In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019 No: 369

BETWEEN:

PHILIP AKEROYD

Applicant

And

(1) ATTORNEY GENERAL
(2) TAX COMMISSIONER

Respondents

JUDGMENT

Sections 11 and 12 of the Bermuda Constitution - Constitutional Challenge to Section 3A(3)(b)(iii) of the Land Tax Act 1967 and Sections 47A(2) and 47A(5)(b) of the Stamp Duties Act 1976 on the grounds of unlawful discrimination between Belongers who have Bermudian Status and Belongers without Bermudian Status – Colonial Laws Validity Act 1865

Date of Hearing:	Tuesday 18 February 2020
Date of Judgment:	Monday 06 April 2020

Applicant	Mr. Peter Sanderson (Benedek Lewin Limited)
Respondents	Mr. Norman MacDonald (Attorney General's Chambers)

JUDGMENT of Shade Subair Williams J

Introductory

1. This matter comes before the Court on an Originating Summons seeking declaratory relief that provisions in the Land Tax Act 1967 ("the LTA") and the Stamp Duties Act 1976 ("the SDA") unlawfully discriminate against 'non-Bermudian Belongers' on the grounds of place of origin, contrary to section 12 of the Bermuda Constitution Order 1968 ("the Bermuda Constitution" / "the Constitution"). The Applicant further seeks damages and injunctive relief.

2. The Applicant pleaded that the impugned provisions unlawfully discriminate between, *inter alia*, classes of persons who possess Bermudian status and those who belong to Bermuda but do not possess Bermudian status. On the Applicant's case, section 3A of the LTA and section 47A of the SDA unlawfully exclude the latter from the special land tax and stamp duty exemptions. These concessions are offered only to persons of a particular age group who own and reside in their primary family homestead and who possess Bermudian status. The Applicant says that these provisions are void under the Colonial Laws Validity Act 1865.

3. The Respondent, on the other hand, contends that the Applicant's case is misconceived as there is nothing constitutionally offensive about reserving the benefit of such tax concessions for benefit of the persons who meet the criteria set out in those provisions.

4. Having heard the able arguments of Counsel for both sides, I reserved my judgment which I now provide with the reasons outlined further below.

The Facts

5. In an affidavit sworn by the Applicant on 10 September 2019 he stated the following:

   "*I was born on the 24th December 1949 and am 69 years of age.*

   On the 6th December 2018, I was naturalised as a British Overseas Territories citizen on the direction of the Bermuda Governor, and so belong to Bermuda pursuant to s.11(5) of the Bermuda Constitution. I exhibit at PA-1 a copy of my certificate of naturalisation.

   On the 18th July 2019, I purchased Shoreby House, Newstead Belmont Hills Golf Resort and Spa, 27 Harbour Road, Paget ("Shoreby"). The annual land tax for Shoreby is currently $8,486. Shoreby is currently being renovated, and I intend to take up residence in April 2020.

   If I possessed Bermudian status, I would be entitled to apply for tax to be assessed on a special concessionary basis, pursuant to s.3A of the Land Tax Act 1967, from the tax period commencing 1 July 2020 when I intend to be in occupation. The value of the special

concessions is currently as much as $1,941 per year, and I should be eligible for the full exemption, as Shoreby exceeds the ARV threshold of $45,500.

Furthermore, if I possessed Bermudian status, I would be eligible to apply for a primary family homestead stamp duty exemption for Shoreby pursuant to s. 47A of the Stamp Duties Act 1976, meaning that stamp duty would not be payable on the value of Shoreby in the event of my death.

I verily believe that discriminating against non-Bermudian Belongers in the operation of special concession for land tax, and the primary family homestead stamp duty exemption is unlawful, and I seek relief from the court in respect of both."

6. The Respondents filed evidence from the Assistant Tax Commissioner (Stamp Duty), Mr. Antoine Lightbourne, who deposed that there is no record of an application from Mr. Akeroyd for assessment on a special concessionary basis or for a stamp duty exemption with respect to the Shoreby property.

7. Notwithstanding, Mr. Lightbourne explained that the policy objective of the topical concessions: "*to give relief to Bermudian families who might own homes after years of hard work but could be described as "asset-rich but cash-poor." The intention was to protect such Bermudians from losing their homes if they were unable to pay the taxes due. The concessions were not intended to apply to persons who moved to Bermuda from overseas as such persons were expected to have the financial resources to sustain themselves*".

The Relevant Constitutional Provisions

8. Section 11 confers a general protection of freedom of movement. Section 11(5) of the Constitution deems four classes of people to belong to Bermuda ("Belongers") for the purposes of section 11. The first category is reserved for persons who possess Bermudian status ("status") (see Part III of the Bermuda Immigration and Protection Act 1956 ("the BIPA 1956")) and the second group is described under section 11(5)(b):

"*…a citizen of the United Kingdom and Colonies by virtue of the grant by the Governor of a certificate of naturalization under the British Nationality and Status of Aliens Act 1914 [1914 c. 17] or the British Nationality Act 1948 [1948 c.56]…*"

9. For present purposes, I am not concerned with the remaining two categories of Belongers under section 11(5).

10. Sub-sections (1) and (2) under section 12 of the Constitution safeguard a protection from discriminatory laws and discriminatory performances by a public office or authority:

Protection from discrimination on the grounds of race, etc

12 (1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

11. Sub-section (3) defines "discriminatory" as follows:

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

12. Sub-section (4)(a) of section 12 contains a proviso limiting the application of subsection (1) in respect of revenue, funds, taxes and fees:

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

(a) for the appropriation of revenues or other funds of Bermuda or for the imposition of taxation (including the levying of fees for the grant of licences);

13. The proviso under section 12(4) also imports a '*reasonably justifiable*' test in respect of subsection (1) for the making of laws which are discriminatory. Section 12(4)(d) provides:

(Subsection (1) of this section shall not apply to any law so far as that law makes provision) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any such other description, is reasonably justifiable in a democratic society.

14. Section 12(5) contains another relevant proviso to subsection (1):

"*(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it requires a person to possess Bermudian status or belong to Bermuda for the purposes of section 11 of this Constitution or to possess any other qualification (not being a qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes*."

15. Section 12(6) :

"*(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section*."

The Statutory Provisions under Review

16. Section 3A of the LTA provides:

"***Special concessionary basis***

3A(1) A person may make an application to the Tax Commissioner (on such form as may be provided for the purpose), requesting that, in relation to a valuation unit to which this section applies, tax shall be charged, levied and collected on the special concessionary basis in subsection (4).

(2) As respects any tax period, this section applies to any valuation unit in relation to which the Tax Commissioner is satisfied that the criteria specified in subsection (3) ("the qualifying criteria") are met during any part of that tax period.

(3) The qualifying criteria for a valuation unit are –

(a) that it is a private dwelling; and

(b) that it is actually occupied by an individual who-

(i) is the owner of that unit;

(ii) is sixty-five years of age or over; and

(iii) possesses Bermudian status.

(4) The special concessionary basis is as follows-

(a) where the annual rental value of the valuation unit does not exceed $45,500, no tax shall be charged, levied and collected; and

(b) where the annual rental value of the valuation unit exceeds $45,500, tax shall be arrived at by-

(i) first calculating the amount of the tax falling to be charged, levied and collected on the basis of the unit's full annual rental value; and

(ii) then deducting from that amount the tax falling to be charged, levied and collected on a private dwelling with an annual rental value of $45,500 which is not subject to special concessionary basis in paragraph (a)."

17. Section 47A(1)-(3) of the SDA provides:

*"**Designation of primary family homestead by owner***

47A (1) Stamp duty shall not be charged in respect of the value of any residential property passing on a death (occurring on or after 1 April 2005) of an individual to whom this section applies if his property is designated under this section as his primary family homestead.

(2) This section applies to an individual who owns, or otherwise has an interest in, residential property which is situated in Bermuda and who has Bermudian status.

(3) An individual to whom this section applies (hereinafter the "individual") may make an application to the Tax Commissioner to designate his residential property as his primary family homestead."

The Application and the Issues in Dispute

18. I should firstly point out that neither party raised an issue as to whether the Applicant had standing to bring the application based on Mr. Lightbourne's evidence of the absence of any record of an application from Mr. Akeroyd for assessment on a special concessionary basis under the LTA or for a stamp duty exemption in relation to the Shoreby property.

19. The main thrust of Mr. Sanderson's submissions was that the qualifying criteria under section 3A of the LTA and section 47A of the SDA discriminated against Belongers without status for no reasonably justifiable cause, contrary to section 12(4)(d). However, he sensibly

accepted during his oral submissions that the 'reasonably justifiable' test could not properly be raised or engaged if the Court found that the proviso under section 12(4)(a) applied. This, no doubt, gave flight to Mr. Sanderson's clever attempt to distance the SDA and LTA provisions from the statutory wording under section 12(4)(a).

20. Mr. Sanderson pointed to previous case law of concurrent jurisdiction where discriminatory treatment which disadvantaged Belongers without status fell outside of section 12(4)(a). In *A v Attorney General* [2017] Bda LR 111, per Kawaley CJ (as he then was) the Applicant was of UK origin and was deemed to belong to Bermuda under section 11(5) of the Constitution. He sought declaratory relief that the discriminatory provisions of Part VI of the BIPA 1956, including the term "restricted person" under section 72(1), did not apply to him. The Respondent in that case relied on the proviso under section 12(4)(b) which provides:

"*with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who not belong to Bermuda for the purposes of section 11 of, this Constitution*"

21. Mr. Sanderson directed my attention to paragraph 35 where Kawaley CJ found:

"*And so it seems to me that the formal order that I should grant, subject to hearing Counsel on what the terms of the final order should be as regards section 113(1)(b) and (f) of the Companies Act is to declare that the definition of "Bermudian" is void and of no effect to the extent that it is construed as excluding persons who "belong to Bermuda" for the purposes of section 11(5) of the Bermuda Constitution*."

22. Mr. Sanderson also placed before me an earlier decision from Kawaley CJ in *Williams v Minister for Home Affairs and Attorney General* [2015] Bda LR 67 where the Court was concerned with the proviso under section 12(4)(b) as it was subsequently in *A v Attorney General*. It was for this reason that the Court was concerned with the scope and supremacy of section 11(5) which outlines the meaning of 'belonging to Bermuda'.

23. In the *Williams* case, the Applicant Belonger had been terminated from his employment under the direction of the Department of Immigration in pursuance of section 60 of the BIPA 1956. He sought declaratory relief that he did not require the specific permission of the Minister to engage in employment or business. The Respondents in that case argued that section 60 did not contravene section 11(5) of the Constitution because the Minister and Parliament generally had a constitutional power to regulate employment in Bermuda in such a way.

24. Mr. Sanderson, who represented the Applicant in the *Williams* case, is reported to have argued that section 11 of the Constitution was not confined in its application to cases pertaining to

the freedom of movement. There, he contended that the constitutional provision additionally conferred a right to unrestricted work, notwithstanding the absence of explicit wording to that effect. On this analysis, the section 11 right, which includes a general right to reside in any part of Bermuda, implicitly confers an equally firm right to uninhibited employment.

25. Kawaley CJ had regard to section 1 of the Constitution where various fundamental rights and freedoms are given to every person in Bermuda:

"Fundamental rights and freedoms of the individual

1 Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of law;
(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

26. In giving some judicial interpretation to section 1, Kawaley CJ cited the Court of Appeal's judgment in *Attorney-General v Grape Bay Ltd* [1998] Bda LR 6 where Kempster JA in turn cited Lord Morris in *Oliver v Buttigieg* [1967] 1 AC 115 at 128 (JCPC, Malta):

"… '*It is an introduction to and in a sense a prefatory or explanatory note in regad to the sections which are to follow*'…"

27. The *Williams* case was decided on the proviso under section 11(2)(d) which allows for the passing of any law which imposes restrictions on the movement or residence of a non-Belonger in Bermuda. By necessary implication, such restrictions were not intended to apply to Belongers. The Court therefore came to a conclusion that Belongers who had a constitutional right to take up residence in Bermuda had an implicit and unfettered right to seek employment etc.

28. By extension of the Applicant's proposition that the proviso under section 12(4)(a) of the Constitution does not apply to Belongers without status, Mr. Sanderson pointed to the 'reasonably justifiable' test prescribed under section 12(4)(d).

29. Counsel for both sides relied on the majority decision in *Arorangi Timberland Ltd and others v Minister of the Cook Islands National Superannution Fund* [2016] UKPC 32 where the Privy Council was concerned with provisions under the National Superannuation Act 2000 ("the 2000 Act") of the Cook Islands, a self-governing and independent nation in free association with New Zealand.

30. Under the 2000 Act a National Superannuation Fund was set up to require compulsory percentage-based deductions from employees' salaries. The effect of the impugned provision under section 53 was that expatriate employees privy to employment contracts of not more than three years were entitled to partial reimbursement of the contributions upon their permanent departure from the jurisdiction. In a Court of first instance, the Appellants successfully argued that this was unlawfully discriminatory before the decision was overturned by the Court of Appeal. On further appeal to the Privy Council, Lords Neuberger and Mance delivered the leading majority judgment of the Court. (Lords Clarke and Toulson concurred and Lord Sumption dissented in part.)

31. The Board recognized the legal principle where a Court is required, where possible, to interpret a statute on the presumption of constitutionality. [Paras 29-33]:

"[29] So far as the presumption of constitutionality is concerned, the Court of Appeal said that it had two components. The first was the principle that a court should, if possible, interpret a statute so that it does not conflict with any constitutional limitations- see Observer Publications Ltd v Matthew [2001] UKPC 11… The second component… was that '[t]he constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional'…

[30] The Board has no doubt but that the first component is an important and valid principle of statutory interpretation, and indeed it is included in the Constitution- see art 65. As Lord Cooke said in Observer Publications…legislation should, if possible, be 'read down' so as to comply with constitutional requirements. And, as Lady said more recently, 'in interpreting [statutory] provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them'- Public Service Appeal Board v Maraj [2011] 3 LRC 616 at para [29].

[31] Greater circumspection is required when it comes to the second component. The Board would accept that, save perhaps in extreme circumstances, a statute should be presumed to

be constitutional until it is shown to be otherwise, that (in so far as it is helpful to speak of a burden in such circumstances) the burden is on the party alleging that a statute is unconstitutional and that any court should be circumspect before deciding that a statute is unconstitutional.

[32] However, the Board is not convinced that the second component of the presumption can normally reach any further than this (unless it is no more than the proportionality exercise under a different name). It is true that there are cases where the Board described the burden on a party who alleges that a statute is unconstitutional as 'heavy'. However, where the issue is one of construction, that description is simply an application of the first, uncontroversial, component of the principle, as enunciated, for instance, by Lady Hale in Maraj. And, in so far as the issue of constitutionality turns (as here) on proportionality, this second limb of the presumption normally adds nothing to the ingredients of the proportionality exercise. However, it is right to acknowledge that the notion that there is a heavy burden on a party who alleges a statute is unconstitutional has obvious force where the allegation of unconstitutionality turns on issues of fact- eg the motive of the legislator (as was discussed in Hinds [1976] 1 ALL ER 353 at 369)."

32. Mr. Sanderson pointed to passages from the *Arorangi Timberland* case where the Board rejected the Court of Appeal's approach to proportionality in terms of arbitrariness. The Board instead cited the judgments of Lord Sumption in the United Kingdom Supreme Court case of *Bank Mellet v HM Treasury (No 2)* [2013] UKSC 39. [36]:

"[36] Thus, in his judgment Lord explained that an issue of proportionality-

> *'depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.* '"

33. As highlighted by Mr. MacDonald, the Board continued [38-41]:

"*[38] As to the nature of the issue involved in this case, the 2000 Act was a measure of social policy with significant macro-economic implications and, particularly bearing in mind the specific criticisms advanced by the appellants, with considerable budgetary implications for*

the government (which are anyway engaged, not least because of the tax foregone on contributions to the Scheme). Whether to introduce such a scheme and, if so, what its general terms should be, and in particular whether it should include a Guarantee, Entrenchment and/or early withdrawal rights are, by their very nature, decisions as to which the courts accord the government a generous margin of judgment (or appreciation). When it comes to policy choices of a social and macro-economic nature, the courts should be particularly diffident about interfering, given the nature of the functions, expertise and experience of the judiciary as against the executive or (as in this case) the legislature- see eg R (on the application of Rotherham Metroploitan BC) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6…

[39] So far as the decision-maker is concerned, in this case it was Parliament. The legislature is entitled to a wider margin of judgment than the executive. Unlike a person exercising delegated powers, the legislature has a wider range of options open to it and, as a result of being elected, it enjoys democratic legitimacy and has direct democratic accountability. Further, as a practical matter, it is, normally at any rate, difficult to identify the motives of a legislature, given that different members may have different reasons for voting the way they did, and in relation to a number of Bills, many of the members who vote in favour do not speak.

[40] The constitutional right raised in relation to this issue in the case is the right to property. While this is an important right, every interference with property rights must be assessed on its facts. In this case an employee loses control of the money which he contributes to the Fund, and there is a risk of its diminution or even its total loss. However, this is not a case of actual deprivation of money; it is more a case of enforced long-term investment of money, albeit that the investment is one over which the owner of the money has not only no choice, but also very limited control, either over how the money is invested or when and how he or she can withdraw the eventual proceeds of the investment.

[41]In these circumstances, this case is very much at the lower end of the intensity of review spectrum. The nature of the decision (particularly as the criticisms advanced by the appellants plainly have macro-economic implications), the identity of the decision-maker (the democratically elected legislature) and the nature of the interference with the constitutional right (which, while serious, is relatively mild) justify the argument that any court should be particularly diffident before acceding to the appellants' case on this first issue. While the Court of Appeal was wrong to conclude that arbitrariness was the hurdle which any proportionality challenge had to cross, it is fair to say that any challenge to the constitutionality of the 2000 Act on the grounds alleged by the appellants faces an uphill task, and may not fall very far short of arbitrariness. However, as explained, arbitrariness is an unhelpful test in this context."

34. [Para 54]:

"*…It appears to the Board that it would require an exceptional case before a court could properly hold that a legislative decision on such an issue could be rejected as being disproportionate. Self-evidently, it is very difficult for a judge, who has relatively limited relevant experience and appreciation of the competing demands on the nation's finances, to decide that the conclusion which the legislature reached on such a macro-economic, policy-based issue was unreasonable or disproportionate.*"

35. Mr. Sanderson invited this Court to be guided by the 'fair balance' and 'reasonable foundation' tests endorsed by the European Court of Human Rights in *The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v United Kingdom* (1998) 25 E.H.R.R. 127 in aid of interpreting Article 1 of the First Protocol to the European Convention on Human Rights (Paris, 20.III.1952) ("ECHR"):

"*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

36. However, Mr. MacDonald discouraged this Court from placing an undue reliance on any corresponding ECHR provisions before looking to the provisions of the Bermuda Constitution and our own binding case law, citing *Bas-Serco v. BIU et al* [2003] Bda LR 64 (C.A.)[114].

37. Mr. MacDonald also produced case law from the Supreme Court of Canada in support of his submission that this Court ought to consider whether the Applicant has proved that his inability to get the tax concessions in question amounts to a violation of his human dignity.

38. He pointed to the below passage from the judgment delivered in *Law v Canada (Minister of Human Resources Development* [1999] 1 S.C.R. 497 at 529 para 51 where the Supreme Court was concerned with a widow's complaint that pension legislation discriminated against her age, contrary to section 15 of the Canadian Charter of Rights and Freedoms:

"*It may be said that the purpose of s 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as*

human beings or as members of Canadian society, equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian Society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian Society."

Analysis and Decision

The Question on Standing

39. No point was taken by the Respondents on whether the Applicant has standing to bring this application. I raise the issue of standing on the strength of the Respondent's evidence that there is no record of an application from Mr. Akeroyd for assessment on a special concessionary basis or for a stamp duty exemption with respect to the Shoreby property.

40. However, because the objection was not made and as it seems that any challenge to standing could be swiftly displaced by the filing of an application, I refrain from ruling on this basis.

Whether Section 12(4)(a) applies to Section 3A of the LTA and Section 47A of the SDA

41. The starting point to section 12 of the Constitution is that discriminatory laws are prohibited by operation of section 12(1). This prohibition applies for the benefit of all persons, irrespective of place of origin or whether any of such persons belong to Bermuda.

42. The relevant exception to section 12(1) is stated under the proviso at section 12(4)(a) which allows for the passing of discriminatory laws which govern the '*appropriation of revenues or other funds of Bermuda or for the imposition of taxation (including the levying of fees for the grant of licences)'*.

43. So the issue for resolve is whether the wording under this proviso applies to the LTA and the SDA provisions in question.

44. Section 3A(1) of the LTA provides a statutory basis for whether '*tax shall be charged, levied and collected on the special concessionary basis'*. Otherwise put, section 3A(1) provides a set of criteria which determines whether taxation will be imposed. A law which provides a

statutory position on whether tax will be imposed, whether in the affirmative or in the negative (eg. as a result of a special concession) is nonetheless a law which makes provision for the imposition of taxation.

45. I do not accept Mr. Sanderson's submission that section 12(4)(a) envisages coverage only for laws which state what and when taxes are to be paid as opposed to tax exemptions. Such an unnatural interpretation could only be drawn from wording which expressly excludes application to tax concessions. This is not the case.

46. In my judgment, section 12(4)(a) applies to any law which governs the taking or charging of public income. This is a plain and literal interpretation of section 12(4)(a) which would otherwise arise by 'necessary implication' under subsection (6).

47. Section 12(4)(a) is not simply a limitation on a constitutional protection for all persons in Bermuda. It is also a constitutional power conferred on the Legislator to enact and regulate public revenue and tax laws, unfettered by the subsection (1) prohibition against discriminatory laws.

48. Mr. Sanderson referred this Court to the binding decision of the Privy Council in ***R v Hughes*** [2002] 2 AC 259 at p.277 [35] in support of the established and accepted principle that broad constructions are not given to provisions which introduce exceptions to the rights and protections which people would otherwise have under the Constitution. However, in this case, I find that Mr. Sanderson is inviting the Court to take a sharp detour from a plainly obvious and literal interpretation of the words "(a) *law* (that) *makes provision for…the imposition of taxation*…".

49. Section 47A(1) governs the charging of stamp duty. The payment of stamp duty is another clear form of taxation and the subject of whether it will be imposed very much comes within the scope of what is meant by section 12(4)(a) of the Constitution where the term '*imposition of taxation*' is employed.

50. For these reasons I find that the impugned provisions under the LTA and the SDA are covered by the proviso created by section 12(4)(a) of the Constitution, particularly where it concerns Parliament's powers to pass laws providing for the imposition of taxation.

Whether the proviso under section 12(4)(a) of the Constitution Permits Discriminatory Laws between a Belonger with Bermuda Status and a Belonger without Bermuda Status

The meaning of the expression 'discriminatory' is drafted in clear terms under section 12(3) of the Constitution:

"*12 (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."*

51. An example of how an enactment may lawfully discriminate between different classes of Belongers without contravening section 12(1) may be gleaned from section 12(5) in the context of public appointments:

"*12 (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it requires a person to possess Bermudian status or belong to Bermuda for the purposes of section 11 of this Constitution or to possess any other qualification (not being a qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes*."

52. In my judgment, it is most significant that the terms 'Bermudian status' and 'belong to Bermuda' are separately stated under section 12(5). If it was intended that all persons who qualify under the class of Belongers were to be treated equally amongst themselves in respect of section 12(1), then no specific mention need have been made to persons who possess Bermudian status.

53. However, section 12(5) should not be taken out of its context since it is expressly tied to the subject of public appointments. Here, it was perhaps open to the Applicant to argue that section 12(5) illustrates that where the Constitution means to permit a discriminatory law to show favour between a Belonger who has Bermudian status and a Belonger who does not, the provision does so in express and clear language.

54. Putting aside section 12(5) for only a moment so to explore any other provisions which might link a Belonger's rights to a possible exemption from section 12(4)(a) by necessary

implication, I now turn to consider what, if any, nexus exists between section 12(4)(a) and the deeming provision under section 11(5) which defines the constitutional term '*belong to Bermuda*'.

55. Section 11(5) is expressly stated to be for the purposes of section 11 of the Constitution, which safeguards the freedom of movement in and out of Bermuda. This also includes a freedom to reside in Bermuda and a protection from expulsion. So, I should pause to examine the full coverage of the section 11 and the relevance and application of section 11(5).

56. Before I come to review the various corner points which illustrate the fullest extent of the protection offered by section 11, I should flag one of its express limitations which did not feature in the submissions before me. The section 11 protection of the freedom of movement is subject to a proviso which allows for the operation of any law which restricts the acquisition or use of land or property in Bermuda by any person (whether or not a Belonger with or without Bermuda status). This proviso is found under section 11(2)(e). Section 11(1) and 11(2)(e) provides:

"*Protection of freedom of movement*

11 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Bermuda, the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion therefrom.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

…

(e) for the imposition of restrictions on the acquisition or use <u>by any person</u> of land or other property in Bermuda…"

57. While any Belonger has a constitutional right to reside in any part of Bermuda and a constitutional right to enter Bermuda, immune from expulsion, it is clear from section 11(2)(e) that a Belonger (whether possessing Bermuda status or not) does not have an unfettered right to acquire land or other property in Bermuda.

58. In the *Williams* case, Kawaley CJ found that section 12 of the Constitution helped to inform the interpretation of section 11 by linking the concepts of movement or residence in Bermuda with employment or engaging in any business or profession in Bermuda. In this lane of thought, Kawaley CJ accepted "*the proposition that section 11 itself should be construed as*

conferring on persons who belong to Bermuda not just the right to reside in Bermuda but also, by necessary implication, the right to, inter alia, seek employment in Bermuda without any restrictions or, indeed, without being discriminated against insofar as one is able to exercise any such rights."

59. Where Kawaley CJ spoke about the linkage in section 12 between employment etc. and movement and residence, he was referring to section 12(4)(b) which does exactly that. Kawaley CJ was looking at sections 12(4)(b) and 11(2)(d) side by side. All classes of Belongers are expressly exempt from the proviso under section 11(2)(d) which empowers Parliament to enact laws which impose restrictions on a person's movement or residence in Bermuda.

60. It was against this statutory background that Kawaley CJ accepted section 11(2)(d) to mean that all Belongers enjoy an unrestricted right to seek employment by extension of a Belonger's expressed and unfettered freedom to reside within Bermuda. Unreservedly, I would concur with the findings in the *Williams* case and in *A v Attorney General* where Kawaley CJ read down section 113(1)(b) and (f) of the Companies Act 1981 so to bring those provisions into conformance with section 12(4)(b) as read with section 11(5) of the Constitution.

61. However, neither section 11(5), 11(2)(d) nor 12(4)(b) assist me in construing section 12(4)(a) or identifying its limitations. The contrary was advanced on Mr. Sanderson's written arguments where he attempted to connect a Belonger's right to reside in Bermuda under section 11 with a right to tax concessions in relation to a primary family homestead. However, beyond his skillful and persuasive advocacy, Mr. MacDonald was clearly correct in his contention that the tax concessions under the LTA and SDA do not restrict the residency rights of a Belonger.

62. There is no class of Belongers who enjoy an unfettered or absolute right to enjoy every single protection offered by the Constitution. Only certain constitutional freedoms have been conferred for enjoyment by every single person in Bermuda. Other provisions are intended only for the benefit of the whole class of Belongers. Outside of that, there are other constitutional protections which may lawfully discriminate between persons who have Bermuda status and persons who are Belongers (by virtue of a ground other than that under 11(5)(a)). This point is, in part, contemplated under section 12(5) which provides another exemption to the rule in subsection (1) allowing for enactments to lawfully discriminate in favour of persons with Bermuda status in respect of eligibility for appointment to public office etc.

63. This is not exhaustive because Parliament may, of course, also enact discriminatory laws which separate different classes of persons, all of whom being in possession of Bermuda status.

64. Where provisions in the Constitution are intended to protect Belongers, an express wording to that effect is employed. For example, section 11(2)(d) is a proviso which expressly shields all Belongers from the otherwise lawful authority of acts performed under any legislation which imposes restrictions on movement or residence in Bermuda. However, where an act is performed in pursuance of a statutory provision which imposes a restriction on acquiring or using land or property in Bermuda, Belongers are not expressly shielded from such authority under section 11(2)(e). This is because Belongers (again, whether they possess Bermuda status or not) are not entitled to every single constitutional right and protection in the Constitution.

65. A full understanding of the application of section 12(4)(a) is dependent on an purposive and contextual analysis of all of these other constitutional provisions, in how they are worded and how they interconnect or operate distinctly. Having carefully considered this constitutional network, I find that section 12(4)(a), in its plain and literal interpretation and also by necessary implication, permits discriminatory laws between Belongers with Bermudian status Belongers without Bermudian status. Any other conclusion, in my view, would amount to an attempt to amend the Constitution through the process of interpretation, an act which Mr. MacDonald cogently warned against in the course of his submissions.

66. To recap, I have found that section 12(4)(a) applies to both the relevant provisions under the LTA and the SDA and I have found that section 12(4)(a) does not, as a matter of construction, shield Belongers without Bermudian status from the discrimination which is permitted in relation to the passing of laws providing for the appropriation of public revenue and the imposition of taxation. Notwithstanding, I will also go on to explore, in the alternative, whether the discriminatory criteria in those Acts of Parliament are 'reasonably justifiable' as required by section 12(4)(d) of the Constitution.

Whether the Discriminatory Laws permitted between a Belonger with Bermuda Status and a Belonger without Bermuda Status under section 12(4)(a) of the Constitution is 'Reasonably Justifiable'.

67. The central theme of Mr. Sanderson's arguments was that a statutory provision which discriminates in favour of a class of persons with Bermuda status to the disadvantage of persons who belong to Bermuda on other grounds is not reasonably justifiable for the purposes of the impugned provisions under the SDA and the LTA.

68. The Assistant Tax Commissioner's evidence described the objective behind section 3A of the LTA and section 47A as a measure "*to give relief to Bermudian families who might own homes after years of hard work but could be described as "asset-rich but cash-poor." The intention was to protect such Bermudians from losing their homes if they were unable to pay the taxes due. The concessions were not intended to apply to persons who moved to Bermuda from overseas as such persons were expected to have the financial resources to sustain themselves."*

69. A fiscal policy driven by a social initiative aimed to protect Bermudian retirees who have spent their lifetime working in Bermuda is a subject of great public importance. This obviously has far reaching effects on the Bermuda economy. Before any Court could properly weigh in with any decision which would interfere with such a policy, a careful analysis of the competing demands on public finances would be required. This plainly carries sufficient importance to justify the limitation of a fundamental right to protection from discriminatory laws.

70. The real question is whether such a fiscal policy ought to distinguish between persons who enjoy Bermuda status under the BIPA 1956 and those who do not but are otherwise Belongers under section 11 of the Constitution.

71. An inclusion of Belongers will obviously have fiscal and budgetary consequences as more people would be entitled to the tax concessions in question. This means that the declaratory relief sought by the Applicant will deliver some level of financial burden and strain on the public purse. The inclusion of all Belongers, who qualify under the remaining statutory criteria, to the special concessions benefits in question will obviously have macro-economic implications. However, it must be acknowledged here that this Court is hardly in a position to fully comprehend the extent to which this is so. Thus, it is not open to me to find that there is a less intrusive measure which could have been employed to achieve this objective.

72. I am bound and most willingly follow the reasoning in the *Arorangi Timberland* case where the Privy Council warned against the Court's interference with policy choices of a social and macro-economic nature. This must be approached with 'diffidence', particularly in this case where the Court is concerned with Legislature's ink through a process infused with democratic legitimacy and accountability.

73. These wide-interest community factors must be measured against the rights of the Applicant and others alike who will not qualify for these special tax concessions. The exclusion from any constitutional right, freedom or protection is no matter of levity. However, I find that an exemption from a narrowly applied fiscal benefit, which also excludes not only Belongers without status but other classes of persons with Bermudian status, qualifies as a case low

intensity on the review spectrum. In any event, it cannot be said on the evidence before me that this is an exceptional case which would warrant the annulment of a legislative fiscal decision on grounds of disproportionality.

74. For these reasons I find, on the reasonable justification test, that the provisions in question under the LTA and the SDA are lawful and constitutionally sound.

Conclusion

75. The terms prayed under this application are refused and the Originating Motion is dismissed.

76. Unless either party files a Form 31D to be heard on the subject of costs within 14 days of the re-opening of the Courts, I make no order as to costs.

Dated this 6th day of April 2020

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HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT