

**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

Determined on the papers

2022 September 20

**JUDGMENT ON THE ATTORNEY-GENERAL'S APPLICATION
FOR AN ADJOURNMENT**

- [1] **JACK, J [Ag.]**: By an application dated 16th September 2022, but filed after hours and thus treated as being made on 20th September 2022, the respondent, His Majesty's Attorney-General, seeks an adjournment of the hearing currently listed on 29th and 30th September 2022. The application is supported by the interested party, the BVI Christian Council, but opposed by the two claimants.
- [2] The claimants issued the fixed date claim form in this matter on 26th February 2021. By an acknowledgement of service dated 10th March 2021 and filed the following day, the Attorney-General acknowledged service and indicated that she disputed the claim. The matter was originally listed to be heard in June 2021, but was adjourned by agreement to await the outcome of two Privy Council appeals, **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 held that the Constitutions of Bermuda and the Cayman Islands did not mandate same-sex marriage.¹ The claimants in the current case indicated that they nonetheless wished their claim to proceed to a final hearing.
- [3] On 6th July 2022 I gave case management directions. I fixed the final hearing of the matter in the week of 26th September 2022. So far as relevant, I directed that the Attorney-General serve her evidence in answer by 5th August 2022. I directed all parties to serve their skeleton arguments by 19th September 2022. Since the date of that order, Her Majesty the Queen has sadly passed and the 19th September is a public holiday in honour of her funeral. The date for service of skeletons is thus 20th September.
- [4] By an application made on 21st July 2022, the Christian Council sought permission to appeal against the case management orders in respect of evidence and the date of the hearing. The Attorney-General took a neutral position as regards that application and did not appear on 26th July 2022, when I heard the application. She made no application herself, either for an extension of time in which to file

¹ [2022] UKPC 5, [2022] *The Times* 18th April and [2022] UKPC 6, [2022] *The Times* 20th April respectively.

evidence or for an adjournment of the final hearing. By judgment of 27th July 2022, I refused the Christian Council's application.

- [5] In the current application, the Attorney-General argues that her chambers have been very busy with the aftermath of the arrest of the former premier in Miami and the publication of the Report of the Commission of Inquiry. The implementation of the framework agreement made between the BVI and the British Governments subsequent to the Report of the Commission of Inquiry has been resource-intensive. Further, she has had difficulty obtaining instructions from the BVI Government. In the affidavit made in support of her application, the deponent says: "This matter was formally brought to the attention of Cabinet on or about 22 August 2022 after which preparations began in earnest on the respondent's case."
- [6] As to evidence, she is seeking from the Foreign, Commonwealth and Development Office in London the notes of the negotiations between the BVI and the British Governments which lead to the making of the 2007 **Constitution**.² She also indicates that she is considering instructing leading counsel.
- [7] Dealing with these points in reverse order, I note that no definite statement is made that the Attorney-General has decided to instruct King's Counsel. This consideration is thus of little weight. Moreover, even if she had made a definite decision, she gives no indication of the steps already taken to instruct leading counsel. I infer that none have been taken. Again, this points to the consideration being of little weight in deciding whether to grant the adjournment. Lastly, it is not too late to instruct leading counsel. I should be surprised if during the day of 20th September, it were not possible to find at least one King's Counsel available to represent the respondent by Zoom on 29th and 30th September, even if her first choice of counsel were unavailable.
- [8] As to the notes of negotiations, no explanation is given as to how these notes would be admissible. It is not for me on an application of this sort to make any

² The Virgin Islands Constitution Order 2007 SI 2007 No 1678.

evidential rulings, but adducing these notes (assuming that they still exist and that they support the respondent's case) faces two potential problems. The first is that *travaux préparatoires* in order to be relevant to the construction of statutory provisions must at least arguably be available to the public, so that the public can know the intended meaning of the **Constitution**. These notes of negotiations would not have been available to the public. The second is that, although the 2007 **Constitution** is in form a unilateral act of the Queen-in-Council, it is in fact a consensual document agreed between the BVI and the British Governments. Negotiations leading up to an agreement are not generally admissible as a tool of construction. As I noted in my judgment of 27th July 2022 when referring to *travaux préparatoires* "in a case dealing with the true construction of a **Constitution** there will in general be little scope for adducing factual evidence."

[9] Moreover, even if the notes of negotiations were likely to be more relevant than they appear to be, the extreme lateness of the application would count against the grant of an adjournment. The dates on which the respondent should arguably have started to obtain this material are 10th March 2021, shortly after 14th March 2022, 6th July 2022 and 27th July 2022. Of these the 14th March 2022 date is probably the latest date when the evidence collection should have begun. Even assuming the July dates were arguable, it appears that it was only after 22nd August 2022 that attempts were made to obtain this documentation. This dilatoriness in my judgment affords no grounds for an adjournment.

[10] The claim to difficulty in obtaining instructions is belied by the fact that as long ago as 10th March 2021 the respondent was able to indicate that the Government intended to oppose the claimants' claim. She obviously had sufficient instructions at that stage to serve her acknowledgement of service. It is unclear what might have changed. The issues in this case are largely matters of construction, which are points of law for her to argue. It is not clear what further instructions she needed. It is difficult to see the relevance of any decision made by Cabinet on 22nd August. So far as appears, the Government were merely confirming the decision already taken back in March 2021 to oppose the claim, thus they were

merely confirming their decision based on the advice already given by the Attorney-General to them. Moreover there is no adequate explanation for the delay in bringing the matter back before Cabinet. None of this in my judgment affords a good ground for adjourning the hearing on 29th and 30th September.

- [11] As to the last ground, the pressure of work on the Attorney-General's Chambers, I am of course sympathetic to this. However, it is for the respondent to organise her resources to deal with the cases to which she is a party. The Court cannot give her a *carte blanche* to adjourn matters on this ground, particularly when these matters were not raised on either 6th July or 26th July 2022.
- [12] The respondent disputes that the claimants would suffer prejudice from any adjournment. I disagree. They give evidence of the ongoing difficulties they suffer from the non-recognition of their marriage. Ms. Forbes says: "Our marriage not being recognized is stressful and feels like an added weight on our shoulders." The respondent suggests that the matter might be relisted in November, but there is no evidence that the Court currently has availability then. Further an adjournment would cause a large loss of Court time. I have set aside 29th and 30th September for the hearing and the following week for writing the judgment. These limited judicial resources would be lost to the prejudice of other litigants: CPR 1.1(2)(e).
- [13] Looking at these matters in the round and weighing the various considerations, in my judgment in the exercise of my discretion I refuse the adjournment. The lateness of the application alone would have justified refusal.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar