In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 37

BETWEEN:

WANDA PEDRO

Plaintiff

-and-

(1) THE MINISTER OF LEGAL AFFAIRS AND CONSTITUTIONAL REFORM
(2) ATTORNEY-GENERAL

Defendants

Before: **The Hon. Chief Justice**

Appearances: **Ms. Wanda Pedro, Plaintiff in Person**
Mr. Brian Moodie, Attorney-General's Chambers, for the Defendants

Dates of Hearing: **26 July 2022**

Date of Judgment: **26 September 2022**

JUDGMENT

Application to strike out proceedings under RSC Order 18 Rule 19; whether the current proceedings constitute an abuse of process given that the same issues have either been determined in previous proceedings or should have been raised in the previous proceedings

HARGUN CJ

Introduction

1. These proceedings, commenced by Originating Summons filed on 5 February 2021, are the latest chapter of the proceedings commenced by Ms. Wanda Pedro ("**the Plaintiff**") against various individuals and entities, including the Department of Child and Family Services ("**DCFS**") of Bermuda, Magistrate Tyrone Chin and Sr. Magistrate Juan Wolffe ("**the Magistrates**"), in respect of the circumstances in which her son, ("**Michael Jr.**"), came to be removed from her care and, by an order made on 8 January 2010, she and Michael Jones ("**Michael Sr.**") were awarded joint custody of Michael Jr. but Michael Sr. was to have care and control of him.

2. In these proceedings the Plaintiff claims that the Magistrates denied her a fair trial by:

    (i) Obstructing the Plaintiff's child and other witnesses to testify.

    (ii) Failing to follow the law and protocols that would have required the Magistrates to (i) have an Emergency Order in order to remove the Plaintiff's child without her knowledge on 31 March 2008 and 1 April 2008; and (ii) to have a report submitted from the Director of DCFS which would have shown the allegations were properly investigated.

    (iii) Failing to notify the Plaintiff that the court was not properly equipped with sound recording devices in order to protect the integrity of the proceedings. This failure, the Plaintiff contends, amounted to a serious violation of the Plaintiff's constitutional and human right to have a fair trial since a "*fair trial*" requires that there is an ability to account or obtain an accurate record of all that transpired in the proceedings.

(iv) Magistrate Chin discharged an order he made on 3 March 2003 granting the Plaintiff sole custody, care and control of Michael Jr. and subsequently, on 5 June 2008, awarded Michael Sr. full care and control and custody of Michael Jr., without an application to vary the order of 3 March 2003, and without the plaintiff being served with such an application filed with the court.

(v) Magistrate Wolffe had already made his mind up before any witnesses were called to give evidence. The Plaintiff contends that Magistrate Wolffe violated her rights to a fair trial when he made the determination without following the normal court protocols and procedures that would normally allow for witnesses and evidence to be adduced prior to a judgment being rendered.

(vi) The Magistrates denied the Plaintiff a fair hearing by obstructing her from accessing the court in September 2013, when she filed an application making a complaint that her son was still being physically abused by his father and that his father was violating a court order for her son to have Skype Access to her and her sister who had moved to the United Kingdom in August 2011.

3. The Plaintiff contends that because of the actions of the Magistrates, she has suffered psychiatric and psychological injury. The Plaintiff contends that the actions of the Magistrates amounted to misfeasance in public office, abuse of power and breach of duty. In this regard the Plaintiff specifically relies upon her contention that the Magistrates unlawfully sanctioned the removal of Michael Jr. from her care and control on 1 April 2008, without evidence to substantiate the allegations presented by DCFS, in breach of her constitutional rights as set out in Article 1, 3 and 6 of the Bermuda Constitution Order 1968 ("**the Constitution**").

4. As a result, the Plaintiff claims damages by way of economic loss suffered by her. The Plaintiff claims that as a result of the continuous psychological harm inflicted upon her, she was unable to maintain employment during the 12 year "*battle*" to regain custody of Michael Jr. She claims that the removal of Michael Jr. resulted in the breakdown of her entire family unit and led to continuous mental anguish or torment and made her incapable of maintaining employment.

5. The Plaintiff claims that as a result, she has suffered irreparable loss and damage to her reputation in the business community and within the family.

6. Based on these allegations, the Plaintiff claims aggravated damages for psychological and psychiatric harm, exemplary damages for the loss of family life; exemplary damages for the damage to the Plaintiff's reputation; and damages for the economic loss suffered by the Plaintiff during the last 12 years.

7. The present judgment deals with the application by the Defendants to strike out these proceedings, pursuant to RSC Order 18 Rule 19 on the grounds that the Plaintiff's Statement of Claim discloses no reasonable cause of action, is frivolous or vexatious or is otherwise an abuse of the process of the court ("**the Strike out Application**").

8. The Defendants also seek an order that the Plaintiff's writ is irregular in that it does not comply with RSC Order 6 Rule 5(1)(b).

9. Alternatively, the Defendants seek relief that (i) the Plaintiff, who is ordinarily resident outside the jurisdiction, pay security for costs pursuant to RSC 23; and (ii) an order that all claims relating to the removal of Michael Jr. from the Plaintiff's custody in or around 2008 be tried together in order to make the most efficient use of the court's time and resources.

Background to the Strike out Application

10. In order to properly understand the background to this application, it is necessary to review the earlier proceedings commenced by the Plaintiff by Writ of Summons dated 10 July 2018 claiming relief against DCFS ("**the 2018 Proceedings**"). The 2018 Proceedings were also subject to a strike out application by the officers of DCFS and that application was heard by Wheatley AJ on 24 September 2019. By her Ruling dated 28 November 2019, Wheatley AJ struck out the entirety of the Plaintiff's claim on the basis that it was frivolous, vexatious and abuse of process. Wheatley AJ awarded the costs of the application to DCFS, on a standard basis, to be taxed if not agreed.

11. The allegations made by the Plaintiff in the 2018 Proceedings are set out in paragraphs 1 and 2 of the Ruling of Wheatley AJ:

> *"1. The Plaintiff filed a Writ of Summons dated 10 July 2018 ("the Writ of Summons"). The underlying facts of this case relate to the Plaintiff's son (who under the supervision and ultimate the care) of the Department of Child and Family Services ("DCFS") by way of applications made by DCFS to the Magistrates' Family Courts. The Plaintiff's allegations are, inter alia, that DCFS was negligent in making their applications for the supervision orders and ultimately a care order in relation to her son. These are applications which were made over a few years between 2008 and 2010. The Plaintiff is seeking damages in the sum of $250,000. The Plaintiff was very descriptive in her statement of claim as to why she is seeking damages, but ultimately it can be summarized as pain and suffering.*
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> *2. The Plaintiff alleges her pain and suffering was caused by actions of DCFS which amount to criminal charges such as, child abduction, unlawful removal of her son, falsification of reports/records, suppression/omission of evidence, fraud. She also alleges DCFS have caused damage to her reputation and inflicted trauma on her. Moreover, the statement of claim averred to make claims on behalf of her son, who is now twenty years old, for pain and suffering."*

12. In the 2018 Proceedings, the Plaintiff initially also made claims against the Magistrates and the Magistrates were formally made parties as defendants in those proceedings. However, the Plaintiff voluntarily elected to remove the Magistrates as parties to the 2018 Proceedings. This is reflected and explained in paragraph 8-9 of the Ruling of Wheatley AJ:

> *"8. For the purpose of completeness, it should be noted these proceedings initially included the Sr. Magistrate, Juan Philip Wolffe, Magistrate Tyrone Chin and Miss Ashley Smith as her position of Court Associate in the Magistrates' Family Court. At the first directions hearing,* ***I brought it to the Plaintiff's attention that Magistrates could not be held personally liable for decisions made in their judicial capacity. This was accepted by the Plaintiff****.*
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> *9. As it related to Miss Smith acting in her course of employment with the Judicial Department as a Court Associate in the Magistrates' Family Court, the Plaintiff also accepted that it was not Miss Smith who played any decision-making role as it relates to the case and was merely carrying out her employment function as a result of the decisions made by the* Courts. *As such, the parties' consented to these parties being removed as Defendants to this matter.* (emphasis added)

13. The basis of the Ruling which struck out the claims in the 2018 Proceedings is set out at paragraphs 31-32:

> *"31. Ms. Pedro has not raised any valid argument that she can escape the reliance of the Defendant on her claim being time barred in accordance with the Act. Allowing Ms. Pedro to proceed with this claim would amount to clearly frivolous, vexatious (David Tucker and Hamilton Properties Limited) and an abuse of process of the courts (White Book (1999 Edition) 18/19/19) as it would effectively give her a second bite of the cherry. The Plaintiff did not appeal the decisions made in the Magistrates' Family Court or make any reasonable effort to bring this matter before the court in a timely manner (despite all the applications put before the Magistrates' Court all being consented to by her).*

32. The Defendant and the Plaintiff appeared in the Magistrates' Family Court for applications made by the Defendant for supervision orders of the Plaintiff's son on four occasions in 2008 and 2009. ***I fully accept the Plaintiff consented to these applications as she admitted this during the hearing***. ***Furthermore, she also was admittedly represented by Counsel throughout these proceedings. At no point did Ms. Pedro appeal any of the orders made in relation to the Defendant's applications***. *Further, on her own admission, she made no attempt to view the court files until 2016 despite remaining in Bermuda until 2011. She was passive in her attempts to bring any action (Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5)."* (emphasis added)

14. The Plaintiff appealed the decision of Wheatley AJ to the Court of Appeal for Bermuda. At the hearings before the Court of Appeal, the Plaintiff was initially represented by Mr Cameron Hill and subsequently by Ms. Simone Smith-Bean. After the conclusion of the argument at the appeal hearing, the Clerk to the Court of Appeal advised Ms. Smith-Bean, by letter dated 9 November 2022, of the following decisions made by the Court of Appeal:

"The President of the Court of Appeal has asked me to write to the parties in the following terms:

The Court of Appeal has been considering its judgment in the light of the submissions that were made to it last week. As a result, the Court is able to give an indication of the course that it proposes to take. The Court intends:

a) to reject the contention that the judgment appeal from was in nullity by reason of the failure of the Acting Judge to swear the requisite oath;

b) ***to hold that any claim against the State for alleged misfeasance in a public office by the Magistrate is ill founded on account of his immunity from suit, and will not be allowed to proceed****;*

c) *to hold that any claim to redress under the Constitution* ***for not having held a hearing in September 2013****, if it is to be pursued at all, be pursued in a separate action;*

(a) to afford the appellant a 14 day opportunity, (i.e. by 23 November 2020), to amend the pleadings in order:

(i) *that a claim for misfeasance in a public office ("MIPO") against the DCFS personnel/DCFS, pleads proper particulars of facts relied on which are said to constitute MIPO identifying:*

(a) *the individuals concerned;*

(b) *what exactly they are said to have done or not done, and when, together with any relevant state of mind alleged, which is said to amount to MIPO;*

(c) *whether and, if so, how, it is said that any of the facts and matters alleged under (b) which are said to constitute MIPO let to the removal of Michael Jr. from her own control, or the non-restoration of such care and control, or to any other consequence (which must be identified) in respect of which she claims damages;*

(ii) *in relation to the defence of limitation taken by the Respondent (which was clearly taken before the judge) to plead a response to the limitation point and the facts and matters relied on in support of that response;*

...

(f) the Court will then rule, without further oral argument, whether a plausible cause of action is pleated and whether there is an arguable defence to limitation and include that ruling in its full judgment." (emphasis added)

15. On 19 March 2021, the Court of Appeal handed down its judgment in this matter dismissing the appeal. The main judgment was delivered by Smellie JA. It is necessary to set out substantial parts of that judgment so that one can see the issues which were considered and determined by the Court of Appeal.

16. Firstly, the Court of Appeal noted and held the Magistrates and Miss Ashley Smith, the Court associate in the family division of the Magistrates' Court, were properly withdrawn as being misconceived. This is reflected in paragraphs 1-2 of the judgment:

"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 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." (emphasis added)

17. Secondly, the Court of Appeal found and held that there did not appear to be any sustainable factual basis upon which it could be proven that DCFS or its officers acted with the kind of targeted malice, bad faith or reckless indifference of the kind required to establish 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]."* (emphasis added)

18. Thirdly, the Court of Appeal found and held that the Plaintiff had consented, with the benefit of legal advice, to the orders made by the Magistrates' Court and in particular the final order made on 8 January 2010 (per Magistrate Juan Wolffe) whereby the Plaintiff withdrew her application for custody care and control of Michael Jr. and agreed that Michael Sr. shall continue to have care and control of Michael Jr., who should reside with his father:

"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****."* (emphasis added).

19. Fourthly, the Court of Appeal held that the underlying cause of action pursued by the Plaintiff were time-barred when she commenced proceedings on 10 July 2018:

> *"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.*
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> *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 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" (i.e.: 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 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.

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, 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****."* (emphasis added)

20. Fifthly, the Court of Appeal held that a claim for negligence by a parent for alleged breach of duty owed to him or her in the context of care and supervision proceedings, is not sustainable as a matter of law:

"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 . 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 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 of New Zealand [2003] UKPC 61.*
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> *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 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." (emphasis added)

21. Following the delivery of the Court of Appeal judgment, the Plaintiffs sought leave to appeal the Court of Appeal judgment to the Judicial Committee of the Privy Council. In dismissing the leave application, Sir Christopher Clarke, the President of the Court of Appeal, held in the judgment dated 22 June 2021, that the appeal did not raise a genuinely disputable issue and that the relevant orders made by the Magistrates were made when the plaintiff was represented by counsel and are expressed to be made with her consent:

> *"12. We take the view that, although the proposed appeal prima facie falls within the prescribed category of case, it does not raise a genuinely disputable issue. Our decision that the Ruling was not a nullity and that the essentials of a claim for Misfeasance in a Public Office were not pleaded was based on well-established authority at the highest level, and in the case of the former, of some antiquity. Our view on the limitation point was based on the relevant statutory provisions; and this point does not in any event arise unless our view on the second point is erroneous.*
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> *…*

16. We would observe that, although Ms. Pedro denies that she ever consented to any order, the orders of the Magistrate, made at the hearings on 20 October and 3 November 2009, and 8 January 2010, at each of which she was represented by counsel, are all expressed to be made with her consent."

22. Following the dismissal by the Court of Appeal of application for leave to appeal to the Privy Council, the Plaintiff sought special leave from the Privy Council itself. In her "FINAL SUBMISSIONS" to the Privy Council, in support of application for leave to appeal, the Plaintiff submitted, *inter-alia*:

- *I filed a further application in **September 2013** for denying my son access to Skype and for Abuse-which was completely denied by the courts.*

- *I filed a separate complaint to DCFS in **September 2013**.*

- *All of these were attempts on my part to regain control of my son, when in fact, there was **no reason for DCFS to have intervened in my family life in the first place!***

- *More importantly if I can prove that my final application made 10th September 2013 was denied due process-see email from Ashley Smith-Family Court dd 12th September 2013-that **this would place my Application I filed 10th July, 2018 within the Statute of Limitations!***

- *It is unconscionable that I am being denied my civil, constitutional, and human rights to have my case properly adjudicated-which means affording me a fair hearing-which means without manipulation, bias or coercion; with the exchange of evidence BY BOTH PARTIES whereby it is tried and tested to ascertain its legitimacy (NONE OF WHICH HAS OCCURRED!!). They have essentially denied the due process once again and THWARTED ALL my efforts to gain justice and to find healing.*

- *Ms. Wheatley HAD NO EVIDENCE in front of to make the determination that I had consented to the applications made in respect of my son in the Magistrates Court in 2008 and 2009.*

- *Whilst it appears that the findings of "fact" (of consent) are concurrent in both the courts below-it doesn't make it TRUE!*

- *… Justice Christopher Clarke surprised [Ms. Smith-Bean] by asking a very crucial question in which he knew would ultimately lead to weakening my case-which was-is Fraud and concealment being removed from my claim. Justice Clarke "ought" to have known that my lawyer could not have responded to that question without consulting first and I say it was a manipulative maneuver because he WAS aware that I had relied on Section 33 of the Limitations Act, Fraud, Concealment or Mistake.*

- *After the hearing I was extremely upset at what transpired when Justice Christopher Clarke asked Ms. Smith-Bean Fraud and Concealment from my claim.*

- *I am alleging that the social workers withheld critical evidence which they failed to question and failed to mention in an affidavit sworn by Katarina Gibbons on the 26th November 2008 after an email was sent to her by my son's father on 16 November 2008 stating that he intends to prove that I PROBABLY cause physical harm to my son! He tells the social worker basically that he has no evidence to prove I caused my son any harm… But yet six months earlier they take my son on an unsubstantiated allegation which sends me 12 years of fighting against this malicious lie that essentially destroyed my son and my family.*

- *There has been nothing but judicial manipulation, coercion and bias that I have endured since 2008 in addition to denying me a fair hearing since*

2008-not to mention since I filed these proceedings, which I'm still fighting four (4) years later. (emphasis in the original)

23. On 16 March 2022, the Judicial Committee of the Privy Council determined, having considered written submissions from the parties, that "*permission to appeal should be REFUSED because the application does not raise a genuinely disputable issue regarding the Constitution and there are no grounds for a grant of special leave as the application does not raise an arguable point of law*."

Discussion

24. In considering the Plaintiff's application for leave to appeal to the Privy Council, Sir Christopher Clarke P observed at paragraph 15 of the Court of Appeal judgment dated the 2 September 2021 that:

"We fully appreciate the impact on Ms. Pedro of the fact that her son was removed from her care; that she has suffered much in consequence, and that she has bent, and continues to bend, every sinew to secure what she would regard as redress against those whom she regards as responsible for all of this. ***However, it is the function of the Court to determine whether she has a viable cause of action, assuming the accuracy of the matters pleaded****. In our view, for the reasons that we have expressed in our judgment she does not."* (emphasis added)

25. The present application to strike out these proceedings necessarily has to be considered in light of the findings and determinations already made by the Court of Appeal.

26. Firstly, it appears to the Court that the Court of Appeal has already determined and ruled that any claims for damages arising out of the decisions made by the Magistrates in relation to the matters complained of in these proceedings are wholly misconceived. This is clearly stated in paragraph 2 of the judgment of the Court of Appeal ("*The claims against the Magistrates and Miss Smith were, however, later properly withdrawn as being*

misconceived.") and paragraph (b) of the letter from the Court of Appeal dated 9 November 2022 ("*The Court intends to hold that any claim against the State for less misfeasance in public office by the Magistrate is ill founded, on account of his immunity from suit, and will not be allowed to proceed*").

27. This Court is of course bound by the rulings of the Court of Appeal in this matter on grounds of issue estoppel as well as the doctrine of binding precedent. Even without the decision of the Court of Appeal, it seems clear to the Court that the effect of section 10A of the Magistrates Act 1948 is that there can be no valid claim against a magistrate for monetary damages in respect of his judicial acts whether within or without jurisdiction. All the actions and omissions of the Magistrates complained of in these proceedings are judicial acts (whether within or without jurisdiction) and are protected by statutory immunity expressly set out in section 10A of the 1948 Act. Given that it is not possible to render a judgment awarding damages in relation to a magistrate's judicial acts, it is difficult to see how such a judgment could be given against the State (represented by the Attorney General in this case). In the Court's view such a result would be contrary to the statutory immunity set out in section 10A of the 1948 act. Furthermore, section 10A (2) merely provides that the decision of magistrate can be challenged by all other available means. Section 10A (2) cannot be read as providing that in relation to any application under section 15 of the Bermuda Constitution a magistrate ceases to enjoy the statutory immunity against civil liability enshrined in section 10A of the 1948 Act.

28. It appears that the Plaintiff has misunderstood what was said on behalf of the Court of Appeal to the Plaintiff in the letter dated 9 November 2020. In answering the Defendants objection that the Plaintiff is not entitled to raise matters in these proceedings which have already been determined by the Court of Appeal, the Plaintiff states in paragraph 1 of her Skeleton Argument:

> *"In support of my constitutional claim against the Magistrates, see Letter from Court of Appeal dd 9th November, 2020 para (c) where the Judges State "**to hold that any claim to redress under the Constitution for not having had a hearing in***

> ***September 2013 must, if it is to be pursued at all, the pursued in a separate action****". On this basis, I filed Constitutional proceedings as it was ALWAYS my intention to hold the Magistrates accountable for their part in the loss of my family construct. If the Court of Appeal judges considered this to be a viable means of obtaining redress, it leaves no question in my mind that they stated this on the basis that my claim had already been struck out. Therefore, the civil judgment that Mr. Moodie [for the Defendants] seeks to rely can have no bearing on these proceedings." (emphasis in the original)*

29. It is clear from the letter from the Court of Appeal dated 9 November 2020 that the Court of Appeal considered the Plaintiff's claim against the Magistrates for misfeasance in a public office to be ill founded. Paragraph 1 (b) of that letter states that: "*The Court intends…that any claim against the State for alleged misfeasance in public office by the Magistrate is ill founded, on account of his immunity from suit, and will not be allowed to proceed*." Paragraph 1 (b) of the letter is consistent with the determination of the Court of Appeal set out in paragraph 2 of the judgment which holds "*The claims against the Magistrates and Ms. 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 which renders them immune from personal liability in respect of decisions taken when acting in their judicial capacities*." It is plain that the Plaintiff has misconstrued paragraph 1 (c) of the letter from the Court of Appeal. Paragraph 1 (c) is not dealing with the liability of the Magistrates in general. Paragraph 1 (c) is dealing with one specific incident: "*any claim to redress under the Constitution* ***for not having held a hearing in September 2013*** *must, if it is pursued at all, the pursued in a separate action*." (emphasis added)

30. Secondly, it appears to the Court that it is an abuse of process to agree to discontinue proceedings against Magistrate Chin, Magistrate Wolffe and Ms. Ashley Smith (Court Associate) on the basis that the Magistrates enjoy statutory immunity against civil liability under section 10A of the 1948 Act in the previous proceedings (paragraphs 8-9 of the judgment of Wheatley AJ and paragraphs 1-2 of the judgment of the Court of Appeal) and

then to pursue the same claims against the Magistrates and Ms. Smith in these proceedings. If the proceedings against the Magistrates and Ms. Smith were going to be pursued, they should have been pursued in the 2018 Proceedings. It is an abuse of the process of the court to discontinue the proceedings against the Magistrates and Ms. Smith in 2018 on the basis that the Magistrates enjoyed statutory immunity in respect of their judicial acts and thereafter to resuscitate the same causes of actions in the current proceedings The relevant legal principles are not controversial and are set out at paragraphs 5-6 in this Court's recent judgment in *Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2022] SC (Bda) Civ (25 July 2022):

> *"5. There is no dispute between the parties in relation to the applicable legal principles relating to abuse of process in this context.* ***The Court accepts the Plaintiffs' submission that it is well established, under the Henderson v Henderson jurisdiction, that the Court "will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case"*** *(Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited [2009] EWHC 255 (TCC) at [21] quoting Henderson v Henderson [1843] 3 Hare 100 at 114–115). The underlying principle isthat "in any given litigation the parties are required to bring forward their whole case" because, amongst other things, this "provokes certainty of economy and minimises expense" (Nikken Kosakusho Works v Pioneer Trading Co [2005] EWCA Civ 906 at [33]. The English Court of Appeal in Barrow v Bankside Members Agency Ltd [1996] 1 All ER 981 at 983 held:*
>
> > *"The rule in Henderson v Henderson (1843) 3 Hare 100, [1843–60] All ER Rep 378 is very well known.* ***It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the courts so that all aspects of it may be finally decided once and for all. In the absence of special circumstances,***

the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. *The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."*

6. The rule applies where, as here, a party seeks to raise an issue in the same proceedings that it could have raised earlier (Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited [23]; [27]; [106-108]). Whether doing so is abusive is fact sensitive and requires the Court to undertake a "broad merits-based judgment" (Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited [23]). It is regarded as "unfair to allow a party to amend his case post judgment so as to allow an opportunity to succeed after a further trial" (Nikken Kosakusho Works v Pioneer Trading Co [34]); and "the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again" (Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited [107]). It is common ground that the critical question is therefore whether CS Life not only could but ***should*** *have raised this issue earlier in these proceedings (Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited [23]).* (emphasis added)

31. In response, the Plaintiff relies upon the decision of the Court of Appeal in *Joyce v Sengupta* [1992] EWCA Civ J0731-2 and relies on the following passage from the judgment of Sir Donald Nicholls VC:

"On one set of facts a plaintiff may have more than one cause of action against a defendant. He may have a cause of action in tort and also for breach of contract. This is an everyday occurrence with some claims for negligence, or with claims for breach of confidence. Again, a plaintiff may have a cause of action for breach of contract and for breach of fiduciary duty. This also is a frequent occurrence with claims against directors of companies. Or a plaintiff may have more than one cause of action in tort: a factory accident may give rise to a claim in negligence and for breach of statutory duty. These instances could be multiplied. When more than one cause of action is available to him, a plaintiff may choose which he will pursue. Usually he pursues all available causes of action, but he is not obliged to do so. He may pursue one to the exclusion of another, even though a defence available in one cause of action is not available in another. Indeed, the availability of a defence in one cause of action but not another may be the very reason why a plaintiff eschews the one and prefers the other. Limitation is an example of such a defence. I have never heard it suggested before that a plaintiff is not entitled to proceed in this way and take full advantage of the various remedies English law provides for the wrong of which he complains. I have never heard it suggested that he must pursue the most appropriate remedy, and if he does not do so he is at risk of having his proceedings struck out as a misuse of the court's procedures. In my view those suggestions are as unfounded as they are novel."

32. The above passage in the judgment of Sir Donald Nicholls VC merely states that where a plaintiff has a number of causes of action arising out of one incident, he is entitled to choose which, if any, cause of action he wishes to pursue against the defendant. This passage is not dealing with the issue whether a plaintiff, who has a number of causes of action arising out of an incident, is entitled to pursue them separately at different times. The answer to that issue is in the negative and is provided by the line of authority starting with *Henderson v Henderson.*

33. Thirdly, on the basis of the findings already made by the Court of Appeal, the present action by the Plaintiff against the Magistrates and Ms. Smith is bound to fail. As noted earlier, the Plaintiff in these proceedings is pursuing claims against the Magistrates alleging misfeasance in public office, abuse of power and breach of duty. The Plaintiff made same allegations against DCFS in the 2018 Proceedings.

34. In relation to the claim for misfeasance in public office, the Court of Appeal noted at paragraph 79 of its judgment, that the third requirement of this cause of action concerns the state of mind of the defendant. Smellie JA referred to the judgment of Lord Steyn in *Three Rivers* where he 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."*

35. Just as in the case against the officers of the DCFS, there is no sustainable factual basis upon which it could be proven that the Magistrates or Ms. Smith acted with the kind of targeted malice, bad faith or reckless indifference, of the kind required. Again, as noted by the Court of Appeal at paragraph 81 of its judgment, 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]). The allegations relied upon are set out at [2] above. They are, in the main, an account of judicial decisions with which the Plaintiff disagrees with. They are not, in the judgment of the Court, the kind of targeted malice, bad faith or reckless indifference which is required to substantiate an allegation of misfeasance in public office. On the contrary, the Court of Appeal held at paragraph 85 of its judgment that the DCFS was first moved to intervene, not at the volition of the officers but by the concerns raised with them and the Police Services by Michael Jr.'s father. The Court of Appeal further held that the matter was taken in due course before the Magistrates

Court and "*orders made after detailed assessment and enquiries were put before and considered by the Court, including reports from qualified and independent psychologists*." In light of this finding, it is impossible to say that the conduct of the Magistrates was such that it amounted to misfeasance in public office.

36. As noted earlier, both Wheatley J and the Court of Appeal held that the relevant orders which are the subject of complaint by the Plaintiff were all made with the consent of the Plaintiff and where the Plaintiff was represented by counsel. There are also orders against which the Plaintiff did not seek to appeal. Thus, the order of 8 January 2010 made by Magistrate Juan Wolffe, where the Plaintiff was represented by Ms. Dosanjh, records that:

> 1. ***That Ms. Wanda Pedro states that in the interests and welfare of the 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* ***JOINT CUSTODY*** *of Michael Jones Jr.*
>
> 3. ***That by consent between the parties*** *Mr. Michael Jones Sr. shall continue to have* ***CARE & CONTROL*** *of Michael Jones Jr. and with this regard Michael Jones Jr. shall reside with Mr. Jones.* (emphasis added)

37. This Court is bound by the finding of the Court of Appeal that where the orders of the Magistrates Court record that they were made by consent of the parties, that is indeed the factual position. Even without this finding by the Court of Appeal, this Court would have come to the same conclusion. In the circumstances, the orders complained of having been made with the consent of the Plaintiff, it is impossible to see how the Plaintiff can sustain her claims against the Magistrates of misfeasance in public office, abuse of power and/or breach of duty of care owed to the Plaintiff. If the Plaintiff has consented to the orders, as held by the Court of Appeal, it is difficult to see how the Plaintiff can maintain that her

Constitutional rights (to the protection of law, right to a fair trial and right to respect for private and family life) could be said to have been breached. If the Plaintiff did not consent to these orders and considered that these orders were wrongly made, it is difficult to understand why the Plaintiff did not seek to appeal these orders.

38. Fourthly, as was the case in the 2018 Proceedings, the Plaintiff not merely pursues a claim based upon misfeasance in public office but also asserts a case in negligence (breach of duty). In that regard, this Court is bound by the holding of the Court of Appeal that in a claim for negligence by a parent for an alleged breach of duty owed to him or her in the context of care and supervision proceedings, no such duty is owed to the parent by body like the DCFS in respect of the exercise of its statutory authority relying upon the English Court of Appeal decision in *JD and Others v East Berkshire and Others* [2003] EWCA Civ 1151. It is relevant to note that the Court of Appeal's decision in this regard was reached after a review of the decisions of the European Court of Human Rights under Articles 3 and 8 of the European Convention on Human Rights. Having reviewed the Strasbourg jurisprudence and the Court of Appeal held at [86]:

> *"The Strasbourg cases 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 childcare 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."* (emphasis added)

39. The rationale for the exclusion of the duty of care in favor of a parent, as set out in *East Berkshire,* applies equally to the existence of such duty by the Magistrates, as it applies to the existence of duty by the officers of DCFS. Accordingly, any claim by the Plaintiff for breach of duty of care by the Magistrates is bound to fail and stands to be struck out.

40. Fifthly, in the 2018 Proceedings the Court of Appeal held that as the Plaintiff was aware in 2009 of the psychological trauma, she was required if she believed that it was caused by tortious conduct of the DCFS, to have commenced proceedings no later than December 2015. The Plaintiff did not commence proceedings until more than two and half years later in July 2018 and so her claim, the Court of Appeal held, must be regarded as time-barred. The same analysis must apply to the present proceedings commenced on 3 February 2021 against the Magistrates and Ms. Smith. The Plaintiff's claim arising out of the alleged denial of access to the Magistrates' Court in September 2013 was likewise time-barred when the proceedings were commenced on 3 February 2021. The Court accepts that the provisions of the Limitation Act 1984 do not directly affect the claims for relief under section 15 (1) and (2) of the Constitution. However, the proviso to section 15(2) provides that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress or have been available to the person concerned under any other law. In relation to this proviso the Court is entitled to take into account that the applicant could have appealed against the orders now complained of and that the causes of actions available to the applicant under the general civil law on our statute barred. There is no satisfactory explanation as to why the Plaintiff did not exercise the other "*adequate means of redress*" which were available to her by appealing the orders to which she now objects.

41. Sixthly, the Plaintiff's claim for redress under the Constitution for not having had a hearing in September 2013, as referred to in paragraph 1 (c) of the Court of Appeal's letter dated 9 November 2020, is in a no better position than the claims struck out by Wheatley AJ and in respect of which the appeal to the Court of Appeal was dismissed.

    (i) The factual basis for this claim is an email from Ms. Ashley Smith dated 10 September 2013 whereby Ms. Smith advised the Plaintiff that the Magistrate, having pursued the application, had decided that in order to have a hearing before the Magistrates Court the Plaintiff must either appear in person or must be represented by counsel. This factual allegation formed the basis of the claim against the Magistrates and Ms. Smith in the 2018

Proceedings (see paragraphs 8 and 9 of the judgment of Wheatley AJ and paragraphs 1and 2 of the judgment of the Court of Appeal). However, the Plaintiff voluntarily abandoned this claim in light of section 10A of the 1948 Act which renders them immune from personal liability in respect of decisions taken when enacting in their judicial capacities (see paragraph 2 of the judgment of the Court of Appeal). Having abandoned this claim in September 2019 at the hearing before Wheatley AJ, it is abuse of process to reassert the same claim in February 2021 claiming relief under section 15 of the Constitution.

(ii) The direction conveyed by Ms. Smith to the Plaintiff in her email of 10 September 2013, reflected a judicial decision made by a Magistrate. The decision was a judicial act in respect of which the Magistrate enjoys statutory immunity under section 10A of the 1948 Act. This was recognized by Wheatley AJ and the Court of Appeal in the 2018 Proceedings. Accordingly, there can be no valid claim for damages against the Magistrate or Ms. Smith (who conveyed the direction) as a consequence of the statutory immunity set out in section 10A of the 1948 Act. If there can be no judgment for damages against the Magistrates in respect of their judicial acts, in principle there can be no liability for damages against the State in respect of the same judicial acts. The Court can of course, in an appropriate case, grant relief by setting aside the decision of the Magistrate or giving other directions to ensure compliance with the fundamental rights enshrined in the Constitution. However, here the only relief sought by the Plaintiff is an award of damages, a relief which is not available to the Plaintiff because of section 10A of the 1948 Act. Accordingly, the claim for damages in relation to this claim is bound to fail.

(iii) The Plaintiff could have appealed the decision if she was dissatisfied with it. The Plaintiff could have commenced proceedings under section 15 of the

Constitution at the time when the Court could have, if it considered that it was appropriate, grant effective relief.

(iv) In her final written submissions seeking special leave to appeal from the Privy Council the Plaintiff expressly brought this issue to the attention of the Privy Council: "*More importantly if I can prove that my final application made 10th September 2013 was denied due process-see email from Ashley Smith-Family Court dd 12th September 2013-that* ***this would place my Application I filed 10th July, 2018 within the Statute of Limitations!"*** (emphasis in the original). As noted earlier the Privy Council refused leave to appeal to Her Majesty in Council.

(v) The actions of the Magistrate now complained of took place 8 years ago (and are statute barred under the general law). The Court is no longer able to grant an effective remedy and no such relief (other than an award of damages) is claimed.

42. Based on each one of the grounds set out above, the Court determines that the Plaintiff's claim is bound to fail. The Court wishes to add that in any event, accepting Mr. Moodie's submission, there is nothing untoward for the Magistrate to direct **in 2013** that for a hearing to take place in the Magistrates' Court, the Plaintiff either must attend in person or be represented by an attorney. In effect, the Magistrate was taking the position **in 2013** that the Magistrate Court could not undertake to arrange a remote hearing. Such a position cannot, in the judgment of this Court, amount to denial of a fair hearing in 2013.

Conclusion

43. In conclusion, based on each of the grounds set out in paragraphs [26] to [42] above, the Plaintiffs claims are struck out, pursuant to RSC Order 18 Rule 19 on the grounds that the Plaintiff's Statement of Claim discloses no reasonable cause of action, is frivolous or vexatious and is otherwise an abuse of the process of the Court.

44. The Court also determines that the Originating Summons filed in this matter is irregular in that it does not comply with RSC Order 6 Rule 5 (1) (b) which requires that where the plaintiff sues in person, if his place of residence is not within the jurisdiction, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent. The Originating Summons provides no such address within the jurisdiction.

45. The Court will hear the parties in relation to the issue of costs when this judgment is handed down.

Dated this 26th day of September 2022

NARINDER K HARGUN

CHIEF JUSTICE