants of the Crown
- It also allowed Barbudans to buy freehold interests in land, inevitably opening up Barbuda to future exploitation by the real estate industry
- McKenzie Frank and Trevor Walker lost their constitutional challenge in 2020 (*Attorney General v McKenzie Frank AG 2020 CA 5*) and it is under appeal to the Privy Council



A comparison: the Maya land rights litigation in Belize

- The Mayan indigenous communities in Belize have traditionally held communal land rights
- In the landmark judgment of *Cal v Attorney General of Belize* (2007) 71 WIR 110, the Mayans of Belize established that their communal land rights were recognised by law
- However, that didn't bring an end to Government interference with the Mayan lands
- Eventually, the Mayans had to take their case to the Caribbean Court of Justice
- In *Maya Leaders' Alliance v Attorney General of Belize* [2016] 2 LRC 414 the Government of Belize accepted that Mayan land tenure gave rise to collective and individual property rights that were protected by the Belizean Constitution



Christi and Bobby Shepherd

- Christi and Bobby Shepherd died on a half-term holiday in October 2006 with their father and his partner
- The holiday bungalow where they were staying had a poorly installed and maintained gas boiler – they died of carbon monoxide poisoning
- A Greek court found three members of hotel staff guilty of manslaughter, but cleared two holiday reps employed by Thomas Cook
- West Yorkshire Police investigated, but the Crown Prosecution Service decided there was insufficient evidence to charge anyone in the company
- Thomas Cook treated the bereaved family appallingly – they did not even provide a private plane to repatriate the children's bodies



AMBULANCE

Wakefield Coroner's Court
Image Capture: Aug 2021
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The Christi and Bobby Shepherd inquest

- The coroner ruled that this was not an Article 2 case, as Thomas Cook was not an arm of the state
- This created difficulties in getting legal aid – though legal aid was eventually granted after intervention of Mary Creagh MP and a personal decision of the Legal Aid Minister Shailesh Vara
- Coroner David Hinchliff accepted an application to summon a jury
- Thomas Cook did not call key witnesses because they were abroad
- UK-based witnesses who did give evidence exercised their right not to incriminate themselves and stayed silent on key issues
- Thomas Cook CEO Peter Fankhauser refused to apologise



Image: World Travel & Tourism Council CC BY 2.0

The inquest verdict

- At the end of the inquest on 13 May 2015, the jury came back with an unlawful killing verdict and said that Thomas Cook had been negligent and had failed in their duty of care to Christi and Bobby and to their grieving parents
- I said, 'Thomas Cook should hang its head in shame as a result of these deaths. The families of Christi and Bobby have waited nearly nine years for an apology – they are still waiting'
- Thomas Cook's share price tumbled
- Mr Fankhauser made a public apology and met with the family

Concluding thoughts

- Litigation can change the world
- But litigation operates in a system which was built by and for the powerful, and frequently serves the interests of the powerful
- David doesn't always defeat Goliath
- And for every lawyer who takes on Goliath in the courts, there are many Davids, many ordinary people on the ground who do the hard work of activism and protest and resistance that moves society forward
- "Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has"