IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2006: 173

BETWEEN:

EDWARD WARREN MING

Plaintiff

-and-

CARLISLE GREAVES
(a Magistrate)

Defendant

RULING (STRIKE-OUT APPLICATION)

Date of hearing: July 17, 2007
Date of Ruling: August 14, 2007

Mr. Martin Johnson, Attorney-General's Chambers,
for the Applicant/Defendant
Mr. Richard Horseman, Wakefield Quin, for the
Respondent/Plaintiff

Introductory

1. On or about February 1, 2000, the Applicant, sitting in the Family Court, was the Chairman of a Panel which committed the Respondent to prison for 90 days pursuant to the provisions of section 17(3)(b) of the Affiliation Act 1976. Similar orders were made on four subsequent occasions in the course of the following nine months, whilst the Respondent was still incarcerated.

2. The laudatory rationale for the committal orders was to enforce child support obligations and to compel the Respondent to discharge the relevant obligations by participating in a work release programme whilst in prison. On December 7, 2000, the Respondent appealed to this Court against the three sentences then imposed upon him whilst he was in prison on the grounds which included the following. It was complained that the Magistrate exceeded his jurisdiction by (a) committing him to prison without releasing him, and (b) by ordering the Respondent to do work release when there was no power to so order. These grounds of appeal were, on the face of the Chief Justice's April 12, 2002 Judgment, allowed by this Court, and the sentences were set aside.

3. On the basis of this Court's finding that the committal orders complained of were made without the jurisdiction of the Family Court, the Respondent on June 6, 2006 filed a Generally Indorsed Writ together with a Statement of Claim seeking damages for false imprisonment. The Applicant applied by Summons dated August 21, 2006 to strike-out the action on various grounds, including the grounds that (a) the Statement of Claim disclosed no reasonable cause of action, and (b) the claim was frivolous and vexatious.

4. At the hearing of the application, Mr. Johnson for the Applicant conceded that the first principal limb of his strike-out application was not entirely straightforward, but asked the Court to consider his submission that, if magistrates were potentially liable for mere errors of law which were not actuated by malice, this state of the law was unsatisfactory.

5. In the event, argument focussed on the second main limb of the strike-out application, namely whether or not the claim was liable to be struck-out because it was time-barred.

Does the Statement of Claim disclose a reasonable cause of action? The Plaintiff's pleaded case

6. The Statement of Claim avers that the Plaintiff fell into arrears in respect of his child maintenance payments under two separate orders and on or about February 1, 2000 was committed to prison for ninety days under the provisions of section 179(3)(b) of the Affiliation Act 1976, which allows a defaulting party to be imprisoned for up to ninety days for wilfully failing to comply with his payment obligations. Thereafter, he was sentenced to four consecutive ninety day terms of imprisonment "*with work release*".

7. On or about December 7, 2000, it is then pleaded, the Plaintiff appealed in each proceeding on various grounds, the first ground being as follows:

> "*That the Learned Magistrate exceeded his jurisdiction by committing the Appellant to three*[1] *consecutive terms of imprisonment without releasing the Appellant.*"

8. The Statement of Claim concludes as follows:

> "*12. By Judgment dated the 12th day of April, 2002, the Chief Justice of the Supreme Court allowed all of the aforesaid appeal grounds.*
>
> *13. As a result thereof, the Supreme Court has ruled that the Magistrate acted unlawfully, in excess and without jurisdiction.*
>
> *14. The Plaintiff will aver that the Magistrate acted in excess of jurisdiction and the Plaintiff was unlawfully imprisoned.*
>
> *15. The Plaintiff avers that he is entitled to compensation and/or damages for the period of his unlawful incarceration and/or false imprisonment of 360 days during the period of the 1st May, 2000 to the 25th of April, 2001.*"

9. The Writ was issued on May 30, 2006, together with an attached Statement of Claim. By Summons dated August 21, 2006, the Defendant, represented by the Attorney-General's Chambers, applied to strike-out the claim on the grounds that "*it discloses no reasonable cause of action; the Defendant is entitled as of right to Judicial Immunity*". This limb of the strike-out application essentially turns on the following legal question. Is it arguable, as a matter of law, that where a Magistrate imposes a sentence of imprisonment which he is not lawfully empowered to impose, the detention in question is unlawful and the detained person may maintain a claim in damages for false imprisonment?

[1] The fourth term of imprisonment consecutive to the initial term was imposed after the appeal was filed.

The respective submissions

10. Mr. Johnson firstly submitted that the scope of judicial immunity at common law was no different for "inferior" or "superior" courts. He relied on dicta from the English Court of Appeal decisions in *Sirros-v-Moore and others* [1974] 3 All ER 776 and *Heath-v- Commissioner of Police for the Metropolis* [2004] EWCA Civ 493, and the House of Lords decisions in *Attorney-General-v- B.B.C.* [1981] A.C. 303 and *Darker and others –v- Chief Constable of the West Midlands Police* [2001] 1 AC 435.

11. The common law position was in effect that as long as the judge or magistrate honestly believed that he was acting within the scope of his jurisdiction, a mere mistake of law would not be actionable against him in his personal capacity. This position did not involve any consideration of whether the Crown might be liable for any unlawful detention of the citizen.

12. Mr. Horseman made the first broad riposte that section 5(4) of the Bermuda Constitution provided for compensation as of right, and the Plaintiff's case was a clear case of unlawful imprisonment. Under section 5 of the Bermuda Constitution Order, the existing laws had to be construed in conformity with the Constitution.

13. He next contended that the common law rules relied upon by the Defendant were inconsistent with the express statutory right to bring an action against magistrates under the Protection of Justices Act. If they already had immunity under the common law, the added protection of the six month limitation period would not have needed to be enacted. The position in England was, in any event, that justices could be sued for errors in excess of jurisdiction: *R-v-Manchester City Magistrates' Court ex parte Davis* [1989] 1 All ER 90 at 93f-95b.

14. Finally, he submitted that the true position was that the liability to suit of magistrates was different to that of judges of higher courts: *McC-v-Mullan and Others* [1984] 3 All ER 776.

Legal findings: the scope of judicial immunity at common law

15. The common law position as far as magistrates' judicial immunity is concerned is of historical interest only as the position is to a large extent now governed by statute. The position as far as judges of other courts and the judicial members of tribunals is, perhaps, still substantially governed by common law rules, subject to the effect of the Constitution.

16. As Counsel for the Crown relied on the common law position, and this may still appertain to judges other than magistrates or lay justices, it may be helpful to consider the scope of the common law rules on judicial immunity. Twaddle J, giving the judgment of the Manitoba Court of Appeal in *Shaw-v- Trudel* [1988] Man. R. (2d) Lexis 596, helpfully analysed the position as follows:

> "*[9] Judicial immunity from action is a rule of some antiquity. There is reference to it in the* ***Year Books****, Hil. 9 Henry 6, fo, 60. Over the course of the next 400 years, it became established that a judge of a superior court could not be sued for what he did whilst acting within his jurisdiction:* ***Fray v. Blackburn*** *(1863), 3 B. & S. 576; 122 E.R. 217;* ***Anderson v. Gorrie****, [1895] 1 Q.B. 668.*
>
> *[10] The rationale for the rule was explained by Lord Bridge of Harwich in* ***McC v. Mullan****, [1984] 3 All E.R. 908, when he said (at p. 916):*
>
> > *"If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine*

*honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction." [**195]*

*[11] No doubt that is why, in **Sirros v. Moore**, [1975] Q.B. 118, Lord Denning, M.R., said (at p. 136):*

"[A]s 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 will be free in thought and independent in judgment', it applies to every judge, whatever his rank."

*[12] Although Lord Denning's judgment in **Sirros v. Moore** was critized by the Law Lords in **McC v. Mullan**, supra, as going too far, a majority of them had no doubt that a justice of the peace was immune from action [*8] for a judicial act done within his jurisdiction. The minority expressed no opinion on the point. If the majority had found that their view of the law had prevailed since 1870, I would have adopted it for application in Manitoba. Instead they found that, whatever the law had been historically, it had evolved in England to the point that in 1983 it was as they found it to be. This conclusion is evident from the speech of Lord Bridge who said (at p. 916):*

"If the old common law rule was different in relation to justices of the peace, I suspect the different rule has its origin in society's view of the justice, reflected in Shakespeare's plays, as an ignorant buffoon. How long this view persisted and how long there was any justification for it, I am not a good enough legal or social historian to say. But it clearly has no application whatever in today's world."

*[13] The law of England was received in Manitoba in 1870. Its subsequent evolution here has not been markedly different from its evolution in England except where it has been changed by statute. There lies the rub! The immunity of justices of the peace and their successors, the judges of the Provincial Court, has been the subject of provincial legislation. Both the **Provincial Judges Act**, S.M. 1972, c. 61, and the **Provincial Court Act**, S.M. 1982-83-84, c. 52, confer a limited measure of immunity on provincially-appointed judges. Faced with that legislation, I cannot say that the law has evolved in Manitoba to the same point that the House of Lords found it had in England. As the statutory immunity is by itself insufficient to warrant an order dismissing the action summarily, I must enquire as to the state of the law when the statutory immunity was first given and, if the common law gave immunity to justices, whether that immunity survives the legislation.*

*[14] The name "justice of the peace" was first used, at least officially, in the 14th century: **Justices of the Peace Act 1361**. Landowners were entrusted in their local areas with the responsibility of keeping the peace and hearing charges in respect of offences against it. In the course of time, they came to be entrusted with administrative responsibilities as well, such as the issuance of liquor licences. Indeed, until late in the 19th century, they exercised many of the powers now exercised by local governments.*

*[15] In 1674, the application of the rule of immunity to justices of the peace was considered in the Court of King's Bench: **Bushell's Case** (1674), 1 Mod. Rep. 119; 86 E.R. 777. In that case, an action had been brought against two justices for false imprisonment. On a motion by the justices for time to plead, Hale, C.J., said:*

"I speak my mind plainly, that an action will not lie. ... In the case of an erroneous judgment given by a judge which is reversed by a writ of error, shall the party have an action of false imprisonment against the judge? No ... The ... writ of error though it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in the course of justice; they will have but a cold business of it."

[16] I do not have the temerity to say that there is no case in which the statement of Hale, C.J., was contradicted, but such a case, if it exists, was neither cited by counsel nor found by me. I have reviewed the authorities referred to in 29 ***Halsbury's Laws of England****, para. 278, and in Winfield,* ***Present Law of Abuse of Legal Procedure****(1921), pp. 216-221 and am satisfied that there is ample support for the proposition that, in 1870, a justice of the peace was absolutely immune from civil suit for what he did as a judge within his jurisdiction.*

[17] There are a number of Cases which, superficially, suggest the contrary. In ***Lane v. Santeloe*** *(1717), 1 Stra. 79; 93 E.R. 396, a justice was ordered to pay damages for malicious prosecution, he having committed an accused, subsequently acquitted, to stand trial. In* ***R. v. Young*** *(1758), 1 Burr. 556; 97 E.R. 447, and* ***R. v. Fielding*** *(1759), 2 Burr. 719; 97 E.R. 531, there are judicial observations as to the possibility of justices having a civil liability. In* ***West v. Smallwood****, [1938] 3 M. & W. 420; 150 E.R. 1208, Lord Abinger, C.B., said that there was a remedy against a justice if he had acted maliciously and, in* ***Cave v. Mountain*** *(1840), 1 Man. & G. 257; 133 E.R. 330, Tindal, C.J., said that a justice who commits a person to prison may be liable in trespass.*

[18] But, these cases are all distinguishable from ***Bushell's Case****. There is no indication, in the very brief report of* ***Lane v. Santeloe****, that the issue of immunity was even raised, far less considered.* ***R. v. Young*** *was a licencing case in which the functions of the justices was administrative.* ***R. v. Fielding*** *involved an act possibly done in excess of jurisdiction, whilst in both* ***West v. Smallwood*** *and* ***Cave v. Mountain*** *there is no doubt that the justices had exceeded it.*

[19] In the years immediately before 1848, there may have been a rash of actions brought against justices. In any event, the United Kingdom Parliament decided in that year to enact legislation on the subject. Section 1 of the statute, ***An Act to protect Justices of the Peace from vexatious Actions for Acts Done by Them in Execution of their Office****, 11 & 12 Vict., c. 44 (U.K), is sufficiently material to justify its reproduction here. It provided:*

> *"That every action hereafter to be brought against any Justice of the Peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the Declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."*

[20] The second section forbade the bringing of an action against a justice, even where he had acted in excess of his jurisdiction, until the allegedly wrongful order he had made was quashed.

[21] Having regard to the state of the law when the 1848 statute was enacted, that statute cannot be construed as limiting the immunity which previously existed. To the extent that the statute purports to recognize a previous right to sue a justice for an act done as a judge acting within his jurisdiction, I am in agreement with the statement in Winfield, ***Present Law of Abuse of Legal Procedure*** *(1921), in which the learned author suggests that the statute "only baptizes something that never existed or has since died".*

[22] This was also the view of Viscount Finlay, expressed in ***Everett v. Griffiths****, [1921] 1 A.C. 631. That case, involving the liability of a justice for signing an order under s. 16 of the* ***Lunacy Act 1891****, was decided on another*

ground, but Viscount Finlay considered the question as to what the liability of the justice would have been if he had been acting as a judge. He said (at p. 665):

> *"It was contended ... that in acting under s. 16 he was in the position of a judge, and therefore enjoyed complete immunity in respect of any judicial act done by him. If this were the case no action against him in respect of any such judicial act would be competent, even if it were alleged that there was malice and want of reasonable and probable cause. The grounds of this immunity for judicial acts have been often explained. ... This immunity is not confined to judges of the High Court. It extends to all judges. The protection given to justices of the peace by the first section of the statute 11 & 12 Vict., c. 44 is not wanted, and does not apply, in respect of acts of a purely judicial nature relating to matters within the justices' jurisdiction. Its protection is wanted in respect of acts of a ministerial character, and its provisions have not the effect of rendering justices of the peace liable to be sued in respect of purely judicial acts, even if alleged to be malicious."*

[23] Nothing changed the law of England in this regard between 1848 and 1870. We therefore find that, when the law of England was received in Manitoba, justices were immune from civil action for judicial acts done within their jurisdiction. Neither malice nor lack of reasonable and probable cause could alter that. And so it continued until 1972, when the ***Provincial Judges Act****, was enacted."*

17. This analysis, focussing on the context of legally erroneous decisions within the jurisdiction rather than without the jurisdiction of the court, suggests that judicial immunity did not exist at common law as regards judicial acts in excess of jurisdiction at common law. One must therefore turn to cases where decisions in excess of jurisdiction were in issue. In *Sirros-v-Moore* [1975] 1QB 118, whether or not the Circuit Judge had jurisdiction was disputed. But Gordon Slynn (as he then was) made the following interesting submission on the judge's behalf:

> *"What was done by the judge was done by him as a judge of a superior court of record acting as such and within his jurisdiction. It is clear law that where a judge so acts he cannot be sued in damages even if he makes a mistake or abuses the jurisdiction which in law he has. There is no case in which a High Court judge has been held to have acted outside his jurisdiction so long as he is acting in his judicial capacity. The concept behind it is that the High Court can itself determine the limits of its own jurisdiction. The position of inferior tribunals appears to be different; and justices of the peace have always been regarded as an inferior tribunal with a limited jurisdiction to which the High Court has power to restrict them…"*[2]

18. It was in fact unanimously agreed that the judge in question had acted within the sphere of his jurisdiction. The distinction between the High Court judge's position and that of inferior tribunals, made by counsel, was adopted by Buckley LJ, and the majority's view to the contrary was subsequently criticised, as Mr. Horseman rightly pointed out in the present case. Accordingly, the more generally accepted English view of the common law scope of judicial immunity for acts in excess of jurisdiction may well be best reflected in the following passage from Buckley LJ's judgment in *Sirros-v-Moore* :

> *"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.*

[2] At page 125.

> *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. On the other hand, in numerous cases of judges of limited jurisdiction (in which any judicial act in excess of jurisdiction would be subject to control by prohibition or certiorari) judges have been held to be personally liable in respect of acts in excess of jurisdiction, notwithstanding that the judge may have acted in good faith and in the belief that the act was within his jurisdiction (for example, Houlden v. Smith, 14 Q.B. 841) unless that belief was based upon ignorance of some relevant fact: Calder v. Halket (1840) 3 Moo. P.C. 28, 77. This immunity is in each case based on public policy. The apparent distinction between a superior court and an inferior court in this respect has been explained by distinguished textbook writers (see below) upon the basis, that, where the assumption of jurisdiction by the court is not subject to the control of another court, the decision whether a particular cause or matter is within that jurisdiction is itself an exercise of the jurisdiction of the court. The court itself is the arbiter on questions relating to what falls within its own jurisdiction. Consequently, it is said, in assuming jurisdiction in relation to any particular cause or matter, the court is exercising that jurisdiction which is vested in it. In so doing the court may act erroneously ("inverso ordine") but, when purporting to act judicially, cannot act without jurisdiction ("coram non judice"). I have been unsuccessful in finding any judicial authority explicitly supporting this explanation apart from the statement of Willes J. in the advice of the judges to the House of Lords in London Corporation v. Cox (1866) L.R. 2 H.L. 239, 262, where he said:*
>
> > *"Another distinction is, that whereas the judgment of a superior court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior court, involving a question of jurisdiction, is not final."*
>
> *… In my judgment, it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court. He enjoys no such immunity, however, in respect of any act not done in his capacity as a judge.*
>
> *This does not mean that if a High Court judge, or indeed a judge of the Court of Appeal, purports to do something demonstrably outside his jurisdiction, he will be entitled to immunity. He must have acted reasonably and in good faith in the belief that the act was within his powers."*[3]

19. The common law position appears to have been that if a magistrate makes an order committing someone to prison without lawful jurisdiction to do so, the magistrate will be liable in tort for false imprisonment. This is at the very least arguably the position. Accordingly, to the extent that no statute governs the position, the Defendant's submission that the Statement of Claim discloses no reasonable cause of action must be rejected.

[3] At pages 137-138, 140.

Legal findings: the position under the Protection of Justices Act 1897

20. Section 1 of the Protection of Justices Act ("*Justice acting within jurisdiction*") provides that in any action in tort for any act in the execution of a magistrates' jurisdiction, "*it shall be expressly alleged that such an act was done maliciously and without reasonable and probable cause.*"

21. Section 2 ("*Justice acting without jurisdiction*") seemingly (a) confirms the pre-existing common law position, and (b) imposes new procedural hoops through which those suing magistrates must first jump. Section 2 provides as follows:

> "*For any act done by a Justice of the Peace in a matter which by law he has not jurisdiction or in which he has exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, or order made, or warrant issued, by the Justice in any such matter, may maintain an action against the Justice in the same form and in the same case as he might have done before 18 December 1897 without making any allegation in his declaration that the act complained of was done maliciously and without reasonable cause:*
>
> *Provided that-*
>
> *(a) no such action shall be brought for anything done under any such conviction or order until after such conviction or order has been quashed either upon appeal or on application to the Supreme Court; and*
>
> *(b) no such action shall be brought for anything done under any such warrant which has been issued by the Justice to procure the appearance of such party, and which has been followed by a conviction or order in the same matter, until after such conviction or order has been so quashed as aforesaid; or, if such last mentioned warrant has not been followed by any such conviction or order, or if it is a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and the summons were served upon such person, either personally or by leaving the summons for him with some person at his most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against the Justice for anything done under such warrant."*

22. So having regard to the statutory position, the Statement of Claim equally discloses a reasonable cause of action.

23. I have also considered a point which was not relied upon by Mr. Johnson on the Defendant's behalf, namely whether this is a case in which only nominal damages of two cents would be available. Section 12 ("*Limitation of damages where plaintiff actually guilty of the offence*") provides as follows:

> *"In all cases where the plaintiff in any such action is entitled to recover, and he proves the levying or payment of any penalty or sums of money under any conviction or order as parcel of the damages he seeks to recover, or if he proves that he was imprisoned under such conviction or order, and seeks to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of two cents as damages for such imprisonment, or any costs of suit whatsoever, if it is proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered, to pay and (with respect to such imprisonment), that he had undergone no greater punishment than*

that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay."

24. This limitation of damage provision has no impact on the existence of the cause of action, and was quite properly not raised as an additional ground for striking-out. It is doubtful that this provision can be relied upon on the Defendant's behalf. Because although it can clearly be proved that the Plaintiff "*was liable to pay the sum he was ordered to pay*", it is equally clear that the Defendant will be unable to prove that the Plaintiff has "*undergone no greater punishment than that assigned by law…for non-payment of the sum he was ordered to pay.*" The law does permit incarceration for the period ordered for wilful neglect to pay but does not permit incarceration at all where wilful neglect does not occur. The unlawfulness complained of here was not purely technical (for instance an acting magistrate imposing an otherwise lawful sentence on a day when his temporary appointment had lapsed), but went to the root of the power to incarcerate itself. As L.A. Ward C.J (as he then was) held at page 4 of his judgment of April 12, 2002 in the Plaintiff's appeals against the committal orders:

> "*I am therefore compelled to the conclusion that under the present state of the law a respondent cannot be compelled to participate in the work-release programme. No doubt honourable respondents will participate as it provides them with an opportunity to work and at the same time provide financial support for their children. I also find that failure to participate in the programme is not itself evidence of wilful refusal.*"[4]

Legal findings: the impact of the Constitution on the Plaintiff's claim

25. Section 5(1) of the Bermuda Constitution Order provides as follows:

> "*Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution…"*

26. Section 2(1) of the same Order provides as follows:

> *"'"the existing laws" means any laws (including Resolves) made before the appointed day by any legislature for the time being constituted as the legislature of Bermuda and having effect as part of the law of Bermuda immediately before the appointed day [2 June 1968] (whether or not they have then come into operation) and any rules, regulations, orders or other instruments made in pursuance of such laws and having such effect."*

27. So the 1897 Act must be construed in such manner as will be consistent with the Constitution. As the 1897 Act does not purport to take away the constitutional right on which the Plaintiff relies altogether, no conflict between that Act and the Constitution arises, as far as the existence of a cause of action is concerned. The question is whether the time bar point would deprive the Plaintiff of his constitutional rights altogether, or to an impermissibly substantial extent. Section 5(1) of the Constitution provides in salient part as follows:

> *" No person shall be deprived of his personal liberty* **save as may be authorised by law** *in any of the following cases:*
>
> *(a)in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which*

[4] *Ming-v-Tacklyn* [2002] Bda LR 16

he has been convicted or in consequence of his unfitness to plead to a criminal charge;

(b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law…*"*

28. Section 5(4), on which Mr. Horseman specifically relied, provides as follows:

> "*Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person."*

29. In my judgment it is not arguable that the 1897 Act, in any direct way, interferes with the Plaintiff's right to seek compensation for an unlawful arrest under section 5 of the Constitution. After all, section 15 permits applications for relief in respect of infringements of constitutional rights which cannot be remedied under the ordinary law. The Act does not purport to take away the right of action altogether, nor does it purport to provide that certain categories of unlawful arrest are not actionable. It merely imposes a special time-limit for bringing claims against magistrates, which does not have the effect of extinguishing the Plaintiff's constitutional right to relief altogether. It is possible, on the face of the statute, for a claim for unlawful arrest flowing from an order in excess of the Court's jurisdiction to be brought within that time limit. Taking judicial notice of obvious facts, it may not be commonplace for appeals to be fully heard within six months from the decision of the summary court, but a would-be claimant under the Act could potentially request an expedited appeal if contemplating a claim under the 1897 Act.

30. The true questions which appear to me to fall for consideration are whether or not the limitation period of six months provided for by section 8 of the Protection of Justices Act 1897, having regard to the procedural requirement of awaiting the setting aside of the order complained of on appeal to this Court (mandated by section 2(a) before bringing an action) impermissibly interferes with the Plaintiff's common law right to seek compensation through an action in tort either (a) by interfering with the Plaintiff's property rights under section 13 of the Constitution, or (b) interfering with his right of access to the Court under section 6(8). Section 13 provides in relevant part as follows:

> "*(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—*
>
> *(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and*
>
> *(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and*
>
> *(c) provision is made by a law applicable to that taking of possession or acquisition—*
>
> *(i) for the prompt payment of adequate compensation; and*
>
> *(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the*

taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

(2)Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1(a)) of this section—…

...(viii) in consequence of any law with respect to prescription or the limitation of actions…

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society…" [emphasis added]

31. So section 13(1) may not be invoked at all, in relation to a limitation period, unless either (a) the provision on its face, or (b) having regard to the application of the provision, is not reasonably justifiable in a democratic society. Mr. Horseman made the valid complaint that in modern-day practical terms the provision will often be unworkable. Strictly read, an action in tort can only be commenced in compliance with section 8 of the Act within six months of the order complained of, and time starts running once the order is made. The Plaintiff's Counsel contended that the normal six year limitation period should apply, without contending that it was arguable that the specified limitation period is on its face not reasonably justifiable in a democratic society, or as applied to this particular case is not justifiable.

32. An appeal against the impugned order, which must be quashed before proceedings are brought, will rarely be heard within that six months period. It is far from obvious that in the rare cases where proceedings under section 2 of the 1897 Act are contemplated, an expedited appeal would be impossible, as I have already noted above. Having regard to the countervailing public policy interest in promoting and protecting judicial independence, limiting the time in which claims against magistrates for damages should be brought cannot (based on the limited material before this Court) be said to be, even arguably, not reasonably justifiable in a democratic society. Taking the Plaintiff's case at its highest, it is perhaps arguable that sections 2 and 8 of the 1897 Act should be modified, pursuant to section 5(1) of the Constitution Order, so that the six month limitation period only runs once the appeal against the order complained of has been allowed.

33. Mr. Johnson pointed out that, even if the time period were regarded as running from the quashing of the last committal order, April 12, 2002 (which he was prepared to concede), the proceedings were actually commenced four years later. The application of the six month time period, so modified, in all the circumstances of the Plaintiff's case can hardly be said to be not reasonably justifiable in a democratic society. No evidence to support such a conclusion was advanced. This would require evidence of the general legislative practice in democratic societies tending to show that the mandated limitation period for actions against magistrates for errors as to the extent of their jurisdiction is unreasonably short. Such an elaborate argument, if it is tenable, would in my judgment best be advanced in an application for relief under section 15 of the Constitution, if the Plaintiff wishes to rely on a point which cannot presently be said to be arguable in his favour.

34. For similar reasons, in my view it is not arguable that the effect of the short limitation period was to so impermissibly interfere with the Plaintiff's right of access to the Court under section 6(8) of the Bermuda Constitution, that the time limit specified in the statute must be ignored altogether. The Plaintiff's case was

that the provisions of section 2 as read with section 8 are, on their face, inconsistent with the Constitution, and must be given modified effect as a matter of construction pursuant to section 5(1) of the Bermuda Constitution Order. This point is sufficiently clear and narrow to determine at this stage as a matter of simple construction.

35. In addition, however, section 6(8) of the Constitution not only implicitly guarantees civil litigants the right of access to the court. It explicitly mandates that civil proceedings shall take place before an "*independent*" court. In my judgment this express constitutional guarantee has very arguably modified the common law position by raising judicial independence to a higher level of importance than it previously enjoyed. Its effect is thus to eliminate the archaic and highly technical distinctions between the scope of judicial immunity available to high court judges and magistrates, based upon the differing jurisdictions of the respective courts. Section 6(8) applies not only to civil proceedings where the primary facts are found before this Court, but to civil proceedings before the Magistrates' Court as well. As Gillard J observed in a Victorian Supreme Court decision of May 15, 2007, *Nisselle-v-Brouwer* 2007 VSC 147 (unreported):

> "*It is a right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour. As O'Connor J speaking for the Supreme Court of the United States, said in Forrester v White , that Court on a number of occasions has 'emphasised that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have'. She said that 'if judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.*"[5]

36. It is therefore far more arguable against the Plaintiff, that section 2 of the Protection of Justices Act 1897 is in fact inconsistent with section 6(8) of the Constitution in permitting any actions against magistrates for judicial acts in excess of jurisdiction based on bona fide errors of law, and should be construed for conformity as requiring proof of the same level of extra-judicial misconduct as is required for suits (a) against justices under section 1 of the Act in respect of acts within jurisdiction, and (b) against superior court judges at common law. Having regard to the judicial independence requirements of section 6(8) of the Constitution, considerable weight may properly be attached as a matter of Bermuda law to the following *dictum* of Lord Denning in *Sirros-v-Moore* [1975] 1QB 118 at 136, which, albeit in the U.K. pre-Human Rights Act 1998 era, were subsequently disapproved:

> "*In the old days, as I have said, there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid. There has been no case on the subject for the last one hundred years at least. And during this time our judicial system has changed out of all knowledge. So great is this change that it is now appropriate for us to reconsider the principles which should be applied to judicial acts. 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*

[5] Paragraph 94.

> *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 - but 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.*"

37. This point is made not by way of substantive decision, but rather to further articulate why I have formed the view that the constitutional interpretation point raised by the Plaintiff may be summarily rejected at this stage. It remains to consider whether any other constitutional points mitigate in favour of the Plaintiff's opposition to the strike-out application, based on the limitation defence.

38. Because this is a strike-out application and not an application for constitutional relief under section 15 of the Constitution, it is not open to this Court to determine whether or not the application of the limitation period to the Plaintiff in this particular case impermissibly interfered with his right of access to the Court. Such relief would be potentially available to the Plaintiff if all other forms of non-constitutional relief were to be shown to be unavailable on technical grounds. However, this doubtful point (having regard to the Plaintiff's presently unexplained delay) would probably be taken as a last resort. The more substantive question would be whether or not it is constitutionally permissible to deprive a person who has been unlawfully imprisoned of his right to compensation under section 5(4) of the Constitution altogether, merely because public policy makes it desirable that magistrates (and to a greater extent judges of this Court and above) be given special protection against personal liability for their *bona fide* judicial acts.

39. In this regard, it is helpful to consider what section 5(4) probably means when it states that: "*Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor* **from that other person"** (emphasis added). It seems most improbable that such an important constitutional guarantee is concerned, in circumstances where a person is unlawfully detained by an agent or servant of the Crown, with ensuring that compensation be obtained from the agent or servant most intimately concerned with the detention, without regard to the principles of agency and/or vicarious liability. The principal object of fundamental rights and freedoms provisions is to hold the State accountable when the conduct of constitutional actors in any branch of government infringes fundamental rights. It cannot sensibly be suggested that section 5(4) expressly or impliedly preserves rights of action against judges in respect of invalid warrants of arrest or committal orders.

40. This is why I assumed in the course of the hearing, that even if the present action were to be dismissed, an alternative common law claim could be maintained against the Crown in one of its many emanations. It seemed obvious that the right to compensation for false imprisonment should not be eliminated altogether simply because public policy is offended by the notion of a judge who made an invalid committal order being personally liable in damages. The mere fact that a litigant cannot sue a superior court judge personally for delays which contravene her constitutional rights to a trial within a reasonable time would, surely, be no impediment to an application for constitutional redress for such delays under

section 15 of the Constitution. The Attorney-General's Chambers, very properly in my view, have from the outset acted on behalf of the Defendant as they typically would in judicial review proceedings in which a magistrate is a named respondent. The Defendant was, at all material times, acting in his capacity as a judicial officer appointed by the Crown and made a wholly rational series of orders which were subsequently held to be technically flawed. However, the Crown Proceedings Act 1947 purports to exclude any Crown liability in respect of judicial acts, section 3(5) providing as follows:

> *"No proceedings shall lie against the Crown by virtue of this section in respect of any act by any person while discharging or purporting to discharge any responsibilities of a judicial nature which may be vested in him, or while discharging or purporting to discharge any responsibilities which may rest upon him in connection with the execution of any judicial process.*"

41. It seems to me that the effect of the quoted provision is one or other of the following. Firstly, it is possible that the provision is constitutionally invalid because it impermissibly deprives potential litigants of any access to the court in respect of unlawful imprisonment flowing from an invalid court order (in breach of section 5(4) of the Constitution). Or, alternatively, the Plaintiff would have a right to seek relief under section 15 of the Constitution for an infringement of his section 5 rights, because no adequate redress is available "*under any other law*"[6]. If by reason of the doctrine of judicial immunity, the ordinary law of the land does not permit an action in tort for what this Court has in substance already determined to be an unlawful imprisonment, relief should be possible under the Constitution. It seems highly improbable that the constitutional requirements for judicial independence may be construed as excluding the right to compensation for unlawful imprisonment flowing from judicial acts, because no relevant *caveats* or exceptions to the general rule are set out in section 5 of the Constitution, as the drafters have done in other sections.

42. This conclusion is supported by the Privy Council decision in <u>*Maharaj –v- Attorney General of Trinidad and Tobago*</u> (1979) 1 AC 385 at 395, where Lord Diplock observed as follows:

> "*Their Lordships can deal briefly with the question of jurisdiction. The notice of motion and the affidavit in support of the application for the conservatory order for the immediate release of the appellant pending the final hearing of his claim, made it clear that he was, inter alia, invoking the original jurisdiction of the High Court under section 6 (2) (*a*), to hear and determine an application on his behalf for redress for an alleged contravention of his right under section 1 (*a*). It is true that in the notice of motion and the affidavit which, it may be remembered, were prepared with the utmost haste, there are other claims and allegations some of which would be appropriate to a civil action against the Crown for tort and others to an appeal on the merits against the committal order of Maharaj J. on the ground that the appellant had not been guilty of any contempt. To this extent the application was misconceived. The Crown was not vicariously liable in tort for anything done by Maharaj J. while discharging or purporting to discharge any responsibilities of a judicial nature vested in him; nor for anything done by the police or prison officers who arrested and detained the appellant while discharging responsibilities which they had in connection with the execution of judicial process. Section 4 (6) of the State (formerly "Crown") Liability and Proceedings Act 1966 so provides. At that time too there was no right of appeal on the merits against an order of a High Court judge committing a person to imprisonment for contempt of court, except to the Judicial Committee by special leave which it alone had power to grant. Nevertheless, on the face of it the claim for redress for an alleged*

[6] Constitution, section 15(2).

> *contravention of his constitutional rights under section 1 (*a*) of the Constitution fell within the original jurisdiction of the High Court under section 6 (2). This claim does not involve any appeal either on fact or on substantive law from the decision of Maharaj J. that the appellant on April 17, 1975, was guilty of conduct that amounted to a contempt of court. What it does involve is an inquiry into whether the procedure adopted by that judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under section 1 (*a*), not to be deprived of his liberty except by due process of law. Distasteful though the task may well appear to a fellow judge of equal rank, the Constitution places the responsibility for undertaking the inquiry fairly and squarely on the High Court.*"

43. Bermuda's Constitution, unlike the Trinidad and Tobago instrument considered in *Maharaj*, expressly provides a right to compensation for unlawful arrest. The range of unlawful arrests which are eligible for relief here are probably far broader.

44. For these reasons, the Defendant's second strike-out point- the limitation issue- falls to be determined substantially under traditional principles, subject to the assumption in the Plaintiff's favour that time under section 2 of the 1897 Act commenced running when the orders impugned were quashed. No need to afford the Plaintiff an opportunity to fully argue the constitutional points relied on, in the context of the present action, arises.

The limitation defence

45. Section 8 of the Protection of Justices Act 1897 provides as follows:

> "*No action shall be brought against any Justice of the Peace for anything done by him in the execution of his office unless the action is commenced within six months next after the act complained of has been committed.*"

46. As far as the Defendant's application to strike-out the Statement of Claim on the grounds that it was obviously time-barred is concerned, Mr. Horseman took the following points. Firstly he contended that the normal six year time-limit for actions in tort should apply, because sections 2 and 8 of the 1897 Act were inconsistent with the Bermuda Constitution and purported to take away the Plaintiff's constitutional right to compensation for an unlawful arrest. And, secondly, he contended that having regard to the inconsistency between sections 2 and 8 of the Protection of Justices Act, the availability of the limitation defence was not sufficiently clear to justify striking out without a more extensive enquiry.

47. I will assume that the provisions of section 2 of the Act to the effect that proceedings may only be commenced after the order in question has been quashed, to comply with the right of access to the Court under section 6(8) of the Constitution, must be read providing that time starts running under section 8 from the date of the Supreme Court order-in this case April 12, 2002. It is a matter of record that the present action was commenced on June 6, 2006, nearly four years after the sixth month limitation period expired on October 12, 2002.

48. There is no suggestion that this Court has any jurisdiction to extend the limitation period, and the argument that the normal limitation period applicable to tort actions should apply, essentially because the six months limit is unconstitutional, has been rejected. No explanation has been afforded for the delay of nearly 44 months after the statutory limitation period expired, over seven times the prescribed limitation period. It is equivalent to commencing an action to which a six year limitation period applies more than 42 years after the expiry of the limitation period.

49. It is difficult to imagine a more plain and obvious case for striking-out on the grounds that the Defendant has a valid limitation defence, particularly since no relevant factual disputes fall for determination.

Discretion to decline to accede to an otherwise meritorious strike-out application

50. I have also considered whether there are grounds for refusing to accede to the present application and affording the Plaintiff an opportunity to pursue a claim which seems bound to fail on limitation grounds. I am mindful of the fact that in a case against a former magistrate who is now a member of this Court, the appearance of justice being seen to be done to the Plaintiff's claim is a particularly sensitive matter. The significance of any perceived partiality towards the Defendant is entirely lacking in substance, however, because it seems clear that the Crown intends to stand behind the Defendant and accept responsibility for any damages claim, whatever the technical legal position may be found to be.

51. In the present case the Plaintiff has a substantive cause of action which, if asserted against any emanation of the Crown other than a magistrate, and subject to any complaints relating to his delay, appears to have good prospects of success. As the rights which the Plaintiff complains were infringed are constitutionally protected, however, the striking-out of the present action on limitation grounds will not deprive him of any form of redress altogether, even if no alternative claim in tort may be advanced by virtue of section 3(5) of the Crown Proceedings Act 1966.

52. In these circumstances there is no identifiable basis for allowing an obviously time-barred claim to proceed to trial, nor is there any public interest in enabling the Plaintiff to have his day in Court although his claim is clearly bound to fail.

Summary

53. The claim is accordingly struck-out, on the grounds that it is frivolous and bound to fail, by reason of the availability of a plainly valid limitation defence.

54. As the Plaintiff is legally-aided, I would make no order as to costs.

Dated this 14th day of August, 2007

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KAWALEY J.