IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

MISC. CIVIL ACTION NO. HBM 105 OF 2007

Between:

ANGENETTE MELANIA HEFFERNAN

Applicant

and

1. **THE HONOURABLE JOHN EDWARD BYRNE**
2. **THE HONOURABLE ANTHONY HAROLD CUMBERLAND THOMAS GATES**
3. **AIYAZ SAYED-KHAIYUM**

Respondents

Mr. D. S. Naidu for the Applicant
Mr. R. Prakash for the 1st Respondent
Mr. C. B. Young for the 2nd Respondent
Mr. A. K. Narayan for the 3rd Respondent

DECISION

(The Respondents' Applications to Strike Out Constitutional Redress Motion)

Background

[1] By **Motion** filed 14 September 2007 the applicant seeks the following relief:

(i) A DECLARATION that *Rule 3(2) of the High Court (Constitutional Redress) Rules 1998* is inconsistent with the constitutional guarantee of access to the courts and is to the extent of the inconsistency *ultra vires*, void and of no effect.

(ii) A WRIT OF CERTIORARI quashing the orders made by the First Respondent in Civil Appeal No ABU0034 of 2007, on 5 June 2007, and directions made on 12 June 2007, and the ruling made by the First Respondent on 30 July 2007.

(iii) AN INJUNCTION restraining the First Respondent from further acting as a Judge of the High Court or as a Judge of Appeal in matters involving the Applicant.

(iv) AN ORDER that the Respondents pay the Applicant all legal costs incurred by her in relation to the orders purportedly made by the First and Second Respondents upon the Application of the Third Respondent.

(v) And that the costs of and incidental to this application be paid by the Respondents.

[2] In the Motion the applicant has stated the grounds on which the said application is made.

[3] The Motion was listed for hearing before me when on 5 October 2007 the applicant **orally** sought an order for my **recusal** as a Judge from hearing the proceedings. It was ordered that a formal application supported by affidavit be made.

[4] The application was heard on 24 October 2007 and a Ruling was given same day refusing the application for recusal and ordering the applicant's counsel to personally pay costs to the Respondents within 10 days and directed that substantive matter of constitutional redress to proceed to hearing before me.

[5] Leave to appeal against the **costs** order was filed but refused. There was no appeal against my order refusing recusal.

Strike out applications

[6] Each of the three Respondents in this action for constitutional redress by **Angenette Melania Heffernan** (the **Applicant**) has applied by summons to strike out the action pursuant to **Order 18 Rule 18 (1)** of the **High Court Rules 1988.**

[7] The **grounds** on which the application to wholly strike out are that:

(a) the applicant's application and pleadings filed discloses no reasonable cause of action.

(b) it is scandalous, frivolous or vexatious

(c) it is otherwise an abuse of the process of the court.

[8] The 3rd Respondent further submits that the applicant is absolutely barred under **Section 3 of the State Proceedings Act, Cap 24** from instituting proceedings against the State in relation to the acts of a judicial officer in the exercise of his judicial function. In other words there is 'judicial immunity' he said.

Issues

[9] In regard to the applications to strike out I have very comprehensive written submissions from the applicant and the respondents and I have given these due consideration.

[10] A number of issues have been raised by the respondents. They are:

(a) There is no reasonable cause of action
(b) Action is frivolous or vexatious
(c) Abuse of the process of the court
(d) There is limitation of time for issuing application

(e) Availability of alternative remedy
(f) Application is not within the scope of section 41.

Consideration of the Issues

Application of Order 18 Rule 18 to Constitutional Redress Applications.

[11] The provisions of **Order 18 Rule 18 (1) also apply** to constitutional redress applications. The court has jurisdiction to strike out the application if the criteria under the Rules are met.

[12] In this regard **Rule 7 of the High Court (Constitutional Redress) Rules 1995** provides as follows:-

> **"Except as otherwise provided in these Rules the jurisdiction and powers conferred on the High Court in respect of applications made by any person in pursuance of either section 41(10) or section 120(4) of the Constitution are to be exercised in accordance with the practice and procedure (including any rules of Court) for the time being in force in relation to civil proceedings in the High Court, with any variations the circumstances require."** (emphasis mine)

[13] The Court of Appeal in **Abhay Kumar Singh –v- Director of Public Prosecutions & Attorney General** (Criminal Appeal No. AAU0037 of 2003S – 16.7.04 Judgment) in the criminal appeal also ruled that the constitutional redress application is to be dealt with in accordance with the practice and procedure of the High Court in civil proceedings.

[14] Furthermore, under the **inherent jurisdiction** of the High Court the constitutional redress applications are the type of proceedings which can be properly considered and dismissed.

[15] On striking out under the Rules or under the **inherent jurisdiction** the following statement of **Megarry V. C.** in **Gleeson v Wippell (J) & Co. Ltd.** [1977] 1 W.L.R. 510 at 518 is apt:

> ***"First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleadings, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial."*** (emphasis mine)

Principles Applicable to Striking Out

[16] The principles governing the grant or refusal of application to strike out under **Or 18 r 18** are well-settled.

[17] As borne out by authorities the Court's jurisdiction is exercised sparingly and where a cause of action is obviously unsustainable.

[18] The following extract from the judgment of Court of Appeal in **Attorney General v Shiu Prasad Halka 18 FLR 210** is to be borne in mind:

> ***"Though these cases indicate that in a proper case a Statement of Claim will be struck out notwithstanding that it raises a constitutional question, they do not detract, in my view, from the rule that the summary procedure under Order 18 Rule 19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law."*** (emphasis added)

[19] Also in **Hemant Kumar v Suresh Kumar & Others** [2003] Civil Action No. 33 of 2003 the Court stated:-

> ***"I think it is definitely established the jurisdiction to strike out proceedings under Order 18 should be very sparingly exercised and only in exceptional cases. It should not be exercised where legal questions of importance and difficulty arise."***

[20] For the purpose of the application to strike out under the ground of **no cause of action**, I refer to the following notes to **Or 18 r 19/11** of **Supreme Court Practice (UK) 1979 Vol 1** on the meaning of **reasonable cause of action:**

> **".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 All E.R. 1094, C.A.). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 W.B. 185) 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 (Moore v Lawson) (1915) 31 T.L.R. 418, C.A.; Wenlock v Moloney [1965] 1 W.L.R. 1238 [1965] 2 All E.R. 871, C.A.)....."**

Inherent Jurisdiction

[21] The **inherent jurisdiction** has been fully described in **Halsbury's Laws of England Vol 37** para 14, 4th Edition thus:-

> **"Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called "<u>the inherent jurisdiction of the Court</u>". In the ordinary way the Supreme Court, as a superior court of record, exercises the full plentitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except insofar as that has been taken away in unequivocal terms by statutory enactment. The term "inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for**

the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; and it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (1) control over process by regulating its proceedings, by preventing abuse of process, and by compelling the observance of process (2) control over persons, as for example over minors and mental patients, and officers of the court, and (3) control over the powers of inferior courts and tribunals.

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure observance of the due process of law, or prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." (emphasis mine)

Is there a reasonable cause of action against the Respondents?

[22] In the light of the orders sought by the applicant, I find and I agree with counsel for the 2nd Respondent that:-

(a) Certiorari is sought against the 1st Respondent only and not against the 2nd Respondent.

(b) Injunction in sought against the 1st Respondent to act as a Judge. The 2nd Respondent is not affected.

[23] It is obvious and clear as crystal from the affidavit of the applicant that there is no reasonable cause of action against the 2nd Respondent.

[24] In fact the applicant's counsel admits in his written submission that "*it is correct that no relief is sought against the 2nd Respondent. However, the principle governing the parties to pleadings requires that all parties who are necessary and proper for the resolution of the dispute must be before the court.*" I do not agree with the reason for the joinder of the 2nd Respondent and it borders on being vexatious and frivolous to join the Acting Chief Justice for 'resolution of dispute' as well as joining Honourable Mr. Justice John Byrne who is a judicial officer performing his duties as a Judge duly appointed by His Excellency the President of the Republic of the Fiji Islands.

[25] It is also an **abuse of process of the court** to join the 2nd Respondent as a party to this action. Whatever hearing His Lordship the Acting Chief Justice did was in the performance of his duty as a Judge for which he cannot be sued in any case. The doctrine of '**judicial immunity**' **applies** in this case as in the case of all judicial officers. More on this in greater detail a little later in this Decision when I deal with the subject of 'judicial immunity'.

[26] Mr. Young raised other reasons for striking out against the 2nd Respondent and I shall deal with them when I consider the submissions of other counsel in regard to the Respondents. However, in view of what I have stated hereabove there is no relief sought against the 2nd Respondent and more so when the applicant concedes that fact. **The action against the 2nd Respondent must be struck out.**

[27] The Applicant's basis for constitutional redress is based on **section 41(1) of the Constitution.**

[32] This maxim as stated by Shameem J has been applied as early as 1789 in **R v Gordon** [1789] 1 Leach 515 and more recently applied in **Campbell v Wallsend Shipway & Engineering Co. Ltd** (1977) Crim. L.R. 351.

[33] Applying the law as stated above and as Byrne J himself stated in Bainimarama Case (supra) he holds that "my authority and acts are in any event valid on the basis of the 'de facto' doctrine."

[34] Byrne J then went on to draw certain inferences on his appointment as a Judge:

> *"(1) I do not lack professional qualifications and competence to sit as a Judge.*
>
> *(2) I was a Judge of the High Court from May 1989 to December 2004*
>
> *(3) I do not know nor could I have known that, there is any irregularity in my appointment. I was appointed by the President on the recommendation of the Judicial Services Commission. Whether the Judicial Services Commission was properly constituted and subsequent procedures were regular or not are beyond the scope of issues calling for decision in this action."*

[35] All the above boils down to saying that until proved otherwise Byrne J was properly appointed by the President under **section 132(3)** of the Constitution even after a judge had retired for the retiring age does not apply to him.

[36] In the light of the law as stated above and under the provisions of the Fiji Constitution the applicant's application seeking injunction restraining Byrne J '*from further acting as a Judge of the High Court or as a Judge of Appeal in matters involving the applicant*' is frivolous and an abuse of the process of the Court apart from there being no cause of action.

[37] The Courts are still intact and are functioning normally unaffected by the events of December 2006. His Excellency The President of the Republic of Fiji Islands appoints and has appointed Judges.

[38] Actions are instituted in Courts of law and counsels appear before those courts to represent their clients. What can one have against a Judge sitting as a Judge after he has been appointed by the President? Nothing, I must say. The appointments are lawful and proper under the Constitution for all intents and purposes. A judge cannot be removed except under the provisions of the Constitution.

[39] Counsel are at liberty to sue the President **if they** so wish **if** that course is available to them if they consider that the appointment of Judges are illegal or unlawful.

[40] Litigants cannot '**sue**' Judges and '**join**' them as parties to an action as the authority of a Judge emanates from the Presidential exercise of power vested in him. There is no need for the Respondent Judges to apply to Court to have themselves struck out as parties to actions as doctrine of judicial immunity applies to them which doctrine has been overlooked by legal advisors in this case.

[41] It is incomprehensible that some counsel appear before Judges to have their cases heard and at the same time do not want to recognize them, as has happened in the case of the two Respondents who are very senior and experienced judges who are duly appointed judges under the hand of the President of the Republic of Fiji Islands. If some lawyers do not accept the serving Judges as judges, then they should not seek audience before them. They should not say, "If your Lordship pleases" when they appear before a Judge.

[42] I must observe and comment on the **contemptuous behaviour** on the part of solicitors on record in this case when they do not want to name His Excellencies Judges properly in the heading to the case! It states "The Honourable John Edward Byrne **formerly** a **Judge** of the High Court of Fiji of Government Buildings, Suva" and "The Honourable Anthony Harold Cumberland Thomas Gates, a Judge of the High Court of Fiji, Government Buildings, Suva". As Officers of the Court, they know and must accept that they are duly appointed as Judge and Acting Chief Justice respectively.

[43] The actions of the applicant in joining the two judges as parties to this action, which must have been on the advice of counsel signed by one Dr. Cameron who has never turned up in person to face the Court, is the worst case of **abuse of process of the court** and amounts to a **frivolous** and **vexatious** proceeding.

[44] It would do well for litigants and their lawyer advisers **to read and digest** all I have to say on '**judicial immunity**' in this Decision with which I deal with hereafter, if they wish to preserve their dignity and respect vis-a-vis the Bench.

Abuse of process

[45] On **'abuse of process'** it is worth bearing in mind the following passage at para. 29 in the case of **Harrikisoon v Attorney General of Trinidad and Tobago** [1980] AC 265, at 268 where **Lord Diplock** said:-

> ***"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to***

> ***be contravened, is an important safeguard of those rights and freedom; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection it it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."*** (my emphasis)

[46] The applicant applied to the **President** of the **Court of Appeal** to set aside the various orders of the 1st Respondent which she is complaining of.

[47] As counsel said the President refused to interfere with the 1st Respondent's orders. Instead of pursuing an appeal to the Supreme Court either by obtaining the leave of the Court of Appeal or if not the Supreme Court, of the Court of Appeal President's decision on 28 June 2007, the applicant seeks a constitutional redress **to avoid** (as **Lord Diplock** put it) **"the necessity of applying in the normal way for the judicial remedy..."** The President of Court of Appeal did not dispute the authority of the 1st Respondent as a Judge.

[48] Although Mr. Young had written to the applicant's solicitors giving them the opportunity to withdraw against the 2nd Respondent, the applicant refused and/or neglected to do so.

[49] The point being driven in the above-quoted passage applies squarely to the present action of the applicant.

[50] This certainly is a case of **abuse of process** of the court.

[51] In considering this ground of the application to strike out I have borne in mind the following passage from **Halsbury's Laws of England 4th Edition Vol 37 para 434** which I consider pertinent:-

> **"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or indorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or indorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."**

[52] By joining the 1st and 2nd Respondents who are Judges as parties to the action is a **clear case of abuse of process**. This the applicant and her counsel ought to have known that there is such a doctrine as '**judicial immunity**' as far as those judicial officers are concerned. This doctrine is well-ingrained in our judicial system and there is abundance of case law on the subject as far as judicial officers are concerned in the performance of their duties as judges.

[53] By instituting **constitutional redress** proceedings without first exhausting the **alternative remedy** available to the applicant is in itself an abuse of the process of the court.

[54] As raised by the 3rd Respondent (the Attorney-General), it is an abuse of process knowing very well or ought to have known that the 3rd Respondent

of 2002). I have noted the observations made by the Court on time limit.

[59] In **Senitiki Naqa v the Commander of RFMF & Others** (HBM0063 of 2003), **Singh J** stated that **"The applicant is the one who is outside the time limits. It is for him to give cogent reasons to persuade the court to grant him the indulgence to pursue these proceedings out of time".**

[60] I agree with counsel that on the pleadings the applicant has not given any acceptable reasons why the time limit has not been complied with and why extension ought to be given to pursue the application.

Alternative Remedy

[61] **Section 41(4)** of the Constitution provides for **'alternative remedy'**. It empowers the court to refuse relief if there is adequate alternative remedy.

[62] In the present case it can be seen from the pleadings that the applicant had the alternative remedy of pursuing an appeal from the decision of the 1st Respondent (Honourable Justice Byrne) on ex-parte hearing. The applicant did apply to the President Court of Appeal to set aside the orders on an inter partes hearing but the President refused to intervene in the matter. The applicant did not pursue this on merits at an inter-parte hearing.

[63] The 1st Respondent sitting as a single Judge of Court of Appeal gave a reasoned ruling. However, by this Constitutional Redress application the applicant is now seeking orders from the High Court to nullify the orders of the Court of Appeal. This the applicant cannot do as it is an **abuse of the process** of the Court.

[64] In **Hinds v Attorney General & Another** [2002] 4LRC 287 the **Privy Council** held:-

> ***"As it is a living document, so must the Constitution be an effective instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional redress does not ordinarily offer an alternative means of challenging a conviction or judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against the conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on s.24."*** (emphasis mine)

[65] The earlier authorities were reaffirmed when in **Thakur Prasad Jaroo v Attorney General** [2002] 5 LRC 258 the **Privy Council** held:-

> ***"Their Lordships wish to emphasise that the originating motion procedure under s.14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law."***

Judicial Immunity and what it imports

This case, as I said earlier, does raise the doctrine of '**judicial immunity**'. The issues raised in these applications touching on judicial immunity can be dealt with under the **inherent jurisdiction** of this Court.

[66] This case is but one example of the practice that is gaining ground where litigants on the advice of some barristers and solicitors in Fiji have begun to sue the Honourable Judges of the High Court of Fiji including the Acting Chief Justice by joining them as defendants and/or respondents.

Law on 'judicial immunity'

[67] For acting in his "judicial capacity" a judge is immune from suit, even though judge allegedly directed officers to carry out order with excessive force (**Burns v Reed**, 500 U.S. 478, 492); a judge acts in a judicial capacity when exercising control of the judge's courtroom (**Sheppard v Maxwell**, 384 U.S. 333,358)

[68] The **independence** of judges should be maintained. To render a judge liable to answer in damages or costs (as in this case) to every litigant who feels aggrieved during the course of judicial proceedings, **"would destroy that independence without which no judiciary can be either respectable or useful."** [Bradley, 80 U. S. (13 Wall) at 347].

[69] On **jurisdiction, Justice Field** in **Bradley v Fisher** (13 Wall) 353 (1871) stated:-

> **".....judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction."**

[70] But he is not immune for tortious acts committed in or purely Administrative, non-judicial capacity (**Forrester v White,** 484 U.S. at 227-229).

[71] **"The doctrine of judicial immunity originated in early seventeenth-century England in the jurisprudence of Sir Edward Coke. In two decisions, Floyd & Baker and the Case of the Marshalsea, Lord Coke laid the foundation for the doctrine of judicial immunity."** [Floyd & Barker, 77 Eng. Rep. 1305 (1607; The Case of the Marshalsea, 77 Eng. Rep. 1027 (1612) were both cases right out of the Star Chamber].

Authorities bearing on judicial immunity

[72] The subject of judicial immunity has been dealt with quite extensively in **Rajski v Powell and Another** [(1987) 11 NSW L.R.p52 Court of Appeal] where it was held, inter alia, that **"a judge of the Supreme Court is immune from civil liability for acts done in the exercise of his judicial function or capacity."**

[73] In **Rajski** (supra) **Kirby P** traces the history of judicial immunity at common law and referred to Australian authorities on the subject. He said:

> **"It is a fundamental principle of our law that a judge of a superior court is immune from civil liability for acts done in the exercise of his judicial function or capacity. Such immunity rests, as it has been said, upon considerations of public policy. Its object is not to protect judges as individuals but to protect the interests of society. The purpose of the rule is to preserve the integrity, independence and resolve of the judiciary and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion not influenced by any apprehension of personal consequences."**

[74] It is an error to assume that there is some form of vicarious liability, like in the case of a master for the acts of a servant, so as to give rise to render the **3rd Respondent (the Hon. Attorney-General)** liable [**Kirby P** in **Rajski** p.530].

75. **Kirby P** (p530 ibid) goes on to say in his judgment that:

> **"The errors of this assumption are manifest. It is fundamental to our constitutional arrangement that judges (and now magistrates) are completely independent of the Executive Government, including the Attorney-General. In the statement of claim, it is asserted that the first claimant was "the judicial officer of the second" claimant. That assertion**

> **represents a serious misunderstanding of the relationship between them. True it is, the Attorney-General of the day normally recommends to the Executive Council (after approval by the Cabinet) the appointment of judicial officers. True also, the Attorney-General has certain administrative responsibilities in respect of the courts and judicial officers. <u>But the independence of the judiciary, which is such an abiding feature of our constitutional arrangements, is fundamentally inconsident with the relationship between the claimants asserted by the opponent in his statement of claim</u>."** (emphasis added).

[76]. The Judge further states (ibid 530) that:

> (a) **"Essential to the notion of vicarious responsibility is the power to direct and control. Such power is absent in the relationship between the Attorney-General and judicial officers such as the first claimant. Indeed, it is fundamental to our arrangements for the administration of justice that no such power should exist. Accordingly, the theoretical basis for rendering a law minister responsible for the acts of a judicial officer, simply does not arise from the relationship between them."**
>
> (b) **"judicial officers enjoy an office under the Crown which provides the office holder an independent source of power, whether resting upon the prerogative, common law or statute".**

[77] On the above pronouncements in the case law, the endeavour by the applicant to render the Attorney-General (3rd Respondent) liable in this case is wholly misconceived. The claim is certainly most hopeless. As I said hereabove under s.3 of the State Proceedings Act the 3rd Respondent is immune from proceedings being instituted against him.

[78] As stated by **Kirby P** at p534 ibid, the principle of judicial immunity is acceptable in Australia **'to be as full and ample as it has been stated to be in England'**. He says that it is a principle **'which appears to be**

them in the circumstances such as the present in the exercise of judicial powers in the course of the hearing or trial.

[81] To complete the picture on judicial immunity, the classic authority on the subject is the judgment of **Lord Denning M.R.** in the Court of Appeal case of **Sirros v Moore & Others** [1975] 1 QB 118).

[82] For the purposes of the present case and for all cases of a like nature the following passage from the judgment in Sirros (supra 136) is of the greatest importance for the determination of the applications before me for striking out the substantive action and as stated therein '**actions based on certain allegations have been struck out and will continue to be struck out**":

> ***"In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.***

This principle should cover the justices of the peace also. They should no longer be subject to "strokes of the rodde, or spur." Aided by their clerks, they do their work with the highest degree of responsibility and competence – to the satisfaction of the entire community. They should have the same protection as the other judges."

[83] On judicial immunity **Buckley L.J.** in **Sirros** (supra at 137) said:

"The English law of judicial immunity against civil liability for acts done by judges in their judicial capacity is rooted far back in our legal history.

A judge is immune from personal liability in respect of any act done in his judicial capacity and within his jurisdiction (Marshalsea Case, 10 Co. Rep. 68b, 76a), even if he acts maliciously or in bad faith: Fray v. Blackburn, 3 B. & S. 576, 578; and Anderson v. Gorrie [1895] 1 Q.B. 668, per Lord Esher M.R., at p.670. It has been held that a judge, if he acts in excess of his jurisdiction, may be personally liable, notwithstanding that he acted in good faith and in a mistaken belief that he had jurisdiction: Houlden v. Smith, 14 Q.B. 841 and Willis v. Maclachlan, 1 Ex.D. 376. If, however, a judge is invested (as is a judge of the High Court) with a jurisdiction of such a kind that he is not amenable to the control of any other court in its exercise (otherwise than by an appellate court on appeal) it is said that he is immune from liability in respect of anything he may do in the purported exercise of that jurisdiction, however irregular or mistaken his assumption of jurisdiction may be."

[84] Further, the following passage in **Buckley J's judgment** (ibid 139) is pertinent to the case before me:

"In determining whether a judge is liable for some act which he purports to have done in his judicial capacity, the sole question may, I think, be said to be whether it was an act coram non judice. If he were not then performing a judicial function, the act was not coram judice (when purporting to act judicially, cannot act without jurisdiction) and the judge has no protection. If he was purporting to perform a judicial function but the matter was such that he had not jurisdiction to adjudicate upon it, again the act was not coram judice because he had no authority to act as a judge for that purpose, and again he is without protection.

> ***If, however, he did the act in question in the purported performance of his judicial function and it was within his jurisdiction, then the act was coram judice and the judge is protected notwithstanding any error in his reason for doing the act or his method of doing it."***

[85] Again **Buckley L.J.** (ibid at 140) said:

> ***"If a judge, acting judicially, does something which is within his jurisdiction, the law will not permit his motives to be impugned in an action brought by anyone who has sustained damage by reason of the act. Anderson v. Gorrie [1895] 1 Q.B. 668, 670 Lord Esher M.R. said:***
>
> > ***"The ground alleged from the earliest times as that on which this rule" that no action will lie for a judicial act "rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice":***
>
> He went on to say, at p.140:
>
> > ***"To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."***

Conclusion

[86] To sum up, the 1st and 2nd Respondents acted in their '**judicial capacity**'. However, it should be noted that the applicant says that she is not seeking any relief against the 2nd Respondent but has joined the Acting Chief Justice for the reason already stated hereabove. However, the reason is not acceptable to Court.

[87] They acted in good faith, even if they were mistaken (Denning MR in Sirros, supra), which they were not, yet they acted judicially and for that reason no action will lie against them.

[88] The applicant must fail applying the doctrine of **judicial immunity** in the circumstances of this case. The High Court is a superior court and not a Court of limited jurisdiction, with the consequence that no action lies against the judges.

[89] This is not a case in which the applicant could seek constitutional redress under **s41 of the Constitution**. As stated already, under s41(4) Court may refuse to grant relief if "**adequate alternative remedy**" is available to the person concerned.

[90] In this case, as I have stated hereabove, alternative remedy was available to the applicant. If the applicant can fulfil the requirements for appeal to Supreme Court then that would be the alternative remedy available to her rather than coming to this Court by way of constitutional redress as she has done in this case based on the reasons she has stated in her application. The whole action is misconceived.

[91] The situation here is, as I have already said, that the case is truly one of abuse of process and therefore under Or.18 r18 as well as under the inherent jurisdiction of this Court the action must be struck out.

[92] I conclude with the following passage from the judgment of **Lord Diplock** in **Hunter v Chief Constable** [1982] AC 529 at 536:

> ***"It 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***

Orders

[96] The Respondents having succeeded in their applications to strike out.

It is ordered:

(a) that the names of the 1st and 2nd Respondents be struck out as parties to the action.

(b) that the action against the three Respondents be struck out under Order 18 R18(1) of the High Court Rules and dismissed.

(c) that the Applicant pay costs of the proceedings on an indemnity basis and each Respondent is ordered to prepare a bill of costs and disbursements in taxable form, certify them and send them to the Master for taxation within 10 days from the date of this Decision.

(d) that the Applicant pay the taxed costs within 10 days thereafter to each Respondent.

(e) that unless the Applicant pays the taxed costs in full in time she be not allowed to make any further application or institute any proceedings herein in Court.

D. Pathik

Judge

At Suva

11 April 2008