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

Judgment

(in Court)

Judicial Review-provisions of the Human Rights Act1981 prohibiting discrimination on basis of sexual orientation – judicial interpretation of 'Services' – whether prior decisions of the court decided per in curium – provision of the Matrimonial Causes Act 1973 regarding void marriages – provisions of the Marriage Act 1944 – Human Rights Act 1981 discrimination on the basis of sexual orientation.

Date of Hearing: 17th – 18th January 2017

Date of Judgment 5th day of May 2017

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

I N D E X

INTRODUCTION

1. This case raises a deeply controversial issue of whether same-sex couples are entitled to marry pursuant to law in Bermuda. Arguments for and against have been raised in public (and no doubt in private) that reflect values and beliefs that Bermudians hold which are informed by cultural, moral and religious norms and which have ascended into the political arena thereby stoking the controversy.

2. The institution of marriage has a long heritage which is deep seated in communities throughout Judeo-Christian countries of the world. This has been conveniently adumbrated by Kennedy J for the majority in the United States Supreme Court decision of *Obergefell Et Al v Hodges* 576 U.S. __(2015):

> "*From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.*
>
> *The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Cha eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by*

Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex."

THE FACTS

3. The facts of this case are relatively simple and straightforward. The Applicants are both male. Each states by affidavit that they met in Canada, the home of the second Applicant, and started dating in 2015. They both love Bermuda, the home of the first Applicant. It is their wish to be married in Bermuda irrespective of their gender as recognition of the feelings that they have for one another.

4. They instructed their attorneys at Pettingill & Co of Hamilton, Bermuda to assist in that regard. Pettingill & Co delivered the requisite Notice of intended marriage to the Registrar General (having responsibility for licencing and contracting civil marriages) tendered a cheque for the appropriate fee and requested that a marriage licence be issued in accordance with the Marriage Act 1944.

5. By written correspondence to Pettingill & Co. dated the 6th and 7th July 2016 the Registrar General (Registrar) refused to issue the licence on the sole basis that the section 13 of the Marriage Act must be read in conjunction with the Matrimonial Causes Act 1974 section 15 (c) the latter of which provides that a marriage is void on the ground that the parties are not respectively male and female.

6. Subsequently, by letter of the 19th July the Registrar withdrew the above mentioned letters in which he had declined to accept the applications, and stated that he would seek the advice of the Attorney General.

7. The Applicants now apply by way of judicial review of the Registrar's refusal to process the marriage application as provided for in section 13 of the Marriage Act. It is their position that such refusal for the reasons given is in breach of the Human Rights Act 1981. The relief that they seek is:

a) an order of mandamus compelling the Registrar to act in accordance with the requirements of the Marriage Act;
b) a declaration that same-sex couples are entitled to be married under the Marriage Act.

THE PARTIES AND INTERVENERS

8. The Applicants have been introduced above. The Respondents are the Registrar General who has responsibility for issuing marriage licences and the authority to contract civil marriage ceremonies pursuant to the Marriage Act 1944. The Attorney General is joined pursuant to section 29 (2) and the Minister of Home Affairs as the Minister with responsibility for the Registry General.

9. The First Intervener the Human Rights Commission (HRC) was joined by Consent Order dated the 17th October, 2016. The Human Rights Commission is set up under the Human Rights Act to administer the Act. It is its position that its view on its own act are important for the court to take into account. The HRC also is interested in the underlying issues as they affect all Bermudians and persons in Bermuda who look to the Human Rights Act and the Constitution for protection.

10. By Order of the court of the 24th October 2016 The Second Intervener Preserve Marriage Bermuda Limited was granted leave to intervene in these proceedings. Preserve Marriage Bermuda Limited (PMBL) is a charitable organization which supports equal opportunities and rights for same-sex couples but which believes that marriage, by definition, involves the pairing of a man and a woman. It is therefore opposed to calls for same-sex marriage. PMBL took a central position in the national debate over same-sex relationships and called for the referendum on the subject which was held on 23 June 2016. Notwithstanding the failure of the referendum PMBL assert in their affidavit evidence that they represent the majority of the population that is against same-sex marriage.

THE POSITION OF THE LITIGANTS IN OUTLINE

11. The Applicants submit that the application before the court is a relatively simple matter of statutory interpretation. That the preamble to the Human Rights Act 1981 perfectly encapsulates the status of the law in Bermuda in considering the fundamental human rights of same-sex couples. Additionally that the Bermuda Constitutional Order 1968 gives protection to religious freedom and allows the secular and the religious to peacefully co-exist.

12. They urge the court to also consider the historic prejudice suffered by homosexuals and same-sex couples and the development of human rights around the world and in Bermuda to address it. One of the central points of the Applicants arguments is that without any specific legislation the Respondents cannot get around the primacy of section 20 of the Human Rights Act.

13. The HRC support the Applicants and agree with their statutory construction arguments. The HRC asserts in affidavits filed on its behalf that societies views on marriage has changed not just over a few hundred years but especially in the last 10 years. In addition, in so far as the relief sought is concerned it asserts that the Human Rights scheme in Bermuda allows the court to re-write the MCA to make it compliant with the HRA. The HRC argues that the Human Rights Scheme in England analysed in cases to which the Respondents turn in support of their submissions is entirely different from that in Bermuda and does not provide the same remedies as are available under the HRA.

14. The Respondents' position is that the Registrar was bound by section 15 of the Matrimonial Causes Act (MCA) to determine that a same-sex marriage would be void. The Respondents contend therefore that the Applicants had no right to a void marriage. They seek to rely on the Official Hansard Report of the Proceedings in Parliament (Hansard) of the 14th June 2013 when the Human Rights Amendment Act was debated in support of their submission that the "sexual orientation" amendment had nothing to do with permitting same-sex marriage. On that basis they contend that the court ought not to interpret that amendment as supportive of same-sex marriage.

15. The Respondents accept that section 5 of the Human Rights Act provides that discrimination can occur where a person is denied the supply of any goods, facilities or services in a number of circumstances. However, one of the Respondents' central propositions is that acts in pursuit of government policy or distinctively governmental functions do not fall within the ambit of 'Services'. They contend that the Registrars functions are not services.

16. PMBL submits that the present Application does not simply seek to extend marriage to same-sex couples but necessarily seeks to re-define the ancient institution of marriage. It is their position that this is not something the Court can or, alternatively, should undertake as in their view such fundamental social questions must be left to the legislature. In outline they assert that the present Application should fail because the HRA applies to the provision of services; the institution of marriage is not a service; the legislative intent behind the HRA was not to permit same-sex marriage; even if the State is in breach of the HRA, the Court does not have the power to provide the relief sought; although the Court can strike-down legislation which breaches the HRA it cannot introduce new laws or, in this case, introduce institutions or facilities which do not presently exist; even if the Court does have such powers, it would not be appropriate to exercise them in this case. They contend that not only is this a prime case where the law should be revised by the legislature only but a Bill seeking to Amend the Matrimonial Causes Act 1974 (MCA) is also currently in progress.

17. I have set out in essence the positions of the litigants in these proceedings. I intend nonetheless the reiterate them or provide expanded submissions on the points where necessary below.

THE LEGISLATION

18. This case does not involves difficult points of law or of statutory interpretation; essentially it involves a consideration of the common law as well as the construction of the section 24 of the Marriage Act; section 15 (c) of the Matrimonial Causes Act and an analysis of sections 2 (2), 5, 29 (1), 30B and 31 of the HRA along with consideration of the Human Rights Amendment Act 2016.

PRELIMINARY ISSUE

19. Before considering the main issues raised by this application, a preliminary issue arises as to whether or not Hansard can be referred to by the court as an aid to construction of the Human Rights Amendment Act 1981.

20. In 2013 The HRA was amended via the Human Rights Amendment Act to include 'sexual orientation' as a prohibited ground of discrimination. Section 2(2) of the Human Rights Act 1981 (for our purposes) as amended therefore prohibits discrimination on the basis of race, place of origin, colour, ethnic or national origins, sex or sexual orientation, marital status, disability, family status, religion, beliefs, political opinions and criminal record (with stated exceptions).

21. The Applicants' position, fully supported by HRC, is that the refusal by the Registrar General (Registrar) to process their application for a marriage licence, inter alia, amounts to discrimination on the basis of their sexual orientation.

22. The Respondents and PMBL argue that the amendment had nothing to do with marriage and therefore was not intended to confer upon a same-sex couple the right to marry. They further contend that in seeking to determine the mischief which the amendment was addressing, that is the legislative purpose, it would be beneficial to the court to resort to Hansard to ascertain the objective of the amendment.

23. The Respondents rely on *Presidential Insurance Company Ltd v St Hill* [2013] 3 LRC a Privy Council decision in a case from Trinidad and Tobago, in support of their contention that the rigid application of the rule established by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 has been relaxed in relation to a court resorting to Parliamentary material to determine the legislative purpose.

24. In *Pepper v Hart* Lord Browne-Wilkinson established the parameters within which reference could be made to Parliamentary materials. He set out conditions that show that such could be resorted to on very limited grounds. He said:

> *"I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear. Further than this, I would not at present go."*

25. In *Presidential Insurance Company Ltd v St Hill ("Presidential Insurance")* Lord Mance delivering the judgment of the Board stated that where the textual changes to an act do not make clear the purpose of the amendments it is permissible as a first step to look at Hansard to try to identify the mischief at which the amendment was aimed and its objective setting. The Respondents also rely on Bennion on Statutory Interpretation page 567 wherein the author expresses the opinion: impressed by *Presidential Insurance "it appears, therefore, that the Judicial Committee would allow regard to Parliamentary material wherever to do so would throw light on the mischief, irrespective of Pepper v Hart."*

26. The HRC submits that it is clear that the three qualifying requirements remain relevant and are consecutive criteria and if the legislation is not "ambiguous or obscure, or leads to an absurdity" then no reference should be made to Parliamentary materials, for the purposes of interpreting the legislation. They submit that that is the case here that the Human Rights Amendment Act is not ambiguous on this point and so no reference to Parliamentary material should be permitted for the purpose of interpreting the statute, as the Respondents purport the court should do.

27. It is trite law that a primary rule of statutory interpretation is that resort should first be had to the plain, ordinary and literal meaning of the wording of the text. Bearing that in mind I do not think that the 2013 amendment to the HRA to include "sexual orientation" to the prohibited grounds of discrimination can admit of any other meaning than what is clear on the face of the actual text. The amendment had to do with the prohibition on discrimination. As such it served the overall

objective of the HRA, to protect the human rights of persons in private relationships as well as against incursions into their rights by the illegitimate exercise of legislative or governmental power. It serves the additional aim of providing to protected groups of persons a means of redress when they have been discriminated against in one or more ways contrary to the specified prohibited grounds.

28. I can conclude therefore that the Amendment Act had to do with the discriminatory manner in which persons had been treated historically based on their sexual orientation. It had nothing to do with same-sex marriage. To the latter extent the Respondent is correct; however I reject the Respondents' contention that the Amendment Act had a wider purpose. The wider purpose contended for would have been contrary to the very purpose of the HRA.

29. However if, which I do not believe, I am wrong on the point, and considering the importance of the application I have reviewed those parts of Hansard of the 14th June referred to by counsel for the Respondent and the HRC, which are abstracted from the whole report contained in the affidavit of Majiedah (Rosie) Azar filed on behalf of the Respondents.

30. The Respondents assert that the purpose of the amendment to the Human Rights Act to include sexual orientation was not to provide for same-sex marriage, and as a consequence the court should not interpret the amendment as such as it is the duty of the court to accept the purpose decided on by Parliament whether the court disagrees with it or considers it to be unjust. For this statement of principle the Respondents rely on Bennion on Statutory Interpretation page 863. I take no issue with the stated principle. However I do not believe that it applies in support of the Respondents' position.

31. PMBL argue that the statements of the government Ministers that "sexual orientation" in the Human Rights Amendment Act has nothing to do with marriage supports the conclusion that marriage is not within the scope of the HRA.

32. Without repeating here all of the comments made by various members of the House of Parliament during the debate on the Human Rights Amendment Bill I am able to make the

following observations. Similar to the observations of Lord Mance in *Presidential Insurance*, I have had considerable difficulty in extracting any clear message from the passages relied on by counsel as to the aim or scope of what was intended to be achieved by the amendment apart from what its clear words import into the act.

33. It is true that the sponsor of the amendment Minister Wayne Scott MP said at page 1352:

> *"there has been much talk and speculation through the community that the addition of a protection against discrimination based on sexual orientation is a slippery slope which will eventually lead to same-sex marriage. I wish to state emphatically that the changes to the act being debated today have nothing to do with same-sex marriage."*

34. He went on to speak of Government not condoning same-sex marriage. The Attorney General (at the time) Mr Pettingill at page 1412 did not support excluding the Matrimonial Causes Act 1974 from the application of the amendment. The Attorney General went on to say that such exclusion would be redundant as the Matrimonial Causes Act sets out effectively that a marriage must be between a man and a woman.

35. The HRC argues that while the 2013 amendment debate was not about same-sex marriage members of Parliament were well aware that the Amendment Act could lead to same-sex marriage in the future or at least a challenge in the Courts in support of the same.

36. Wayne Furbert MP at page 1372 stated that discrimination against same-sex marriage is discrimination. He went on to observe that there is a possibility that the legislation gives individuals the right to move to same-sex marriage. He proposed an amendment to the Bill that would make it clear that no provisions to the Matrimonial Causes would be voided by the amendment. His proposal was defeated.

37. Mr Pettingill at page 1412 speaking of the need to use the term "sexual orientation" and not "gay rights" cautioned his honourable friends:

> *"…we are trying to impose into the Human Rights Act a position relating to section 15 (c) …of the Matrimonial Causes Act. "Those laws are there and maybe as has happened in other jurisdictions the day will come when that becomes an issue. Maybe it has to be tested out. Maybe somebody has to bring that challenge into the courts."*

38. Wayne Furbert purposed an amendment to the Bill to exclude the Matrimonial Causes Act 1974 (MCA) from the reach of discrimination on the basis of sexual orientation. Mr Derrick Burgess MP at page 1413 said, in relation to the Wayne Furbert (failed) proposed Amendment:

> *"I support the amendment because if the Bill, as the Bill stands now, was challenged in a court of law I would think that the judge would make this ruling based on the Human Rights Act and not the Matrimonial [Causes] Act…"*

39. Mr Walton Brown MP commented at page 1413 on the proposed Amendment that:

> *"My concern is that I think there has been a level of hypocrisy permeating a large part of this, mostly, very healthy debate. But we cannot talk about giving rights to people who are currently marginalised, who do not have equal rights, and yet at the same time say we are going to put a cap on the extent to which those rights can be realised."*

40. Ms Kim Wilson MP commented at page 1415 that she was concerned that the Government stated, in relation to the argument that the HRA 2013 "main" Amendment Act was not concerned directly with same-sex marriage, that this was being couched as "*We are not talking about that now*". Her concern was that Parliament could be talking about that on a later day. Ms Wilson recognized that:

> *"If a case was taken to the Supreme Court, we ultimately know that it would be a matter for the judge to determine whether or not the provisions in the Matrimonial Causes Act 1974 trump, or supersede, the provisions of the 14th of June 2013 amendments to the Human Rights Act. That would be a matter for the judiciary."*

41. Minister Shawn Crockwell MP stated at page 1417, in relation to his refusal to accept the Furbert proposed Amendment:

> *"I certainly will not support preventing the development of justice in this country. And so whether it is a legal technicality or a legal argument, I believe that we cannot, as a responsible Government, cap the fullness of these rights."*

42. The HRC argue that these excerpts from Hansard show that it was always accepted by Parliament that the 2013 Amendment Act might lead a court to conclude that same-sex marriage was permissible, even if the Amendment Act was not about same-sex marriage directly, but was dealing with all forms of discrimination based on sexual orientation generally.

43. Reading the excerpts from the debate, demonstrates to me that there were no clear explanations given by the promoters of the Bill that the purpose and aim of the amendment was to shut out the possibility of same-sex marriage. Indeed the presenter of the Bill Minister Scott and the Justice Minister, the Attorney General were not ad idem about the amendment and its possible impact on the issue of same-sex marriage. In my estimation the Attorney General was doing no more than stating his understanding of marriage law in Bermuda. He was not stating that Parliament intended the issue of same-sex marriage to be outside of the protections of the HRA.

44. There was some suggestion that the Attorney General and or Minister Scott said in Committee something affirming that the Matrimonial Causes Act would not be rendered void by the Amendment Act. However in my view the mischief contended for cannot be ascertained from that because some of the above statements do not support the view that Parliament relied on such

a statement. I am confirmed in my view by the fact that diverse comments were made by members of the Government. These statements are therefore incapable of supporting the Respondent's position.

45. Parenthetically, in their oral submissions HRC expressed the view that no resort should be had to comments made in committee by the Minister of Justice. I disagree. In the *Presidential Insurance* case Lord Mance stated that the Parliamentary material to which he had access included passages from the committee stage in the Senate. By parity of reasoning passages from the committee stage in the House form a part of Parliamentary material available for our purpose.

46. It would be convenient to mention here that Lord Mance paid tribute to Parliamentary Privilege, and expressed the view that he did not intend to offend that by putting excerpts of Hansard in his judgment. I echo Lord Mance's deference to Parliamentary privilege and intend no offence there to by this judgment.

47. I am reminded that Lord Mance went on to state that the criteria of clarity required by *Pepper v Hart* still had to be satisfied when looking at Parliamentary material to determine the general back ground and the mischief which the legislation was addressing. In my view no clear statement on the subject is discernible.

48. I accept the HRC's submission that "the can has been kicked to the court" and that it was always clear to Parliament that a challenge in the Courts could be brought based on the current wording of the HRA. The resort to Hansard in my view does not assist the Respondents or PMBL in their submissions on this point. Accordingly I hereby reject their submission on this preliminary point and hold that there is no evidence that Parliament intended to exclude the Matrimonial Causes Act from the effects of the HRA. The court is not precluded therefore from interpreting discrimination based on sexual orientation as possible support for same-sex marriage.

49. Having settled that matter, I take the position that the submissions of the litigants can be conveniently distilled into three (3) main issues. Under the caption Marriage, whether there is common law definition and or a statutory provision on marriage that constitutes a bar to same-

sex marriage; under Discrimination, whether the Applicants have been discriminated against on the basis of sex and or their sexual orientation; and "Service", whether the Registrar performs a "service" as contemplated by section 5 of the HRA.

50. The HRC were astute in pointing out that if the court decides either of the first two issues in the Applicants favour then that is dispositive of this matter. I agree but for one caveat, which I shall come to in paragraph 99.

MARRIAGE: Whether there is a common law position and or statutory provision on marriage that is a bar to same-sex marriage

51. In the opening paragraphs to this judgment I said that this case raises a deeply controversial issue of whether same-sex couples are entitled to marry pursuant to law in Bermuda. I observed that the institution of marriage has a long heritage which is deep seated in communities throughout Judeo-Christian countries of the world. I further observed that arguments for and against same-sex marriage reflect values and beliefs that Bermudians hold which are informed by cultural, moral and religious norms and which have ascended into the political arena thereby stoking the controversy.

52. The strongly held views of the Parties herein and the supporting and opposing views of communities divided over this subject that is reflected by the comments above can be gleaned from the affidavit of Ms Lisa Reed the Executive Director of the HRC filed here in by the HRC and the affidavit of Dr Melvin Bassett chairman of PMBL filed herein on behalf of PMBL. Each affidavit was accompanied by exhibits the relevant contents of which I shall outline in brief. Counsel urged me to read these affidavits and exhibits. It would neither be practicable or helpful to do more than a brief outline of the respective views presented and in doing this I have tried to give a fair and balanced précis to the material which is voluminous.

53. I start with the exhibit to Dr Melvin Bassett's second affidavit. The extract comes from a book which is entitled "What is Marriage" and is subtitled "Man and Woman: A Defence".[1] The essential claim of the authors is:

> *"There is a distinct form of personal union and corresponding way of life, historically called marriage, whose basic features do not depend on the preferences of individuals or cultures. Marriage is, of its essence, a comprehensive union: a union of will (by consent) and body (by sexual union): inherently ordered to procreation and thus the broad sharing of family life; and calling for permanent and exclusive commitment, whatever the spouses preferences."*
>
> *"Marriages have always been the main and most effective means of rearing healthy, happy, and well-integrated children. The health and order of society depends on rearing of healthy, happy, and well-integrated children."*
>
> *"There can thus be no right for non-marital relationships to be recognized as marriages. There can indeed be much harm, if recognizing them would obscure the shape, and so weaken the special norms, of an institution on which social order depends. So it is not the conferral of benefits on same-sex relationships itself but the redefining marriage in the public mind that bodes ill for the common good. Indeed, societies mindful of this fact need deprive no same-sex-attracted people of practical goods, social equality, or personal fulfillment."*
>
> *"Here, then, is the heart of our argument against redefinition. If the law defines marriage to include same-sex partners, many will come to misunderstand marriage. They will not see it as essentially*

[1] Authored by Sherif Girgis, Ryan T. Anderson and Robert P. Georgen, 2012, Encounter Books

comprehensive, or thus (among other things) as ordered to procreation and family life – but as essentially an emotional union. For reasons to be explained, they will therefore tend not to understand or respect the objective norms of permanence or sexual exclusivity that shape it. Nor, in the end, will they see why the terms of marriage should not depend altogether on the will of the parties…to the extent that marriage is misunderstood; it will be harder to see the point of its norms, to live by them, and to urge them on others. And this, besides making any remaining restrictions on marriage arbitrary, will damage the many cultural and political goods that get the state involved in marriage in the first place."

"If same-sex relationship are recognized as marriages, not only will the norms that keep marriage stable be undermined, but the notion that men and women bring different gifts to parenting will not be reinforced by any civil institution. Redefining marriage would thus soften the social pressures and lower the incentives – already diminished these last few decades – for husbands to stay with their wives and children, or for men and women to marry before having children. All this would harm children's development into happy, productive upright adults."

"If civil marriage is redefined, believing what virtually every human society once believed about marriage – that is a male-female union – will be seen increasingly as a malicious prejudice, to be driven to the margins of culture."

"Before we continue, we should clarify what our argument is not. First, it is in the end not about homosexuality. We do not address the morality of homosexual acts or their heterosexual counterparts. We will show that one can defend the conjugal view of marriage while bracketing this moral question and that the conjugal view can be wholeheartedly embraced

without denigrating same-sex-attracted people, or ignoring their needs, or assuming that their desires could change. After all, the conjugal view is serenely embraced by many thoughtful people who are same-sex attracted. Again, this is fundamentally a debate about what marriage is, not about homosexuality.

Second, our argument makes no appeal to divine revelation or religious authority. We think it right and proper to make religious arguments for or against a marriage policy (or policies on capital punishment, say, or immigration), but we offer no religious arguments here."

54. I will set out now excerpts from the exhibit to Ms Lisa Reed's affidavit. From the textbook "The Development of the Family and Marriage in Europe"[2]

"The Church attempted to control the sexuality of the populace, both inside and outside marriage, in a variety of ways, many of which ran against lay interests and customs. Since intercourse was a sine qua non of marriage, and marriage in turn was a procreative union, it was surrounded with numerous restrictions."

55. From the textbook "Masculinity, Law and the Family"[3]

"…exclusion of homosexuality from marriage is predicated on biological imperative which exclude same sex relations from entry to the institution. Advocates of legal reforms which would enable homosexuals to 'marry' have thus argued that the criteria for establishing a test for validity of a marriage should be based on commitment to a relationship and not matters of biological sex. Other jurisdictions have moved towards this

[2] Jack Goody, Professor of Social Anthropology, Cambridge University.
[3] Richard Collier,

position…Nonetheless this continued exclusion of homosexuals from marrying establishes marriage as an institution for heterosexual sexual activity – a point which is central to understanding the constitution of heterosexuality in law.

This negation of legal recognition of same-sex relationship has been justified in different ways and reveals a complex set of fears and anxieties (Crane 1982).

56. From "Becoming Natural: Exploring the Naturalisation of Marriage"[4]

"According to the work of anthropologist, Jack Goody, the origins of companionate, monogamous marriage in Europe appear to date to the birth and establishment of the Christian Church. He proposes that the reinterpretation of Biblical scriptures and the subsequent separation of Christianity as a sect, led not only to a new system of beliefs but to a necessary drive for the Church to grow and expand; and he argues that economic interests seem a rather more likely motive for many of the changes in the attitudes to marriage and the family which the Christian Church instituted."

"It seems far from coincidental, argues Goody, that, 'the church appears to have condemned the very practices that would have deprived it of property'. Under Christianity concubines became mistresses, their children bastards, adoptees fictional, and the rules of incest were extended beyond consanguineous kin to include affines and spiritual kin as well. As a result of these shifts the Church became an organisation with tremendous wealth, and the companionate monogamous unit came to be established as the only legitimate family."

[4] Jennifer Attride-Stirling, Ph.D.

57. Having set out these views I turn to the question of whether the common law provision on marriage and the Marriage Act by their terms discriminate against same-sex marriage. I start with how marriage is legally defined in Bermuda. The first point to be made is that there is no statutory definition of marriage; counsel have agreed to this assertion and no statute has been produced to the contrary. Secondly, as difficult as it may be to believe, there is no decided case in Bermuda that defines marriage. As will be seen from the following quote, Bermuda acquired the definition from England.

58. The common law definition of marriage is based on the classic formulation of Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) L.R. 1 P.&D. 130 at 133:

> *"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."*

59. The court is bound by this common law definition of marriage and must apply it. It would appear from this that the common law is a bar to same-sex marriage.

60. In Bermuda the formalities for the celebration of a marriage are achieved through the provisions of the Marriage Act 1944. It is to be observed that marriage though freely entered into by the parties, must be undertaken in a public and formal way and once concluded must be registered.

61. The formalization of the marriage ceremony is contained in several sections of the Marriage Act. Section 6 of the Marriage Act provides that the Registrar General is the Registrar of marriages. Section 9 (b) provides for a marriage to be contracted before the Registrar as opposed to subsection (c) which provides for a marriage to be celebrated by a Marriage Officer. Notice of Intended Marriage ("the notice") (in the requisite form) is required by section 10. Section 13 (1) provides for the notice of intended marriage to be entered into the Marriage Notice Book, and specifies the period during which the notice is to be prominently displayed in the Registry and

(2) requires the Registrar to advertise the Notice once in two newspapers in circulation in Bermuda.

62. There is a statutory provision touching directly upon the validity of marriage contained in section 15 of the Matrimonial Causes Act 1974. Section 15 (c) is the section referred to by the Registrar in his letter refusing to process the marriage Notice. Section 15 specifies the grounds on which a marriage is void. Section 15 (c) provides that a marriage is void if the parties are not respectively male and female:

> *"15 A marriage celebrated after the 31 December 1974 shall be void on the following grounds only, that is to say –*
>
> *(a) that it is not a valid marriage under the Marriage Act 1944;*
> *(b) that at the time of the marriage either party to the marriage was already lawfully married;*
> *(c) <u>that the parties are not respectively male and female</u>."*
>
> [Emphasis added]

63. In light of these provisions, can it be said, as the Applicants submit, that having complied with the provisions of the Marriage Act to the extent required of them, that the Registrar had no discretion to refuse to process their Notice of Intended Marriage?

64. Section 24 of the Marriage Act provides that the Registrar shall not permit any marriage to be contracted before him if he knows or has reason to believe that there is any lawful impediment to the marriage. The statutory provisions in the Marriage Act that would render a Marriage void are set out in section 28. None of those prohibited matters concern an application for marriage between persons of the same sex.

65. One prominent point to be observed in the provisions of the Marriage Act is that the neutral term "party" to the marriage is used throughout and there is no mention of a gender identifier in the

Act, that is, except for section 23 (4) in respect to the celebration of marriage by a Marriage Officer[5] and section 24 (1) (b) in respect to a contracted marriage before the Registrar.

66. Section 23 (4) provides:

> *"Unless the marriage ceremony includes an exhortation to the parties to the marriage that if either of them knows any impediment why they should not lawfully be married he or she shall then confess it, or to the like effect, each of the parties shall during the course of the celebration and in the presence of the witnesses make the following declaration: "I do solemnly declare that I do not know of any lawful impediment why I [A.B.] should not be joined in matrimony to [C.D.] here present;" and unless the ceremony includes an assent by the intended husband that he takes the intended wife to be his wedded wife, and an assent by the intended wife that she takes the intended husband to be her wedded husband, 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 lawful wedded wife [or husband]".*

67. In similar vein gender identifiers are used in section 24 (1) (b) which provides:

> *"the Registrar on the delivery to him of the certificate or special licence as aforesaid shall enquire of the parties whether they are desirous of becoming man and wife, and if and when the parties answer in the affirmative he shall address them as follows: "Do you or either of you*

[5]Section 3 "Marriage Officer" means a minister who by virtue of this Act, and subject thereto, is enabled to celebrate marriages in Bermuda. Interpretation section: "minister" means a person who is a clergyman, priest or minister of a Christian body; or who, in the case of a Christian body which by reason of its tenets has no clergyman, priest or minister, is an officer, elder or member of that Christian body, and who is authorized by or under the rules and usages of the Christian body to which he belongs to celebrate marriages according to its rites and ceremonies.

know of any lawful impediment why you should not be joined together in matrimony?" Each of the parties shall then declare in the presence of the witnesses "I do solemnly declare that I do not know of any lawful impediment why I [A.B.] should not be joined in matrimony to [C.D.] here present." 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 [or husband]."

68. On the facts of this case the Applicants were applying for a contracted marriage before the Registrar. The Registrar used section 15 (c) of the Matrimonial Causes Act as the reason for his belief that the marriage would be void. The Applicants submit that the provisions of the MCA do not apply universally but only where an action[6] has been commenced in accordance with the Matrimonial Causes Rules 1974 with respect to divorce, nullity of marriage or judicial separation. They further rely on the precise language of section 15 of the MCA in making the point that it contains limited grounds on which a marriage may be declared void. They argue therefore that the Registrar's reference to section 13 of the Marriage Act (marriage book and public notice) as having to be read with section 15(c) is misguided.

69. Notwithstanding that submission and whatever else may be said of the propriety of the Registrar making reference to the Matrimonial Causes Act section 15 (c), it is clear that that section provides a strong indication that Parliament was at that time cognizant of the common law position on marriage as being between a man and a woman. The fact that the Registrar, pursuant to section 24 of the Marriage Act, would be required to enquire into the issue of consent by asking if the parties were desirous of becoming "man and wife" and parties to the marriage would be required to acknowledge to the witnesses that each party takes the other to be his "wife" or her "husband" (as the case may be) would no doubt have alerted him to the common law impediment without any reference to section 15 (c) of the MCA. There is no scope within the terms of the Act for each party to the marriage to be referred to as wife or each to be referred

[6] As defined in the Supreme Court Act 1905

to as husband. The Registrar has no discretion to change the language employed by section 24(1)(b).

70. For these reason I am of the view that in so far as void marriages are concerned, where section 28 of the Marriage Act states "Without prejudice to the effect of any other provision of law under which marriage is void…", the section engages the common law definition of marriage. By that definition, since marriage is the voluntary union of one man and one woman, a same-sex marriage would be void.

71. In light of this interpretation it would appear to me that both the Marriage Act and the MCA are a statutory reflection of the common law impediment to same-sex marriage. Looked at in this way the Registrar does not appear to have acted irrationally by refusing to process the Notice. By acting as he did he avoided committing the offence of accepting a notice of intended marriage contrary to section 33 of the Marriage Act, the penalty for which is provided for in the section and includes a term of imprisonment.

72. This view however is not dispositive of the issue whether a same-sex marriage is legally available in Bermuda today. I must now scrutinise the common law definition of marriage and its applicability to the Marriage Act and section 15 of the MCA through the prism of the HRA.

73. An appraisal of the rights and values in the HRA necessarily involves the court appreciating that this important legislation resulted from Parliament recognising the changing attitudes of societies internationally reflected in the leading international Human Rights instruments, and in particular in Bermudian society toward, inter alia, family, marriage and interpersonal relationships that have occurred since at least the historic advent of Christian marriage up to recent times. Note my reference above to supporting affidavit materials indicating the dividing line between the Applicants and PMBL concerning influences over the history of marriage.

74. This change in societal attitudes is common ground; it is aptly reflected in the outline provided by PMBL:

> *"In recent years, social attitudes towards homosexuality and same-sex coupling have changed dramatically in many parts of the world. A number of countries have legislated to allow for same-sex couples to formalize their relationships through either civil unions (having equal status as marriage for legal purposes) or by extending the pre-existing institution of marriage. This is however a very recent phenomenon. The first country to introduce same-sex civil unions was Denmark in 1989. In the UK, the Civil Partnership Act 2004 came in to force on 5 December 2004. This was followed by the Marriage (Same Sex Couples) Act 2013 which came into force on 13 March 2014."*

75. This recognition by PMBL of changing societal attitudes can be compared to a more strident statement by the Applicants which include a call for the court to assess Human Rights as they relate to the historic unfair discrimination against same-sex coupling. In their view, they stated:

> *"Many Modern societies, including Bermuda, have matriculated through what now may be viewed as archaic times. It is respectfully submitted that it is time for the courts, fully armed with the legal precedent of the modern Universal Declaration [of] Human Rights, to write the final chapter in the protection of the rights of gay people. And it is submitted that that chapter, cannot and must not, amount to allowing gay people, by direct analogy to the Civil Rights struggle, to ride on the bus but have to sit at the back. The time has come for the Court to ensure the rights, freedoms and dignity of a minority are safeguarded… equal rights, equal freedoms, equal opportunity, equal privilege…and equal justice."*

76. The preamble to the HRA reveals that its purpose is to give domestic law effect to international human rights conventions and to promote and protect the fundamental rights and freedoms enshrined in the Bermuda Constitution Order (the Constitution). It asserts:

> ""*WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the World and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations:*
>
> *AND WHEREAS the European Convention on Human Rights applies to Bermuda:*
>
> *AND WHERAS the Constitution of Bermuda enshrines the fundamental rights and freedoms of every person whatsoever his race, place of origin, political opinions, color, creed or sex, but subject to respect for the rights and freedom of others and for the public interest:*
>
> *AND WHEREAS these rights and freedoms have been confirmed by a number of enactments of the Legislature:*
>
> *AND WHEREAS it is expedient to make better provision to affirm these rights and freedoms and to protect the rights of all members of the Community-"*

77. Notwithstanding PMBL's recognition of the dramatic changes in social attitudes towards and same-sex coupling their first position in regard to the HRA is that there is no scope under section 29 of the HRA to alter the common law by declaring it inoperative. They argue further that since the Marriage Act is undergirded by the common law, if it was declared inoperative under either section 29 or 30 of the HRA the common law position would prevail and continue to constitute an impediment to same-sex marriage toward homosexuality.

78. The HRA has quasi–constitutional status. The full meaning and effect has been conveniently set out by Kawaley CJ in his seminal judgment *Bermuda Bred Company v Minister of Home Affairs*

and the Attorney General [2005] Bda LR 106 @ page 8 (herein after referred to as 'Bermuda Bred'):

> *"Thus while the rights protected by the HRA do not enjoy quite as elevated a status as the fundamental rights and freedoms provisions of the Constitution, Parliament has clearly conferred on this statute quasi-constitutional status. Accordingly, the guidance famously given by the Judicial Committee of the Privy Council in Minister of Home Affairs-v Fisher[1980] AC 319 can, perhaps in very slightly diluted form, direct the way human rights protected by the HRA are construed. Lord Wilberforce (at page 338) crucially stated as follows:*
>
> > "*Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual' It is known that this chapter [,] as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the Nations' Universal Declaration of Human Rights of 1948. <u>These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to</u>...*" [Emphasis added]

Bennion cites with approval the following statement by Vancise JA in Canadian Odeon Theatres Ltd-v-Saskatchewan Human Rights Commission and Huck [1985] 3WWR 717 at 735, which I adopt:

> "*…a statute which guarantees fundamental rights and freedoms and which prohibits discrimination to ensure the obtainment of human dignity should be given the widest interpretation possible.*"

79. I accept the above guidance on the distinctive rules governing the interpretation of human rights provisions and in particular the HRA. The HRA should be given a broad interpretation. Bearing that in mind the question arises does section 29 of the HRA apply to the common law? The powers of the Supreme Court for present purposes are reflected in sections 29 and 30B of HRA.

80. Section 29 provides:

> *"(1) In any proceedings before the Supreme Court under this Act or otherwise it may declare <u>any provision of law</u> 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.*
>
> *(2)The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions.*" [emphasis added]

81. It is beyond peradventure that section 30B of the HRA constitutes a primacy clause. The primacy clause, section 30B provides as follows:

> "*(1)Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the*

statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.

(a) the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act; or

(b) the statutory provisions listed in Schedule 2 as a statutory provision that is to have effect notwithstanding this Act. (2)Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."

82. The Respondents, who include the Attorney General have not specifically joined PMBL in its contention that section 29 does not apply to the common law. PMBL did not produce any local or comparative English or Commonwealth authority to support their contention. Looking at the clear wording of section 29, and as a matter of simple logic, "<u>any provision of law</u>" would appear to me to encompass the common law. The term "provision of law" is defined by section 2 of the Interpretation Act 1951:

"<u>provision of law" means</u> <u>any provision of law</u> which has effect for the time being in Bermuda, <u>including</u> any statutory provision<u>, any provision of the common law,</u> any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative". (emphasis added)

83. In *Bermuda Bred* the Chief Justice in his analysis of section 29 and section 30B described section 29 as the more "powerful" of the closely connected provisions providing "vitality" to section 30B. He was making reference to the power under section 29 to declare an offending provision of the law to be inoperative.

84. I would add that section 29 is also powerful because it has a more generous ambit than section 30B. Unlike section 30B which strictly applies to statutory provisions, section 29 encompasses

constitutional law, the common law, any right or power which may be exercised by virtue of the Royal Prerogative and in my view, (possibly) regulations promulgated by the executive branch of government.

85. It would appear to me that if I am correct in this analysis of section 29 of the HRA the court could declare the common law provision on marriage to be inoperative to the extent that it authorizes or requires marriage to be between a man and a woman. There is of course no case cited to the court that contains an express declaration that the common law on marriage operates notwithstanding the HRA. One can certainly appreciate that such a provision is not contemplated by the common law on marriage, it having preceded the HRA. In point of fact the common law definition of marriage has not been developed at all in Bermuda to meet the changing social landscape.

86. By parity of reasoning section 24 (b) of the Marriage Act and section 15 (c) of the MCA are founded on the common law provision on marriage. When section 29 is read with section 30B, the aforementioned sections being statutory provisions, neither of which contain a primacy clause, could also be declared to be inoperative. Of course that would be dependent upon whether it can be shown that the sections offend one of the prohibited grounds of discrimination under section 2 (2)

87. I find confirmation of my view on the common law provision on marriage and its related Marriage Act provisions in a decision of the Constitutional Court of South Africa. South Africa is a commonwealth jurisdiction. While the authority of a decision of the Constitutional Court of South Africa does not carry the persuasive authority of a House of Lords decision, and is not binding on Bermuda's courts as a decision of the Privy Council would be, in the absence of such authority I find the case to be most relevant and instructive.

88. In *Minister of Home Affairs and Another v Fourie and Another* (2005) ZACC 19 the Applicants wanted to get married. There was one impediment, they were both women. In South Africa neither the common law nor statute provide for any legal mechanism in terms of which Fourie

and her same-sex partner could marry. The common law definition of marriage in South Africa, "a union of one man and one woman", as in Bermuda, made marriage only available to heterosexual couples. Further section 30 (1) of their Marriage Act contained a formula similar to our section 24, referring to "wife" and "husband".

89. Sachs J writing for the majority held that the common law and section 30(1) of their Marriage Act were inconsistent with certain specified provisions of the Constitution. Under the South African Constitution the Court had power to declare any law inconsistent with the Constitution invalid to that extent. I find this case relevant and instructive because of the parallels between Bermuda and South Africa in the common law definition of marriage and in the statutory provision of Marriage.

90. In the circumstances the weak resistance offered by PMBL to the court referring to this case is unsustainable. In any event PMBL went on to rely on the case, with the Respondents' support, in so far as their submissions relate to remedies. They preferred the remedy chosen by Sachs J.

91. In the premises the common law provision on marriage, the Marriage Act section 24, (1) (b) and the MCA section 15 (c) are a bar to same-sex marriage.

DISCRIMINATION: **Whether the Applicants have been discriminated against on the basis of their sexual orientation**

92. The common law definition of marriage excludes same-sex couples on one hand but includes heterosexual couples on the other. It appears on its face therefore that the exclusion denies the equal benefit of marriage law to the Applicants. How do we evaluate this exclusion? By virtue of section 2 (2) of the HRA such exclusion may amount to discrimination. That section provides:

> *"For the purposes of this Act a person shall be deemed to discriminate against*
> *another person—*

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—

(i) of his race, place of origin, colour, or ethnic or national origins;

(ii) of his sex or sexual orientation;

(iii) of his marital status;

(iiiA) of his disability;

(iv) of his family status;

(v) [repealed by 2013 : 18 s. 2]

(vi) of his religion or beliefs or political opinions; or

(vii) of his criminal record, except where there are valid reasons relevant to the nature of the particular offence for which he is convicted that would justify the difference in treatment.

93. Thus it can be seen that section 2 (2) (a) relates to direct discrimination. Section 2 (2) (b) relates to indirect discrimination and has not been included above because no serious submission has been made in that regard, and no submission has been made in reference to the issue of justification.

94. In *A and B v Director of Child and Family Services and the Attorney General* [2015] Bda LR 13 at page 3 Hellman J, on analysing section 2 (2) of the HRA stated that:

"Where direct discrimination is alleged ie discrimination contrary to section 2 (2) (a) of the 1981 Act, the court is required to engage in a factual enquiry as to whether discrimination on a prohibited ground has taken place. If it has, then that is an end of the matter: the discrimination was unlawful."

95. The facts reveal that the Registrar General declined to process the Applicants' Notice, giving as his reason that marriage is between a man and a woman. In so doing he discriminated against the Applicants on the basis of their sexual orientation. By virtue of section 2 (2) (a) of the HRA, that discrimination was unlawful assuming that the conduct of the Registrar fell within the perimeters of the prohibited grounds of discrimination. The substantive provision is the prohibition of discrimination in the provisions of services as provided in section 5(1) of the HRA.

96. Before I leave this topic, bearing in mind the evidence that was set out above taken from the affidavits filed on behalf of the Interveners and bearing in mind the preamble to the HRA recognising the dignity and equal and inalienable rights of all members of the human family it is apt that I turn once more to Sachs J who expresses the stark reality of discrimination directed at same-sex couples where the government has not provided them with equal treatment in marriage laws:

> *'The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples."*

97. I have found specifically that the exclusion by the Registrar of the Applicants' access to Bermuda's marriage laws potentially amounts to unlawful direct discrimination on the basis of

their sexual orientation. More generally, such discrimination in access to marriage, where two same-sex persons would otherwise qualify, would in my view potentially amount to unlawful discrimination in relation to any such person whose sexual orientation is expressed differently from the norm in Bermudian society.

98. Whether or not the discrimination is substantively inconsistent with the HRA depends on an analysis of section 5 of the Act. The Applicants say that on its plain reading of that section the Registrar performs a "service" an interpretation upon which the Applicants rely.

SERVICE: Whether the Registrar performs a "service" as contemplated by section 5 of the HRA.

99. Section 5 of the HRA provides that discrimination can occur where a person is denied the supply of any goods, facilities or services in a number of circumstances. It provides as follows:

> *"(1) No person shall discriminate against any other person due to age or in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.*
>
> *(2) The facilities and services referred to in subsection (1) include, but are not limited to the following namely —*
>
> *access to and use of any place which members of the public are permitted to enter;*
> *accommodation in a hotel, a temporary boarding house or other similar establishment;*

facilities by way of banking or insurance or for grants, loans, credit or finance;
facilities for education, instruction or training;
facilities for entertainment, recreation or refreshment;
facilities for transport or travel;
the services of any business, profession or trade or local or other public authority"

100. The Respondents' submission is that, in so far as this application is concerned, for discrimination to occur under section 5 of the HRA, it must be established that a service was being performed by the Registrar. The Respondents accept that the term "service" was given a generous and purposive interpretation by the Supreme Court in both *A & B* and *Bermuda Bred*. The Respondents contend however that while both cases found that the term "services" should be broadly construed, neither case considered how section 31 of the HRA would apply to said construction.

101. Section 31(1) applies to the Crown. It provisions are:

"(1) This Act applies—
(a) to an act done by a person in the course of service of the Crown—
(i) in a civil capacity in respect of the Government of Bermuda;
(ii) or in a military capacity in Bermuda; or
(b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office,
as it applies to an act done by a private person."

[Emphasis added]

102. It is the Respondents' position that the phrase "as it applies to an act done by a private person" establishes the premise that acts in pursuit of government policy or distinctively governmental functions do not fall within the ambit of "services".

103. For this the Respondents rely on a similar provision found in section 85(1) of the UK *Sex Discrimination Act 1975*. That section was considered in the case of *In Re Amin [1983] 2 AC 818, (Amin)* an immigration case. The Respondent takes comfort in what Lord Fraser of Tullybelton found that section 85 means. He said the section:

> "*applies only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person. It does not mean that the Act is to apply to any act of any kind done on behalf of the Crown by a person holding statutory office."*

104. The Respondents are further confirmed in their view by the holding by Buxton LJ in *Gichura v Home Office and another [2008] ICR 1287* a UK case involving the Disability Discrimination Act 1995. In that case the claimant sought damages for discrimination in the provision of services. Section 64 of the Act provided that the Act also applied to the Crown "as it applies to an act done by a private person. Buxton LJ determined that:

> "…*acts in pursuit of government policy or the performance of distinctively governmental functions do not fall within the ambit of provision of services".*

105. The upshot of the Respondents submission therefore is that in accordance with *Amin* and *Gichura*, the Registrar is carrying out functions that are distinctively governmental functions that do not fall within the ambit of provision of services. That they are outside of acts that can be done by a private person. That the Registrar in carrying out the provisions of the Marriage Act taking into consideration the provision of the Matrimonial Causes Act that a marriage is void if not between a man and woman. PMBL submit that the Registrar is not performing a service because the institution of marriage is not a service.

106. I have problems with the Respondents' contentions. They contend that Kawaley CJ did not consider how section 31 of the HRA would apply when broadly constructed; in my view he did. In support of their main contention they rely on *Amin* a case that Kawaley CJ soundly rejected the majority decision in when deciding *Bermuda Bred*. Lastly, in doing so, the Chief Justice rejected the Defendants' contention, that acts in pursuit of government policy or distinctively governmental functions do not fall within the ambit of "services" as the section should be interpreted broadly and not narrowly.

107. In *Bermuda Bred* the Chief Justice analysed section 31 of the HRA. At paragraph 32 he had this to say:

> *"The HRA (as of April 8, 1993) applies to acts done by Government Ministers and other public officers in the same way that it applies to acts done by private persons. This provision is fortified by section 29, which empowers this Court to declare provisions of other statutes to be "inoperative" to the extent that they are inconsistent with the HRA. In other words, the Act not only binds the Crown but, unless Parliament expressly legislates in terms which exclude the primacy of the HRA (conferred by section 30B as of April 8, 1993), the Crown cannot justify infringing the provisions of the Act by relying on legislative authority conferred by other statutes. All of these provisions were inserted into the HRA after section 5 (2), which subsection has been unchanged since at least 1989.*

108. And at paragraph 34 in reference to several sections of the HRA:

> *"Looked at very broadly and without expressing any concluded view on the position in relation to other sections, there is no obvious basis for contending that particular Government functions are exempted from any of the various other prohibited forms of discrimination by sections in Part II of the HRA apart from section 5. So the wider context of the HRA as a*

whole is generally supportive of the starting assumption that the Crown in its various emanations is intended to be bound by the various prohibitions on discriminatory conduct."

109. And at paragraph 36 regarding section 5:

"So looking at section 5 as part of the broader context of Part II of the HRA, as opposed to in the wider context the Act as a whole, the starting assumption would fairly be that any exceptions to the general prohibitory rule against discrimination would be explicitly spelt out."

110. The application of section 31 (b) to the Crown was fully engaged in this analysis in my view. To my mind the Chief Justice was saying that a specific government function would have to be carved out that is expressly stated to operate notwithstanding the primacy cause which would of course encompass the general applicability of section 5.

111. The Chief Justice evaluated and analysed the decision of the House of Lords in the case of *Amin*. He described its relevance to section 5 (2) of the HRA:

"This was potentially high persuasive authority as the statutory provision under consideration was a provision on which section 5(2) of the HRA was substantially based."

112. Yet the Chief Justice rejected the majority decision and declined to follow it. He disagreed with the applicability of the reasoning of the majority of the court to modern day Bermuda. The majority found that the immigration functions complained of were not a service within section 29 of the UK Sex Discrimination Act 1975. The Chief Justice assessed their reasoning in this way:

"This reasoning, viewed through 21st century lens, seems so restrictive and technical that it turns modern notions of interpreting human rights provisions generously on their head. It seems designed to limit the scope

of the sex discrimination provisions rather than to amplify them. It is difficult to extract the distinction between the direct and indirect supply of services from the relevant statutory language. It is also difficult to see why as a matter of policy Parliament should be deemed to have intended that both individuals and public and private entities who provide direct access to services should be prohibited from discriminating and those who provide indirect services should not."

113. The Chief Justice went on at paragraph 47 to say that he preferred the guidance gleaned from the dissenting judgment of Lord Scarman in *Amin:*

> *"This reasoning is more consonant with a modern approach to interpreting statutory human rights provisions. Lord Scarman's approach has even greater force in the context of construing section 5(2) of the HRA, which provision not only binds the Crown (as did the UK Sex Discrimination Act 1975), but also:*
>
> *(a) has primacy over other legislation;*
> *(b) empowers this Court to declare conflicting statutory provisions to be inoperative; and*
> *(c) forms part of a wider statutory human rights code in which each prohibited form of discrimination is drafted in broad terms and made subject to explicit exceptions or 'carve-out' provisions.*
>
> *These three distinctive factors which are applicable to section 5(2) of the HRA, but which were not applicable to the statutory provision considered by the House of Lords in Amin, are potent indicators of a legislative intent to give the fullest possible effect to the human rights protected."*

114. Thus, the Chief Justice can be seen to have applied a generous and purposive interpretation to section 31 as it relates to the Crown, and to section 5 (2) of the HRA. He found support for his position in *Canada (Attorney-General)-v-Davis* in that it confirmed that the term "services" in a human rights statute should be broadly construed according to the natural and ordinary meaning of the words in their context. Further that a service is provided when something of benefit was being offered to the public. The Chief Justice observed that the decision left open the possibility that purely enforcement action on the facts of individual cases might not be caught by the "services" concept. I am guided by the reasoning of the Chief Justice.

115. In my view the Respondents' reliance on the words "*as it applies to an act done by a private person"* in section 31 (1) as words restricting the applicability of 5 (2) of the HRA *is* too narrow. Most of the acts carried out by the Registrar concerning an application for a marriage certificate are strictly administrative functions and do not differ in quality from acts akin to those performed by licencing authorities. The HRC for example referred to issuance of driving licences or the issuance of lobster fishing licences.

116. I note that the performance of a marriage service is carried out by a marriage officer who by the Marriage Act is a minister of religion. To my mind a minister of religion is a private person. A contracted marriage can be performed by the Captain of a Bermuda registered ship pursuant to the Maritime Marriage Act 1999 sections 3 and 3A and 15[7]. Those provisions show that administrative acts performed under the Maritime Marriage Act 1999 are carried out by the Registrar however the actual marriage service is performed by the Captain of such a ship. The Captain is a private person. I am of the opinion therefore that the above provides adequate indication that "*as it applies to an act done by a private person"* is intended to be construed widely. I reject the Respondents' contention that those words have no applicability to the services performed by the Registrar.

117. PMBL's main contention is that when the Chief Justice decided *Bermuda Bred* he went too far in the broad interpretation of services under the HRA. They contend that the departure from *Amin*

[7] The Maritime Marriage Act was not referred to by counsel.

occurred because the court was not drawn to the highly relevant legal authorities referred to which demonstrate inter alia that firstly even in human rights cases a broad and purposive interpretation of the word 'services' is restricted and does not include pure public functions, and secondly the modern day approach to interpretation of the word "service" is still based on the majority decision in *Amin*, which remain good law in England. Finally they contend that it was never the intention of Parliament for the HRA to extend to matters which are purely functions of the state.

118. I agree with the Applicants that what PMBL contend is that this court should act as a court of appeal in relation to the decision of the Chief Justice in *Bermuda Bred*. It would be wholly inappropriate for this court to do so if in fact that is what is being suggested. The Applicants suggest that disregarding *Bermuda Bred* would also fly in the face of judicial comity. More importantly the Applicants rely on the doctrine of *Stare Decicis* in rejecting PMBL's invitation to the court to rule that *Bermuda Bred* was decided *per incuriam*.

119. In *Young v Bristol Aeroplane Company* [1944] KB 718 Lord Greene M.R. summarised the limited exceptions to the general rule that the Court of Appeal would follow its own decisions. For our purposes, the only relevant exception is where the Court is satisfied that its earlier decision was given *per incuriam*. A decision is given *per incuriam* where it is given in ignorance or forgetfulness of the existence of existing authority: *Huddersfield Police Authority v Watson* [1947] 2 All ER 193 at (196); *Aggio and others v Howard de Walden Estates Ltd* [2007] 3 All ER 910 at [90].

120. As I understand this doctrine, the above authorities support the proposition that it applies to this court as it does the High Court in England. The doctrine is to be observed where a prior decision has been made without reference to specific binding authority already in existence. PMBL and the Respondents rely on *Gichura*. This case was subsequent to *Amin* however it is not an authority binding on this court. Further it does not support the contention relied on. Buxton J observed:

> *"the broad view of what counts in these terms as provision of services is important because it is important that the disability and other discrimination legislation does apply in circumstances which it is natural to think it should apply".*

121. The broad view of the provision of services was exactly what the Chief Justice adopted in *Bermuda Bred.* He rejected the majority decision in *Amin* because of its restrictive and technical view. In the circumstances *Gichura* would not, if my view is correct, have had any effect on the Chief Justice's decision. Having reviewed the other cases relied on by counsel I observe that they do not consider the construction of 'services' as was done in *Amin.* Further, they too do not constitute "existing authority". In the circumstances, it is doubtful that those cases would have caused the Chief Justice a change of direction in *Bermuda Bred* had they been brought to his attention.[8]

122. To close out this point, reference is made to section 18 of the Supreme Court Act where in it is provided that all matters in controversy between parties in a case should be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. If the court were to concede to the submissions of the Respondent and PMBL on this point, there would possibly be no end to litigation as to the issue of what constitutes a "service" under section 5 of the HRA. A triumvirate of decided cases by this court stand to be held to be wrongly decided.

123. First to fall would be *Bermuda Bred.* That would be followed by *A&B* where Hellman J said this of "services":

> "*'Services' are not defined within the 1981 Act. However in Marshall v Deputy Governor [2011] 1 LRC, PC, Lord Phillips, giving the judgment of the Board, accepted at para 15 that section 6 of the 1981 Act, which*

[8] *Savjani v. Inland Revenue Comrs* (1981) QB 458; *Farah v. Comr of Police of Metropolis* (1998) QB 65

prohibits discrimination by employers, must be given an interpretation that is generous and purposive. By parity of reasoning the same approach would apply equally to the other provisions of the 1981 Act, including section 5";

124. In *Bermuda Bred* Kawaley CJ speaking of *A&B* and another case said this:

> "*These highly authoritative pronouncements about the approach to interpreting terms of general application in the HRA to my mind furnish strong support for construing the terms "services" in section 5(2) in a broad rather than a narrow fashion. And in my judgment construing the word as encompassing Immigration services, and potentially the services provided by any other public authority, involves no distortion of the statutory language and does not entail adopting an artificially wide meaning."*

125. As a consequence, by the above referred submission *A&B* would fall due to its influence on the decision in Bermuda *Bred.* The third of the triumvirate of decided cases subject to the Respondents and PMBL' axe is *Leighton Griffith and another v the Minister of Home Affairs et al* [2016] SC (Bda) 62 Civ. In that case the Chief Justice again found support for interpreting human rights in a broad and purposive manner designed to amplify rather than constrict the enjoyment of rights protected by the HRA by reference to his decision in *Bermuda Bred* which he observed had not been found to be wrongly decided.

126. In the circumstances, reason, principle, doctrine and authority having come down on the side of the Applicants, I must decline the invitation of PMBL to hold that *Bermuda Bred* was wrongly decided.

127. 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 to hide behind a technical narrow approach to what a "service" is.

128. The Applicants were seeking to obtain the provision of services by the Registrar by submitting their Notice of Intended Marriage. Therefore the refusal by the Registrar to process the Applicants' Notice of Intended Marriage as required by sections 13 and 14 of the Marriage Act on the basis of their sexual orientation amounted to discrimination contrary to sections 2 (2) (ii) as read with section 5 of the HRA.

CONCLUSION

129. By way of summary I hold that:

i. The common law definition of marriage, that marriage is the voluntary union for life of one man and one woman, and its reflection in the Marriage Act section 24 and the MCA section 15 (c) are inconsistent with the provisions of section 2 (2) (a) (ii) as read with section 5 of the HRA as they constitute deliberate different treatment on the basis of sexual orientation. In so doing the common law discriminates against same-sex couples by excluding them from marriage and more broadly speaking the institution of marriage.

The court examined the common law definition of marriage through the broad scope of the HRA. That scope encompasses and reflects the changing values in the modern democracy that Bermuda is. Those changing values are reflected in decisions that have emanated from the Supreme Court. The courts have struck down legislation that discriminated against a same-sex male couple from adopting a child: *A & B*. Further it struck down immigration legislation that treated a non-Bermudian same-sex partner of a Bermudian differently from a non-Bermudian opposite-sex from a partner of a Bermudian regarding a classification of immigration status: *Bermuda Bred*.

Against the legal, social and cultural back drop of changing attitudes regarding same-sex relationship and sexual orientation it is fair to say that notions such as marriage or the

institution of marriage being predicated upon heterosexual procreation and marriage being the main and most effective means of rearing healthy, happy, and well-adjusted children, to borrow a phrase from the Chief Justice, have been turned on their heads. Their historic and insular perspective as reflected in the common law definition of marriage is out of step with the reality of Bermuda in the 21st century.

ii. The functions that the Registrar carries out under section 13 and 14 of the Marriage Act amount to "services" as provided by section 5 of the HRA.

On the facts of this case the Applicants were discriminated against on the basis of their sexual orientation contrary to section 2 (2) (a) (ii) as read with section 5 of the HRA when the Registrar refused to process their Notice of Intended Marriage as required by sections 13 and 14 of the Marriage Act.

Same-sex couples denied access to marriage laws and entry into the institution of marriage have been denied what the HRC termed a "basket of goods", that is, rights of a spouse contained in numerous enactments of Parliament (if they are to have the right to marry they must of course also assume the various obligations that adhere thereto). Such denial has created a hardship for same-sex couples. Children adopted by same-sex couples can potentially experience hardship by their parents being denied marriage status and them the concomitant family status.

REMEDIES: discussion on the appropriate remedy

130. Having made these findings it only remains for a decision to be made on remedies. The Applicants have applied for two remedies (a) an order of mandamus compelling the Registrar to act in accordance with the requirements of the Marriage Act; and (b) a declaration that same-sex couples are entitled to be married under the Marriage Act.

131. PMBL have strenuously argued that where the state is in breach of the HRA the court cannot introduce new laws to give effect to the HRA. Their alternative argument is that if the court has the power to strike down legislation, this case is a prime case where the law should be revised by

the legislature. Joined by the Respondents they argue further that there is a draft Bill in progress intended for Parliament to address the same-sex marriage issue and the matter should be left to Parliament for that reason. I disagree with these submissions.

132. It is neither the intention nor the purpose of the court to introduce new legislation to give effect to the HRA. There is neither need nor ability in the court to do so. Section 29 of the HRA however empowers the court to declare any provision of law in violation of the prohibitions contained in the HRA to be inoperative. As I have indicated above this includes the common law definition of marriage and statutory provisions reflecting the same. The remedial provisions of the HRA are broad enough to allow for a striking out and or reformulation of certain words. Powers quite distinct from powers available under the Human Rights scheme in England.

133. Parliament has had ample opportunity to re-endorse the common law definition of marriage. It failed, declined or omitted to do so when it passed the Human Rights Act in 1981. There was an attempt made during the debate on the Amendment Act 2013 to carve out the common law definition of marriage from the effect of the HRA, however that attempt failed. The same Member of Parliament who proposed the failed 'carve out' has proposed bringing a Bill back to Parliament. There is no reason in all of the circumstances to await the likelihood of that proposal or a result.

134. The public have had an opportunity to decide on the issue of same-sex marriage and civil unions in a referendum held in 2016; however that referendum failed to reach the appropriate level of voter participation.[9] One can fairly assume, politics aside, that the public was aware of the issues but chose not to engage in the process. For these reasons I disagree that this is the time and or the prime case for marriage law to be revised by the legislature.

[9] The Referendum Act 2012 section 6 (4)

135. The common law is by definition judge made law. As such it is a creature of change. This characteristic is reflected in the statement of McCardie J. in *Prager v Blatspiel, Stamp & Hancock Ltd.*, [1924] 1 KB 566 at 570, [1924All E.R. Rep. 524: [10]

> *"the common law does not remain static. Its very essence is that it is able to grow to meet the expanding needs of society."*

On this basis, I think 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

[10] This authority was not cited by counsel.

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.

DATED the day of 2017.

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Charles-Etta Simmons, PJ