

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

CLAIM NO. BVIHCV 2021/0054

**IN THE MATTER OF sections 9, 12, 19, 20, 21, 26, 31 and 115 of the Virgin Islands
Constitution**

AND IN THE MATTER OF THE MARRIAGE ACT

**AND IN THE MATTER OF SECTION 13(1) OF THE MATRIMONIAL PROCEEDINGS AND
PROPERTY ACT**

BETWEEN:

[1] KINISHA FORBES

[2] KIRSTEN LETTSOME

Claimants

AND

THE ATTORNEY GENERAL

Respondent

AND

**BRITISH VIRGIN ISLANDS CHRISTIAN COUNCIL
(also known as the BVI Christian Council)**

Interested Party

Appearances

Ms. Lorraine La Rose of Vigilante Law for the Interested Party

Ms. Karlene Thomas-Lucien of Chase Law for the Claimants

The Respondent did not appear and was not represented

2022: July 26
 July 27

JUDGMENT ON THE APPLICATION FOR PERMISSION TO APPEAL

- [1] **JACK, J [Ag.]**: On 6th July 2022 I gave case management directions. These included adding the British Virgin Islands Christian Council (“the Christian Council”) as an interested party and giving directions for the service of evidence. I fixed the final hearing of the matter in the week of 26th September 2022. By an application made on 21st July 2022, the Christian Council seeks permission to appeal against the case management orders in respect of evidence and the date of the hearing.
- [2] This matter concerns the validity of the marriage between the claimants, both of whom are women, and whether any prohibition against same-sex marriage in this Territory is contrary to the **Constitution of the Virgin Islands**.¹ The claimants entered a civil partnership in England on 28th July 2011 under the United Kingdom’s **Civil Partnership Act 2004**.² On 5th July 2019 the deputy superintendent registrar of the Westminster Registry Office in London certified that, pursuant to the provisions of the United Kingdom’s **Marriage (Same Sex Couples) Act 2013**³ the claimants were to be treated as married with effect from 28th July 2011, when they entered their civil partnership. It is the validity of this marriage which is at issue in the current proceedings. It is common ground between the claimants and the Attorney-General that Ms. Forbes and Ms. Lettsome are and have at all material times been domiciled in this Territory (“domicile” having the special meaning given by the common law to the determination of person’s homeland as a matter of private international law). Subject to argument, the validity of their marriage will depend on whether as a matter of BVI law they have the capacity to enter a same-sex marriage, or in other words, whether BVI law permits same-sex marriages.
- [3] The fixed date claim form in the current action was issued on 26th February 2021. It was amended on 9th June 2021. On 18th June 2021 Ramdhani J (Ag) stayed the action pending the outcome of the appeal to the Privy Council in the two cases of

¹ The Virgin Islands Constitution Order 2007 SI 2007 No 1678.

² 2004 c. 33.

³ 2013 c. 30.

Attorney-General of Bermuda v Ferguson and Day v Government of the Cayman Islands. The Privy Council gave its advice on 14th March 2022 and found that the prohibitions on same-sex marriage in Bermuda and Cayman were compliant with the Constitutions of those Territories.⁴ The matter then came before me for directions on 6th July 2022.

- [4] At that hearing there was agreement (subject to the Court's approval) between the parties that the Christian Council should be added as an interested party. There appeared to have been some informal discussions with listing, who were able to offer a date convenient to counsel in November 2022. I, however, was aware that an earlier date in the week commencing 26th September 2022 was likely to be available. That week was also convenient to counsel.
- [5] Accordingly I ordered that the Christian Council be added as an interested party. I gave them until 20th July 2022 to file their evidence for the trial with evidence in reply from the claimants and the Attorney-General by 5th August 2022. I fixed the hearing for the week of 25th September 2022 before either Ellis J or myself. That timetable gave scope for a degree of slippage, if further time was needed to finalise evidence. It also catered for everyone's holiday plans.
- [6] Unfortunately, there was a delay in the Christian Council being given the access code for the ePortal. Despite that problem, the Christian Council were able on 20th July 2022 to file the second affidavit of Rosemarie Flax, its vice-president, with detailed evidence of its case. The affidavit concludes with a complaint that the two weeks given for filing evidence "was nowhere near sufficient for the Interested Party to gather or to properly gather its evidence or to properly consider the claim of the Claimants." No details, however, were given in that affidavit of the further evidence which the Christian Council says it wants to gather. The evidence will only close on 5th August 2022, but to date no one has suggested that there may be a need for deponents to be cross-examined on their affidavits.

⁴ [2022] UKPC 5 and [2022] UKPC 6 respectively.

[7] The application for leave to appeal asks for the application for leave to be considered in the week commencing 8th August 2022. There is, however, no request for the matter to be treated as suitable for vacation business. Ms. La Rose, acting on behalf of the Christian Council, in email correspondence with the Court has suggested that at least seven days' notice of the application needs to be given. In this, she is in my judgment mistaken. Applications for leave to appeal are usually dealt with *ex parte*. Indeed CPR 62.2(4) allows leave to be given without even hearing the applicant. It was obviously sensible to deal with the application before the end of term. I had availability on Tuesday 26th July 2022, when I listed the matter for hearing. If leave was refused, then there would be time for the Christian Council to apply to the Court of Appeal before the end of term.

[8] In the event Ms. La Rose put her application on two bases. The first was that the interested party needed more time to put in evidence. In her skeleton she said the evidence which was sought:

“relates to the issue of the Claimants’ domicile since domicile is a fact sensitive matter. Further, the Claimants were married in the United Kingdom and seek by their claim a recognition of that marriage. A material issue for consideration is whether in fact the marriage is valid according to UK law and whether the certificates submitted as evidence of that marriage and civil statue are valid and genuine. Hence any investigations on the validity of the Claimants’ marriage would involve sourcing the relevant records from the UK authorities within the 10-business day period in time to file on 20 July.”

[9] On 6th July 2022, when I gave directions, I made it clear that the Court discouraged the interested party from raising matters, such as domicile, particular to Ms. Forbes and Ms. Lettsome. The interest of the Christian Council in the case was the general issue as to the validity of same-sex marriages in this Territory, not the factual issue as to any specific impediments to the validity of the marriage of these two individuals. This latter issue is one for the Attorney-General in her capacity as the Queen’s Proctor. Moreover it appears to be wholly speculative.

[10] In her third affidavit, Ms. Flax suggested that the Christian Council wanted to put evidence in about the social history of this Territory and expert evidence on “the impact of same-sex and the LGBT lifestyle on society.” Ms. La Rose did not pursue these two matters before me. No application to adduce expert evidence has been made.

[11] It will of course be open to any of the parties to draw the Court’s attention to any relevant *travaux préparatoires*. However, in a case dealing with the true construction of a **Constitution** there will in general be little scope for adducing factual evidence.

[12] In the current case, section 20 of the **Constitution** provides:

“Protection of the right to marry and found a family

(1) Every man and woman of a marriageable age has the right to marry and found a family in accordance with laws enacted by the Legislature.

(2) No person shall be compelled to marry without his or her free and full consent.

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of public order, public morality or public health;
- (b) for regulating, in the public interest, the procedures and modalities of marriage; or
- (c) for protecting the rights and freedoms of other persons.

(4) Spouses shall be entitled to equal rights and subject to equal responsibilities—

- (a) as between themselves, both during the marriage and, if the marriage is dissolved, at its dissolution; and
- (b) as regards their children, where there are any, both during the marriage and, if the marriage is dissolved, at and after its dissolution;

but this equality of rights and responsibilities shall be subject to such arrangements or measures as may be agreed or as may be ordered by a

court, in accordance with prescribed law, in the interests of the spouses and their children.”

[13] I suggested to Ms. La Rose that the Christian Council have three arguments on the construction of this section. (She did not argue that there were others.) The first is that, at least as it was understood in 2007, the term “marriage” in section 20(1) referred to opposite-sex marriage only. The second is that, even if that is wrong, the provision at the end of section 20(1) means that the ability to marry is subject to limitations “in accordance with laws enacted by the Legislature”. The **Marriage Act 1925**⁵ on this argument provides only for opposite-sex marriage and this limitation is carried into the quasi-proviso at the end of section 20(1). The third is that section 20(3)(a) and (c) applies to bar same-sex marriage. No factual evidence is required to resolve these issues of construction.

[14] I have not yet seen the evidence of the claimants and the Attorney-General in answer to the second affidavit of Ms. Flax, but, as I have said, it seems unlikely there will be disputes of fact which require determination after cross-examination of witnesses. This is a case which will turn on legal argument rather than findings of fact. As I indicated to Ms. La Rose in argument, I am not debarring her from applying to adduce further evidence, but she will need to obtain that evidence and then put it before the Court, so the Court can consider whether on case-management grounds it should be allowed in. Seeking to appeal the case management order in circumstances where the Christian Council has actually complied with the directions as to evidence is in my judgment inappropriate. If further evidence is desirable, the Court can make appropriate directions after seeking the proposed further evidence. That may potentially involve adjourning the hearing date.

[15] Ms. La Rose’s second basis for appealing concerns the listing of the matter on 29th and 30th September 2022. That is over two months away. I see no reason why

⁵ Cap 272, Revised Laws of the Virgin Islands.

the case cannot be adequately prepared in that time. As I indicated to Ms. La Rose, if the interested party's counsel is abroad, the advocate can be heard remotely.

[16] So far as bringing the hearing date forward is concerned, this case was originally assigned to Ramdhani J, however he is no longer in the jurisdiction. Ellis J, who would normally have heard the case, has had little involvement with it. Due to a substantial trial going off in the Commercial Division, I was and am able to assist her. After discussions with her, we agreed that I should hear the case on 29th and 30th September. There had originally been discussions with counsel about the matter being tried in November 2022 before Ellis J. Indeed, listing overlooked the provisions of the Order of 6th July 2022 and on 14th July in error sent out a hearing date with November dates. However, the September date was very rapidly substituted. It is elementary that the parties cannot chose their judge. Given the pressure on the judiciary in this Territory, it is important to make the best use of its resources. Freeing up the November dates will give other litigants the opportunity to be heard sooner than they otherwise would be.

[17] For all these reasons, in my judgment the proposed appeal has no realistic prospect of success and there is no other reason to grant leave. Case-management decisions are notoriously difficult successfully to appeal. I do not consider this case is an exception.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar