In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 428

BETWEEN:

GREGORY EDWARD TROY BURGESS

Plaintiff

- and -

FIRST BERMUDA GROUP LIMITED
(A Subsidiary of Clarien Bank Limited)

First Defendant

CLARIEN BANK LIMITED

Second Defendant

CANTERBURY LAW LIMITED

Third Defendant

CONYERS DILL AND PEARMAN LIMITED

Fourth Defendant

NARINDER KUMAR HARGUN

Fifth Defendant

RULING

(Via Zoom)

Date of Hearing: **29 November 2024**
Date of Ruling: **28 January 2025**

Appearances: **LeYoni Junos as McKenzie Friend for the Plaintiff**

Keith Robinson, Carey Olsen Bermuda Limited, for Fifth Defendant

RULING of Southey, AJ

Introduction

1. This judgment will address an application by the 5th Defendant for strike out of proceedings brought against him.

2. The Plaintiff is assisted by Ms. LeYoni Junos of the Civil Justice Advocacy Group. She also holds a power of attorney that is said to cover these proceedings. I have also permitted her to act as a McKenzie Friend.

Factual Background

3. The Plaintiff has issued a generally endorsed writ of summons dated 21 December 2023.

4. The statement of claim essentially alleges that the Plaintiff was the victim of fraud. The fraud is alleged to have been associated with a consent order issued in proceedings involving the Plaintiff. The 5th Defendant was the judge who endorsed the consent order.

5. Relevantly the statement of claim states that:

> *42. Prior to the appointment of Mr. Narinder Hargun to the post of Chief Justice, the Plaintiff's case No. 59 of 2018 was proceeding steadily to trial and was seized of Justice Shade Subair-Williams (Justice Hellman having left the jurisdiction at the end of June, 2018). Pleadings were virtually completed in the third week of July and the discovery stage would have been the next step before trial.*
>
> *43. Mr. Hargun was a former attorney and director of litigation with Conyers Dill & Pearman for over three decades with Mr. Jeffrey Elkinson, counsel for Justin Williams in case No. 59 of 2018. Mr. Harshaw had completed his pupillage at Conyers litigation department.*

> *44. Within two weeks of the swearing in of new Chief Justice Hargun on 16 July 2018, the fraudulent "Consent Order" had been filed at the Supreme Court Registry on 30 July 2018. Ten days later, on 9th August 2018, the "Consent Order" had been endorsed by Mr. Hargun and sealed. It remains a mystery why Mr. Hargun engaged himself in this matter - involving as it did close associates of him and his former firm – rather than let the judge who had been seized of the matter deal with it.*

6. Later in the statement of claim, it is said (under the heading of fresh evidence) that:

> *52. The Plaintiff is in possession of the sealed "Consent Order" filed on 30 July 2018 and signed by the former Chief Justice on 9 August 2018, which shows the intent of all the Defendants to bribe him and silence him - but not to give him adequate justice.*

7. Finally it is said that:

> *54. All the Defendants have worked together to try and prevent the Plaintiff from exposing the truth of what they have done - and what they continue to do to cover up the fraud of the First Defendant and the ill-gotten assets of the Second Defendant.*

8. It appears to me that it is far from clear what tort is alleged against the 5th Defendant in the statement of claim. Although it appears to be alleged that the Defendants had some form of agreement that had some form of improper purpose, there are no relevant particulars of that agreement. It appears to me that it is unclear precisely what it is said that the 5th Defendant is said to have done that was unlawful and, in particular, what actions amounted to an agreement with others.

9. The Plaintiff's skeleton argument states that:

> *A cause of action … exists against the Fifth Defendant by way of his participation in facilitating the unlawful acts of the Third & Fourth Defendants.* [5]

10. The passage of the Plaintiff's skeleton argument set out in the paragraph above does not clearly identify a tort. A person may innocently facilitate the illegality of others.

11. In the course of oral submissions, Ms. Junos made it clear that the case was that the order had been issued knowingly for corrupt purposes. That followed questioning from me intended to ensure that I properly understood the Plaintiff's case. As pointed out by the 5th Defendant that submission does not fit easily with other submissions made on behalf of the Plaintiff that the role of the 5th Defendant was merely to act as a rubber stamp. In addition, nothing that I have seen in the statement of claim suggests that there are any factual allegations that would allow a judge to find corruption. This is something I will return to. However, I will take account of the oral submissions so that there is no doubt that the Plaintiff has been able to fully advance his case.

12. The Fifth Defendant has issued a strike out application on the basis that:

    (a) the Writ and Statement of Claim disclose no reasonable cause of action against the Fifth Defendant;

    (b) further or in the alternative, the Writ and Statement of Claim is scandalous, frivolous and vexatious; and/or

    (c) further or in the alternative, the Writ and Statement of Claim is an abuse of process of the Court.

13. The Fifth Defendant has filed an affidavit in support of the strike out application. That states, among other matters, that:

    (a) Prior to receiving the consent order, the Fifth Defendant had no prior involvement (personally, professionally or as a judge) in the matter.

(b) The matter came before him as the practice of the Registrar was to place consent orders before any judge with availability.

(c) The consent order appeared on its face to confirm that all parties agreed. There was no reason to make further enquiries.

14. The Plaintiff has filed an affidavit in response to this strike out application. That states, among other matters, that:

(a) He never agreed to the consent order.

(b) The consent order had been endorsed by Conyers Dill & Pearman, a law firm in which the 5th Defendant had been a partner for over 30 years until shortly before the consent order was endorsed. The 5th Defendant's daughter remains employed at this law firm. Paul Harshaw, a lawyer associated with the 3rd Defendant had also worked for this law firm.

(c) He believes that the timing of the filing of the consent order was 'not a coincidence'. It is said that it was intended by the First and Second Defendants in SC Case No. 59 of 2018, Paul Harshaw and Justin Williams respectively, that the consent order would be placed before the Fifth Defendant.

(d) The actions of the Fifth Defendant in approving the consent order amounted to a 'highly improper administrative rubber-stamp'.

(e) It concludes by stating that:

> *I believe the Defendants - including the Fifth Defendant - were aware of the serious ramifications of my evidence and were willing to commit this criminal act to suppress any of this coming to light.*

15. The matter was previously listed for hearing on 2 October 2024. I adjourned the matter to ensure that the Plaintiff had every opportunity to respond to the strike out. Following that hearing, an affidavit of Ms Junos was filed on behalf of the Plaintiff. This exhibits a petition that was filed with the Governor complaining about the 5th Defendant's endorsement of the consent order. It also exhibits 2 applications for judicial review relating to the endorsement of the consent order.

16. A second affidavit has been filed by the 5th Defendant responding to issues raised by the Plaintiff.

Arguments of the parties

17. I have carefully considered the arguments of the parties. The matters set out below are a summary of the arguments. Any failure to reference a matter relied on in argument does not mean that I have not considered it.

18. The Fifth Defendant argues that:

    (a) The writ and statement of claim disclose no reasonably arguable cause of action against him. There are no material facts which found any reasonable civil claim against the Fifth Defendant. Even if the matter did involve close associates of the Fifth Defendant and his former law firm, this would not give rise to any civil claim against the Fifth Defendant.

    (b) If and to the extent there is any cause of action disclosed, the Fifth Defendant has judicial immunity from personal suit, rendering the writ and statement of claim frivolous and an abuse of process of the Court. When he signed the consent order in question, he was acting within jurisdiction.

19. The Plaintiff argues that:

(a) The Bermuda Constitution does not authorise judicial immunity. It is not protected by the Constitution and it cannot trump the Plaintiff's fundamental right to the protection of the law.

(b) The English Civil Procedure Rules make it clear that a 'court officer' cannot enter and seal an order where one of the parties is a litigant in person.

(c) The skeleton argument states that:

> *Judges acting in a bona fide judicial capacity do not simply rubberstamp consent orders, particularly when an unrepresented party is involved* [34(g)]

(d) The skeleton argument states that:

> *All in all, there appears to be a suspiciously narrow window and circumstances between the date the Fifth Defendant took office on 16 July 2018; the date the Plaintiff's case got media coverage on 18 July 2018; the date the Third Defendant complained of the media coverage on 23 July 2018; and the date the Consent Order – having not been sent to the Plaintiff's address for service – was filed at the Registry on 30 July 2018 at 9:40 PM, if the court's time stamp is to be believed.* [33]

Legal Framework

The relevant rules

20. Rule 19 of order 18 of the Rules of the Supreme Court 1985 (GN/1985) provides that:

> 1. *The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—*

(a) it discloses no reasonable cause of action or defence, as the case may be;or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2. *No evidence shall be admissible on an application under paragraph (1)(a).*

21. In *David Lee Tucker v Hamilton Properties Limited* [2017] Bda LR 136 (SC) Subair Williams R (as she then was) held:

> *The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.* [14]

22. Rule 12(1) of order 18 of the Rules of the Supreme Court 1985 (GN470/1985) states that:

> *... every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words—*
>
> *(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and*

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

23. In *Robert Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699 Arnold LJ identified the following principles as governing the pleading of dishonesty:

(i) Fraud or dishonesty must be specifically alleged and sufficiently particularized, and will not be sufficiently particularized if the facts alleged are consistent with innocence …

(ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded …

(iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence …

(iv) *Particulars of dishonesty must be read as a whole and in context …* [23]

24. In *Intercontinental Natural Resources Ltd v Conyers Dill & Pearman* [1982] Bda LR 1 the Court of Appeal held that:

A Fundamental Fallacy

141. Mr. Lightman rightly states that the Court on a striking out summons must assume that the facts pleaded are true. This is no doubt correct; but facts may be of two sorts. There may be primary facts and there may be conclusory facts; the latter are really no more than conclusions which it may or may not be right to

deduce from primary facts…It seems manifestly clear that a statement of claim founded largely on a series of conclusory facts does not inform the defendant of the case he has to meet and is in clear breach of O19, r 4 which requires the party pleading to state in summary form the material facts on which he relies; and in this context material facts mean primary facts; i.e., those facts which the party needs to be informed of in order to know what case he has to meet. Unless the primary facts are pleaded the statement of claim must necessarily be deficient. This is a case in which serious allegations are made against reputable professional men and they are entitled to know what it is that each respondent is charged with wilfully doing or wilfully omitting in the knowledge that he was doing wrong. If they are charged with mismanagement of the company's affairs then facts must be pleaded from which the actual mismanagement complained of can be understood. If a statement of claim is so deficient in particulars that a defendant cannot tell what is the case he has to meet then it becomes a vexatious pleading and should not be allowed to stand. [141]

25. The fact that a party is a litigant in person does not excuse a failure to comply with the obligations set out above in relation to the pleading of fraud (*Lines and Blades v PricewaterhouseCoopers and Clarien Bank Limited* [2021] SC (Bda) 42 Civ at [63]).

Reasonable cause of action

26. In *Pedro v Department of Child and Family Services* [2019] SC (Bda) 85 Civ Alexandra Wheatley AJ cited (with apparent approval) the White Book (1999 Edition) which states that:

> *A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered … So long as the statement of claim or the particulars … disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out …* [18/19/10] [Emphasis added]

27. In *Calvin Simons v The Minister of Public Works* [2021] Bda LR 123 Jeffrey Elkinson AJ held that:

> *There have been various expressions used in the case law concerning Order 18, rule 19 as to when the court should exercise its power to strike out a claim. The language used is a variation on the proposition that it should be exercised in either plain and obvious cases, where there is no realistic possibility of the Plaintiff establishing a cause of action consistent with his pleading and the possible facts of the matter when they are known, or where the evidence relied upon by the Plaintiff can properly be characterised as shadowy or where the story told in the pleadings is a myth and has no substantial foundation. <u>It is clear that the power to strike out is a draconian remedy and should only be employed in clear and obvious cases</u> where it is possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of proof.* [8] [Emphasis added]

28. In light of the case law above, I said in *Williams and Trott v Chief Inspector Stableford and the Attorney General of Bermuda* [2024] SC (Bda) 16 Civ:

> *… the case law … demonstrates that any strike application must be reviewed with care to ensure that the draconian step of denying a party a trial is only used in clear cases where an action is bound to fail. In consider [sic] whether an action is bound to fail, it is necessary for me to remind myself that I have not heard oral evidence and so am not in a position to make findings regarding disputed issues of fact.* [17]

This still appears to me to be the correct approach.

<u>Frivolous or vexatious</u>

29. The White Book 1999 states that:

The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court" (per Jeune P. in Young v. Holloway [1895] P. 87 at 90; and see Whitworth v. Darbishire (1893) 68 L.T. 216). [18/19/16]

Abuse of process

30. In *Michael Jones v Stewart Technology Services Ltd* [2017] Bda LR 117 Hellman J cited with approval the following passage of the judgment of Lord Diplock in *Hunter v Chief Constable* [1982] AC 529 at 536C holding that:

> *[Abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…* (at [26] of *Michael Jones*).

31. The House of Lords held in *Lawrance v Lord Norreys* (1890) 15 AppCas 210 that:

> *It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of*

> *criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques' affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation. For these reasons, I concur with the Court of Appeal in thinking that the action is an abuse of process of the Court…* (at 219)

32. It appears to me that the passage of the judgment in *Lawrance* set out in the paragraph above demonstrates that abuse of process can be established where there is a vague allegation of fraud or dishonesty that, on the basis of facts pleaded and any evidence, cannot be established. That is because the claim has 'no substantial foundation'.

Judicial immunity

33. In *Sirros v Moore ELR* [1975] QB 118 Lord Denning MR (at 132) held that:

> *Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal*

courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear.

It appears to me that the statements of Lord Denning are clear that judicial immunity is absolute. That is because the ability to sue a judge has the potential to undermine their independence.

English Civil Procedure Rules

34. Paragraph 40.6 of the English Civil Procedure Rules provides that:

(2) A court officer may enter and seal an agreed judgment or order if – …

(b) none of the parties is a litigant in person …

(5) Where paragraph (2) does not apply, any party may apply for a judgment or order in the terms agreed.

(6) The court may deal with an application under paragraph (5) without a hearing.

35. Practice Direction 40B paragraph 3.2 provides that:

If a consent order filed for sealing appears to be unclear or incorrect the court officer may refer it to a judge for consideration.

36. Paragraph 3.3 provides that:

Where a consent judgment or order does not come within the provisions of rule 40.6(2):

(1) an application notice requesting a judgment or order in the agreed terms should be filed with the draft judgment or order to be entered or sealed, and

(2) the draft judgment or order must be drawn so that the judge's name and judicial title can be inserted.

37. In *L v L* [2008] 1 FLR 26 Munby J considered the role of a judge considering an ancillary relief consent order and held that:

> *... the judge is not a rubber stamp. He is entitled but is not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret.* [73]

Conclusions

38. I have already identified how the case law makes it clear that a strike out is a draconian step. It denies a party the opportunity to have their case proceed to trial. As a consequence, it is important that I consider with care the arguments of both parties before concluding that there are grounds for strike out. I also need to take account of the fact that I have not heard oral evidence. That is one reason why I permitted the Plaintiff to file additional evidence rather than proceed to a hearing on 2 October 2024. I wanted to ensure that the Plaintiff had every opportunity to meet the strike out application. I am satisfied that the Plaintiff has had every opportunity to advance his case.

Merits of the claim against the 5th Defendant

39. Given the nature of the serious allegations made against the 5th Defendant, it appears to me that it is important that this case is dealt with on the merits first. It is important to determine whether there are any proper allegations for immunity to bite on.

40. The oral submissions that were made on behalf of the Plaintiff were wide ranging and very serious allegations. I allowed those oral submissions to be made because the Plaintiff is a litigant in person assisted by a McKenzie friend. However, there are 3 things that became clear when listening to those submissions:

(a) They are not set out in the pleadings. That is significant as there is a need to focus on the pleadings. I have already set out the legal framework making that clear. I will consider this further below.

(b) They are essentially suspicions that have no real solid basis. By this I mean that that the facts pleaded would not provide a proper basis for a judge to make findings of the illegality alleged. For example, Ms. Junos accepted during oral submissions that she was not aware of connections between the 5th Defendant and the other Defendants that may have been present and influenced the issuing of the consent order. However, without some basis for alleging connections, it is impossible to see how illegality could be established.

(c) At times the Plaintiff was essentially arguing that I should allow the material to proceed to trial as things might be uncovered by the trial process. That is not a proper basis for allowing the matter to proceed for the reasons set out below.

41. I have set out above the relevant passages of the statement of claim. It appears to me that on a fair reading these passages demonstrate that it is alleged that:

(a) The 5th Defendant endorsed the consent order shortly after being appointed as Chief Justice.

(b) The 5th Defendant had previous professional ties with others who are alleged to have obtained a fraudulent consent order.

(c) There is said to have been some form of unlawful agreement between the Defendants.

42. Assuming that the consent order was fraudulent (and I have not heard evidence regarding that issue or examined the statement of claim with care to see whether it identifies a factual basis for making such a finding), it appears to me that no facts are pleaded in the statement of claim that would allow a judge to find the 5th Defendant is liable for a tort. The pleading does not clearly identify the alleged tort but it appears to be suggested that there was some sort of corruption or conspiracy. The obvious problem with this is that there are no factual allegations that would allow such a finding to be made. The facts pleaded simply allege that the 5th Defendant performed a judicial task when sitting as a judge. The mere fact that he had previously been a colleague of other lawyers in the case does not assist the Plaintiff. It is not uncommon for judges to sit in matters involving former colleagues. Even assuming that there was bias (and nothing I have seen suggests that there was), that would not mean there was a tort. Further, when deciding whether to issue a consent order, the 5th Defendant was not adjudicating a dispute between the parties. The parties had apparently agreed to the order. There is no reason to believe that any conspiracy required the participation of the 5th Defendant.

43. Contrary to the submissions of the Plaintiff, it is not open to me to allow a matter to proceed on the basis that something might be discovered during the discovery process. Rule 12(1) of order 18 of the Rules of the Supreme Court 1985 (GN470/1985) is clear. A pleading must include 'particulars of the facts on which the party relies' where a state of mind is alleged such as 'fraudulent intention'. In this case, although it is unclear what tort is alleged, it would appear that some form of dishonesty is alleged. That means that it will not be sufficiently particularized if the facts alleged are consistent with innocence. The test 'is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence …' (*Robert Sofer*). It appears to me that not only is a finding of dishonesty not more likely than innocence, there would be no basis for such a finding. It would be perverse to find dishonesty. As was said in *Intercontinental Natural Resources Ltd*, this is a case in which serious allegations are made against a

reputable professional man and so he is entitled to know what he is charged with. It is not enough that there are charges against others who the 5th Defendant previously had a professional relationship with.

44. The fact that the Plaintiff is a litigant in person makes no difference. The pleading rules have to be complied with (*Lines and Blades*).

45. In light of the matters above, it appears to me that:

(a) There is no reasonable cause of action against the 5th Defendant. Applying the approach in *Pedro* and *Simons*, it is clear and obvious that there is no chance of success when only the pleadings are considered. The matters above demonstrate that I have concluded that the pleadings do not identify any basis for a finding of dishonesty. Such a finding appears to be necessary if a tort is to be established.

(b) Further, even if I am wrong about there being no reasonable cause of action, the proceedings are an abuse. The matters above demonstrate that the allegations of fraud are vague, unparticularised and lack any substantial foundation.

Judicial immunity

46. The matters above mean that, in principle, there is no requirement for me to consider judicial immunity. However, having heard argument regarding this topic I should make it clear that separately I have no doubt that the 5th Defendant enjoys judicial immunity. The process of issuing, signing and approving a consent order is a quintessential judicial act. *Sirros* makes it clear that it is long established that judicial independence is absolute.

47. The Plaintiff relies on the English Civil Procedure Rules. Ignoring the fact that they do not apply in Bermuda, they support the claim for judicial immunity. The Plaintiff argues that the 5th Defendant should have taken action because the Plaintiff is a litigant in person. Despite asking Ms. Junos what she thinks should have been done differently, I am unclear about that. What the English Civil Procedure Rules suggest is that it is important that a

consent order is approved by a judge where there is a litigant in person. That is what happened in this case.

48. The Plaintiff also argues that judicial immunity is inconsistent with the Bermuda Constitution Order 1968. Section 6(8) of the Constitution provides that:

> *Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.* [Emphasis added]

It appears to me that far from being inconsistent with the Constitution, judicial immunity safeguards a key right safeguarded by the Constitution. That is judicial independence (*Sirros*).

49. The application of the principle of judicial immunity does not mean that the Plaintiff is denied a remedy if it can be established that the consent order was obtained by fraud or was otherwise unlawful. It is well-established that in appropriate cases consent orders can be set aside. Ms. Junos argued that steps had been taken on behalf of the Plaintiff but failed. It appears to me that that is irrelevant. Immunity is a principle that does not depend upon the facts of the case. It is not for me to judge the outcome of the earlier attempts to set aside the consent order.

50. Finally, it is suggested by the Plaintiff that the role played by the 5th Defendant was not bona fide. On the material available to me, I can see no basis for suggesting that the role of the 5th Defendant was not bona fide. His evidence describes how he was a 'watchdog' (as described in *L v L*). However, there was no reason to doubt the consent order.

51. In light of the matters above, it appears to me that the principle of judicial immunity means that there is a second reason why there is no reasonable cause of action against the 5th Defendant. The pleadings essentially allege a claim that is bound to fail because of judicial immunity.

Concluding remarks

52. In light of the matters above, it appears to me that I am required to strike out this claim. I have reminded myself that any judge must be very cautious striking out a claim. However, it appears to me that this claim is bound to fail. The claim is totally without merit.

Postscript

53. Lawyers are subject to important duties not to allege fraud without a sufficient basis for doing that. For example, the Barristers' Code of Conduct (BR 48/1981) states that:

> *A barrister instructed to settle a pleading is under responsibilities to the court as well as to his client. … He may not allege fraud unless-*
>
> *(i) he has clear instructions in writing to plead fraud; and*
>
> *(ii) he has before him reasonable credible material which, as it stands, establishes a prima facie case of fraud.*

I have previously ruled that Ms. Junos cannot have greater rights as McKenzie friend than a lawyer with rights of audience. Despite that I permitted oral submissions that went far wider than those I would have allowed a lawyer to make in light of rules such as those set out in the Code of Conduct. The oral submissions made by Ms. Junos included serious allegations against the 5th Defendant. I allowed the submissions to be made so that I could understand fully the Plaintiff's case. However, having heard the submissions, it appears to me that the allegations were unfounded and should not have been made.

54. I have no doubt that Ms. Junos was motivated by a desire to expose what she believes is injustice. In light of this and the fact that I have not raised my concerns with Ms. Junos, I do not propose to take any action in relation to the submissions she raised. However, I hope Ms. Junos remembers that are limits to what is acceptable in Court. As a McKenzie friend she needs to respect those limits. I may need to take action in future to enforce those limits if there is a continued failure to comply with those limits.

Dated this 28th day of January 2025

THE HON. HUGH SOUTHEY
ASSISTANT JUSTICE