IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL 88/21

BETWEEN:

(1) TIMOTHY HAYMON

(2) RICHARD SANKAR **PLAINTIFFS**

-and-

(1) DEREK BEEN (in his capacity as the Director of Immigration)

(2) THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS **DEFENDANTS**

Before:	**The Hon. Mr Justice Anthony S. Gruchot**
Appearances:	**Mr Tim Prudhoe together with Mr Yuri Saunders and Mr Lemenko Missick of Stanbrook Prudhoe for the Plaintiffs**
	Mr Ivan Hare KC and Ms Clemar Hippolyte on behalf of The Attorney General's Chambers for the Defendants
Hearing Date:	**26th March 2024**
Venue:	**Court 5, Graceway Plaza, Providenciales.**

JUDGMENT ON COSTS

Introduction

1. I handed down an *ex tempore* judgment in this matter on 1st March 2024 followed by a

written judgment on 12th March 2024.

2. The matter was to be listed to hear counsel as to the form of order and costs however a form of order was sent in by email in a form that was not agreed. As a result I fixed the terms of the Order on 15th March 2024 and sealed the same.

3. The matter was listed to hear counsel as to the issue of costs on 26th March 2024. I reserved the costs decision. This is that decision.

Relief sought and obtained

4. The relief sought was:

    a. A declaration in respect of the First Defendant's refusal on 1st October 2021 of the First Plaintiff's Residence Permit Application (as made on 16th August 2021) a (sic) reflecting his spousal relationship to the Second Plaintiff. Such refusal being:

        i. Based on the stated reasons that a "marriage" is defined elsewhere in the laws of this jurisdiction than the Immigration Ordinance under which the application was made (namely the Marriage Ordinance) as being solely *between a man and a woman*. Also, under the Constitution as defined hereinafter.

        ii. in contravention of the fundamental rights and freedoms of the Plaintiffs in Schedule 2 to the Turks and Caicos Islands Constitution Order 2011 ("the Constitution").

    b. An order under s.21(2) of the Constitution for the amendment of the Marriage Ordinance to the extent that such is necessary for the grant to the First Plaintiff of his Residence Permit Application.

5. I granted 2 declarations namely:

    The First Defendant's refusal on 1st October 2021 to grant the First Plaintiff a residency permit based on the definition of 'spouse' derived from the Marriage Ordinance (Cap. 11.02) and the Constitution (Cap. 1.01) was:

        a. a breach of Section 9 of the Constitution; and

b. a breach of Section 16(3) of the Constitution.

6. I refused the Order sought under Section 21(2).

7. The Plaintiffs seek their costs of the application, Mr Prudhoe submits that whilst accepting that the full relief was not obtained, the judgment was a 'victory' for the Plaintiffs.

8. He referred me to a letter before action, which he submitted set out the relief sought and as such, should have alerted the Defendants to the strength of the claim and the relief sought.

9. I note that the letter was dated 5th October 2021 and stated a deadline for a response as being noon on 8th October 2021. The letter was sent by email time-stamped at 12:36 p.m. The response time was therefore just under 3 working days. Mr Prudhoe submits that the letter was ignored or at least not responded to. Mr Hare KC points out that the receipt of the letter was acknowledged.

10. In that letter, Mr Prudhoe[1] after referring to the Court of Appeal decision of the Cayman Islands in **Day -v- Deputy Registrar of Cayman**[2] Islands, and the introduction there of the Civil Partnership Law 2020, a copy of which was enclosed, states:

> *"The Turks and Caicos Islands legislature has the opportunity to be proactive by way of introduction of equivalent legislation."*

11. In reliance on the above Mr Prudhoe submits that the Plaintiffs did everything that they could do to avoid proceedings.

12. The letter concluded with the ultimatum:

> *"No reminder will be sent. After that date and time proceedings will simply be issued and then served."*

[1] The letter is from the law firm of Prudhoe Caribbean and signed in that style, however, under the signature is Mr Prudhoe's email address and it was sent by email by Mr Prudhoe. It seems reasonable for me to assume he was the author.
[2] CICA No. 9 of 2019

13. The Originating Summons was dated Friday, 8th October 2021 and was filed with the Court by email on 12 October 2021 at 9:40 a.m.

14. Mr Hare KC accepts that there was no substantive response to the letter of 5th October 2021, but submits that the only relevance of that failure would be if the Court took the view that a response could properly have narrowed the issues and thereby have reduced the costs to which the parties were put in litigating the matter.

15. I do not accept that the letter of 5th October 2021 had the intent of being a purposeful letter before action. In the penultimate paragraph, it stated:

> *"In addition to any explanation you may wish to give, please ensure that any response to this Letter Before Action (including any intention to introduce legislation is received by us by* ***noon, Friday 8 October 2021****."* (Emphasis in the original)

16. It is simply not plausible to suggest that this letter was sent with the intention of avoiding litigation. How was the Turks and Caicos Islands Government supposed to have considered the letter, and its position on the issues raised and formed a view on passing legislation on such a sensitive issue in less than 3 days? Proceedings were already drafted by 8th October 2021; the supporting affidavit having been sworn on 7th October 2021.

17. Further, and against the argument that the letter supports a claim for costs, the letter refers to the prohibited degrees of marriage and to the reference to marriage in the Constitution and asserts that "*neither such definitions are a bar to* ***recognition of a valid overseas same-sex marriage***". (My emphasis)

18. The letter continues after referring to the protected rights at sections 9, 11 and 16 of the Constitution:

> *"The combined effect of (at least) the sections of the Constitution is that your decision (per the Refusal Letter) to construe any provisions of the Marriage Ordinance and / or the Constitution as (whether separately, or in combination) constituting a bar to* ***recognition of a valid overseas same-sex marriage*** *in (sic)*

inconsistent with the Constitution in at least the ways stated above." (My emphasis)

19. What is apparent from the above is that what was being sought in that letter was the recognition of an overseas same-sex marriage. The Plaintiffs lost on that issue[3]. Whilst the letter did refer to the legislation that has been passed in the Cayman Islands, and touched upon a suggestion of introducing legislation, that is not, unlike in **Day**[4], the relief that was sought in the matter. In the circumstances, I do not consider that the letter before action is relevant to the issue of costs but I return to this below.

20. Mr Hare KC suggests that the Court could take the view that the issues in this case are of general and public interest and as such both parties should bear their own costs, but he does not push the point. I am cognisant that in **Day**[5], no costs were sought either at 1st instance or on the appeals.

21. Mr Hare KC submits that there should be a very substantial reduction in any award of costs made to reflect three matters:

    a. the limited basis upon which the plaintiffs succeeded;

    b. the limited relief which they have been granted; and

    c. the manner in which the case was advanced.

22. He refers to the List of Common Ground and Issues[6] and submits that the Plaintiffs lost on issues 1 & 2 and were partially successful on 3. He submits that there should be a reduction in the Plaintiffs' costs to something in the region of 30% to 35%.

23. Mr Prudhoe submits that the 2 declarations I gave set up an unanswerable argument that the Plaintiffs have in a large part succeeded. He suggests that if I am minded to make any

[3] Para. 46 of the judgment.
[4] In *(1) Chantelle Day (2) Vickie Bodden Bush -v- (1) The Governor of the Cayman Islands (2) The Deputy Registrar of the Cayman Islands Government General Registry (3) The Attorney General of the Cayman Islands* Civil Cause Nos. 118 & 184 of 2018 (at 1st instance) the Applicants/Petitioners sought alternative relief to be able to enter into a civil union protected by law.
[5] *Ibid.*
[6] Para. 15 of the judgment.

cost reduction, that it be significantly different from 70%.

24. I do not agree with Mr Prudhoe that the Plaintiffs have in all practical respects won. The Plaintiffs have not received what they wanted. There is nothing in the judgment that provides for a grant of a residence permit to the First Plaintiff. The primary relief claimed was an amendment to the Marriage Ordinance. That relief was refused.

Discussion

25. Ord. 62 r.3 provides:

> *"(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*
>
> *(3) If the Court in the exercise of its discretion sees fit to make any order as to the cost of any proceedings, the Court shall order the cost to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

26. In **Straker -v- Tudor Rose (a firm)**[7] Waller LJ gave the following guidance on the starting point of the approach to party and party costs:

> *"First is it appropriate to make an order for costs?*
>
> *Second, if it is, the general rule is that the unsuccessful party will pay the costs of the successful party.*
>
> *Third, identify the successful party*
>
> *Fourth, consider whether there are any reasons for departing from the general rule in whole or in part. If so the court should make clear findings of the factors justifying the departure."*

27. In **Day -v- Day**[8] Ward LJ referred with approval to Chadwick LJ in **Johnsey Estates -v-**

[7] [2007] EWCA Civ 368
[8] [2006] EWCA Civ 415.

Secretary of State for the Environment[9] who stated the applicable principles to be these:

> *"(1) Costs cannot be recovered except under an order of the court;*
>
> *(2) the question whether to make any order as to costs – and, if so, what order – is a matter entrusted to the discretion of the trial judge;*
>
> *(3) the starting point for the exercise of discretion is that costs should follow the event; nevertheless*
>
> *(4) the judge may make different orders for costs in relation to discrete issues – and in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another, and, in that event, may make an order for costs against the party who has been generally successful in the litigation;*
>
> *(5) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue;*
>
> *(6) an appellate court should not interfere with the judge's exercise of discretion merely because he takes the view that it would have exercised that discretion differently."*

28. Mr Prudhoe submits that the task for the Court is the test laid down in **Lipkin Gorman -v- Karpnale Ltd**[10] case as to whether or not the Court can discern a winner in the proceedings. He did not expand upon this submission.

29. In **A L Barnes Ltd -v- Time Talk (UK) Ltd**[11] Longmore LJ set out at para 28 a formulation that the trial judge ought to adopt to determine the identity of the successful party:

> *"In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indicator of success*

[9] [2001] EWCA Civ 535.
[10] See Supreme Court Practice 1999; Note 62/3/5.
[11] [2003] EWCA Civ 402.

and failure."

30. The above approach was adopted by Ward LJ in **Day -v- Day**[12] who stated:

> *"We must ask ourselves whether the primary rule applies in this case – the general rule, that is, that the unsuccessful party will ordinarily be ordered to pay the cost of the successful party unless the court thinks otherwise. The question is, which, if any, of these parties did enjoy success in this litigation? We were referred to a judgment of Lightman J in Bank of Credit and Commerce International SA v Ali (no 3) [1999] NLJ 1734 Vol 149 where he said that:*
>
> > *"For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense.""*

31. In considering the above the learned writers of Cook on Costs[13] say:

> *"The logic of this simple formulation of success is patent. After all, it only answers the first question posed of who was the successful party and engages the general rule. The court then has the task of considering the factors at CPR 44.2(4) and CPR 44.2(5) to determine whether there is a reason to depart from that general rule"*

32. Longmore LJ in **A L Barnes**[14] did qualify his test to the extent that is applied to "*what might be called commercial litigation [where] the disputes were ultimately about money".* I am not bound by the CPR[15] but in my view the above is useful guidance, particularly as this is not a money case.

33. **Medway Primary Care Trust -v- Marcus**[16] was a claim for clinical negligence following the amputation of the plaintiff's left lower leg. Quantum was agreed at

[12] *Supra*.
[13] Lexis Nexis – Part III Chapter 22 at [22.16]
[14] *Supra.*
[15] Civil Procedure Rules of England and Wales. CPR 44.2 – The Court's discretion as to costs.
[16] [2011] EWCA Civ 750.

£525,000.00 before trial but the Plaintiff lost on liability. He was awarded £2,000.00 for pain and suffering for a limited period as a result of an admitted breach of duty to provide pain medication. At 1st instance the Plaintiff was held to be the successful party but the trial judge reduced the costs award by 50%.

34. The majority decision of the Court of Appeal was that the award of £2,000.00 was not a vindication for the plaintiff and "*was scant consolation for the claimant whose only real claim was for the amputation*". The Court went on to order that the respondent should pay the appellant's costs but reduced the award to 75% holding:

> *"In my view*[17]*, there should be a reduction for (a) the fact that the Respondent did succeed to a very small extent; (b) the fact that the First Defendants did not concede liability until a very late stage; and (c) the more significant point that the case that Dr Thom felt a weak pulse on 6 April 2005 (which, given a finding of liability, would predicate that the Respondent's causation case might well have succeeded) was not withdrawn until just before the trial. I do not consider that there should be a reduction because there was no Pt 36 offer, but I do take into account that the Appellants might have written a* Calderbank *letter offering £3,000 plus costs proportionate to that recovery. It remains the fact, however, that the real claim failed and no rational person would have issued the proceedings which were issued to recover only £2,000.*"

35. Jackson LJ gave a dissenting judgment concluding:

> *"The blunt fact is that the Claimant had a good claim for £2,000 and the Defendants were refusing to pay anything. The only way the Claimant could recover the £,2000 due to him was by issuing proceedings and pressing on until the Defendants agreed or were compelled to pay (a) £2,000 damages and (b) costs assessed on the standard basis.*"[18]

36. With respect to the 1st instance costs award he commented:

[17] Sir Anthony May P.
[18] At para. 28.

"The judge decided to reflect the issues on which the Claimant had lost by making a 50% reduction in the recoverable costs. That assessment was undoubtedly a generous one to the Claimant. However, the judge is best placed to make an assessment of this nature… The judge did not reach a decision which was outside the generous ambit of his discretion, even though it was a decision more favourable to the Claimant than I would have reached."[19]

Decision

37. I consider Mr Hare KC's submission that this matter is of general and public interest such that both parties should bear their own costs has some considerable merit, but that outcome was not actively pursued and I was not directed to any authority. Indeed, Mr Hare KC's conclusion was that the Plaintiffs' costs should be reduced to between 30% to 35%, which I take as him conceding the Plaintiffs are entitled to an award of costs. He does not pursue an order for costs in the issues upon which the Plaintiffs did not succeed.

38. The starting point for me is to consider if the Plaintiffs were successful. I am mindful that the primary relief which they sought was a writing down of the Marriage Ordinance such would require the Director of Immigration to grant the First Plaintiff a residence permit. They failed to obtain that. A secondary objective was to have their same-sex overseas marriage recognised in this jurisdiction. They failed on that issue also.

39. They did succeed in obtaining a declaration that the refusal to grant a residence permit to the First Plaintiff was discriminatory based on their sexual orientation and was also a breach of their constitutional right to private and family life. They therefore succeeded in part and it cannot be said that the success is 'scant consolation' in terms of the recovery in **Medway**[20]. As I said at paragraph 91 of the judgment, "*In my judgment, it is beyond peradventure that such a challenge in the TCI*[21] *would have a similar outcome and it is perhaps without doubt that such a challenge is now imminent*."

[19] At para.37.
[20] *Supra.*
[21] For legislation to be enacted that would give same-sex long term committed partners access to a status functionally equivalent to marriage.

40. Accordingly, the starting point in this matter is that the Plaintiffs are entitled to their costs of the action.

41. I therefore now go on to consider if there should be any reduction in the costs. No issue was taken to such a proposition by Mr Prudhoe, only to the amount of the suggested reduction albeit he maintains that the Plaintiffs scored a victory and should be entitled to all of their costs.

42. In exercising my discretion, I keep in mind that the principle is to do justice in all the circumstances of the case.

43. Mr Hare KC urges me to take into consideration the extent to which the Plaintiffs succeeded and the extent of the relief they obtained. The reality is that the declarations made found the claim for damages which is yet to be heard, but do no more in this action.

44. Mr Prudhoe submits:

> *"A goodly portion of the judgment dealt with why the Court felt constrained not to be able to amend any part of the Marriage ordinance, and explains why in robust terms."*

45. I am of the view that there should be a reduction in the amount of recoverable costs on the basis that the Plaintiffs were not successful on a significant part of their claim which is mirrored in the relief obtained. As Mr Prudhoe puts it:

> *"Anybody in similar circumstances as Messrs. Haymon and Sanker would be unsuccessful in an application of this type to the now Director of Immigration.*

46. I am of the view that a reduction of 50% would fairly reflect the outcome.

47. Mr Hare KC also asks that I consider the conduct of the litigation.

48. As I have noted above, I do not consider that the letter before action was a genuine attempt to avoid litigation or to narrow the issues. The failure to engage in purposeful correspondence before the issue of proceedings in a pre-CPR environment does not

disentitle the Plaintiffs to their costs of the action[22]. The foregoing said the Turks and Caicos Islands courts are influenced by the CPR, particularly in respect of pre-litigation correspondence. Indeed, Mr Prudhoe sought to justify his claim for costs in part, based on that letter.

49. Mr Hare KC references the volume of authorities which the Plaintiffs put forward. He submits that the Plaintiffs included some 50+ authorities against 12 put in by the Defendants. He goes on to submit that some of these authorities were not referred to and suggests that if the case had been properly prepared a good number would not have been authorities before the Court. He gives the example of reference to authorities from the European Court of Human Rights where reliance on the same was withdrawn.

50. Further, with respect to conduct, Mr Prudhoe filed a 38-page skeleton argument. The Defendants' skeleton argument was some 18 pages. On 6th May 2022 Aziz J directed that any reply skeleton argument was to be limited to 5 pages. Notwithstanding, the reply skeleton, whilst acknowledging the 5-page restriction at paragraph 6 of the same, extended to 17 pages.

51. Mr Hare KC also highlights the difficulties I faced with the way the Plaintiffs' claim was put as recorded in the judgment[23].

52. I am of the view that costs have been incurred in the way this matter has been presented that could have been avoided. That said, I am of the view to reduce the recoverable costs further would not be doing justice to the success the Plaintiffs have achieved and I am mindful that certain issues are better left to taxation.

53. I, therefore, Order that the Defendants shall pay 50% of the Plaintiffs' costs of the action to date, to be taxed on the standard basis if not agreed.

54. Mr Prudhoe raises a further issue in that as the Plaintiffs have already filed an appeal from my judgment and also the Defendants have indicated their intention to appeal, I deal with

[22] *Goodhart -v- Heytt* (1883) 25 Ch.D. 182.
[23] At paras. 18, 21 to 22, 35 & 40.

the issue of leave to appeal this costs decision.

55. I have not been referred to any substantive decision with respect to costs in this jurisdiction. Additionally, as I have noted above, the issues and relief in this case are somewhat different from the authorities I have cited with respect to the considerations of who has won or lost, the judgment not being one of monetary value. As the matter is already going to the Court of Appeal on the substantive judgment, leave not being required for that element, I do not see that anything is to be achieved by refusing leave to appeal. Accordingly, both parties have leave to appeal this costs decision if so advised.

56. In closing I comment on the letter before action in which Mr Prudhoe states:

> *"As to the general question of costs, you should be aware that as a result of two decisions of the TCI Court in late July in the combined judgment of Justice Simons on 23rd July 2021, conditional fee arrangements between lawyers and clients are now permissible. Those cases are CL 86/2019 in the matter of Regent Grand Management Limited (in liquidation) and see CL 8/2021 Kajeepan Paintamilkavalan.*
>
> *You should be made aware further that if legal proceedings against you are necessary, it is likely that such proceedings will be pursued on the basis of a conditional fee agreement which will provide for the payment of this firm's costs and expenses relevant (sic) to be paid only if our Clients are successful.*"

57. I am of the view that the above-cited cases were potentially decided *per incuriam* and the judgment conflates 'conditional fee agreements', 'contingency fee agreements' and 'third-party litigation funding agreements' together with perhaps a waiver of the indemnity principle. Whether I am correct in that view will require the Court to look at such arrangements further but I do not accept that the combined judgment gave *carte blanche* authority for, or sanctioning of, conditional fee agreements as the above suggests.

58. At paragraph 45 of the judgment, Simons J says:

> *"However, I am restrained by the caution that is quite properly urged upon me*

by Ms. Hippolyte[24] *and Mr. Cadman*[25] *- for general rulemaking and defining boundaries of public policy in this area of the law, the legislature is far better placed than the courts."*

59. In my view the judgment sanctioned the proposed agreements in those 2 particular matters only. Likewise, the authorities referred to, particularly those from the Cayman Islands have sanctioned individual agreements and have not provided for a general rule that such agreements are permissible. No such sanction was given in this case.

8th April 2024

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court

[24] Ms Hippolyte appeared for the defenants/respondents in CL 08/21.
[25] Mr Cadman appeared for the Bar Counsel as *amicus curiae* in CL 86/19.