Neutral Citation Number: [2021] CA (Bda) 1 Civ

Case No: Crim/2020/1

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. ACTING JUSTICE WHEATLEY
CASE NUMBER 2018: No. 245

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 19/03/2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- - - - - - - - - - - - - - - - - - - -

Between:

WANDA ANN PEDRO

Appellant

- and -

THE ATTORNEY-GENERAL & MINISTER FOR LEGAL AFFAIRS

Respondent

Cameron Hill of Westwater Hill & Co (on 6 June 2020), and Simone Smith-Bean of Smith-Bean & Co (on 3 November 2020) for the Appellant

Mr Brian Moodie, of the Attorney-General's Chambers for the Respondent

Hearing date(s): 6 June and 3 November, 2020

- - - - - - - - - - - - - - - - - - - -

APPROVED JUDGMENT

Misfeasance in Public Office – ingredients of the tort – claim against officers of Department of Children and Family Services for misfeasance in the context of child care and supervision proceedings – whether duty of care owed to a parent in the context of such proceedings where the interests of the child is paramount – need for clear and fully particularized statement of claim – application to strike out claim for being frivolous and vexatious and for being time-barred – application to strike out heard by Acting Puisne Judge who had not sworn to prescribed oath of office – whether decision of the judge invalidated by failure to swear the oath or whether the decision deemed valid by application of the doctrine of de facto authority.

SMELLIE JA:

Introduction

1. The Appellant, Ms Pedro then acting in person, on 10 July 2018 brought claims in the Supreme Court against the Department of Child and Family Services ("the DCFS"), certain individual social workers employed within the DCFS ,against officers of the courts, including the Magistrates who had dealt with the case involving the care and supervision of her child and which was the subject of her claims in the Magistrates' Court and Miss Ashley Smith, the latter in her clerical capacity as Court Associate in the Family Division of the Magistrates' Court.

2. The claims against the Magistrates and Miss Smith were, however, later properly withdrawn as being misconceived. In the case of the Magistrates, this was especially so in light of the provisions of section 10A of the Bermuda Magistrates Act 1948[1] which renders them immune from personal liability in respect of decisions taken when acting in their judicial capacities. In the case of Miss Ashley Smith, it was accepted by the Appellant that as a clerical officer acting on the instructions of the Magistrates, she had no decision-making role in relation to the proceedings in question and therefore there was no basis on which she could properly be sued. The Appellant's claim has thus come to proceed only as against the Attorney General acting on behalf of the DCFS itself, pursuant to section 14 of the Crown Proceedings Act 1966 and on the fully contested basis of allegations which later came to be particularized as the misfeasance in public office of certain DCFS officers, viz: the social workers who were assigned to the case involving her child.

3. By a Chambers Ruling delivered on 28 November 2019 ("the Ruling"), Madam Registrar Alexandra Wheatley, in her ostensible capacity as Acting Puisne Judge of the Supreme Court, on an application by the Attorney General, struck out the Appellant's remaining claims against the DCFS and its officers on two grounds. Firstly, under the Rules of the Supreme Court Order 18 r 19 - that they were frivolous, vexatious and an abuse of the process of the court because, among other reasons, the Appellant had consented to and had not appealed against the orders of which she complained in her action. These were orders which had been rendered by the Magistrates on the applications brought by the DCFS. Secondly, that her claims were time-barred by operation of the Limitation Act 1984 and that she had failed to establish that they came within any of the exceptions allowed by the Limitation Act.

[1] As amended in 2009.

4. The Appellant appealed against the Ruling on a number of grounds. These, initially presented by her in lay and rather prolix style, were nonetheless adopted by Mr Hill and still later in succession, adopted also by Miss Smith-Bean and may be summarized as follows; that: (i) the learned Registrar lacked jurisdiction to hear the claims as she purported to do sitting as an Assistant Justice (sic) of the Supreme Court[2] while not having sworn to the prescribed constitutional judicial oath of office; (ii) the learned Registrar ought to have recused herself on grounds of apparent bias from trying the claims because she had earlier, in her capacity as Legal Aid Counsel[3], formed a view of the merits of the claims when deciding to refuse the Appellant a full grant of legal aid and further; (iii) also on account of previous interactions in her capacity as Registrar with the Appellant about her claims, in striking out the claims under Order 18 r.19, the learned Registrar improperly excluded from her consideration evidence which would otherwise have been relevant for consideration and which, if adduced at trial, would have been capable of justifying the claims and finally; (iv) in striking out the claims as time-barred, the learned Registrar considered matters which she ought not to have considered and failed to consider matters which, by virtue of the relevant provisions of the Limitation Act, she ought properly to have considered.

5. Her claims having been struck out, the Appellant failed to apply, either to the Supreme Court or to this Court, for leave to appeal within the time limits of the rules, as was required when seeking to appeal against an interlocutory judgment such as the Ruling. While being unrepresented at the time afforded the Appellant no automatic excuse (as even lay litigants are expected to ascertain and comply with the basic requirements of the Rules of Court), this Court recognized that these failings were not deliberate but were indeed the result of her acting in person in the context of what had become a matter of some complexity.

6. An application to this Court for leave to appeal out of time was, eventually, allowed to be filed by Mr Hill and granted. In order that the appeal might be heard and disposed of in a timely manner, we granted that application by waiver of non-compliance with the rules, pursuant to Order 5 rule 1 of the Court of Appeal Rules.

7. We noted however, that unhelpfully, the Record of Appeal did not include a proper chronology or summary of the background circumstances of the case. Nor was there yet a clear and proper particularization of the claims which the Appellant asserts. Instead, there was the prolix and discursive type-written seven- and- a-half page document prepared by the Appellant herself, headed "*Damages caused by Social Workers of Child & Family Services*" (along with another headed "*Damages Caused by Magistrates as follows*") which had been put before the Supreme

---

[2] The Ruling is signed by Alexandra Wheatley as an Acting Puisne Judge of the Supreme Court and a copy of the instrument appointing her in that capacity has been shown to the Court. That is the capacity in which Ms Wheatley will be considered to have purported to act in this matter notwithstanding the description in Ms Pedro's grounds of appeal. Assistant Justice and Acting Puisne Judge are both judicial offices created by the Constitution of Bermuda and appointees are required to swear to the judicial oath of office prescribed under section 76 of the Constitution. The erroneous nomenclature used in the grounds of appeal will therefore be inconsequential to the outcome.

[3] So described in an email exchange with Ms Pedro on 6 November 2017. This ground of appeal appears however, to have been abandoned. It was never argued. There is merely a passing reference in the amended pleading at [81] to an application to then Registrar Alexandra Wheatley who was also employed as legal aid counsel having acted with delay in respect of an application for legal aid which was nonetheless granted. The suggestion of an appearance of bias on the part of Ms Wheatley such as to have required her recusal from dealing with the strike out application, would not, in any event, have appeared to us to be well founded.

Court below, and served there as the record of her claim - that which was ultimately struck out by Ms. Wheatley in the Ruling ("the Claim").

8. It became obvious, that in order effectively to resolve this appeal, a proper amended writ and clearly particularized amended statement of claim were required. At the conclusion of the arguments, directions were therefore given in that regard, allowing as well for the Attorney General to file particulars of an amended defence in response on behalf of the DCFS. Directions were also given for the submission in writing of any final arguments. These pleadings were eventually filed in draft ("Amended Statement of Claim" and "Amended Defence" respectively). The Amended Statement of Claim runs to some 83 paragraphs of narrative seeking to explain the claim which the Appellant finally seeks to advance. That document, the Amended Defence and further submissions from Mr Moodie for the Attorney General were considered by the Court in arriving ultimately at our decision on the appeal, as will become apparent below.

Background

9. It appeared from the Claim, from the terms of orders made in the Magistrates' Court; from a Plan of Care filed in that Court in April 2008[4], and from passing reference to the history in the Ruling[5], that the orders against which the Appellant complains, were indeed made upon applications brought under the Children Act 1998 by the DCFS. These applications at first sought a Supervision Order in respect of Michael Jones Jr., the then 9 year old son of the Appellant and Mr Michael Jones Sr. At the time in April 2008, his parents having earlier separated[6], Michael Jr. resided with his mother but concerns for his welfare brought to the attention of the DCFS by his father, led to the involvement of the Police Services and application by the DCFS for the Magistrates' Court's intervention.

10. On 2 April 2008 - in the presence of the Appellant (then represented by attorney –at –law Margaret Burgess-Howie), Mr Jones Sr. and social workers from DCFS - an initial Supervision Order for two months was made and the Magistrates' Court then also ordered that Michael Jr. reside with his father until the review date, then set for 5 June 2008. On 2 April 2008, the Court also ordered that Michael Jr. undergo a mental health assessment by a clinical psychologist at Child and Adolescent Services, with a report to be produced to the Court as soon as possible. Both parents then consented to attend parenting and other counselling classes and this was also ordered by the Court.

11. On 5 June 2008, the case came before the Court for review and having seen the aforementioned Plan of Care in respect of Michael Jr. and the annexed Report to the Court from the clinical psychologist, Magistrate Tyrone Chin directed the implementation of the thirteen (13) provisions of the Plan of Care, imposed a further Supervision Order for six months and ordered that his father, with whom Michael Jr. would reside, would have full care, control and custody of Michael Jr.

---

[4] This is a detailed document of 14 pages which also annexes a Clinical Psychologist's Report. It was recovered from the Magistrates' Court Case Record and provided to this Court on12 June 2020.

[5] At [1] and [2].

[6] Mr Hill in his submissions explained that Ms Pedro was never married to Mr Jones Sr and that an assertion to the contrary appearing at page 3 paragraph 3 of the Clinical Psychologist's Report of 5 May 2008 is erroneous, further, as he submitted, that it is indicative of the neglect with which the DCFS approached the entire case.

However, among the other detailed provisions of the Plan of Care adopted, by provision # 5, his mother was allowed to exercise supervised access to Michael Jr. at the premises of the Department of Child and Family Services, for one hour each week.

12. The record shows that the case came back before the Magistrates' Court for review on several occasions during 2009-2010 when, as appears from the terms of the successive orders, the Supervision Order granted to Michael Jr.'s father was from time to time extended but with increasingly more favourable terms of access for his mother. The last three of these orders- those rendered respectively on the 29 October 2009, 3 November 2009 and 8 January 2010 - are all expressed as made with her consent. Of significance also to the ultimate outcome of this matter, one sees that further orders were also made for psychological and/or psychiatric assessment or treatment in respect of Michael Jr. and for counselling and coaching in respect of his mother.

13. From the working draft found on the Court file of what appears to be the final order made on 8 January 2010 by the Magistrate's Court (per Magistrate Juan Wolffe), the following significant provisions appear:

> "*1. That Ms Wanda Pedro states that in the interest and welfare of Michael Jones Jr. that she wishes to withdraw her application for custody care and control of Michael Jones Jr. and in this regard the court orders that her application is hereby withdrawn.*
>
> *2. That by consent between the parties, Mr Michael Jones Sr. and Ms Wanda Pedro shall have JOINT CUSTODY of Michael Jones Jr.*
>
> *3. That by consent between the parties, Mr Michael Jones Jr shall continue to have CARE & CONTROL of Michael Jones Jr. and with this regard Michael Jones Jr. shall reside with Mr Jones.*
>
> *4. ..*
>
> *5. ..*
>
> *6. That by consent between the parties, including the Department of Child & Family Services, the Interim Supervision Order dated 27 October 2009 is hereby discharged. By consent between the parties the Department of Child & Family Services shall for a period of three (3) months conduct an After Care Program in respect of Michael Jr.*
>
> *7. That there is liberty for either party to restore in respect of any issue related to Michael Jr., including but not limited to access or child support."*

The filing of the Appellant's complaints in the Supreme Court, the application to strike them out and this appeal.

14. It appears that the Appellant first filed her complaints against the DCFS' conduct of the case (and against the other defendants then joined) by way of a document described as a Writ of Summons on 10 July 2018[7] ("the Writ"). The Writ was filed some eight years and seven months after Magistrate Wolffe made what appears to have been the conclusive order in the Magistrates' Court on 8 January 2010.

15. The Defence to the Writ was filed by the Attorney General on behalf of the DCFS on 23 August 2018 and in due course the strike-out summons, that which led to the Ruling, was filed and heard.

16. The Appellant's first ground of appeal as identified at [4] above, seeks to challenge the validity of the appointment of Ms. Wheatley as an Acting Puisne Judge (albeit cited in the grounds of appeal as "Assistant Justice"), her jurisdiction to hear the strike-out summons and thus, the validity of the Ruling itself. This is therefore the first ground of appeal to be addressed.

The constitutional appointment of judges and the judicial oath of office.

17. The Bermuda Constitution Order 1968, by sections 73 and 75, vests authority in the Governor (after a prescribed process of consultation) for the appointment of the Chief Justice, Judges, Acting Judges and Assistant Judges of the Supreme Court. The authority to appoint an Acting Judge (that which is relevant here) is vested by section 75 (2), expressed in these terms:

> "(2) *If the office of a Puisne Judge is vacant, or if any such judge is acting as Chief Justice, or is for any reason unable to perform the functions of his office the Governor, after consultation with the Chief Justice, may appoint a person, possessing such legal qualifications and experience as he may deem appropriate, to act as a Puisne Judge*."

18. It is confirmed that Registrar Wheatley was duly appointed in keeping with section 75(2) to act as a Puisne Judge by an instrument of appointment signed by the Governor on 16 September 2019, covering the relevant period (19 September through 27 September 2019). This is as expressed in her Instrument of Appointment, a copy of which was presented to this Court during the hearing of the appeal.[8]

19. In order to undertake the functions of office, an appointee must first swear and subscribe to the oaths or declare the affirmations of office, as prescribed by the Constitution. This appears from section 76 of the Constitution:

> "76. *Before entering upon the functions of his office, every judge of the Supreme Court shall make and subscribe before the Governor, or some other person authorized in that behalf by the Governor, oaths or affirmations of allegiance and*

[7] As appears from the Ruling at [1]. An undated, unsealed copy of this document is seen at tab 6 of the Hearing Bundle presented for this appeal.

[8] At Tab 7 of the bundle containing the Outline Submissions of the Attorney General (then the Intended Respondent)

> *for due execution of his office in the forms set out in the First Schedule of this Constitution.*"

20. The prescribed judicial oath and affirmation for due execution of office as they appear in the First Schedule are as follows:

> " *Judicial Oath*
> *I, …… , do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of …… and will do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill will.*
> *So help me God.*
> *Judicial Affirmation"*
>
> [Here is set out the alternative form of affirmation to same effect as the Judicial Oath for those who do not wish to swear to an oath].

21. The precise judicial oath of office to be sworn, or affirmation to be declared, depends on the particular judicial office to be held and so the form of oath or affirmation obviously requires the name of the officer and the particular office – in this case Acting Puisne Judge of the Supreme Court –to be inserted before being executed.

22. Of particular importance for present purposes, by the terms of section 76 as set out above, it is to be recognized that the execution of the judicial oath or affirmation is required before the appointee may enter into the functions of the office.

23. Enquiries having failed to confirm that Registrar Wheatley executed the prescribed oath (or affirmation) as Acting Puisne Judge, the appeal proceeded upon the concession, properly given by Mr Moodie on behalf of the Attorney General, that she did not. Indeed, in an affidavit provided by Ms Wheatley, she acknowledges her inability to verify that the oath prescribed by section 76 was executed although she affirms that the prescribed oath of office for her substantive post of Registrar was executed when she was formally appointed to that post, on 31 October 2018. That oath of office is however, prescribed under the Bermuda Promissory Oaths Act 1969 ("the Bermuda Act") and it is accepted that its execution for the assumption of her duties as Registrar could not be regarded as a substitute for the oath prescribed for the assumption of her duties as an Acting Judge.

24. The question is therefore whether that apparent failure to have taken the prescribed form of oath or affirmation carries vitiating consequences for her functions as an Acting Judge, here in particular, for the purposes of the Ruling.

25. The following passage from ***Halsburys***[9], while not supported by authority, comments on the position in the United Kingdom as understood by the learned authors. It is submitted on behalf of the Appellant that the position must be *a fortiori* in Bermuda, given that the requirement here is one mandated by the Constitution:

[9] Halsbury's Laws of England, Fifth Edition Vol 20 para 597 (pp595-596)

> "597. ***Oaths to be taken.*** *As soon as may be after their acceptance of office, the senior executive officers of state and members of the judiciary as specified by statute must take the oath of allegiance and official or judicial oath, in the form and manner specified. [Here citing the prescribed forms of oath specified as set out in the Promissory Oaths Act 1868, U.K. ss 2-4.] ("the 1868 Act")….*
>
> *If any officer specified declines or neglects, when an oath required to be taken by him is duly tendered, to take such oath, he must, if he has already entered on his office, vacate it and if he has not entered office he must be disqualified from entering it; but no person may be compelled, in respect of the same appointment to the same office, to take such oath more than once."*[10]

26. Similarly worded provisions to those from the 1868 Act appear in the Bermuda Act in relation to the offices for which oaths are prescribed by that Act. Notably, section 5 requires the judicial oath to be taken by the Magistrates, Coroners, Justices of the Peace and the Registrar while not including the higher judicial offices, leaving those, it must be assumed, to be dealt with as they are, under the Constitution. Indeed, sections 9 and 10 of the Bermuda Act expressly recognize that the oaths prescribed under the Constitution are exempt from the purview of the Bermuda Act.

27. From earlier email exchanges between Mr Hill and Madam Registrar Wheatley presented on this appeal, and from her affidavit filed in response to this appeal, it appears that the constitutionally prescribed form of oath for the office of Acting Puisne Judge (or for that matter Assistant Justice) of the Supreme Court, was not sworn by her because of a belief or assumption that the form of oath earlier sworn by her under the Bermuda Act upon assuming the office of Registrar,[11] would suffice.

28. This belief or assumption has been conceded to be erroneous for the obvious reason that the oath earlier taken, not only referenced the office of Registrar and not that of Acting Puisne Judge of the Supreme Court, but also because it was not in the form prescribed under the Schedule in keeping with section 76 of the Constitution.

29. The consequence, while, as we explain below, not invalidating of the Ruling, was not a matter of mere formality. The office of Acting Puisne Judge of the Supreme Court is a judicial office created by the Constitution and the Constitution and laws invest its holder with all the moral and legal duties and responsibilities, powers, rights and obligations which flow from that appointment. This symbolic construct is the foundation of the framework for ensuring that citizens' rights are determined by competent, independent and impartial judges, according to law. The swearing of the oath (or declaration of the affirmation) is the expression of the office holder's recognition of the requirements and responsibilities of the particular judicial office which he or she assumes, and a solemn promise, binding upon conscience, for its due and proper fulfilment. Section 76 of the

---

[10] Here citing section 7 of the 1868 Act. (as amended by the Statute Law (Repeals) Act 1981; and by SI 1999/1042, to include offices in Scotland and Northern Ireland).

[11] The form of oath prescribed under the Bermuda Act and actually sworn by her before the Governor on 1 November 2018 is exhibited to Ms Wheatley's affidavit and is in the form prescribed in Form C of the Schedule to the Bermuda Act (in the same form as the Judicial Oath prescribed under the 1868 Act and indeed under the Constitution as set out above but here referencing the "Office of Registrar").

Constitution requires that upon being appointed and before entering into the functions of the office, the Acting Puisne Judge must swear the judicial oath or declare the judicial affirmation, in that capacity and in no other capacity. The requirement of appointment and the requirement of the swearing of the oath (or declaration of affirmation) are both substantive and different requirements. A proper assumption of office therefore, it seems to us, necessitates that both are satisfied.

30. But significant as all this is, does it follow that failure to have taken the precise prescribed form of oath must mean that the Ruling is invalid? We address this question below.

The presumption of regularity and Rules of the Supreme Court 1985 ("RSC") Order 32 Rule 11.

31. Mr Moodie, on behalf of the Attorney General in his original submissions, argued to the contrary, in alternative ways. His primary submission was that there is a presumption of regularity that the required oath or affirmation was duly executed. His secondary submission was that, as Order 32 rule 11 of the RSC empowers the Registrar to "*transact all such business and exercise all such authority and jurisdiction as may be transacted by a judge in Chambers with limited exceptions* [not applicable here]", the Ruling, despite being on its face expressly rendered by her purportedly as Acting Puisne Judge, should be regarded in the alternative, as having been regularly and validly rendered by Ms Wheatley in her capacity as Registrar.

32. We found neither of these arguments to be acceptable.

33. The maxim *Omnia praesumuntur rite et solemniter esse acta*[12] provides a legal presumption to the effect that an official act complied with all requirements so that the official who performed it was to be regarded as properly appointed.

34. Mr Moodie argued that the maxim would operate in the circumstances presented to put an onus of proof on the party challenging the act - here Ms Pedro - to prove that the judge's appointment was defective. As no such actual proof has been presented by Ms Pedro, he argued that the presumption must be that Ms Wheatley was properly appointed as Acting Puisne Judge.

35. This was patently unacceptable in the circumstances of this case. Here the irregularity is apparent from the fact that on its face, the Ruling was ostensibly rendered by Ms Wheatley qua Acting Puisne Judge, even while, from the evidence filed in the appeal[13], the only form of oath presented as ever having been sworn by her was that as Registrar.

36. The presumption of regularity has no place where the available evidence points, at least prima facie, the other way. This is authoritatively explained in ***Words and Phrases Legally Defined***[14]***:***

> *"'The maxim, Omnia praesumuntur rite esse acta, is an expression, in short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn*

[12] Identified during the course of arguments by the Court, inviting counsel's views as to its applicability.

[13] By way of affidavit with leave of the Court and discussed further below.

[14] Fourth Edition Volume 2, LexisNexis Butterworths, at page 368

> *when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect' Harris v Knight (1890) 15 PD 170 at 179, per Lindley LJ."* [emphasis added].

37. In this matter, Ms Wheatley states frankly at [6] and [7] of her affidavit, that she does not recall whether the oaths she swore during the period January 2018 to July 2018 and prior to being appointed substantively as Registrar on 1 November 2018, specified either that she served as Acting Registrar or as Acting Puisne Judge. The form of oath she is able to produce[15] is that sworn upon her appointment substantively as Registrar on 1 November 2018. At [8] of her affidavit, Ms Wheatley refers to having produced to Mr Hill, then acting for Ms Pedro, a copy of the Instrument of Appointment appointing her as Acting Puisne Judge for the period 19 to 27 September 2019[16] but it is implicit that she was not then able to also produce a copy of a judicial oath of office for that period. Further enquiries of the Governor's Office, where a copy of such an oath would ordinarily be kept, confirmed that no such oath was on file.

38. As regards Mr Moodie's alternative argument based upon the Rules of the Supreme Court; the obvious difficulty it faces is that the Ruling itself expressly purports to have been rendered by Ms Wheatley as Acting Puisne Judge. For the purposes of this appeal, it is therefore simply not open to this Court, on the material before us, to conclude that she dealt with the application qua Registrar. And there is a further practical reason why this argument may not be prayed in aid in the circumstances here presented. This is that, were the Ruling deemed to have been rendered by Ms Wheatley in her capacity as Registrar (again despite what it states on its face), there would be no basis for an appeal to this Court. Under the RSC, the right of appeal from a ruling of the Registrar is to a Judge of the Supreme Court. See RSC O.58 r. 1.

The public policy doctrines of de facto authority and the de facto judge

39. There are however, long and well-settled lines of judicial authority based on public policy and which recognize the important public interest in the due administration of justice, which must be considered. This public policy is embodied in two distinct but complimentary doctrines discussed in the cases which were brought to the attention of counsel by the court, inviting further submissions which were subsequently allowed and accepted in writing.

40. By way of summary introduction, the first line of authority is directly relevant to the question of the consequences of a failure of procedure, such as a failure to follow a statutory procedure for the empanelment of jurors or a failure to take a prescribed form of oath. The following discussion of the principles comes from the judgment of Lord Mance on behalf of the Privy Council in ***Director***

[15] As exhibited to her affidavit.
[16] Page 1 of the Ruling records that the hearing was on 24 September 2019.

of Public Prosecutions of the British Virgin Islands v Penn[17] beginning at [15] , citing and applying dicta from the earlier judgment of the Privy Council in ***Montreal Street Railway Company v Normandin***[18]**.** Both of these cases involved failures to observe the statutory processes for the proper selection of criminal juries (in ***DPP V Penn***) and civil juries (*in* ***Montreal Railway***):

> "*15.The question in the present case is whether, when default by the returning officer is revealed after trial, the consequence is, either automatically or in the circumstances of this case, that a venire de novo should issue and a retrial be ordered. The Court of Appeal considered this to be the effect of the Jury Act 1914. But, before looking more closely at that statute, the Board will address a previous decision which the Court of Appeal distinguished as inapplicable in view of the wording of the Jury Act.*
>
> *16. Montreal Street Railway Company v Normandin [1917] AC 170 involved, like the present case, "very elaborate and minute "statutory enactments... Municipalities were to provide annually lists of qualified persons, which a board on which the sheriff sat and which he apparently chaired was to revise to make a list of grand jurors. This list was then to be provided to the prothonotary, who was to take from it names of all persons residing within 15 miles of his office in order to create a list of civil jurors, from which civil juries were to be impanelled. The sheriff and board neglected their duties for several years by 1912 when the case was tried, and the prothonotary (who the Board in its reasoning assumed thereby also to have been in default: p176) used old lists to impanel civil juries. There had been no challenge to the array or to any individual juror at the trial.*
>
> *17. The judgment of the Board was delivered by Sir Arthur Channell and is worth quoting at length:*
>
> > *"The statutes contain no enactment as to what is to be the consequence of non-observance of these provisions. It is contended for the appellants that the consequence is that the trial was coram non judice and must be treated as a nullity.*
> > *It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed. , p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience,*

[17] [2008] UKPC 29 (8 May 2008), pp8-9, a case in which the Court Official responsible for vouchsafing the jury selection process for criminal trials, had habitually failed to comply with the statutory procedure.

[18] [1917] AC 170 - this case also involved an elaborate process which was not complied with for the selection of juries for civil cases.

> *or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable [(ie: sanctionable)], not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale , P.C., p 50, Rex v Leicester Justices (1827) 7 B & C 6, and Parke B. in Gwynne v Burnell (1835) 2 Bing N C 7, 39); to provisions as to rates (Reg v Inhabitants of Fordham (1839) 11 Ad & E 73 and Le Feuvre v Miller (1857) 26 L J (MC) 175); to provisions of the Ballott Act (Woodward v Sarsons (1875) LR 10 CP 733 and Phillips v Goff (1886) 17 QBD 805); and to justices acting without having taken the prescribed oath, whose acts are not held invalid (Margate Pier Co v Hannan (1819) 3 B & AI 266). In the case now before the Board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list ipso facto null and void, so that no jury trials could be held until a duly revised list had been prepared… In this case the prothonotary had a list in fact, although an old one, and the men on it had all been qualified, and probably in most cases, remained so. The names were taken in proper rotation, and those ultimately sworn appear all to have been qualified. As to some of the matters, such as omission to initial correct alterations, it would be impossible to hold that these made the whole list null and void. Having regard to the nature of the sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect, if there had been any in other matters, would be of the same kind as the sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box, to stand, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials where there was reason to think that a fair trial had not been had. The view taken by Monet J. that he ought not to interfere where the appellant had shown no prejudice appears very reasonable, and their Lordships are of the opinion that it is also in accordance with the authorities." (pp 174-176) [emphases added]*

41. Lord Mance continued at [18]

> "18. The modern tendency is no longer to seek to identify or distinguish between mandatory and directory acts, but the Board's judgment in the *Montreal Street Railway case underlines the need for careful examination of the relevant legislation, to ascertain the purpose of statutory procedures for the impanelling of an array and whether an intention should be attributed to the legislature that non-compliance with such procedures should render a jury trial a nullity, irrespective whether it may have occasioned potential unfairness or prejudice. The Board*

> *recognizes the seriousness of a criminal charge and the particular vigilance that the courts will exert to maintain the fairness and integrity of criminal proceedings. But the Board considers that there is scope for the reasoning in the Montreal Railway case in a criminal context." [emphases added]*.

42. There must be even greater scope for the reasoning in a civil context such as the present case, which, although of manifest importance to the parties, does not involve an even more concerning possible infringement of the liberty of the subject. One therefore seeks, for present purposes, to extract the applicable principles from the reasoning in the cases.

43. First, one sees that there is the need for careful examination of the relevant legislation, here section 76 of the Constitution, to ascertain the purpose of the relevant statutory procedure or requirement (the taking of the prescribed oath) to determine whether an intention should be attributed to the legislature (Her Majesty in Council exercising the powers vested by the Westminster Parliament by the West Indies Act 1962) that non-compliance with such requirement should render a trial a nullity.

44. The symbolic importance of the oath (as described above) notwithstanding, the Constitution (as were the Juries Acts in both ***Montreal Railway*** and ***DPP v Penn***), is silent as to the consequences of non-compliance. This is especially important for present purposes because of the longstanding and pre-existing principles of common law discussed in the cases and which came to be relied upon by the Privy Council in ***DPP v Penn,*** principles of which the legislature must be taken to have been aware when the Constitution was promulgated.

45. It can therefore be assumed that the Constitution leaving them untrammeled is in recognition of the important public policy which the pre-existing principles embody.

46. Nonetheless, it appears from the reasoning of the Privy Council in emphasis above, that there is a discretionary balancing exercise to be undertaken. This involves the need to consider the possible great inconvenience of a trial de novo (not only in the instant case but also in any others undertaken by the non-compliant tribunal) as against any risk that a fair trial might not have been afforded. Where there is any such real risk, the public policy is in favour of nullification and a trial de novo.

47. And further in this regard, the requirement of being qualified to act or the absence of impersonation, as appears from Sir Arthur Channell's recognition, adopted implicitly by Lord Mance in ***DPP v Penn***, that "*the prothonotary had a list in fact, although an old one, and the men on it had all been qualified.. the names were taken in proper rotation, and those ultimately sworn appear all to have been qualified."*

48. To the extent therefore, that the same public policy concerns of uncertainty, inconvenience and finality to litigation which informed the decisions of the Privy Council in both ***Montreal Railway*** and ***DPP v Penn***, would inform the present discussion as to whether the failure to have subscribed the oath invalidates the Ruling of a duly qualified and appointed tribunal (or any others rendered during the relevant time by Ms Wheatley), there appears no basis in principle for distinction and the result must be the same.

49. Moreover, as we discuss further below, there is the second limb of the doctrine, apparently originating in the ***Margate Pier*** case (above), whereby a failure of procedure – such as the failure to subscribe to an oath or comply with other process - has come to be regarded as not invalidating the acts of the judge. Indeed to the contrary, as ***Coppard v Custom and Excise Commissioner***[19] shows, the de facto doctrine may be held to validate not only the judgment given by the judge but also the office which he was duly qualified to occupy and the duties of which everyone thought he was performing. It is from this line of authority that has emerged the modern doctrine as it relates more particularly to judges, that of the *de facto judge*.

50. The more prominent of these cases were also discussed by Lord Mance in ***DPP v Penn*** (above) although only briefly because the problem presented there had to do with jury selection and its answer found primarily in the principles as enunciated in the ***Montreal Railway*** case (above) and in the other cases discussed[20] dealing with failure to comply with statutory processes in the criminal context.

51. As Lord Mance noted in this regard at [23] :

> "*The qualification recognized in the de facto cases – that the de facto judge must act in good faith and be believed by himself and all concerned to be acting with authority – matches the qualification regarding impersonation identified in the jury cases which the board has already discussed… the de facto cases reflect an approach which can be said to be broadly consistent with, and may even be regarded as going further than, that taken in the jury cases, including the* ***Montreal Railway*** *case. But the two strands of authority have not proceeded along identical lines (the isolated* ***Wisconsin*** *case*[21] *appears to be the only instance of the de facto doctrine being applied to a jury) and it is, in the Board's view, unnecessary in order to resolve the present appeal to rely on the de facto cases or to enquire further as to their precise relationship with the extensive case law on juries."*

52. As we are here dealing with the question of the validity of the Ruling as the act of a judge the validity of whose appointment is also questioned, we explain our reliance upon the de facto judge doctrine. This equally longstanding doctrine of the common law was cited by the English Court of Appeal in ***Fawdry & Co (affirm) v Murfitt*** [2002] EWCA Civ 643[22] as having been summarized in ***Wade and Forsyth, Administrative Law,*** 8th Edition as follows, at pp 291-292:

> "*The acts of an officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so."*

53. ***Fawdry*** was a case which was heard and decided by a judge "ticketed" to hear Technology and Construction Court (TCC) cases but not cases in the Queen's Bench Division of the High Court.

---

[19] [2003] EWCA Civ 511
[20] At [19] to [21].
[21] ***State ex rel Dunn, Sheriff v Noyes*** (1894) 27 LRA 776; 58 NW 386 (cited at [22] in the ***Montreal Railway*** case.
[22] Per Lady Justice Hale (as she then was) at [18].

While the supervising judge had directed that the case in question be transferred to the TCC to be listed before the judge, there was doubt whether she had heard the case in that capacity or had purported to hear it as a judge of the Queen's Bench Division. In the event, the Court of Appeal held that the case had been validly transferred to the TCC and heard by the judge in that capacity, but expressed the view that, even if this had not been so, the de facto doctrine would have protected her judgment as well as the judge's appointment itself from invalidity, the judge having been properly qualified and so regarded by everyone, to hear the case in the TCC.

54. Lady Justice Hale began her scholarly analysis at [19], by recognizing that nowadays the doctrine is based squarely on public policy and that the authorities show that the de facto judge must have some basis for his or her assumption of office, variously expressed as "*colourable title*" or "*colourable authority*"[23] . As she also noted, quite what suffices for that purpose has been debated. "*But*" she continued at [22] "*the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him. Mr Sales [counsel for the Lord Chancellor] also suggests that the doctrine does not apply where the person concerned knows himself to be a usurper even if the litigants before him do not. That is consistent with the approach and dicta in Re Aldridge (1897) 15 NZLR 361 and Adams v Adams [1971] P 188".*

55. In ***Re Aldridge*** the dictum of which Lady Justice Hale here approved, had been stated by Richmond J in these terms:

> *"It may well be that the principle which validates the acts of a judge de facto cannot be invoked for their own protection by any who wilfully abuse the office, still less by mere usurpers."*

56. In ***Coppard*** (above), the circumstances were the obverse of those in ***Fawdry :*** a Queen's Bench Division case was decided by a circuit judge assigned to the TCC who believed that his appointment to the TCC gave him authority to sit in the Queen's Bench Division. By a regrettable oversight, the Lord Chancellor's power under section 9(1) of the Supreme Court Act 1981 to authorize the judge to sit as a Justice of the High Court had not been exercised and it was therefore acknowledged that the judge had therefore heard the case without legal authority. As mentioned above, the de facto doctrine, although expressed firmly as in ***Fawdry*** so as not to protect a usurper, was nonetheless held to validate both the office which everyone thought the judge was performing, as well as his judgment.

57. In his lead judgment on behalf of the Court of Appeal in ***Coppard,*** Sedley LJ concluded on this issue of the validity of the office in these terms, at {32]:

> *"(The doctrine) postulates, in the interests of certainty and finality, that a person who is believed and believes himself to have the necessary judicial authority will be regarded in law as possessing such authority. If this is the true meaning of the*

[23]An expression which, in the same case did not find favour with Sedley LJ, described by him in his concurring judgment as too "opaque" and which ordinarily connotes something "specious and therefore false" (citing the Concise OED entry), even while, as he noted, it has acquired a legal meaning which is almost the opposite: "capable as being presented as true or right, having at least a prima facie aspect of justice or validity (OED #2b)

> *de facto doctrine of jurisdiction, as we would hold it is, then the first question [(*raised for resolution both in ***Coppard*** as well as in ***Fawdry)]*** *of compatibility with Article 6* [of the European Convention on Human Rights][24] *is answered. The judge-in-fact is a tribunal whose authority is established by the common law*."

58. While, to the extent that the doctrine thus restated might be seen as allowing non-valid appointments we would not be inclined to rely upon it, the present case raises no such concern about the judge's title. Here Ms Wheatley has been presented with a duly issued instrument of appointment by the Governor authorizing her to sit as an Acting Puisne Judge of the Supreme Court, which is itself a duly constituted tribunal under the Constitution of Bermuda.

59. In the present circumstances, there was no mistake of the sort which operated in the English Court of Appeal cases discussed above (or in yet a third more recent such case)[25] and which brought into question the authority of the judge to deal with the particular cases, but answered all the same in each case in the affirmative. Here, Ms Wheatley was not mistaken as to the Court or her jurisdiction but was oblivious to not having taken the correct form of oath. She was no mere "usurper", having been lawfully appointed by instrument granted by the Governor in keeping with section 75(2) of the Constitution. Everyone therefore reasonably assumed that she was validly appointed to act. Any question as to the validity of the Ruling as an act performed with her not having entered properly into the functions of her office, for want of the proper oath as contemplated by section 76 of the Constitution, is in our view, amply answered by the application of the de facto doctrine such that the Ruling is to be regarded as valid. In keeping with the mandate of the de facto doctrine for public confidence in the certainty and finality of litigation, so too would any other act performed during the tenure of the appointment which might be questioned on similar grounds.

Other cases

60. For the sake of completeness, we should mention two other cases which were cited in the course of the arguments.

61. The first, cited by Miss Smith-Bean, comes from the Allahabad High Court in the Indian State of Utter Pradesh: ***Shabbir v The State,*** AIR 1965 All 97, 1965 CriLJ 258[26]. The issues were whether the appointments of three judges, (one of whom, Satish Chandra J., had commenced hearing the criminal case in question), were invalid either because they had taken the wrong form of oath or because the person before whom they had taken the oath, the Chief Justice of Utter Pradesh, had

---

[24] The equivalent for the present purposes of these civil proceedings, of section 6(8) of the Bermuda Constitution Schedule 2, Bill of Rights which reads: "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

[25] ***Badlock v Webster and Others*** [2004] EWCA Civ 1869, where yet another judge, Recorder Hamer, confounded by the complex system of case assignments, tried a case under the belief that he was authorized to deal with it when it had been erroneously listed before him. Laws LJ, in his lead judgment on behalf of the Court upheld the validity of the judgment, finding at [19], that the Recorder sat in a court that was competent to hear the case and was not a usurper. He was eligible to be authorized by the Lord Chancellor to sit in the High Court where the case should have been listed.

[26] Delivered on 6 December 1963., per Jagdish Sahai, J.

administered the oath acting upon a delegated authority from the Governor which had been generally, not specifically, and therefore improperly given.

62. In respect of the first issue, while declaring that subscription to the proper form of oath was a mandatory prerequisite to the assumption of office, it was held that the judges had validly assumed their offices by virtue of the form of oaths which they had actually taken and subscribed.

63. In respect of the second issue, it was held that while the delegated authority granted to the Chief Justice by the Governor was given by a letter which was expressed improperly in general terms rather than as required specifically addressed for a particular occasion, as the judges had effectively taken their oaths, their assumption of office would not be abrogated by the irregular use of the authority vested in the Governor, and further that as he had authorized the Chief Justice to act on his behalf knowing of the appointment of the three judges, he could be regarded as having sufficiently applied his mind to the occasion of their swearing-in so as to validate the use of the general authority given to the Chief Justice.

64. In the result, the judgment concludes:

> *"… in our opinion, Satish Chandra J was competent to hear the criminal revision. We direct that the case shall be sent back to him for decision on the merits*."

65. That having been the outcome for the reasons explained, the Allahabad High Court did not need to and did not consider the established case law dealing with the doctrine of de facto authority, considered above herein.

66. Nor do we find helpful or persuasive, Miss Smith-Bean's reliance upon this case as support for her proposition that there is an "*Hierarchy of Norms*", such that a requirement of the Constitution, which is Supreme Law, for the taking of the prescribed form of oath, may not be derogated from by the application of the common law doctrine.

67. In our view, even if capable of support by authority[27] , no such proposition is involved in the application of the doctrine here. Rather, its application serves not to derogate from any constitutional requirement going to the legality of the appointment (which is not in question) but to validate the "acts" (here the Ruling or other acts) of a lawfully appointed Acting Judge who may be said not yet to have entered into the functions of her office for having not taken the prescribed form of oath.

68. The second case – ***Paul Chen Young and Others v Eagle Merchant Bank Jamaica Limited and Others, the Attorney General of Jamaica Intervening***[28] - dealt with the question whether a judgment delivered by retired judges of appeal in a case heard by them before their retirement but for which purpose of delivery they had not received the extension of their appointments from the Governor-General as required by section 106(2) Constitution of Jamaica, was therefore invalid.

---

[27] None was cited although the argument may simply be allusion to the European legal concept. See for instance: "***Instruments and the Hierarchy of Norms: EU LawText, Cases and Materials***" by Paul Craig and Grainne de Burca: www.oxfordlawtrove.com/view.

[28] [2018] JMCA App 7 , delivered 26 April 2018.

69. In finding that the judgment was indeed a nullity, the Court construed section 106(2) as imposing a mandatory requirement and that moreover, the posts which the judges had occupied, had been filled. The doctrine of de facto authority could not therefore, on the proper construction of the constitutional provisions, be applied in aid of the validity of their appointments or of their impugned judgment.

70. The following dicta appear in the first of three judgments delivered, that of Morrison P:

> "[60] *There is no question that the judges, having reached their respective retirement ages, had retired. There is no evidence that an extension was given to any of them under section 106(2). The vacancies in the complement of the court brought about by their retirement were filled. Unlike the judge referred to in Lord Denning MR's famous dictum in* ***Re James (an insolvent)(Attorney General intervening)*** *[[1977] 1 All ER 364], none of the judges can in any sense be said, after passing the age of retirement, to have held the office of a judge, worn the robes of a judge or sat in the seat of a judge. Nor has it been suggested that they acted under or by virtue of any kind of colourable authority, certainly not in the sense in which the Chief Justice in* ***Whitfield v Attorney General*** *[(1989) 44 WIR 1] and the trial judge in* ***R v Myers*** *[(2009) 76 WIR 16] both continued to sit in court after their respective retirement ages. Accordingly, although no one can possibly doubt that the judges all acted perfectly in good faith in continuing to work on and producing the impugned judgment, I am clearly of the view that the de facto doctrine cannot be applied in this case."*

71. At [70], Morrison P. goes on to explain why, in effect for the same reasons, the judgment itself must be regarded as a nullity.

72. The differences between the circumstances of this and those of the ***Paul Chen Young*** case resulting in the outcome there, are readily apparent and readily distinguishable. Of obvious importance in our view, is the circumstance here of the valid and subsisting appointment which vested in Ms Wheatley, the lawful authority as Acting Judge which she exercised in arriving at the Ruling.

The further grounds of appeal

73. The paltry state of the pleadings having been somewhat addressed by the Amended Generally Endorsed Writ, Statement of Claim and Amended Defence as directed, we were better placed to assess for ourselves whether there was any sustainable basis for the Appellant's allegations against the DCFS and so also examine her further grounds of appeal against the striking out of her claims.

74. We are satisfied that there is no sustainable basis for the allegations and may now state our reasons for that conclusion briefly.

75. The factual averment of the claim as set out in the draft Generally Endorsed Amendment Writ is, in paragraph 1 for "*Psychiatric and Psychological Injury suffered by the Plaintiff as a result of the*

Misfeasance in Public Office by personnel of Department of Child and Family Services who unlawfully removed the Plaintiff's child, one Michael Jones Jr from the care and control of the Plaintiff on 1 April 2008, in breach of the Mother and Child's constitutional rights … In that DCFS had a malicious or reckless disregard of the consequences of said removal on the Child and Plaintiff's Right to Family Life (ECHR Article 8) and the effect of the removal on the social and mental well-being of the family as a whole including the detrimental impact on the other 2 children of the Plaintiff.." And, in paragraph 2, the averment continues that "*Loss and Damage (was) suffered by the Plaintiff and her children as a result of the Department's acts or omissions that resulted in the violation of their Right to Family Life ECHR Article 8 and further breaches of the Children's Act 1998. The issue being exasperated by their failure to consider the Plaintiff's continuous plea of innocence and previous good character... having never received a complaint about her parenting skills; and further their failures to consider conclusive evidence in support of her innocence and the quality of life that was enjoyed by child and his siblings prior to the removal of the child from the Plaintiff's home. Resulting in a biased position presented to the court against the Plaintiff. Further, through the misfeasance of (DCFS) and their agents; in the absence of any evidence or investigation into the allegations that the Plaintiff presented a danger to the aforementioned minor child Michael Jones Jr and contrary to expert reports produced in support of Plaintiff's application, at the Material time, to regain custody, care and control of the then minor child as set out in the Order dated 3 March 2003*."

76. In summary, the Generally Endorsed Writ as proposed to be amended, would allege misfeasance in public office with reckless disregard for its effect upon Ms Pedro and her children, in breach of their rights to family life. Conspicuously absent from the draft Amended Writ and the draft Amended Statement of Claim (even now after clear directions given for the filing of a fully and clearly particularized pleadings), is any allegation of the kind of malice required to be proven (in the sense of conduct specifically intended to injure the plaintiff) or bad faith (in the sense of the officers of the DCFS knowing, believing or being recklessly indifferent to whether they had no power to act in the manner complained about and that such action would probably injure the plaintiff). In short, the facts now sought to be pleaded by Ms Pedro are still incapable of establishing the requirements of the tort of misfeasance in public office.

77. Those requirements were settled authoritatively by the House of Lords in ***Three Rivers District Council and Others (Original Appellants and Cross-Respondents) v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1*** , per Lord Steyn (at pp191 – 192) in the following terms under the heading "*The ingredients of the tort"*:

> "(1) *The defendant must be a public officer. It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private-law functions … is capable of being sued.."*

(Here there is no dispute that the DCFS is capable of being sued)

78. "(2) *The second requirement is the exercise of power as a public officer*". Here we do not understand this ingredient to be in issue either. The conduct of the officers of the DCFS in this case was in the exercise of public functions. Moreover, as Lord Steyn reminded (ibid) "… *the principles of vicarious liability apply as much to misfeasance in public office as to other torts*

involving malice, knowledge or intention", citing with approval: ***Racz v Home Office*** [1994] 2 A.C 45.

79. (3) The third (and in this case the pivotal) requirement concerns the state of mind of the defendant. As Lord Steyn also explained: "*The case law reveals two different forms of liability for misfeasance in public office. First, there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper purpose or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.*"

80. Further, at pp 192 t0 193, Lord Steyn went on to explain that reckless indifference on the part of public officer as to the illegality and consequences of his actions may also be sufficient to ground the tort in its second form.

81. As we already noted above, in this case there does not appear to be any sustainable factual basis upon which it could be proven that the DCFS or its officers acted with the kind of targeted malice, bad faith or reckless indifference, of the kind required. Such allegations must be fully particularized in the pleadings as required in order to allow the action to continue: ***Carter v Chief Constable of Cumbria Police*** *[2008] EWHC 1072;* ***F-D v The Children and Family Court Advisory Service*** *[2014] EWHC 1619 at [176]*.

82. In summary, the draft Amended Statement of claim merely relates events (including hearings before the Magistrates' Court), in a number of paragraphs, which are asserted on behalf of the Appellant as being indicative of neglect to bring evidence in favour of the Appellant to the attention of the Court or failure to act upon her request to bring further applications before the Court (paragraphs 44,45, and 73); or in paragraph 47, "*reckless disregard*" for the consequences to the Appellant and her children "*amounting to Misfeasance in Public Office*" on the part of the DCFS, by its officers asserting to the Court that "*He (Michael Jr) may have been abused physically and emotionally"*, after having asserted at first positively that he had been abused by her by relying upon the evidence of his father, which evidence the father was not able to substantiate. In paragraph 46, that the DCFS's omission to "*look into the case in the round*", amounts to serious breach of duty to investigate and amounts to misfeasance in public office. In paragraph 62, that as the Appellant herself had been assessed by the psychologist Dr Brownwell to be "*mentally stable*" and that "*there was nothing that disqualifies her as a mother capable of carrying for her child",* the DCFS should have acknowledged this to the Court and not pursued their applications. In paragraph 69, that the DCFS's failure to do anything about her own complaint against his father that he had abused Michael Jr was "*Further misfeasance in public office*". All this, although at paragraphs 65 and 66, it is acknowledged that the Appellant had herself advised the Court about this allegation and complaint during the hearing on 9 January 2010.

83. Sad and lamentable for its impact upon the Appellant and her children though the circumstances were, the reality is that this was the result of the breakdown in the relationship between herself and her son's father, not the result of misfeasance on the part of the DCFS officers. Regrettably, as is so often the case, a sad outcome will result despite the efforts of the professionals and the focused

intervention of the Court and in this regard, it is perhaps most telling to note the averments of the Appellant herself. At paragraphs 58 and 59, she pleads the deterioration in behavior and mental state of Michael Jr, including about him having been placed in the Mid-Atlantic Wellness Institute (MAWI) for "depression and "suicidal ideation". While she seeks to blame the DCFS for "not recognizing "that this was the result of Michael Jr being taken from her custody and care and for "failing to acknowledge" that she was a fit parent, she does acknowledge at paragraphs 51 to 70 that at all times she was herself able to make representations to the Court about the child's condition and was throughout represented by an attorney. Ultimately, as appears at paragraphs 69 and 70, one sees the allegation that while the conclusive orders made by Magistrate Wolffe on the 8 January 2010 are expressed as having been made with the consent of the Appellant, her consent was only given under duress for fear that if she did not consent especially to Michael Jr remaining in the custody of his father, he would be removed from the custody of both parents and placed instead in foster care.

84. This, it must be said, is but a thinly veiled attempt to excuse the Appellant for having throughout participated in the court proceedings while being represented by counsel and ultimately consenting in those proceedings to the very orders against which she now fervently complains.

85. This is all to the contrary of the DCFS being shown to have acted with malice or bad faith. What is clear is that the DCFS was first moved to intervene, not at the volition of its officers but by the concerns raised with them and the Police Services by Michael Jr's father. The matter was taken in due course before the Magistrates' Court and orders made after detailed assessments and enquiries were put before and considered by the Court, including reports from qualified and independent psychologists. The detailed Plan of Care was developed by the DCFS officers and put before the Court. It provided the basis for the orders which were made (in the modern language of the Children's Act 1998) for Michael Jr's residence and for contact with him by his parents, his welfare being required to be regarded as of paramount importance. These orders were made with the consent of his mother the Appellant, who at the time had the benefit of legal representation. They were orders against which she did not seek to appeal.

Limitation

86. The Writ was filed on 10 July 2018 and thus (as already noted at [12] above), some 8 years and 7 months after Magistrate Wolffe made the conclusive orders in the matter on the 8 January 2010. Regarding that as the date, at the very latest, on which the alleged cause of action in misfeasance could have accrued, the Writ was therefore not filed within the six years prescribed by section 4 of the Limitation Act ("the Act") for the institution of such an action founded as alleged, in tort. Where, as also alleged here, the case is one of a breach of duty resulting in personal injuries, section 12(4) of the Act would prescribe a limitation period of 6 years, not from the date the cause of action accrued (section 4) but from the date of knowledge (if later) of the person injured, whichever is the later. "Date of knowledge" for these purposes is defined by section 15 as being the date on which the plaintiff first had knowledge that the injury in question was significant and was attributable in whole or in part to the act or omission alleged to constitute the breach of duty on the part of the particular defendant, here the DCFS.

87. At paragraph 107 of her draft amended pleadings, the Appellant invites this Court as she did the Court below, to find that she has a good arguable case for the extension of the limitation period on this basis of sections 12(4) and 15 of the Act. We will return below to address this averment.

88. Before the Court below and during the arguments before us, the Appellant had also sought to invoke section 33(1)(b) of the Act, to the effect that the limitation period of 6 years shall not be deemed to have started to run until after she discovered facts which had been deliberately concealed from her by the DCFS and which were relevant to her right of action.

89. Prior to the presentation of her draft Amended pleadings, she alleged a conspiracy on the part of the DCFS to suppress relevant evidence which would have been supportive of her case[29] and that relevant facts had been concealed deliberately from her either by the DCFS not having disclosed them to her or not having put them before the Magistrates' Court. This included the early court orders in the care and supervision proceedings, and reports and affidavit evidence which the DCFS is said to have obtained and kept "concealed" on file but which she had not discovered until she had had the opportunity of perusing the files in 2017. In her draft Amended Statement of Claim, the Appellant now makes, however, only passing reference to these allegations of concealment, failing to aver how they could in any way advance her allegations of malice, bad faith or recklessness on the part of the DCFS. See paragraphs 29, 31, 33, 36, 38, 44 and 45. In the hearing before us, Miss Smith-Bean conceded that these allegations could not amount to fraudulent concealment by the DCFS and although stated, were not allegations upon which she relied. We therefore can see no basis on which this reliance on section 33(1) of the Act could proceed and it has not been relied on in the draft pleading which we allowed to be filed in order, inter alia, to set out the basis upon which the Plaintiff sought to reply to the Limitation Act defence that the Attorney General was going to rely on.

90. The Appellant's reliance on sections 12(4) and 15 of the Act, involves an averment (at paragraph 107(a) of the draft amended pleadings) that the limitation period should not be held to have started to run until when , in 2020, she obtained a medical report from Dr Lisa Nolan, as that was when, as she alleges, she discovered the extent of her "injuries" (ie: Adjustment Disorder with Anxiety and Depression), as having been caused by the tortious conduct of the DCFS. This now appears to be the only remaining basis[30] upon which she seeks to rely upon an exception to limitation but it too, is clearly untenable. This is because the report from Dr Nolan itself references previous psychological reports from Dr Phillip Brownwell dated 15 December 2009 and Susan Adhemar dated 19 May 2009, the former of which , from Dr Brownwell's summary [31] , reveals that the Appellant had from 2009 been diagnosed with Adjustment Disorder with Anxiety. See paragraph 6.9 of Dr Brownwell's report.

---

[29] See for instance [5], [6], [7] and [14] of the leading headed "Damages Caused by Social Workers of Child and Family Services as follows:"

[30] In the Court below and in arguments before us, reference had been made also to section 34 of the Limitation Act which vests a discretion in the Court to exclude time limitations in cases of personal injury (or death) in certain circumstances where it is equitable to do so. This is not however relied on in the Statement of Claim and does not, in any event appear to us to be a route realistically open to the appellant, for the reasons given by the Acting Judge and having regard to (a) the lack of any merit in the case as pleaded (b) the delay from 2009 to July 2018, and (b) the effect of that delay on the cogency of any evidence at a future trial.

[31] The reports themselves have not been presented to the Court by the Appellant.

91. As now appears from her own evidence, because the Appellant was aware in 2009 of her psychological trauma, she was required if she believed that it was caused by the tortious conduct of the DCFS[32], to have commenced proceedings no later than December 2015. She did not commence proceedings until more than two and a half years later in July 2018 and so her claim must be regarded as time-barred, in addition to being unsubstantiated in its allegations of misfeasance in a public office.

92. In the result, the Appellant has failed in her arguments on each of her grounds of appeal. This is despite having been afforded by this Court the further opportunity to plead a viable cause of action to overcome the result below (on the paltry state of the pleadings as then presented) that her claim was frivolous and vexatious, and time-barred.

93. We also note, in passing and for completeness, that in her draft Amended pleadings not only are there proposed claims for misfeasance in public office, but also allegations of negligence or "neglect" as discussed above. It is important in this regard, that a claim of negligence by a parent for an alleged breach of duty owed to him or her in the context of care and supervision proceedings, is not sustainable. While a duty of care will be owed to the child in the context of such proceedings, it is now settled that no such duty is owed to the parent by a body like the DCFS in respect of the exercise of its statutory authority: ***JD and Others v East Berkshire and Others*** [2003] EWCA Civ 1151[33]. This is for the reason that it is primarily in the interests of the child that the DCFS professionals must act and those interests will often be different from and even sometimes in conflict with those of a parent. This is cogently explained on behalf of the Court of Appeal by Lord Phillips:

> "*86. The position in relation to the parent is very different. Where the issue is whether a child should be removed from the parents, the best interests of the child may lead to the answer yes or no. The Strasbourg cases[34] demonstrate that failure to remove a child from the parents can as readily give rise to a valid claim by the child as a decision to remove the child. The same is not true of the parents' position. It will always be in the parents' interests that the child should not be removed. Thus the child's interests are in potential conflict with the interests of the parents. In view of this, we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of care should be owed to the parents. Our reasoning in reaching this conclusion is supported by that of the Privy Council in B v Attorney-General[35].*
> *87. For the above reasons, where consideration is being given to whether the suspicion of child abuse justifies taking proceedings to remove a child from the parents, while a duty of care can be owed to the child, no common law duty of care is owed to the parents."*

94. Regrettably, in the present case, consideration had to be given to whether the child should be removed from the care of one parent to that of the other and, on the Appellant's averment as set

---

[32] Causation is an essential element of the cause of action: ***Three Rivers (No 3***) (above) per Lord Steyn, at p 194.
[33] Upheld by the House of Lords : [2005] 2 A.C.373
[34] Primarily ***Osman v United Kingdom*** [199] 1 FLR 193, (2000) 29 EHRR 245.
[35] ***B and Ors v Attorney General of New Zealand and Ors***, [2003] UKPC 61

out above, as to whether it might have become appropriate to remove the child from the custody of both parents into foster care. It follows, on the authority of ***East Berkshire*** (above), that no common law duty of care was owed to either parent in the taking of such decisions and that the Appellant could have properly pleaded no claim in negligence in her own right based upon such a duty of care.

95. This in all likelihood, explains her resort to the claim for misfeasance in public office and the emphatic importance therefore, of the requirement that such a claim, based as it must be upon allegations of targeted malice or bad faith, be pleaded properly, supported by clear and sustainable particulars of fact.

96. For all the failings of the pleadings in that regard and for its failings to meet the requirements of the Act, the claim was liable to be struck out; see: ***Ronex Properties v John Laing Construction and Others***[36].

97. Further, while we note the Appellant's averments in the draft pleadings alleging breach of family life and the denial of Michael Jr's "voice in the proceedings", those pleadings do nothing to advance or support the claims for misfeasance in public office, in the absence, as we have found, of any basis for a finding of targeted malice or acting in the knowledge of a want of power to act, or reckless indifference to whether such a power exists..

98. In the result, the appeal must be dismissed and it is accordingly so ordered.

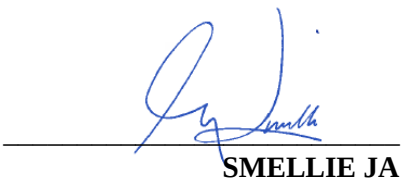
99. Since the Appellant has been legally aided throughout the proceedings of the appeal, we have it in mind that there should be no order as to costs, subject to any submissions to the contrary, which should be filed within 14 days of the publication of this judgment.

GLOSTER JA:

100. I agree.

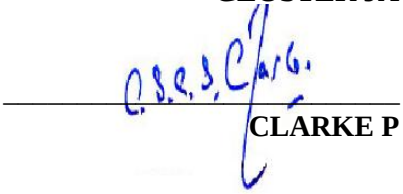
CLARKE P:

101. I also agree, the appeal is dismissed.



SMELLIE JA

GLOSTER JA



CLARKE P

[36] [1983] 1 Q.B 399.