

**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:

Mr. Terrence F Williams, with him Ms. Karlene Thomas-Lucien of Chase Law for
the Claimants

Ms. Maya Barry and Ms. Kisha Frett for the Respondent

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

2022 September 29
September 30

JUDGMENT

- [1] **JACK, J [Ag.]**: On 20th September 2022, I gave judgment refusing an application made on behalf of His Majesty's Attorney-General (a) to adjourn the final hearing of this matter which was listed for 29th and 30th September 2022 and (b) to give her until 7th October 2022 to file further evidence regarding the negotiations leading up to the making of the **Constitution of the Virgin Islands**¹ in 2007.
- [2] There had earlier been a case management order made by me on 6th July 2022. By that order the BVI Christian Council was added as an interest party. They were given until 20th July 2022 to file their evidence. Evidence from the claimants and the respondent was to be filed by 5th August 2022, which was to be the close of evidence. Skeletons were to be filed by 19th September 2022 and the matter listed before me or Ellis J in the following week.
- [3] The Christian Council sought leave to appeal that case management direction. By an order consequential on a judgment I handed down on 27th July 2022, I refused permission to appeal. So far as I am aware, the Christian Council did not attempt to seek leave from the Court of Appeal. At any rate, if they did, they did not obtain it.
- [4] In the meantime, the Christian Council filed its evidence in accordance with my order of 6th July 2022. Neither the claimants nor the Attorney-General sought to file evidence in answer. The evidence accordingly closed. No matters were raised by the parties and the matter appeared to be proceeding smoothly towards the hearing on 29th and 30th September.
- [5] What then occurred is that on Friday 16th September 2022, after hours, the Attorney-General sought an adjournment of the hearing on 29th and 30th September 2022 and permission to adduce by 7th October 2022 further evidence. The application had not been foreshadowed by correspondence with the Court.

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

Ms. Barry had canvassed the application with the parties. The Christian Council supported the application. The claimants opposed it. Purely by chance I saw the application on Saturday 17th September, because I decided to check whether any of the parties had lodged their skeletons early.

[6] It was immediately apparent to me that the application, unless dealt with promptly, had the potential to derail the hearing on 29th and 30th September. Due to the funeral of Her Majesty Queen Elizabeth, the 19th September was a holiday, so the deemed date of the Attorney-General's application and the date for filing skeletons was Tuesday 20th September. If the application was dealt with normally after a hearing on notice, then the reality of the matter would be that the Attorney's skeleton would not be filed on 20th September, but probably only the week after. This would prejudice the fair conduct of the hearing on 29th and 30th September.

[7] CPR 11.14(c) permits the Court to determine an application without a hearing "if the Court does not consider that a hearing is appropriate." I determined that I could properly determine the matter without a hearing. There was no realistic prospect of listing a hearing at short notice over the weekend. Staff are not available; nor are Court reporters. Counsel's availability was unknown. Sunday is in any event a *dies non*. Holding a hearing on 20th September would not ensure that the parties timeously filed their skeletons. For the reasons which I gave in my subsequent written judgment I decided to refuse the application. On Saturday 17th September, shortly after noon, I had the deputy registrar inform the parties of my decision. This allowed the parties the maximum time to prepare their skeletons over the long weekend, whereas there might otherwise have been a tendency to down tools until the outcome of the Attorney's application was known. On the morning of Sunday 18th September I had my draft judgment circulated.

[8] In the event, Mr. Williams for the claimants had his 21-page skeleton filed at 8.40am on 20th September. Ms. Barry for the Attorney-General filed her 10-page skeleton slightly late at 5.54pm on 20th September (thus with deemed filing on 21st September). Ms. La Rose for the Christian Council filed her 27-page skeleton at

7.51am on 21st September. Thus the matter was entirely ready for hearing on 29th and 30th September.

[9] Importantly, Ms. Barry on the Attorney-General's behalf accepted my decision to reject her application for an adjournment. She did not seek a rehearing, nor leave to appeal. Instead, as I have noted, she lodged her skeleton argument and prepared for the hearing on 29th and 30th September.

[10] Another consequence of the Attorney-General's abandonment of her application was that she did not lodge a draft order. After Farara JA's stay of the proceedings at about 3pm on 28th September, I asked her to lodge a draft order, which she did on 29th September. At the time of writing this judgment, the order has not been sealed.

[11] The form of order which I shall approve provides:

"UPON CONSIDERING, on paper, the application for adjournment of the Respondent dated 16th September 2022, but filed after hours and thus treated as being filed on 20th September 2022, seeking an adjournment of the hearing listed for 29th and 30th September 2022 and permission for the Respondent to file further evidence by 7th October 2022;

AND UPON noting

- (a) that the application was supported by the Interested Party, but opposed by the Claimants;
- (b) that skeleton arguments were due to be delivered by close of business on 20th September 2022;
- (c) that failure to lodge skeletons by close of business on 20th September 2022 would potentially disrupt proper preparation for the hearing on 29th and 30th September 2022;
- (d) that there was inadequate time to have an inter partes hearing;
- (e) that the Court's decision was intimated to the parties on the afternoon of Saturday 17th September 2022 and its draft judgment was able to start being distributed to the parties on the morning of Sunday 18th September 2022 albeit without guarantee of delivery before the morning of 20th September 2022, so that the parties had as much notice as possible that their skeletons were still due by close of business on 20th September 2022;
- (f) that pursuant to CPR 11.14(c) it was accordingly inappropriate to list the matter for a hearing;

AND UPON THE COURT not being satisfied that any of the reasons provided by the Respondent warrant the grant of an adjournment, and being further satisfied that the lateness of the application alone, would have justified refusal;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Respondent's application dated 16th September 2022 (deemed filed on 20th September 2022) seeking an adjournment of the hearing listed for 29th and 30th September and for permission to adduce further evidence by 7th October 2022 be refused.
2. No order for costs.
3. Pursuant to CPR 11.16 the claimants and the interested party and pursuant to CPR 11.18 any party may within 14 days of service of this order on them apply to vary or discharge this order."

[12] On 23rd September 2022, Mrs. Flax, the vice-president of the Christian Council swore an affidavit in support of an appeal by the Christian Council's against my refusal of the Attorney-General's application. The affidavit and the other documents in support were filed on Monday 26th September 2022. Nothing was served on the claimants or the Attorney-General. Nor was any intimation given either to this Court or to the other parties that such an application was being made. The application to the Court of Appeal for leave to appeal and for a stay of the proceedings below was thus being brought completely *ex parte*.

[13] About 3pm on Wednesday 28th September 2022, Farara JA made the following order after consideration of the matter on paper:

"UPON READING the notice of application filed 26th September 2022 seeking leave to appeal against the judgment of Justice Adrian Jack [Ag.] dated 20th September 2022 and a stay of proceedings pending the hearing and determination of the appeal, along with the first affidavit and second affidavit of Rosemarie Flax, certificates of exhibits and draft order; UPON READING the judgment of Justice Adrian Jack [Ag.] dated 20th September 2022;
UPON NOTING the certificate of urgency filed by the applicant on 26th September 2022;
UPON READING the written submissions and list of authorities filed by the applicant on 27th September 2022;
UPON NOTING that there is no evidence that the applicant has served the respondents with the application seeking a stay of proceedings;

AND UPON THE COURT BEING OF THE VIEW that the applicant has a realistic prospect of success and therefore ought to be granted leave to appeal;

IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal against the judgment of Justice Adrian Jack [Ag.] dated 20th September 2022 is granted.
2. The applicant shall file and serve its notice of appeal on or before 4pm on 29th September 2022.
3. The applicant shall serve the respondents with the application seeking a stay of proceedings and a copy of this order on or before 4pm on 28th September 2022 and furnish this Court with proof of such service.
4. The applicant is granted an interim stay of proceedings pending the hearing and determination of the application seeking a stay of proceedings pending the hearing and determination of the appeal.
5. The first, second and third respondents [the claimants and respondent in the Court below] shall file and serve written submissions in response to the application for a stay of proceedings pending the hearing and determination of the appeal on or before 4pm on 30th September 2022.
6. The application for a stay of proceedings pending the hearing and determination of the appeal shall be determined on paper on an urgent basis on 3rd October 2022.”

[14] I have not seen the written submissions made by Ms. La Rose on the Christian Council’s behalf to Farara JA, but the following matters appear to arise.

[15] Firstly, Ms. La Rose did not lodge with the Court of Appeal a sealed copy of my order of 20th September. This is of course because Ms. Barry had not submitted a draft and none had been sealed. Nor had Ms. La Rose sought a copy of the order from the Court. So far as appears, Ms. La Rose did not draw this omission to the attention of the Court of Appeal. This is potentially significant. The case of **Michael Wilson & Partners Ltd v Temujin International Ltd**² concerned by application by receivers to be discharged. They and their predecessors had been appointed many years before. They said that nothing was happening in the receivership and that the assets which were the subject of the receivership order were inadequate to pay their fees. On 18th July 2022 I granted the order sought and discharged the receivership. Mr. Wilson, who was representing the claimant,

² BVIHCV 2006/0307.

had not appeared at the hearing on 18th July 2022. He applied under CPR 11.18 for a rehearing. By judgment of 20th July 2022³ I refused his application for a rehearing, but I directed that my orders should not be sealed until 28th July 2022, so that Mr. Wilson, if so advised, could seek a stay of execution from the Court of Appeal. Mr. Wilson subsequently did seek leave to appeal and a stay on the claimant's behalf. As was subsequently reported back to me, the Court of Appeal refused the application on the basis that it had no jurisdiction without having a copy of the sealed orders of the Court below. If that account of the Court of Appeal's reasoning is correct, then the Christian Council's application for leave to appeal would have failed *in limine*.

[16] Secondly, the order which I shall approve gives the parties the right to apply to vary or discharge the order of 20th September. Ms. La Rose told me yesterday that she was indeed aware that applying for a rehearing was an option, but that she on behalf of the Christian Council had decided to go down the appeal route. In other words, she made a deliberate decision not to seek a rehearing of the application. As regards the Christian Council the Court had determined the Attorney-General's application *ex parte* and, as Ms. La Rose accepted that she knew, the Christian Council could have applied to set it aside. The problem with this is that the Court of Appeal held in **Greater Sail Ltd v Nam Tai Property Inc**⁴ that it was an abuse of process to seek to appeal an *ex parte* order without giving the first instance judge an opportunity to reconsider the *ex parte* order.

[17] I have seen no evidence that Ms. La Rose brought this point to Farara JA's attention.

[18] Thirdly, the Christian Council was not the applicant. The applicant was the Attorney-General who had decided not to challenge my refusal of her application. Although there is jurisdiction for a non-applicant to challenge a refusal of an application, in the nature of things this be unusual and requires the Court to pay

³ [2022] ECSCJ No 252.

⁴ [2022] ECSCJ No 187.

particular regard to the reason the party primary affected by the order below has decided not to appeal: **George Wimpey UK Ltd v Tewkesbury Borough Council**⁵ and **Re W (A Child) (Care Proceedings: Non Party Appeal)**.⁶ The appeal court has to be astute to ensure that the appeal is not an abuse of process: **Martineau v Ministry of Justice**.⁷ I have seen no evidence that this point was drawn to the attention of Farara JA. Nor does any explanation seem to have been given as to why Ms. La Rose did not consult with Ms. Barry as to why the Attorney-General had decided to proceed with the substantive hearing on 29th and 30th September rather than challenge my order of 20th September, since the Attorney-General had an obvious interest in the matter.

- [19] Fourthly, the effect of the order which Ms. La Rose sought and which Farara JA granted was in nature of final relief. The Christian Council's Notice of Appeal, as now served, seeks the following substantive relief:

“i. That the Judgment and said order [of 20th September 2022] be set aside;
ii. That the Attorney General's said application be re-instated and **those portions which are still live (and have not naturally fallen away)** be re-considered afresh after allowing the parties an opportunity to tender evidence and to be heard on the application, if they so wish.” (My emphasis.)

- [20] It will be apparent that the only relief which survives the adjournment of 29th and 30th September hearing pursuant to Farara JA's order is the Attorney-General's application to adduce further evidence by 7th October 2022. As regards the substance of the appeal, namely the adjournment, the order is final.

- [21] Ms. La Rose does not seem to have drawn Farara JA's attention to the fact that the order he was invited to make was — at least in its effect — the grant by a single judge of the Court of Appeal of final relief on an application brought *ex parte*

⁵ [2008] EWCA Civ 12, [2008] 1 WLR 1649.

⁶ [2016] EWCA Civ 1140, [2017] 1 WLR 2415.

⁷ [2015] ICR 1122.

without having given any notice to the other parties. Nor did she raise any issues as the powers of a single judge of the Court of Appeal to make such an order or as to the exercise of the Court's discretion in these circumstances.

[22] Fifthly, the Christian Council in seeking a stay did not offer any cross-undertaking in damages. This is significant. In the days leading up to 29th September, both Mr. Williams and Ms. Barry were heavily engaged in preparation for what was any view a heavy hearing over 29th and 30th September. The adjournment of the hearing of 29th and 30th September by the order communicated to the parties at about 3pm on 28th September resulted in significant waste of legal costs. This was readily foreseeable.

[23] I regret to say that when I asked Ms. La Rose about this yesterday, she treated this matter flippantly and as a matter of no concern. She indicated that the Christian Council accepted no liability for the costs thrown away by the late adjournment.

[24] The claimants are both in employment, but, at least so far as appears, they are not people of great wealth. The costs burden may well be a hardship. Further the Attorney-General's Chambers are, as is well-known, under extreme pressure. The Attorney can ill-afford to have Ms. Barry's efforts to present the case wasted in this way.

[25] It does not appear that Ms. La Rose drew these points to the attention of Farara JA.

[26] The adjournment also caused a significant waste of this Court's limited resources. I had of course made extensive preparation for the hearing. Two days of Court time had been set aside for the hearing. I had set aside next week for judgment writing. Ms. La Rose was obliged to assist in insuring that the Court's resources were used effectively: CPR 1.1(2)(e) and 1.3. Again this point does not appear to have been brought to Farara JA's attention.

- [27] Sixthly, Ms. La Rose kept the fact that she was making the application on behalf of the Christian Council a complete secret from all the other parties and from this Court itself. Yesterday, she explained that that she took the view applications for leave to appeal could be dealt with *ex parte*, so she did not feel the need to serve them. That is true in relation to leave to appeal: CPR 62.2(4), but not in relation to an application for a stay: CPR 62.16(1)(b), where there is no equivalent to CPR 62.2(4). I have seen nothing suggesting that Ms. La Rose drew this to Farara JA's attention.
- [28] Seventhly, the Christian Council's application for leave to appeal is largely a re-run of their challenge to the case management decisions I made on 6th July 2022. As noted above in para [3], the Christian Council's attempt to challenge those order was unsuccessful and was not pursued. Again this does not appear to have been brought to Farara JA's attention.
- [29] The significance of these matters is of course a matter for the Court of Appeal.
- [30] As a result of the stay ordered by Farara JA, the Court could not and cannot make any ongoing orders. However, it seemed to me that it might be useful to explore with counsel the effect of the Court of Appeal's order. All counsel were agreed that the substance of the appeal was now academic, because the adjournment of the hearing on 29th and 30th September had taken place. As regards allowing the Attorney-General's application to adduce fresh evidence, the reason that application was refused in the order of 20th September, was a matter of timing: the 7th October was after the date of the hearing on 29th and 30th September. The parties agreed that the Attorney-General should be given until 21st October 2022 to file further evidence.
- [31] As regards relisting the matter, as I have noted above, I have put significant work into preparation. A relisting before another judge would entail that judge having to repeat the work to the detriment of other litigants. Mr. Williams and Ms. Barry

were both available for 10th and 11th November 2022. Ms. La Rose said that she was available on those dates. However, she said that she wanted to instruct counsel, but when asked who, she refused to divulge the name of counsel. She said that he was not yet admitted to the bar. She submitted that she lacked the expertise to represent her client. This, however, is belied by the quality of her 27-page skeleton argument submitted for the substantive hearing.

- [32] By reason of the stay I can make no orders. It would, however, be open to the Court of Appeal to make an order determining the appeal, giving the Attorney-General by consent until 21st October 2022 to file further evidence and listing the matter for a substantive hearing on 10th and 11th November 2022.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar