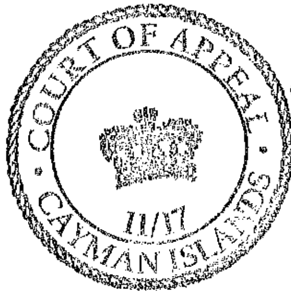
IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 9 of 2019
Civil Cause No. 111 of 2018
Civil Cause No. 184 of 2018

BETWEEN



(1) THE DEPUTY REGISTRAR OF THE CAYMAN ISLANDS
(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Appellants

AND

(1) CHANTELLE DAY
(2) VICKIE BODDEN BUSH

Respondents

Before:

The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, JA
The Hon C. Dennis Morrison, JA

Judgment on Costs - Released 18 December 2019

Sir John Goldring, President:

1. This is the judgment of the Court.

2. Both the Appellants and the Respondents submit they should be awarded the costs of the appeal. As to the proceedings below, the Respondents submit the order of the Chief Justice that the Appellants should pay their costs on the standard basis should remain, the Appellants that, subject to a small reduction to reflect the time taken up by the civil partnership argument, they should be awarded the costs below as well.

The legal provisions

3. Section 24 of the Judicature Law (2017 Revision) provides that the costs of and incidental to all civil proceedings in the Grand Court and Court of Appeal, shall be in the discretion of the Court. This is a wide and flexible discretion, which is exercised taking into account all relevant

circumstances: see *In the Matter of an Application of BDO Cayman Limited Concerning Argyle Funds SPC Inc (in official liquidation)* [2018] (1) CLR 187 at §6.

4. Order 62 rule 4 of the Grand Court (Amendment) Rules 2016, which applies both to the Court of Appeal and to the Grand Court, provides:

> *"...(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court...*
>
> *...(5) 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.*
>
> *(6) The amount of the costs which a successful party shall be entitled to recover from any other party is –*
>
> *(a) the fixed costs prescribed in rule 7;*
> *(b) the amount assessed by the Judge in accordance with rule 8;*
> *(c) the amount allowed after taxation on the standard basis; or*
> *(d) the amount allowed after taxation on the indemnity basis.*
>
> *(7) The orders which the Court may make under this rule include an order that a party must pay –*
>
> *(a) a proportion of another party's costs;*
> *(b) a stated amount in respect of another party's costs;*
> *(c) costs from or until a certain date only;*
> *(d) costs incurred before proceedings have begun;*
> *(e) costs relating to particular steps taken in the proceedings;*
> *(f) costs relating only to a distinct part of the proceedings;*
> *(g) interest on costs (at the prescribed rate for Cayman Islands dollars) from or until a certain date, including a date before judgment; and*
> *(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily."*

The background to the proceedings

5. In order to understand "*the circumstances of the case*," it is necessary to go into the background to these proceedings.

The Respondents' attempts to avoid litigation

6. The Respondents made considerable efforts to avoid litigation. The Chief Justice set out the evidence before him of those efforts in paragraphs 52 to 56 of his judgment. He referred to a letter of 1 December 2017 from Mr Tonner QC on behalf of the Respondents to the Governor (a party to the proceedings below) which, among other things, stated:

> "*We summarize the position as follows:*
>
> 1. *The Cayman Islands is obliged under the...ECHR to allow [the Respondents]...access to an institution that provides the same package of rights as marriage (e.g. via marriage itself or civil partnership). The current situation is clearly a violation of the ECHR.*
> 2. *...*
> 3. *Civil partnership is a bare minimum...*"

7. On 25 May 2018 the Respondents wrote a letter before action to the Premier of the Cayman Islands, the Governor and the Registrar. It stated:

> "*On 26th September 2017, Ms. Day wrote to Premier Alden McLaughlin, former Governor Helen Kilpatrick, Chairperson of the Human Rights Commission James Austin Smith, and Attorney General Samuel Bulgin (correspondence attached).*
>
> *In her email, Ms. Day highlighted the discrimination that she and her partner face in the Cayman Islands as a same-sex couple. She stated that it was the couple's intention to marry in the Cayman Islands in 2018 and she urged the Government to introduce legislation to allow her to do so as soon as possible in order to protect the human rights of same-sex couples and avoid the need for litigation.*
>
> *Premier McLaughlin did not acknowledge receipt of our client's email and has failed to respond to date. The Governor's Office acknowledged receipt but has failed to take steps to cure said discrimination.*
>
> *...*
>
> *Our clients have, over the past six months, sought to work with the Governor's Office to encourage changes which would guarantee their rights enshrined in the Cayman Islands Constitution Order 2009 ("CICO"), the European Convention on Human Rights ("ECHR") and the Cayman Islands*

international human rights treaty obligations (for which the United Kingdom is responsible).

In the course of such dialogue, our clients have made clear that, in the absence of a legal framework in the Cayman Islands which recognises and protects their relationship, the current state of the legislation in the Cayman Islands is not compliant with the various human rights instruments referenced above and, as such, the Governor and the General Registry is required by s.5 of CICO to interpret the Marriage Law (2010 Revision) in such a way as to bring it into conformity with the Constitution and enable same-sex applicants to marry.

Much to our clients' disappointment, no changes to the law have materialized during the last 6 months, neither has the Governor agreed with our interpretation of the law (set out in the preceding paragraph). Indeed, it is our understanding that the Governor's Office has no intention of correcting this flagrant, and ongoing, breach of CICO and the ECHR unless our clients force the Governor, and the Government, to do so by taking legal action in the Grand Court of the Cayman Islands.

In light of the foregoing, our clients, the victims of entirely avoidable and ongoing discrimination, have been forced to take the initiative.

On 12th April 2018, some six and a half months after the initial correspondence to Premier McLaughlin et al, and in the absence of any remedial action whatsoever being taken by the Premier and his Government or the Governor, Ms. Day and Ms. Bush attended the Cayman Islands Government General Registry and applied for a special licence to marry. The Governor's Office was on notice that such an application was going to be made by our clients.

...

The decision of the Deputy Registrar and/or the Governor to refuse our clients' application to marry was unconstitutional and unlawful. The failure of the Government and/or the Governor to provide for same-sex marriage or civil partnership in the Cayman Islands is unconstitutional, unlawful and a serious human rights violation.

Our clients have shown understanding and tolerance towards the Cayman Island authorities, despite the blatant denial of their rights, and they have given said authorities ample opportunity to remedy this defect in Cayman law. Denying our clients the right to legal recognition of their relationship denies them their dignity. Rejecting our clients' application to marry demeans and

humiliates them. Preventing two adults who love each other very much from forming a legal union is a cruel abuse of state power.

Unless immediate steps are taken to remedy this situation, you will force our clients to litigate in order to obtain legal recognition of their basic human rights. The Cayman Islands authorities should be doing all they can to facilitate that union, but instead they compound the denial of our clients' dignity by forcing them to litigate in order to have their relationship recognised.

Our clients' rights will continue to be violated and their human dignity stripped from them until they are entitled to marry. ***However, civil partnership - as in England and Wales's Civil Partnership Act 2004 - will provide a practical solution that allows them to return to the Cayman Islands together. In terms of settling this dispute, legislating to provide either marriage or civil partnership will be an option only if it is implemented promptly to remedy the practical problems that the State has created due to the absence of any institution.*** (our emphasis)

If our clients are forced to litigate, the remedy they will seek is that the Grand Court modifies the Marriage Law to allow same-sex marriage and/or that the Court declares the Marriage Law incompatible with the rights contained in CICO. Both routes will lead to the full recognition of our clients' relationship in law. This outcome is inevitable.

For the avoidance of doubt, this is your final chance to remedy this injustice and avoid litigation. Our clients should not be forced to litigate in order to have their rights upheld and they will seek an indemnity costs order against you should you require them to do so.

We invite proposals forthwith (and within no more than 14 days) on what measures the Governor and/or the Government of the Cayman Islands are proposing in order to recognize our clients' relationship and remedy the discrimination they, and other couples like them, are being subjected to.

If we receive no substantive response within 14 days, we will proceed to file legal proceedings without further notice to you. Furthermore, if your substantive response fails to outline concrete steps to remedy this situation (accompanied by a clear timeline), we will file legal proceedings without further notice to you."

8. As our judgment has made plain, there was no answer to the assertion that the Respondents were entitled to legal recognition of their partnership. Unfortunately, there was no substantive response to the letter. Had the Appellants (and the Governor) responded appropriately and undertaken promptly (or, as we put it in our declarations, expeditiously) to bring the long-standing violation of the Bill of Rights and the European Convention on Human Rights to an end, the Respondents would not have been obliged to bring the proceedings before the Chief Justice to vindicate their rights.

The proceedings before the Chief Justice

9. In the event, there were two issues before the Chief Justice. Firstly, the Respondents submitted they were entitled to marry. It was on that issue that they succeeded before him but failed on appeal. The Chief Justice summarised the second issue in the following terms (paragraphs 12 and 13 of his judgment):

> "*12. As regards the Petitioners' plea that they should be entitled in the alternative to enter into a civil union protected by law, the Respondents say that this is a challenge to the absence of law, any law, on the subject, not a challenge to any positive act of the Respondents. That therefore, this is perforce a matter for the Government to consider, not for the Court to address. Nevertheless, that the Respondents would of course respond to any ruling of the Court to the contrary, with respect for good administration and the rule of law.*
>
> *13....the questions which the Court must answer are these:*
>
> - *Is the denial of access to the institution of marriage a violation of the Bill of Rights?*
> - *Is the absence of an alternative institution to marriage that recognises and protects the Petitioners' relationship, a violation of the Bill of Rights?*
> - *If either of these first two questions is answered in the affirmative, how will the Court provide a remedy?*"

10. While we accept, as the Appellants submit in their skeleton argument on costs, that a substantial part of the proceedings before the Chief Justice was taken by the marriage issue, the fact remains that the proceedings would not have been necessary in the first place had the Appellants agreed to cease their violations of the law. No question of an appeal would then have arisen.

The proceedings before the Court of Appeal

11. As the Appellants rightly submit, those proceedings concerned the Chief Justice's finding that the Respondents were entitled to marry, in respect of which the Appellants succeeded. There was no challenge to any finding touching upon civil partnership, as the Notice of Appeal made plain. That absence of challenge, however, did not lead to the Appellants undertaking promptly to act in accordance with their legal obligations. They did not suggest to the Court of Appeal they would. In their submissions in respect of the terms of any declaration, they sought to avoid any sort of commitment as to the timing of the required legislation. As the Court said in paragraph 116 of its judgment, it is difficult to avoid the conclusion that the Appellants have been doing all they can to avoid facing up to their legal obligations.

The competing submissions

12. The Appellants submit that they succeeded entirely in the Court of Appeal. They should therefore have the costs of the appeal. They further submit that on the primary issue before the Chief Justice, namely that of same-sex marriage, they ultimately succeeded. They should therefore have their costs below, less a reduction to reflect the time spent on argument in respect of the civil partnership issue.

13. In our judgment, the Respondents are right to submit that is to take too simplistic a view of the proceedings. The proceedings would not have been necessary at all had the Respondents' reasonable offer of a settlement been accepted. The Appellants did not before the Chief Justice accept their failure to provide a framework was a violation of the Constitution or the ECHR. Moreover, the Respondents have successfully established a breach of their constitutionally protected right to private and family life requiring prompt remediation by the Appellants, something, which, as we have set out above, they have so far failed to do.

14. We think too that there is force in the Respondents' submission that the Appellants' failure to accept the inevitable has resulted in unnecessary, additional, costs.

How the Court should decide costs in the present case

The general approach

15. As both parties accept, the rule that costs follow the event, albeit stated in firm terms, is only the starting point. The Court is required to consider all the circumstances of the case (as the Cayman Islands case of *Campbells v Kurt Josephs GC Cause No. G0161/2018* illustrates).

16. Moreover, a party may be denied all or part of its costs if it has caused a significant increase in the length or cost of the proceedings: *Sagicor General Insurance (Cayman) Limited and Proprietors of Strata Plan No. 151 v Crawford Adjusters (Cayman) Limited and Six Others* [2011] (2) CILR at §12, citing *In Re Elgindata Ltd (No. 2)* [1992] 1 WLR 1207 at §29.

The approach in cases of constitutional challenge

17. *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, was an appeal to the Privy Council from the Supreme Court of Mauritius. It concerned a challenge to the Constitution of Mauritius in respect of the Supreme Court's power to punish for contempt of court. The appellant's appeal to the Privy Council from the decision of the Supreme Court failed. Lord Steyn, giving the judgment of the court, said (page 11):

> "*The appeal is dismissed. Given that the real substance of the appeal concerned important matters of constitutional law, and that bona fide resort to rights under the Constitution ought not to be discouraged, their Lordships make no order as to costs.*"

18. The question of costs in constitutional appeals was considered by the Constitutional Court of South Africa in *Trustees for the time being of the Biowatch Trust v Registrar of Genetic Resources and others* Case CCT 80/08 [2009] ZACC14. It is not necessary to go into the facts. As to the "*general approach…to suits between private parties and the state,*" Sachs J, in a judgment, with which all members of the Court agreed, said (paragraph 21 and following):

> "*[21] In Affordable Medicines [Trust and Others v Minister of Health and Another [2005] ZACC3] this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs…Ngcobo J said the following:*
>
> > *'The award of costs is a matter which is within the discretion of the Court…It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule as where the litigation is frivolous or vexatious. In*

Motsepe v Commissioner of the Inland Revenue this Court articulated the rule as follows:

> *'[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access...''*

....[23] The rationale for this general rule is three-fold. In the first place, it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights...Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the consequences of failure. In this way, responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."

The approach of the European Court of Human Rights

19. Article 41 of the ECHR provides:

> *"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."*

20. The Court has no power to award respondent governments their legal costs should an appellant be unsuccessful.

21. In *Oliari* (2017) 65 EHRR 26, having found no violation in respect of same-sex marriage, but a violation in respect of Italy's failure to provide legal recognition of an equivalent institution, the Court ordered the Italian Government to pay their reasonable costs. The Respondents submit that is similar to the present situation.

Our conclusion

22. We have concluded that to make the sort of order sought by the Appellants would not be appropriate. We say that for the following reasons.

23. First, while in the Court of Appeal the Appellants succeeded in overturning the judgment of the Chief Justice, and in consequence they succeeded in respect of the most substantial issue before the Chief Justice, their conduct of this litigation is open to significant criticism, as we have set out above (see in particular, paragraphs 13 and 14).

24. Second, and of considerable importance, the Respondents were challenging the constitutionality of section 2 of the Marriage Law (2010 Revision), plainly an important matter of constitutional law in the Cayman Islands. As Lord Steyn put it in *Ahnee*, "*bona fide resort to rights under the Constitution ought not to be discouraged*." Why that is so, was in our judgment, persuasively set out by Sachs J in the three aspects he highlighted in paragraph 23 of *Biowatch* (see paragraph 18 above). While not going so far as to express it in terms of a rule, it does seem to us that a bona fide resort to constitutional rights is likely to be an important, possibly decisive, element when the court is exercising its discretion in respect of the appropriate order for costs.

25. No-one in the present case can doubt that the Respondents' constitutional challenge was genuine, not frivolous and of substance. Part of the challenge was unanswerable, namely the failure, promptly, to provide for same-sex partnerships. Part of the challenge, namely in respect of same-sex marriage, while in the end not succeeding, was also self-evidently genuine, not frivolous and of substance. While their challenge was obviously of great importance for the Respondents themselves, it was of considerable, wider, public importance, both for the population of the Cayman Islands and their governance. Those circumstances alone strongly argue against any order for costs being made against the Respondents.

26. We have anxiously considered whether it would be a proper exercise of our discretion to order the Appellants to pay all or some of the costs of the Respondents. We have of course noted the approach of the European Court of Human Rights in *Oliari*. However, we have concluded that

in all the circumstances the just outcome would be to make no order for costs. Accordingly, that is the order we make.

Goldring P

Field, JA

Morrison, JA