IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL

2017: No.

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; AND

BETWEEN:

PRESERVE MARRIAGE BERMUDA LIMITED

Appellants (Second Intervener below)

and

THE HONOURABLE MAXWELL ARISTON BURGESS J.P.
(as spokesman for and on behalf of the 2nd Appellants)

2nd Appellants (Collectively see Attached List)

-and-

(1) WINSTON GODWIN

(2) GREG DEROCHE

Respondents (Applicants below)

NOTICE OF APPEAL

The Community is a collective of a significant proportion of this society who are aggrieved by the judgment of the LTJ on 5th June 2017. The names of the members of the Community are to be found on the list appended to this document as if they appeared individually in the headnote.

TAKE NOTICE THAT the 2nd Appellants also being dissatisfied –

1. With the judgment and orders of Justice Simmons PJ of the Supreme Court of Bermuda (hereinafter referred to as the (Learned Trial Judge) LTJ) dated the 5th May 2017 granting the order of mandamus and declarations as set out in the judgment at [135-136] to the effect that–

(1) The definition of marriage in the common law was redefined in the judgment of the LTJ to include unions between individuals of the same gender.

(2) The form of words for the contracting of a marriage before the Registrar in s.24(b) of the Marriage Act 1944 be reformulated to include the gender-neutral expression 'spouse'.

(3) The form of words for the contracting of a marriage by a Marriage Officer in s23.(4) of the Marriage Act be reformulated to include the gender-neutral expression 'spouse'.

(4) s.15(c) of the Matrimonial Clauses Act 1974 is inoperative.

(5) the cultural shift caused by the judgment was so offensive to the culture and custom of the significant proportion of the community who, on 24th June 2016, in the non-binding referendum defeated the proposition of introducing same sex unions to the culture of Bermuda and thereby in the judgment eroding the custom of the island with a detrimental effect to the custom so as to offend the beliefs of those who uphold that Marriage as defined in the common law as being between a man and a woman in naturalis.

(6) the 2nd Appellants reserve the right to amend these grounds to add additional grounds that are separate and distinct from those advanced by the Appellants (2nd Intervener.

2. With the whole decision including the reasoning said to justify the said declarations, and in particular the paragraphs identified in paragraph A doth hereby appeal to the Court of Appeal upon the grounds set out in paragraph B, and will at the hearing of the appeal seek the relief set out in paragraph C.

AND THE 2nd APPELLANTS FURTHER STATE that the names and addresses of the persons directly affected by the appeal are those set out in paragraph D

A. PART OF THE DECISION OF THE SUPREME COURT COMPLAINED OF:
The whole decision in which Justice Simmons PJ granted the following orders and declarations:

1. The Order of mandamus in paragraph 135.
2. As to the first declaration –
   Paragraphs [85] – [89], and [129i].
3. As to the second, third and fourth declarations –
   Paragraphs [99] - [128] and [129ii]

A. GROUNDS OF APPEAL

1. As to the first declaration –
   a. The LTJ correctly identified the common law definition of marriage as formulated by Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) L.R. P & D. 130 at 133. She further correctly observed at [59] that the court is bound by this definition.
   b. The LTJ was not entitled to 'develop the common law' as she sought to do at [129i] and [135], to allow marriage between members of the same sex.
   c. Insofar as the common law can be developed by LTJs, the changes must be incremental and should avoid policy matters which are the domain of the Legislature so as to supercede the statutory provision.
   d. Insofar as the LTJ at [132] used s.29 of the Human Rights Act 1981 ("the HRA") to change the common law definition of marriage, this too was impermissible. Marriage is a cultural and legal concept. It is distinct from the process for the certification and legal recognition of marriage under the Marriage Act. Marriage is therefore not a service as defined in s.5 of the HRA and falls entirely outside of the scope of the HRA.
   e. Further or in the alternative, the common law concept of marriage is not a provision of law which 'authorizes or requires the doing of anything

prohibited by this Act'. The powers under s.29 of the HRA cannot be used to strike down a concept.

2. As to the second, third and fourth declarations –
    a. At [99] the LTJ referred to the coverage of the HRA to the 'supply of any goods, facilities or services…'
    b. The LTJ observed at [126] that she was bound to follow the broad definition given to the term 'services' by the Supreme Court in *Bermuda Bred Company v Minister of Home Affairs and the Attorney General* [2005] BdA LR 106. The broad definition of the term 'services' which originates from *Bermuda Bred* and has been carried forward by the Supreme Court is an incorrect interpretation of the HRA which should be corrected by the Court of Appeal.
    c. The correct interpretation of 'services' limits its scope to facilities which could be provided by private individuals and excludes functions of the state.
    d. Alternatively, if the LTJ applied the correct definition of services, she was nonetheless wrong to conclude that marriage before the Registrar was within that definition. There must be a limit to what state functions are services and marriage is outside that.

3. As to the second and third declarations –
    a. The LTJ correctly observed at [132] that s.29 of the HRA empowers the Court 'to declare any provision of law in violation of the prohibitions in the HRA inoperative.' This permits the Court to strike out offending provisions. However it does not permit the Court to rewrite or reformulate any provisions and thereby usurping the function of the legislature.
    b. The LTJ was not therefore entitled to reformulate the common law definition of marriage or the form of words used for the marriage ceremony provided by the Marriage Act.

4. As to the all the declarations generally and the order of mandamus –

a. The exercise of the Court's powers under s.29 of the HRA and s.65 of the Supreme Court Act 1905 are discretionary. It is however inappropriate for the Court to descend into the political arena by making significant changes to the law in matters which involve competing and significant cultural, moral and religious interests and which have far-reaching ramifications to the detriment of the established culture and custom . The Court should not have been engaging with the tasks of reformulating the law and compelling the Registrar to conduct a re-invented form of marriage ceremony.. That is the exclusive role of Parliament.

b. Alternatively, the Court should have stayed its Orders to allow time for Parliament to respond to the Court's findings through legislation.

B. RELIEF SOUGHT FROM THE COURT OF APPEAL

1. An order setting aside the four declarations and the order of mandamus referred to above;

2. Alternatively, a stay of the Court's declarations;

3. An order that the Respondent do pay the Appellant's legal costs incurred in this Appeal;

4. Such further or other relief as this Honourable Court thinks fit;

5. Costs.

C. PERSONS DIRECTLY AFFECTED BY THE APPEAL

1. The Respondents Messrs Godwin and Deroche

2. The Attorney General, on behalf of the Minister of Home Affairs, whose address is

4th Floor, Global House, 43 Church Street, Hamilton 12, Bermuda.

3. The Minister of Home Affairs, whose address is 129 Front Street, Hamilton HM-12, Bermuda.

PHOENIX LAW CHAMBERS
Counsel for the 2nd Appellants Collectively

Dated this 15th day of June 2017

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THE COMMUNITY
2nd Appellants (Collectively see Attached List)

-and-

(1) WINSTON GODWIN

(2) GREG DEROCHE

Respondents (Applicants below)

NOTICE OF APPEAL

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