In the Supreme Court of Bermuda

CIVIL JURISDICTION
2016 No. 259

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

AND IN THE MATTER OF THE INACTION OF THE REGISTRAR GENERAL WITH REGARDS TO A NOTICE OF MARRIAGE

B E T W E E N:

WINSTON GODWIN
First Applicant

-and-

GREG DEROCHE
Second Applicant

-and-

THE REGISTRAR GENERAL
First Respondent

-and-

THE ATTORNEY-GENERAL
Second Respondent

-and-

THE MINISTER OF HOME AFFAIRS
Third Respondent

-and-

HUMAN RIGHTS COMMISSION
First Intervener

-and-

PRESERVE MARRIAGE BERMUDA LIMITED
Second Intervener

DECISION

(Circulated)

Dated the 22nd September 2017

Terms of final order – Costs in public interest matter – costs of or against Intervenors in judicial review matter – whether conduct of party attracts indemnity costs order.

Mr Mark Pettingill of Chancery Legal Ltd for the Applicants
Mr Grant Spurling of Chancery Legal Ltd. for the Applicants
Mrs Shakira Dill-Francois Deputy Solicitor General for the Respondents
Mr Rod Attride-Stirling of ASW Law Ltd for the First Intervener
Mr Delroy Duncan of Trott and Duncan Limited for the Second Intervener

BACKGROUND

1. In this ruling I address the issues of a final order and of costs arising out of a substantive Judicial Review hearing of the application brought by the Applicant's Messrs Godwin and Deroche. I shall use the same abbreviations that were used in the Judgment dated the 5th May 2017. In that Judgment I determined that:

> *"…it is apt that the Court should develop the common law by giving effect to the will of Parliament as expressed in the HRA and specifically reflected in sections 29 and 30(b), of the HRA. As the Marriage Act and the MCA are informed by the common law definition of marriage, I believe that as a matter of internal and external cohesion and legal certainty it would be appropriate for the Court to remedy those sections and grant appropriate declaratory relief along the lines of those drafted below subject to hearing counsel on the precise terms of the final Order to be drawn up to give effect to the present Judgment and as to costs.*
>
> *i. The Applicants are entitled to an Order of Mandamus compelling the Registrar to act in accordance with the requirements of the Marriage Act; and*
> *ii. A Declaration that same-sex couples are entitled to be married under the Marriage Act 1944.*
>
> *136. I include below a draft regarding other Declarations and possible reformulations of relevant sections of the Marriage Act and Matrimonial Causes Act. But, as said above, I will hear from counsel on the precise terms of the final Order:*
>
> *i. The definition of marriage to be inoperative to the extent that it contains the term "one man and one woman" and reformulated to read "the voluntary union for life of two persons to the exclusion of all others.*

ii. As the Marriage Act is informed by the common law definition of marriage, it would be appropriate for the court to declare section 24 (b) of the Marriage Act 1944 to be inoperative to the extent that it refers to "man" and "wife". And further to reformulate that section to read: "and each of the parties shall say to the other in the presence of the Witnesses "I call upon these persons here present to witness that I [A.B.] do take thee [C.D.] to be my lawful wedded wife/husband/spouse" (as the case may be).

iii. In a similar vein section 23 (4) of the Marriage Act should be reformulated in the following way: "I [A.B.] do take thee [C.D.] to be my lawfully wedded wife/husband/spouse". And "each of the parties shall during the course of the celebration say to the other in the presence of the witnesses "I call upon these persons here present to witness that I [A.B.] do take thee [C.D.] to be my lawfully wedded wife/husband/spouse".

iv. As part of the existing marriage laws, the Matrimonial Causes Act reflects the common law definition of marriage. For the reasons stated above it is appropriate for the court to declare section 15 (c) of the Matrimonial Causes Act inoperative."

FINAL ORDER

2. Counsel for the Applicants submitted a draft written form of order that coincides with the draft terms of order provided in the judgment as cited above. Counsel for the HRA supports the version of order contended for by the Applicants.

3. Counsel for the Defendants Mrs Dill Francois contends that section 29 of the HRA does not permit the Court to reformulate a provision of law or add words to it. She contends that the section simply allows the court to declare a provision inoperative. Section 29 of the HRA provides:

> *" In any proceedings before the Supreme Court under this Act or otherwise* ***it may declare any provision of law to be inoperative*** *to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act."* (ephasis added)

4. Mrs Dill Francois prays in aid the case of *A and B v Director of Child and Family Services and the Attorney-General [2015] Bda LR 13* (*A and B*) at paragraph 42,

where she suggests that Justice Hellman exercised judicial restraint and remained within the letter of the law (my words) when he stated:

> *"…pursuant to section 29 of the 1981 Act, I declare the word "married" in subsections 28(1) and 28(3) of the 2006 Act to be inoperative."*

5. In *A and B* Hellman J was dealing with what he found to be discrimination on the basis of the two applicants' marital status as they were an unmarried same-sex couple. Section 28 provided for a joint application by a married couple only. Hence to remove the discriminating provision Hellman J declared the word "married" to be inoperative.

6. Counsel for the Defendants seek further support from the finding of the Chief Justice in the case of *Bermuda Bred Company v Minister of Home Affairs and the Attorney-General [2015] Bda LR 10 (Bermuda Bred).* She contends that the declaration made by the Chief Justice at paragraph 99, was in keeping with section 29 of the HRA. In that case the Chief Justice stated:

> *"Sections 25 and 60 of the Bermuda Immigration and Protection Act 1956 shall be inoperative to the extent that they authorise the Minister to deny the same-sex partners of persons who possess and enjoy Bermuda status, and who have formed permanent relationships with such Bermudians, residential and employment rights comparable to those conferred on spouses by the said sections 25 and 60 respectively."*

7. It is to be noted that in that case the Chief Justice did not have the ease of declaring only a word or two inoperative. He found that the whole of the provisions in sections 25 and 60 offended the HRA in that they were being operated in a discriminatory manner by the Minister against same-sex partners of Bermudians. The Chief Justice declared inoperative the above referred sections to the extent that they reflected the discriminatory basis for the Minister excluding a same-sex couple from the benefit of the immigration provision.

In my judgment dated the 5th May 2017 in the present case, one of the proposed declarations that I drafted reads as follows:

> *"the common law definition of marriage is inoperative to the extent that it contains the term "one man and one woman" and reformulated to read "the voluntary union for life of two persons to the exclusion of all others."*

8. Mrs Dill Francois objects to the proposed reformulation in the declaration; she submits that it goes further than is necessary and is not in accordance with section 29 of the HRA. Additionally, she argues that such a reformulation can lead to further questions such as whether the term *"two natural persons"* can refer to persons who have not yet reached the age of majority or whether it refers to persons who are prohibited by virtue of consanguinity. It is her position that if the Court wishes to make a declaration regarding the common law definition of marriage, then it should be limited so as to read as follows:

> *"the common law definition of marriage is inoperative to the extent that it contains the term "one man and one woman*" .

9. She also suggests that the draft reformulation of sections 24(b) and 23(4) of the *Marriage Act 1944* by the addition of the word "spouse" in each provision goes beyond the intended reach of section 29 of the HRA.

10. Mr Attride-Stirling for the HRC disagrees with Mrs Dill Francois' submissions. He argues that Justice Hellman in *A and B* went further than just delete the word *"married"* from subsections 28(1) and 28(3) of the 2006 Adoption Act, contending that the judge added the words:

> *"… by an unmarried couple whether same-sex or different-sex, provided that they have been living together for a continuous period of one year…"*

11. I think that Mr Attride-Stirling is acting under a misapprehension in his submission on this point. To my view Justice Hellman confined his remedy to paragraph 42, which only refers to declaring the word ***"married"*** to be inoperative. The quote above referencing an unmarried couple living together for a continuous period of one year is contained in paragraph 43 of the judgment which appears to me by its terms to

provide guidance as to how the authorities in the Department of Child and Family Services might adjudge the meaning of the word "couple" in the relevant section in respect to cases they report on relating to adoptions by two individuals.

12. Mr Attride-Stirling supports the draft reformulation contained in my judgment in paragraph 136 sub-paragraphs 1, ii, and iii on the basis that they are entirely consistent with para 132 of my judgment and the reformulation is necessary to give full effect to the judgment. He contends that otherwise the legislation would remain confined and restricted to its "man and woman" language - which he argues would defeat the purpose of and frustrate the ratio of the judgment.
In paragraph 132 I stated:

> *"The remedial provisions of the HRA are broad enough to allow for a striking out and or reformulation of certain words."*

13. In saying "a striking out…of certain words" I meant declaring such words inoperative under section 29 of the HRA. On reflection, in so far as this case is concerned, I do not believe that once the offending words have been declared inoperative I should reformulate them. In order to achieve compliance with the judgment, pursuant to section 23(4) of the Marriage Act as an example, the reformulation of the vows when necessary can be achieved by the Registrar simply asking a prospective same-sex couple how each would like to be referred to in the spoken vows. A party may choose the words currently in the act or may choose "partner' or "spouse". The Registrar would then have to use the chosen word. This compliance with the judgment can also be achieved by legislative amendment.

14. I therefore disagree with Mr Attride-Stirling's, and the Applicant's position on how far I should go in addressing the offending provisions of law in this case. I understand how Mr Attride-Stirling may have been misled by the overly broad wording that I used. I accept Mrs Dill Francois' position that a reformulation in the circumstances of this case is surplus to the court's exercise of power under section 29 of the HRA and unnecessary in all the circumstances.

15. I am strengthened in my view by the restraint exercised by the judges in ***A and B*** and in ***Bermuda Bred***. It is sufficient in my view and entirely consistent with my written judgment as well as section 29 of the HRA to simply make an order declaring the offending provisions of law to be inoperative and to provide the reason for it without any attempt on my part to reformulate the provisions.

Accordingly, the final order is:

1. The common law definition of marriage shall be inoperative to the extent that it contains the term "one man and one woman" and does not provide for the marriage of a same-sex couple.
2. Section 24(b) of the Marriage Act 1944 shall be inoperative to the extent that it only refers to "man" and "wife" and does not provide for the marriage of a same-sex couple.
3. Section 23(4) of the Marriage Act shall be inoperative to the extent that it contains the terms "wedded wife" and "wedded husband", and does not otherwise provide for the marriage of a same-sex couple.
4. Section 15 (c) of the Matrimonial Causes Act is inoperative as it does not provide for same-sex marriage.

COSTS

16. The Applicants and the HRC have applied for costs following judgment in the captioned matter. There was a brief hearing in court and which was then followed up by counsel sending in their written submissions. There were extensive submissions and authorities provided by counsel on the issue of costs. The following issues have been raised by them and are required to be determined, viz.:
    1. Costs in a public interest case
    2. Costs awarded to and costs against interveners
    3. Costs of the constitutional argument
    4. Indemnity costs
    5. Cost of two parties

17. The relevant rules as to the award of costs are contained in the Rules of the Supreme Court 1985 ("RSC") Ord 62 r3 which 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."*

Costs In A Public Interest Case

18. The public interest can be a relevant consideration in costs determinations, but rarely displaces the usual costs rules by and of its self. While the public interest is often a relevant consideration in the context of determining the availability and/or scope of substantive relief, it will rarely operate to displace the usual costs rules. ***Bermuda Environmental Sustainability Taskforce v Minister of Home Affairs*** [2014] Bda LR 68.

19. As to costs generally, Kawaley CJ stated in ***Minister of Home Affairs v Bermuda Industrial Union and ors*** [2016] Bda LR that:

> *"the central object of the costs rules is to impose a discipline on civil proceedings which would be wholly lacking if the Court was not obliged to apply the costs rules in a predictable manner. That discipline essentially operates so as to reward meritorious applications and punish both unmeritorious applications and unreasonable conduct in the course of litigation…"*

20. However, when those rules are displaced, it is usually because the public interest was accompanied by other exceptional circumstances. The court has held that when costs rules are displaced, it occurs in circumstances where the public interest was accompanied by other exceptional circumstances. A further instance of the usual costs rules being displaced in the public interest is the case in which an individual of limited means brings proceedings to enforce his/her fundamental rights: ***Holman and Ors v Attorney- General (Costs)*** [2015] Bda LR 93."

21. I find that no exceptional circumstances exist in this case such as would disturb the usual cost rule that cost follow the event. As to means, the Defendants are not of limited means; accordingly the usual rule applies as against them. On a provisional view, however, it would appear that PMBL is of limited means. It had charitable status which was provisional or taken away at some point during the proceedings leaving it to be funded by small contributions from multiple funders themselves of limited means. I shall return to this.

Costs of the Constitutional Argument

22. The Respondents rely upon ***De Smith's Judicial Review, 7th Edition, Sweet & Maxwell, page 938 para 16-096*** to make good their submission that the costs of a successful party may be limited to some only of the issues raised. Mrs Dill Francois argues that the Defendants should not be liable to pay any costs associated with the constitutional arguments made in the case on the basis that the arguments did not provide any value to the case and did not assist the Court.

23. She argues further, that the Applicants scarcely referred to such arguments as it was primarily advanced by the HRC. In any event, her position is that the Applicants relied on the alternative remedy of Judicial Review which was the basis for the relief the Court ultimately granted.

24. Mrs Dill Francois also submits that the Defendants ought not to be penalised in costs for the hearing in which the Applicants were required to amend their claim to include constitutional relief in the circumstances where the HRC was seeking to make constitutional arguments for the Applicants' benefit. She prays in aid the order of the court of the 27th January 2017 in which the HRC were given leave to make constitutional arguments.

25. Mr Duncan for PMBL argues that the success of the Applicants' case was based on the submissions of the Applicants and not on the constitutional arguments made by the HRC therefore the HRC ought not to be permitted costs related to that issue.

26. Mr Attride-Stirling for the HRC argues that although leave was granted and the constitutional arguments were allowed, they were the HRC's and the Applicants' alternative case, and therefore the court only needed to rule on it if the court was against the Applicants and the HRC on the HRA statutory interpretation argument. He relies on the fact that the HRC and Applicants were wholly successful on the HRA point, rendering a decision on the alternative constitutional arguments unnecessary.

27. Factually, PMBL had filed a summons seeking to prohibit any arguments being made by the HRC on constitutional grounds. This occurred because the HRC had prior to the actual substantive hearing indicated that they would address constitutional points which had not been included in the Applicants' claim. In the order of the court of the 27th January 2017 the Applicants were given leave to include constitutional arguments and relief. The HRC, Respondents and PMBL were permitted to respond thereto.

28. The HRC argues that costs in this matter should not be apportioned on an issue-by-issue basis, but should follow the event given who won in a real sense. They contend that this view is in keeping with Kawaley CJ in *BEST v Min of Home Affair*s. They further rely on Kawaley CJ's final costs ruling in *Bermuda Environmental Sustainability Taskforce v Min of Home Affair*s [2014] SC Bda 73 App Comm (18 Sept 2014)), wherein he stated:

> *"12. …In Munjaz-v-Mersey Care NHS Trust [2004] QB 395 at 439-410, Hale LJ (as she then was, giving the judgment of the English Court of Appeal within a costs framework within which issue-based costs orders are expressly provided for) held:*
>
> > *'89. We do not consider that an issue-based approach, in the sense of an approach based upon which arguments succeeded and which arguments failed, is appropriate in a case such as this. Fundamental human rights and the liberty of the subject are involved….there is a public interest in these issues beyond those of the individual parties. It would be wrong to discourage any party from raising any proper and reasonable argument even if it ultimately failed.'*

> *13. I reject the contention … that these observations have no relevance beyond the narrow confines of the facts of the case in which they arose where failed arguments were simply not punished with the usual adverse costs consequences."*

29. The HRC argues that consistent with *Munjaz* and *BEST*, and with the costs rulings in *A&B, Bermuda Bred*, and *Griffiths*, costs should follow the event in full and not on an issue-by-issue basis.

30. Mr Attride-Stirling has made it plain that the HRC has a statutory obligation to intervene in court proceedings in respect to the interpretation of the Human Rights Act. No one sought to deny that, however his mandate in this matter can be said to have begun and ended there. As matters evolved the Applicants did not amend their claim in order to add any specific constitutional relief. The court is of the view that the Applicants had not intended to rely on any constitutional relief and to the extent that they relied on any constitutional argument, they did so primarily to allow those arguments to be led by the HRC. The HRC were under no mandate to make any such arguments, and they were aware that the Applicants always contended for an interpretation of the HRA.

31. I agree with the position of Mrs Dill Francois that, the above authorities notwithstanding, the constitutional argument can be treated separately from the main issue upon which the judgement was based. I accept the general applicability of the principle stated above. However on the facts of this case, for the above stated reasons, I agree with the position of Mrs Dill Francois and Mr Duncan that costs should not be allowed in relation to the hearing of the summons associated with the granting of leave to include the constitutional issue only.

Costs awarded to or against interveners

32. Mr Duncan for PMBL argues that there is no provision in O.62 of the RSC for costs to be ordered for or against an intervener. He argues that to the contrary the English courts have statutory power to order costs for and against anybody involved in litigation. He cites Section 87 of the Criminal Justice and Courts Act 2015 for orders for costs to be made against interveners in proceedings for judicial review (reflected in r.46.15 of the Civil Procedure Rules). He submits that the usual position in

England is that despite there being an express power, no order for costs is made against interveners.

33. He submits that the English courts have prevented interveners from recovering their costs in most cases. In *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176, the House of Lords explained that interveners would not be entitled to costs unless they had a specific interest in the case which required separate representation. One can understand the merit in such a decision although, it may have had only narrow application to the cited case.

34. Mr Duncan is wrong in his contention that there is no provision in O.62 RSC for costs to be ordered for or against an intervener. Such a provision may not be specifically set out in O.62 of the RSC but there is ample authority that the power to order costs for or against an intervener exists in practice.

35. Following upon the usual rule that cost follow the event several decisions stand as authority for the proposition that costs can be awarded both for and against an intervener. The HRC submit that cost can and ought to be awarded against PMBL. They argue that the risk of a costs order is particularly great when an intervener acts for all intents and purposes as if they are a substantive party to the proceedings. They seek to make good their point by reference to *R (E) v JFS & Ors [2009] UKSC 15* where costs were awarded against an intervener who "assumed a role that went well beyond that of an intervener. Mr Attride-Stirling argues that PMBL went well beyond the role of an intervener, or alternatively, that they conducted themselves as if a party, even though they remained an intervener.

36. To the extent that Mr Attride-Stirling is relying on the above referred decision as authority to undergird his suggestion that PMBL stepped into the role of a party to the litigation, it should be pointed out that in the cited case the court made its determination based on the fact that Lord Pannick who appeared in the case for an intervener at one stage of the proceedings switched clients during the subsequent appeal and commenced representing a party to the proceedings and no longer

appeared on behalf of the intervener. There is no corollary on the facts of the instant case.

37. In ***R (Barker) v Bromley London Borough Council*** [2007] 1 AC 470, the Court ordered costs against an intervener because the intervener joined forces with the respondent in its submissions in such a way that the court was of the opinion that the effect of the intervention was that the intervener became a party to the proceedings.

38. In ***Fay v Governor and Bermuda Dental Board*** [2006] Bda LR 72, Kawaley J (as he then was) began by applying the usual rules as to costs in relation to the judicial review proceedings, and found that the intervener was justified in intervening and therefore entitled to costs; although no costs were ordered ultimately. Looking at a England and Wales decision in the judicial review matter of ***British Academy of Songwriters, Composers and Authors & ors v Secretary of State for Business, Innovation and Skills*** [2015] EWHC 2041 (Admin), costs were awarded against an intervener according to the usual rule that costs follow the event.

39. I am satisfied from the above cited authorities (and others too numerous to mention) that an award of costs can be made to an intervener as well as against an intervener following upon the usual rule that cost follow the event. In the instant case PMBL intervened after the court expressed the view that it would be receptive to an application for intervention because the court was aware from previous cases and widely reported news events that there were interested groups. Notwithstanding their justification for intervening, in so far as costs are concerned, an intervener would additionally be judged by the substance of their intervention, the conduct of their litigation and the effect their intervention had on the cost of the litigation.

40. The breadth PMBL's submissions did extend the length of the litigation. I took the view that the case was of such significant public import that a mere outline of the issues intended to inform the court would not be sufficient therefore I was somewhat generous in allowing the litigants including PMBL to make full submissions. As to conduct there were early attempts by Mr Duncan to delve into Religious doctrine

which had to be curtailed but that conduct falls short of the type of conduct that should have a consequence in costs.

41. I noted however that Mr Duncan's submissions were to some extent advanced by him out of what appeared to be deference to the expectation of his client and or their supporters. He had his instructions but he had to have been aware of when he was on thin ground; nonetheless he made submissions in that context almost apologetically. The substance of those submissions was wanting. Based on the above assessment, on a provisional basis PMBL is subject to a cost order being made against them.

42. The question remains however, did PMBL cross the Rubicon and become a "party" as alleged by Mr Attride-Stirling. I do not accept that PMBL acted as a party in this case. They may have litigated in a spirited and thorough manner through their counsel Mr Duncan, however, the same can be said for the manner and spirit in which the Mr Attride-Stirling litigated on behalf of the HRC.

43. Mr Duncan was lengthy in his submissions, some of which were unsustainable in the end but at all times he spoke to the public interest that his client stood for and his understanding of the legal issues. He never appeared to me to have advocated for the Defendants.

44. PMBL started the litigation as a registered charity. During the proceedings their charitable status was called into question and then suspended and ultimately they were struck of the register. They were relying on numerous funders, primarily small contributions from individuals, many of whom were pensioners and church members.

45. The Applicants and latterly the HRC are no longer seeking to discover the identities of the small contributors, for the purpose of going after them in the event of a cost order against PMBL, although they do continue to seek cost against PMBL.I find that PMBL had a genuine interest in the case, they were invited to intervene, and the case involved quasi constitutional issues regarding fundamental rights. In all the

circumstances it seems to me that this is an appropriate case where cost should not be awarded against PMBL.

46. I am not suggesting that carte blanche should be given to an intervener to litigate without consideration of the usual rules as to costs. However given the above findings in this case, where a cost order should be made against the losing side following the usual rule, and the fact that there are two sources against which the order can be made, my view is that this is an appropriate case for costs to be ordered against the Respondents only.

Indemnity costs

47. The Respondents do not resist the principle that costs follow the event. They take issue with the HRC being awarded costs and the application for indemnity costs. The question remains therefore, at what level should the cost order be made against the Respondents, and whether both the Applicants and the HRC should be awarded costs.

48. Mrs Dill-Francois submits that the Respondents' conduct in defending the Applicant's case was not improper and as such no order of indemnity costs should be made. I believe that it is her contention that the heart of this case turned on the interpretation of a discrete part of section 31 of the HRA; as to whether the duties which the Registrar performs in respect to contracting a marriage constitutes services "as it applies to a private person". I believe her to be arguing that that distinguishes the instant case from the statutory interpretation and other legal considerations falling for determination in what I described in my judgment as the triumvirate of HRA cases decided by the Supreme Court, to wit, *A&B, Bermuda Bred* and *Griffiths v Minister of Home Affairs, the AG, and the Commissioner of Prisons* [2016] SC (Bda) 62 Civ.

49. She argues that in the *Bermuda Bred* case, the Court did not suggest that the same-sex couple was entitled to be married but rather found that a regime should be instituted to treat them as if they were entitled to the same rights as a married couple. She contends therefore, that it was arguable that the services that the Registrar performed were not those that could be performed by a private person and as such it was not improper or woefully hopeless to advance such an argument.

50. Mr Duncan for PMBL argues that the instant case is one of the most important cases in Bermuda's history and that as such it called for all significant interests to be represented fully and that all permissible arguments were to be advanced fully and thoroughly.

51. He asserts that the HRC has made an unjustified criticism of his client's case and his conduct of it. Mr Duncan argues that there is nothing unreasonable about seeking to uphold the clear wording of long-standing legislation and in ensuring that every proper argument in response to an Application is ventilated before the Court. It is his position that because of the likelihood that the case would go to appeal, bearing in mind the importance of the underlying issue, the Respondents and PMBL were obligated to challenge the correctness of ***Bermuda Bred*** so that they could take this argument to the Court of Appeal. He contends that the limits to the definition of "services" set out in ***Bermuda Bred*** – and whether it encompassed marriage – was properly a matter for disagreement.

52. Mr Attride-Stirling could not disagree more. He relies on the following holding made in my judgment in this case:

> *"In all the circumstances I hold that the administrative functions performed by the Registrar pursuant to sections 13 and 14 of the Marriage Act amount to "services" as provided by section 5 of the HRA. The broad sweep of the HRA and section 5 (2) is intended to provide the HRA with teeth. It is not intended to allow a government department to be selective about what it will be bound by. Or* (sic) *to hide behind a technical narrow approach to what a "service" is."*

53. It is the HRC's contention that the point relied on by the Respondents and PMBL was unarguable, from a strict legal perspective, because it was always clear that the rule of stare decisis meant that, in the action, the court would be obliged to follow the three earlier cases, a fact based on principle that was predictable. He complains that the Applicants and the HRC were forced to go through a trial, in circumstances that did not make the legal conclusion any less predictable. He seeks to underscore the

predictability by suggesting that because the case was predictable, none of the four parties involved saw fit to call in leading counsel from overseas.

54. I do not find the latter point to be the strongest of the HRC's submissions on this point as a myriad of factors go into a decision whether or not senior counsel will be instructed in a case. Although complexity of legal issues is usually a highly relevant determining factor, it does not necessarily follow that a case without leading overseas counsel will have a predictable outcome.

55. A review of authorities on indemnity costs show that they are normally awarded in cases where a party has done something improper and caused costs to be incurred unreasonably. However the discretion to award indemnity costs has not been limited to that test in the Bermuda courts.

56. In ***Phoenix Global Fund Ltd and Phoenix Capital Reserve Fund Ltd v Citigroup Fund Services (Bermuda) Ltd and the Bank of Bermuda Ltd [2009] Bda LR 70***, Bell J (as he then was) outlined the test in Bermuda for indemnity costs at paragraph 13 of the judgment wherein he stated:

> *"…Ground J in **De Groote v MacMillan et al** [1993] Bda LR 66 was clearly making comments of general application when he indicated that he considered that an award of indemnity costs as against a defendant should be reserved for exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct. That said, the judgment as to whether a particular case is exceptional, and the nature and extent of the impropriety will always be matters for the trial judge before whom the question falls to be determined."*

57. In the first cited case indemnity costs were ordered against the Plaintiffs, the unsuccessful party to the action whose conduct was referred to as *"thoroughly reprehensible"* by Bell J.

58. Costs may be ordered on an indemnity basis if they are incurred as a result of the unreasonable conduct of the opposing party as held by Langley J in ***Amoco (UK) Exploration Co v British American Offshore Ltd*** (22 November 2001) unreported)**.**

59. In ***American Patriot Insurance Agency v. Mutual Holdings (Bermuda) Ltd*** (2012) Bda LR 23 the Court of Appeal for Bermuda made clear that indemnity costs were not restricted to cases where fraud was proved or where the proceedings had been misconducted by the losing party. The court held that both the way the litigation has been conducted and the underlying nature of the claim may be relevant in assessing whether indemnity costs ought to be ordered.

60. In ***Vernon Trott & Claude Slater v James Douglas & Jakeisha Douglas*** [2015] Bda LR 53 the Court of Appeal upheld the indemnity cost order of Kawaley CJ. The Chief Justice had described the defendant's unreasonable behaviour as flouting procedural orders of the court and making minimal attempts to identify the real issues in controversy. In his judgment Kawaley CJ had also noted that the defendants rebuffed encouragement from the court to pursue settlement and made no attempts to save time and costs.

61. I cannot agree that the Defendants or PMBL misconducted themselves as illustrated above, or behaved in a reprehensible manner during the hearing. No fraud has been alleged on their part arising out of the hearing, although the HRA describes a part of PMBL's cost submissions as false, baffling and disingenuous, a criticism which I find unhelpful. What has been contended, is that the outcome of the case was predictable based on three decided cases which engaged section 31 of the HRA in respect to the interpretation of "services".

62. Although Mrs Dill Francois made the briefest submissions of all counsel and made her points clearly and for the most part precisely, she did attempt in my view to obscure the previous decisions of the court by relying on an artificial rendering of the provision of "services", the discrete point as I referred to it above. There was in my judgment nothing distinguishing about the wording she relied on. The interpretation of the whole section had been ventilated in *Bermuda Bred*. In other words, the underlying nature of her case was based on an indefensible footing which she sought

to shore up by delving into the two preliminary issues neither of which helped her case, and all of which ultimately protracted the litigation.

63. I must say that it appeared to me that Mrs Dill Francois was in a difficult position. She no doubt had instructions to defend, but as the Applicants pointed out, her position ran counter to the position that the government had previously taken. This was ultimately borne out by the review of the Hansard. Defending in such circumstances can be an expensive enterprise and counsel would be aware of the costs risk. In this case the analysis above demonstrates clear reasons for an order to be made for costs to be paid by the Respondents on an indemnity basis.

Cost of two parties

64. Mr Attride Stirling has applied for costs to be paid to the HRA on the basis that costs can be awarded to an intervener where costs follow the event. Further he contends that in litigation between government and a private person seeking to assert a constitutional right, the principle is that if government loses, it should pay the costs of the other side.

65. The Defendants, relying on ***De Smith's Judicial Review, 7th Edition, Sweet & Maxwell, page 938 para 16-096*** argue that in claims where there is more than one defendant or interested party, an unsuccessful claimant will normally be ordered to pay only one set of costs**.**

66. Mrs Dill-Francois further relies on the authority of *Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs) 2013 Bda LR 34*, wherein the Chief Justice approving Lord Lloyd in *Bolton case ([1996) 1 WLR 1176*), noted that:

> *"…when a claim is brought against a Minister and a second respondent appears, the second respondent "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 covered by counsel for the Secretary for State; or unless he has an interest which requires separate representation."*

67. She prays in aid the case of *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at paragraph 24, wherein the Court of Appeal provided an overview of the distinctive features relating to costs in public law litigation:

> *"...Official bodies, for instance, would often appear or intervene in public law proceedings on the basis that they were present to assist the court in an amicus curiae role, even if they were respondents in the proceedings, and in that capacity, in a court which traditionally ordered only one set of costs, it would neither apply for costs nor expect an order for costs to be made against it, even if its submissions favoured one side more than the other. Examples of this practice were recently given by Brooke LJ in R (Davies v Birmingham Deputy Coroner [2004] EWCA Civ 207, [2004] 3 All ER 543: justices, tribunals, coroners and the Central Arbitration Committee were cited as examples."*

68. The Defendants submit that this principle can also apply to interveners and should be applied to the HRC. The Defendants argue that there was no separate issue that the HRC was entitled to be heard on, and the only additional issue that was raised by them was a Constitutional ground which did not form the basis of the judgment in the case.

69. What is more Mrs Dill Francois resists a cost order in favour of the HRC because in her view it would be a case of the government paying its self because it is her contention that the HRC is paid out of the consolidated fund. In support of this proposition she relies on *Smith v Minister of Culture and Social Rehabilitation; Ombudsman for Bermuda Intervening* [2011] Bda LR 7, where it was said:

> *"As the costs of the Ombudsman and the Respondent are both payable out of the Consolidated Fund, my provisional view is that I should make no order as to those costs."*

70. To make good her argument she has submitted an affidavit sworn by the financial secretary Anthony Manders. He states that the HRC is considered to be a Non-

Ministry Department and its yearly budget is funded out of the consolidated fund and its financial activities are reported within that fund. He attest to the fact that part of the legal costs of this action were provided for in the 2016/17 fiscal year funding and provisions for legal fees were provided for therefrom.

71. Mr Attride Stirling rejects the contents of Mr Manders. He argues that any award of costs will be directly credited against the HRC's budget. He also argues that in these times of financial austerity it would be difficult to obtain supplementary funding for legal costs. He submits that Mr Manders cannot and did not controvert the real position, which is that the HRC has its own budget out of which it must pay its legal fees.

72. I am not persuaded by Mr Attride Stirling's arguments. I do not think one can obfuscate the fact that the HRA budget that is funded from the consolidated fund comes from the same source as the Defendants' budget. Legal fees are accounted for within that budget. I see no reason to reject Mr Manders' statement that a part of the fees for this case have been provided for. Any further funding if not available from the budget can be made available from the consolidated fund by application. It is folly to suggest that an application by the HRA for funds out of which to pay legal fees would be resisted in the circumstances. Making a cost order therefore will achieve no more than a paper trail of accounting procedures in my view.

Conclusion

73. In all of the circumstances, in the exercise of my discretion, I do not think that the justice of this case calls for a cost order to be made in favour of the HRC. Further, having ventilated all of the arguments for and against costs being awarded against PMBL, I am of the view that the justice of the case calls for the following cost order:

    i. Costs to the Applicants to be paid by the Defendants on an indemnity basis to be taxed if not agreed.
    ii. no order of costs against the Defendants for the hearing of the constitutional summons

74. There were some minor issues raised in the submissions which I do not think helped at all in assessing the cost issue I reject them, including PMBL's submissions, on the case being an academic one. I also reject the Applicants' request for cost of two counsel. There was no forewarning that the Applicants would make that application. Further, in my view, the issues were not so complicated as to warrant such an award.

DATED the day of 2017.

Charles-Etta Simmons
Puisne Judge