COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/CLE/gen/No. 00203

BETWEEN

ROMONA A. FARQUHARSON

Plaintiff

AND

CAROLYN VOGT/EVANS
(in the capacity as Stipendiary and Circuity Magistrate)

1st Defendant

AND

THE ATTORNEY GENERAL

2nd Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Ms. Gia Moxey for the Plaintiff/Respondent**
	Dr. David Whymms and Mrs. Sophia Thompson-Williams for the Applicants/Defendants
	Hearing Date:23rd November, 2020
Ruling Date:	**20th October, 2021**

RULING

Civil – Strike Out – Order 18 Rule 19 (1) (a) (d) Rules of the Supreme Court – No reasonable cause of action – Whether there was an absolute defence – Whether the Plaintiff's action was an abuse of process - Magistrate – Judicial Immunity – Sections 30 and 31 Magistrate Act – Plaintiff found guilty of contempt of court, sentenced and convicted – Whether Plaintiff should have appealed decision – Constitutional relief pursuant to Article 28 of The Constitution – Article 19 No deprivation of liberty – Article 20 Right to a fair hearing

1. This is an application by the Defendant to strike out the Plaintiff's Amended Writ of Summons filed 14th February 2019 and Amended Statement of Claim filed 27th March 2019 (**"Amended SOC"**), pursuant to Order 18, Rules 19 (1) (a) and (d) of the Rules of the Supreme Court (**"RSC"**).

2. Order 18 Rule 19 of the RSC is set out as follows:

> **"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —**
>
> **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**
>
> **(2) No evidence shall be admissible on an application under paragraph (1) (a).**
>
> **(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."**

Background

3. By her Amended SOC, the Plaintiff, Mrs. Ramona Farquharson, an Attorney-at-Law **(the "Plaintiff")**, commenced this action against the First Defendant, Carolyn Vogt-Evans, a sitting Magistrate in the Magistrate's Court of the Commonwealth of The Bahamas **(the "First Defendant")** and the Second Defendant, the Attorney General of the said Commonwealth **(the "Second Defendant") (the "Defendants")**. The action was filed subsequent to the First Defendant's finding that the Plaintiff was guilty of contempt of court which led to her imprisonment in the prisoner's dock at the Magistrate Court for several hours immediately thereafter.

4. The contempt finding came as a result of a verbal exchange between the Plaintiff and the First Defendant after the First Defendant allegedly refused to allow certain documents in evidence. The Defendants allege that the Plaintiff was belligerent, rude and derogatory while the Plaintiff alleges that the First Defendant uttered words that were malicious and calculated to disparage and cause damage to her in her profession.

5. As a result, the Plaintiff claims that the First Defendant's actions were abusive, malicious and/or wrongful and without reasonable or probable cause which injured her reputation as an Attorney-at-Law and caused her to suffer loss and damage. She claimed against both Defendants, damages for injury to reputation, breach of her constitutional rights, wrongful arrest and false detention, aggravated damages and exemplary damages.

6. The Amended SOC is set out below:

> **"2. The 1st Defendant is and was at all material times a Stipendiary and Circuit Magistrate sitting in Magistrate's Court Number 6, South Street Complex, South Street, Nassau, Bahamas.**
>
> **3. The 2nd Defendant is sued pursuant to Section 12 of the Crown Proceedings Act.**
>
> **4. Sometime on or around the 8th March, 2017, the Plaintiff appeared as Counsel before the 1st Defendant in Magistrate's Court Number 6, South Street Complex, Nassau, Bahamas in Case Number 947 of 2015 – Commissioner of Police v Melinda Clayton et al.**
>
> **5. During the conduct of Case Number 947 of 2015, the 1st Defendant, while acting in the performance of her duties, rudely and derogatorily shouted at the Plaintiff on several and repeated occasions, the following words:**

a. "That she [the Plaintiff] must shut up."
b. "That she [the Plaintiff] must shut up and sit down".
c. "I order that you [the Plaintiff] be held in contempt of Court".
d. "Arrest her [the Plaintiff] and take her downstairs."
e. "Take her [the Plaintiff] through the prisoner's dock. She is no different from anybody else."

6. The words spoken by the 1st Defendant, to the Plaintiff, in their natural ordinary meaning were malicious and calculated to disparage and cause damage to the Plaintiff in her profession and concerning the Plaintiff in the way of her occupation and in relation to her conduct therein, as the 1st Defendant made such statements publicly and in a full open Court while the Plaintiff made legal submissions on a question of law on behalf of the Defendants the Plaintiff represented in Case Number 947 of 2015 and such words infer that the Plaintiff was, or behaved as, a criminal before the 1st Defendant.

7. The 1st Defendant's actions were abusive, malicious and/or wrongful and were without reasonable or probable cause and in the premises the Plaintiff has been injured in her credit and reputation as Counsel as foresaid and has been brought into public scandal, odium and contempt.

8. Subsequent to the order by the 1st Defendant that the Plaintiff be held in Contempt of Court, the Plaintiff was wrongfully arrested, escorted by a police officer through the prisoner's dock and unlawfully detained at the Magistrate's Court Complex for several hours.

9. As a result of the 1st Defendant's actions, the Plaintiff has suffered loss and damage.

PARTICULARS OF DAMAGE

a. **The Defendant's actions were arbitrary, oppressive and unconstitutional. The Plaintiff was held in Contempt of Court when the 1st Defendant did not have the jurisdiction to do so;**
b. **The Plaintiff was wrongfully arrested, was not given an opportunity to be heard and at no time was informed of the grounds on which she was being held in contempt.**
c. **After being escorted out of Magistrate's Court #6 by a police officer, the Plaintiff was returned to Court #6, at the insistence of the 1st Defendant, and paraded through the prisoner's dock which contained other male detainess, and taken to the cell block holding area.**
d. **The Plaintiff was unlawfully detained for approximately three (3) hours.**

AND THE PLAINTIFF CLAIMS:

i. **General Damages for Injury to Reputation;**
ii. **Damages for Breach of Constitutional Rights;**
iii. **Damages for Wrongful Arrest and False Detention;**
iv. **Aggravated Damages;**
v. **Exemplary Damages Breach of Constitutional Rights;**
vi. **Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992;**
vii. **Further and other Relief; and**
viii. **Costs."**

7. As the Defendants' application is made pursuant to Order 18 Rule 19 (1) (a) and (d), the two issues for the Court's determination are:

7.1. Whether the Plaintiff's claims against the Defendants should be struck out as a result of there being no reasonable cause of action as set out in the Amended SOC and pursuant to Order 18 Rule 19 (1)(a) and;

7.2. Whether the Plaintiff's claims against the Defendants should be struck out for being an abuse of process pursuant to Order 18 Rule 19 (1)(d).

WHETHER THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANTS SHOULD BE STRUCK OUT AS A RESULT OF THERE BEING NO REASONABLE CAUSE OF ACTION SET OUT IN THE AMENDED SOC

DEFENDANTS SUBMISSIONS

8. The Defendants submit that it is the Plaintiff's duty to prove her case as established in **Asa. H Prichard Ltd. v Bahamas Supermarkets Limited CLE/gen/01244 of 2011**, where Bain J cited **William and Humbert v W and H Trade Marks (Jersey) Ltd [1986] A.C. 368 HL**, where Lord Templeman stated:

> **"If an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbors doubts about the soundness of the pleading, but in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."**

9. The Defendants further submit that there is no claim made out against the Second Defendant as the Plaintiff simply joined the Crown as a matter of procedure pursuant to section 12 of the **Crown Proceedings Act ("CPA")**. As a result, all claims against the Second Defendant are wholly untenable and must fail. Section 12 of the CPA states:

> **"12. (1) Civil proceedings by or against the Crown shall be instituted by or against the Attorney-General. (2) No proceedings instituted in accordance with this Part of this Act by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General."**

10. The Plaintiff was barred from making a claim for damages against the Second Defendant because no claim for damages was included against the Crown in her pleadings nor did she outline any breach committed by the Second Defendant or plead vicarious liability against the Second Defendant, accordingly no cause of action ever arose against the Second Defendant.

11. The action fell within the proviso to **s. 4 (1) (a) of the CPA**, and accordingly an abuse of process.

12. S. 4 (1) of the **CPA** states,

> **"4. (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject —**
>
> **(a) in respect of torts committed by its servants or agents;**
>
> **(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and**
>
> **(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:**
>
> **Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."**

13. The Defendants submitted that the Plaintiff did not plead or prove any vicarious liability against the Second Defendant and is therefore unable to establish or maintain that any claims have arisen.

14. The Defendants further relied on **Halsbury's Laws of England, Vol. 20 (2014)14** which stated:

> **"nor can any action be brought against the Crown in respect of acts or omissions of persons discharging responsibilities of a judicial nature or in connection with the execution of judicial process"**

15. It would be patently wrong they submitted, to find that the Second Defendant was liable in damages to the Plaintiff if there could be no action against the First Defendant whilst she was acting in her judicial capacity and was therefore protected by the principles of judicial privilege or judicial immunity.

16. They further submitted that the decision of the First Defendant not to allow or to restrict the admission of the documents is a judicial act and not a ministerial act. They concluded that the action against both Defendants should be dismissed and the Plaintiff condemned in costs.

17. They relied on **Halsbury's Laws of England/Constitutional and Administrative Law (Volume 20 (2014))/14** which stated that inferior court judges may be immune from liability when acting maliciously but within jurisdiction.

18. In the same vein, the Defendants submitted the action could also not be maintained against the Second Defendant for the acts or omissions of individuals discharging responsibilities of a judicial nature or in connection with the execution of a judicial process. **Halsbury's Laws of England, Vol. 20 (2014)14** was cited as follows:

> **"548. Protection for Magistrates. A magistrate or other person acting in a judicial capacity is not liable for acts done within his jurisdiction, but he is liable to a claim for false imprisonment if he unlawfully commits a person to prison in a matter in which he has no jurisdiction if he acts in bad faith.**
>
> **608. Object of judicial protection. The object of judicial privilege is not to protect malicious or corrupt judges, but to protect the public from the danger to which the administration of justice would be exposed if the persons concerned therein were subject to inquiry as to malice, or to litigation with those whom their decisions might offend. It is necessary that such persons should be permitted to administer the law not only independently and freely and without favor, but also without fear.**
>
> **1351. Persons protected. Persons exercising judicial functions in a court are exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity, nor can any action be brought against the Crown in respect of acts or omissions of persons discharging responsibilities of a judicial nature or in connection with the execution of judicial process. A further protection arises from the rule that the record of a court of record cannot, if subsisting and valid upon its face, be traversed in any action against the judge of that court.**
>
> **1353. Requirements for protection. To entitle any person to the protection of judicial privilege, the proceedings out of which the action arises must be the judicial proceedings of a tribunal which is, in the eyes of the law, a court.**

The protection applies to all courts of justice and to certain other courts having similar attributes. Thus, among courts of justice it has been applied not only to superior courts, but also to inferior courts of record and to inferior courts of justice not of record. The protection is also applied to analogous tribunals other than courts of justice, if the case is one of an authorized inquiry before a tribunal acting judicially. It is not, however, sufficient that the tribunal should be acting judicially, it must also be a court or authorized tribunal."

19. The Defendants cited **Scott v Stansfield (1868) L.R. III Exch. 220, where** Kelly C.B. opined:

> **"I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the bona fides of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable."**

20. The Defendants also relied on **Higgs and Another v. Blackman and Others [2011/PUB/CON/00002]** where, Adderley J accepted the Respondent's submissions. At pg. 32 he stated:

> **"He [Mr. Klein] points out that this principle of judicial immunity also applies to declaratory relief as well as confirmed by the House of Lords where Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237 when upholding the immunity of proceedings of the Board of Visitors as judicial proceedings (at 253, C) he said this:**

> **"...I see no difference between an action for damages and an action for a declaration. If a prisoner or litigant is not allowed to sue a justice of the peace for damages, neither should he be allowed to sue him for a declaration that he was biased. Have you ever heard of an action against a magistrate asking for a declaration that he was biased? Or was guilty of any other kind of conduct? I have not. I am sure that no such action lies."**

21. They also relied on Order 15 Rule 6 (2) (a) of the **RSC** in support of their contention that the First Defendant is not a proper party to the action and should therefore cease to be a party to this action. Order 15 Rule 6 (2) (a) provides:

> **6. (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —**
>
> **(a) order any person who has been improperly or unnecessarily made a party of who has for any reason ceased to be a proper or necessary party, to cease to be a party......"**

22. The Defendants then turned their arguments to the alleged breach of the Plaintiff's constitutional rights and submitted that based on their protection by the principle of judicial immunity, the alleged acts of the First Defendant could not amount to a breach of the Plaintiff's constitutional rights. They relied on **Maharaj v Attorney-General of Trinidad and Tobago (No. 2) [1979] A.C. 385 where Lord Diplock stated:**

> **"...no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair."**

PLAINTIFF SUBMISSIONS

23. The Plaintiff relies on **McDonalds v. Corp and another v Steel and another [1995] 3 ALL ER 615** in which the justices of the Court of Appeal collectively held,

> **"(2).....The power to strike out was a draconian remedy which was to be employed only in clear and obvious cases where it was possible to say at an interlocutory stage and before full discovery that a particular allegation was incapable of being proved."**

24. Counsel for the Plaintiff submitted that para. 6 of the Defendants' Affidavit of Fern Bowleg which stated that, **"The Defendants verily believe that if the Plaintiff is allowed to proceed to trial, not only will such a trial be lengthy, costly and unnecessary but that it would infringe against Order 18 Rule 19 (1) (a),(d) of the Rules of the Supreme Court 1976"**. In response, her Counsel, Ms. Moxey, stated that they were not reasons for a court to consider in its adjudication of an application to strike pursuant to Order 18 Rule 19 (1) (a) and (d) of the RSC.

25. She maintains that the court in adjudicating the application under Order 18 Rule 19 (1) (a) must only consider the Plaintiff's pleadings and whether or not there is a cause of action pleaded. No additional evidence should be considered. The Plaintiff drew the

Court's attention to the Amended SOC which she said particularized the causes of action including, malicious behavior and negligence.

26. Ms. Moxey explained that a cause of action is where there is some occurrence, or some reason between two parties which necessitates an adjudication by the court to determine whether rights have been infringed by the particular claimant.

27. The Plaintiff accepted that if the court made the finding that the First Defendant had the jurisdiction to act as she did then there would have no case against her. Conversely, she submitted that the First Defendant exceeded her authority which is an issue that had to be determined substantively. She relied on **Magistrate Janet Bullard v. The Attorney General and Jairam Mangra SC Civ App No. 307 of 2016** where the Court held that before it could be determined whether or not a Magistrate exceeded his/her jurisdiction to find an individual guilty for contempt of court, the question that must first be answered is whether the Magistrate had the jurisdiction to do so.

28. The Plaintiff asserted that the Defendants have accepted that the First Defendant did in fact hold the Plaintiff in contempt. She however submits that the First Defendant did not have the jurisdiction to do so and by extension should not have had her arrested.

29. She also submitted that the First Defendant's powers and authority were derived from the Magistrates Act, and she had no discretion thereunder. The provisions of the CPA which the Defendants rely on do not apply, and that there was nothing in the Magistrates Act which gave the First Defendant the statutory jurisdiction to condemn an attorney or a civil litigant by finding them guilty of contempt of court. That jurisdiction she submitted was vested in a judge of the Supreme Court and that the First Defendant erred in law by so doing.

30. As the First Defendant had no jurisdiction to do what she ordered against the Plaintiff she exceeded her authority and this issue must be determined substantively.

DECISION

31. In **AML Food Limited v. Dennis Williams 17th June 2020 SC 2018/CLE/gen/00169 (unreported)** I considered the effect of Order 18, rule 19 (1) (a) of the RSC and reviewed the existing authorities in the law. I repeat them there.

> **"In Sandyport Homeowners Association Limited v. P. Nathaniel Bain SCCivApp & CAIS No. 289 of 2014, the Court of Appeal discussed the role of a judge when considering whether to accede to an application pursuant to O 18 r. 19 (1) (a) of the RSC. Crane-Scott JA in delivering the judgment of the Court stated:**
>
> > **"8. The scope and effect of the foregoing rule is succinctly explained in note 18/19/1 of the 1999 edition of the Supreme Court Practice in the following terms:**
> >
> > > **"There are two jurisdictions pursuant to which the Court may impose sanctions for breaches of the rules of pleading, (1) under the provisions of this rule...and (2) under the inherent jurisdiction...Not every writ or pleading which offends against the rules will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach...In applying this rule, it must be remembered that "it is not the practice in the civil administration of our Courts to have a preliminary hearing, as it is in crime." (per Sellers L.J., in Wenlock v. Maloney [1965] 1 W.L.R. 1238 at 1242." [Emphasis added]**

9. The following extract from Volume 36 of the Fourth Edition of Halsbury's Laws of England is also instructive as to how the discretion under Ord. 18, r. 19 ought to be exercised:

> **"Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider the evidence until the question whether or not on the face of the pleadings some reasonable cause of action... is disclosed has been determined. In judging the sufficiency of a pleading for this purpose the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases; and where a question of general importance or a serious question of law would arise on the pleadings, the court will not strike out the pleading unless it is clear and obvious that the action will not lie." [Emphasis added]**

10. The "Strike-out application" in this case was instituted under Ord. 18, r. 19 on the sole ground that the indorsements of the appellant's Writ and Statement of Claim disclosed no reasonable cause of action against the respondent. As paragraph (2) of rule 19 clearly states, no evidence is admissible where the only ground on which the application is made is that the pleadings disclose no reasonable cause of action. See for example Republic of Peru v. Peruvian Guano Co. Ltd. (1886-90) All ER Rep 368 at 371."

Crane-Scott JA continued:

"14. Case law also shows that the discretion to strike-out a pleading should be exercised with extreme caution and only in clear and obvious cases. The discretion to strike may be exercised if it is clear and obvious on the pleadings that no reasonable cause of action is disclosed (meaning a cause of action with some chance of success) or if it is obvious that the pleadings are so bad that no legitimate amendment could cure the defect in its pleadings."

"18. The authorities in the Annual Practice also show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. See Wenlock v. Moloney [1965] 2 All ER 871 discussed below."

19.The Court's power to strike is a draconian one and should only be used where there is clearly no cause of action pleaded or inferred. The Court must be careful not to dispossess the Plaintiff of its right to be heard where there is the possibility of a weak or strong case against the Defendant. Likewise, if upon reviewing a pleading and the Court is satisfied that there is a cause of action, although not properly pled, the Court can exercise its discretion to grant leave to amend the pleading. At all times the power to strike should only be exercised where it is impossible to save the action by amendment. In B.E. Holdings Limited v. Lianji (also known as Linda Piao-Evans or Lian Ji Piao-Evans) - [2017] 1 BHS J. No. 28 Charles J stated:

> **"7 As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually**

means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

8 In Walsh v Misseldine [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

32. The Defendants have not invoked the Court's inherent jurisdiction and instead rely on Order 18 Rule 19 (1) (a) of the **RSC**. As a result, I am bound to only consider the Amended SOC in accordance with Order 18 rule 19 (2) which does not permit the admissibility of any additional evidence. In consideration thereof, is there a purported cause of action in the Amended SOC which amendments can cure or is it incurably bad. Additionally, do the Defendants have an absolute defence which would render a trial useless.

No Reasonable Cause of Action

33. According to **Black's Law Dictionary (10th Edition)**, a cause of action is defined as,

> 1. **"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person;**
>
> **"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent averse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property." Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 170 (2d ed. 1899)."**

34. The Amended SOC contains the facts of the incident between the Plaintiff and the First Defendant that led to the suit against the Defendants. Based on the pleadings as is, it can be gleaned that the Plaintiff has made certain allegations against the First Defendant, for which she claims the Defendant should be held civilly liable. Any doubt about what was being claimed was clarified at the end of the Amended SOC which set out that the damages were sought for certain torts and breaches of her constitutional rights.

35. As stated repeatedly the jurisdiction to strike out an action is a draconian one and should only be used in exceptional cases. In the exercise of its permissive jurisdiction, the Court must ensure that it does not drive a Plaintiff from the judgment seat. I can only exercise my jurisdiction to strike under Order 18 rule 19 (1) (a) of the **RSC**, if the Amended SOC is so incurably bad that there is no way, from the pleadings alone, that the purported cause of action can be determined.

36. As the Plaintiff rightfully submitted, a consideration under this head is not whether a trial would be lengthy, costly and unnecessary. Therefore, after a review of the Plaintiff's Amended SOC, while not properly pleaded, it can be gleaned that there are causes of action against the Defendants which with amendment can be properly pleaded.

Whether the Defendants have an absolute defence

37. The Defendants assert that the First Defendant is protected by judicial immunity, therefore there could be no civil action brought against her in her capacity as a Magistrate and by extension no claim would exist against the Second Defendant. A Magistrate is appointed pursuant to the Magistrates Act "The Act" which sets out the powers of a Magistrate. The Act also addresses the redress available if a Magistrate acts outside of the statutory jurisdiction. Sections 30 – 31 of the Act states,

> **"30. Every action hereafter to be brought against any magistrate for any act done by him in the execution of his duty as such magistrate, with respect to any matter within his jurisdiction as such magistrate, shall be in the nature of an action on the case as for a tort; and in the declaration or claim it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause, and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant.**
>
> **31. For any act done by a magistrate in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such magistrate in any such matter, may maintain an action against such magistrate in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration or claim that the act complained of was done maliciously and without reasonable and probable cause: Provided that no action shall be brought for anything done under any such conviction or order until after such conviction or order shall have been quashed by the Supreme Court; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such magistrate to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence; nevertheless if a summons were issued previously to such warrant, and such summons were duly served and he did not appear according to the exigency of such summons, in such case, no such action shall be maintained against such magistrate for anything done under such warrant."**

38. An action in tort therefore can be brought against a Magistrate in his or her capacity as Magistrate, if the Magistrate acts maliciously and without reasonable and probable

cause. If the Magistrate does any act outside of his or her jurisdiction or exceeds that jurisdiction or if a person injured by any act done under any conviction or order made or warrant issued, any injured person can also bring an action against the Magistrate provided that such conviction or order was quashed by the Supreme Court.

39. In **Magistrate Janet Bullard v. Attorney General and Jairam Mangra 7 Nov. 2018 CA Civ App No. 307 of 2016**, the appellate court held that sections 30 and 31 of the **Magistrate Act** addressed the immunity of Magistrates in The Bahamas. Evans JA **(Actg)** (as he then was), at para. 31 of the judgment stated,

> **"31. In our view the case of Sirros v Moore has no bearing on the issue which we have to decide. The immunity of Magistrates in the Bahamas is provided for by sections 30 and 31 of the Magistrates Act. The case of Marahaj to our mind is the relevant authority for our consideration. That case reinforces the point that a person who alleges that his constitutional rights have been affected has the right to approach the court for redress. We can see no merit in the distinction which Mr. Mackey sought to make. It is clear that Article 19 of our Constitution which guarantees protection from arbitrary arrest and detention contemplates that any arrest or detention must follow due process in order to be in accordance with the law. "**

40. In the case of **Sirros v Moore (1975) QB 118**, Lord Denning held that judges of superior courts had no greater claim to immunity than the judges of the lower courts as they should all be protected to the same degree and liable to the same degree to ensure that they may be free in thought and independent in judgment. Lord Denning's interpretation meant that judges of the superior and lower courts could commit acts outside of their jurisdiction - in fact or in law - so long as they honestly believed it to be within their jurisdiction, therefore they would not be liable once they honestly entertained their beliefs and were protected from being plagued with allegations of malice or ill-will or bias or anything of the kind.

41. The Act however limits a Magistrate's immunity and the Court of Appeal has decided on the interpretation of the immunity provisions which this court is bound to follow.

42. The Amended SOC states that the First Defendant's words **"sit down and shut up"** were malicious and were calculated to disparage the Plaintiff's reputation in her profession. The verbal exchange between the Plaintiff and the First Defendant stemmed from the First Defendant's refusal to allow a certain document to be admitted into evidence during a trial before her, in which the Plaintiff acted as Counsel for one of the parties involved.

43. The First Defendant's refusal to allow the document into evidence during a criminal trial was agreed by both parties to be a judicial act. What must be determined is whether the First Defendant exceeded her judicial powers by finding the Plaintiff in contempt as a result of the exchange which followed after the judicial act. I cannot make such a finding on this application that can only be determined at trial, after the evidence has been tested and the law reviewed. Once that happens this court can determine whether the First Defendant is protected or not. Accordingly, I make no order to remove the First Defendant from the action.

44. In relation to the Defendant's notion that no constitutional claim should lie against the Second Defendant, the appellate court in **Magistrate Janet Bullard** also

addressed this issue. Evans JA (Ag) (as he then was) rejected Counsel for the Attorney General's argument that the findings of the Privy Council in **Maharaj v A-G of Trinidad and Tobago (No 2)** (1979) AC.385 were not applicable. Counsel sought to argue that the issue of due process as expressed in the Constitution of Trinidad and Tobago was not expressed in The Bahamas Constitution which expressed a limitation on an individual's fundamental rights and freedom as to not prejudice the public interest.

45. Evans JA (Ag) discussed the Court's findings as follows:

> **"26. In our view Article 28 affords the Respondent the ability to approach the Court and to seek redress for what he alleges to be breaches of his Constitutional rights. It is noted that Lord Diplock in Marahaj's case also addressed the issue relative to how this right operates relative to judicial immunity as follows:-**
>
> > **"In their Lordships' view an order for payment of compensation when a right protected under section 1 "has been" contravened is clearly a form of "redress" which a person is entitled to claim under section 6 (1) and may well be the only practicable form of redress; as by now it is in the instant case. The jurisdiction to make such an order is conferred upon the High Court by section 6 (2) (a), viz. jurisdiction "to hear and determine any application made by any person in pursuance of subsection (1) of this section..." The very wide powers to make orders, issue writs and give directions are ancillary to this. It has been urged upon their Lordships on behalf of the Attorney-General that so to decide would be to subvert the long established rule of public policy that a judge cannot be made personally liable in court proceedings for anything done by him in the exercise or purported exercise of his judicial functions. It was this consideration which weighed heavily with Hyatali C.J. and Corbin J.A. in reaching their conclusion that the appellant's claim to redress should fail. Their Lordships, however, think that these fears are exaggerated.**
> >
> > **In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1 (a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event. In the second place, no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6 (1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6 (1) and (2) of the Constitution.**
> >
> > **In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary**

course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6 (1) with a further right of appeal to the Court of Appeal under section 6 (4). The High Court, however, has ample powers, both inherent and under section 6 (2), to prevent its process being misused in this way; for example, it could stay proceedings under section 6 (1) until an appeal against the judgment or order complained of had been disposed of." [Emphasis mine]"

46. He continued:

> **"31. In our view the case of Sirros v Moore has no bearing on the issue which we have to decide. The immunity of Magistrates in the Bahamas is provided for by sections 30 and 31 of the Magistrates Act. The case of Marahaj to our mind is the relevant authority for our consideration. That case reinforces the point that a person who alleges that his constitutional rights have been affected has the right to approach the court for redress. We can see no merit in the distinction which Mr. Mackey sought to make. It is clear that Article 19 of our Constitution which guarantees protection from arbitrary arrest and detention contemplates that any arrest or detention must follow due process in order to be in accordance with the law.**
> **32.....**
> **33.....**
> **34. For the purpose of this appeal we are content to say that the Respondent's Statement of Claim (notwithstanding its lack of felicity in drafting) raises the issue of breaches of his Constitutional rights and possibly the tort of inducement to breach of contract. He is entitled to pursue those against the Appellant for determination by the Court. There will no doubt be further amendments or applications for further and better particulars to properly lay out the specific claims for a proper determination by the Court below.**
> **35. We note that the learned trial judge had for her consideration the decision of Geoffrey Farquharson v The Attorney General SCCiv App No.77 of 2010 a decision of this Court differently constituted. In that case this Court awarded compensation to a Counsel and Attorney who in the Supreme Court had been cited and found guilty of contempt and who had been detained prior to being heard on the committal proceedings. In that case the Attorney General was the defendant. In these circumstances it is difficult to see how the Appellant thought that the Judge could accede to the Crown's submission that the action was not justiciable against the Attorney General. To do so would have been to go against binding authority from this Court."**

47. The Plaintiff seeks constitutional redress for being imprisoned as a result of a premature finding that she was held in contempt of court. It is the practice of a court who considers that a person may be guilty of contempt, to allow such person to be heard on why he or she should not be cited for contempt. To deprive an individual of his or her right to liberty by imprisonment without a fair hearing is considered a breach of one's constitutional right.

48. An individual's constitutional rights can only be protected by the State. If there is an allegation that an agent, employee or representative of the State has contravened a constitutional right, the Attorney General as the legal representative of the State would be the proper party to defend such an action. In the circumstances, I am satisfied that there is a valid action against the Second Defendant for constitutional relief which should

be determined by trial. Accordingly, the Second Defendant is a proper party for a claim for constitutional relief.

WHETHER THE PLAINTIFF'S AMENDED SOC SHOULD BE STRUCK OUT AS AN ABUSE OF PROCESS

49. The Defendants contend that the Amended SOC should be struck out for being an abuse of process as the appropriate remedy for the wrong complained of was to appeal the First Defendant's decision to the Court of Appeal. They also submit that the First Defendant is not a proper party to this action.

50. The Defendants further submitted that if the Plaintiff was aggrieved by the decision of the First Defendant to find her guilty of contempt, then the appeal process to the Court of Appeal would have been available to her. They relied on the **Court of Appeal Act s. 14 (1) (a) – (k),** which provides for an appeal from the Magistrate Court. Section 14 states as follows:

> **"Grounds of appeal from magisterial court.**
> **14. (1) Any person who is dissatisfied with any judgment, sentence or order of a magisterial court, given or made after the coming into operation of this section in respect of any offence referred to in the Third Schedule to the Ch. 91. Criminal Procedure Code Act or of an offence for which he is liable to imprisonment for a period of one year or more, may appeal to the court on any of the following grounds-**
>
> **(a) subject to subsection (2), that the magisterial court had no jurisdiction in the matter;**
> **(b) that the magisterial court exceeded it, jurisdiction in the matter;**
> **(c) that the magistrate took extraneous matters into consideration;**
> **(d) that evidence was wrongly rejected or inadmissible evidence was wrongly admitted by the magistrate, and that in the latter case there was not sufficient evidence to sustain the decision;**
> **(e) that the decision was unreasonable or could not be supported having regard to evidence;**
> **(f) that under all the circumstances of the case, the decision is unsafe or unsatisfactory**
> **(g) that the decision was erroneous in point of law, the particular point of law being specified in the grounds of appeal;**
> **(h) that the decision of the magistrate or sentence passed was based on a wrong principle or was such that a magistrate viewing the circumstances reasonably could not properly have so decided;**
> **(i) that some material illegality or irregularity, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the proceedings therein or in the decision;**
> **(j) that the sentence was unduly severe or unduly lenient;**
> **(k) that the Magistrate in passing any sentence in respect of any offence referred to in Part I of the Third Schedule or any offence referred to in the Fourth Schedule to the Criminal Procedure Code Act did not comply with any sentencing guidelines issued by the Chief Justice or did not provide sufficient justification for not following such guidelines."**

51. The Defendants added that the constitutional claim alleged, created a collateral attack on the First Defendant's decision which constitutes an abuse of process as a result of the matter not being able to proceed by way of appeal to the Court of Appeal.

52. The Plaintiff in response submits that she exercised her civil right which she was not precluded from so doing as damages were incurred. Additionally, she submitted that the First Defendant, as a Magistrate, was a creature of statute and that she had no discretion to hold the Plaintiff in contempt.

53. The Plaintiff additionally contended that it was the Defendants' application to strike which was an abuse of process. While she accepted that leave was granted to the Defendants to proceed with their application, the application should have been made prior to discovery as the Court acceding to the application after discovery would raise the issue of costs.

DECISION

54. In **Note 18/9/9 of The Supreme Court Practice 1976** abuse of process of the court is discussed as follows:

> **"Abuse of the Process of the Court. – Para. (1) (d), supra, confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court". This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation....."**

55. In **Willis v. Earl of Beauchamp (1886) 11 P. 59,** Bowen L.J stated at pg. 63 of the judgment that:

> **"the Court has the inherent power to prevent the abuse of its legal machinery which would occur, if for no possible benefit, a party is to be dragged through litigation which must be long and expensive."**

56. In **West Island Properties Limited v. Sabre Investment Limited et al 22 November 2012 CA SC No. 119 of 2010**, Allen P stated,

> **"30. Concerning Order 18; rule 19(1)(d) R.S.C. both Bramwell B. and Blackburn J. in the cases of Castro v. Murray Law Rep. 10 Ex. 213'218 and Dawkins v. Prince Edward of Saxe-Weimar 1 Q.B.D. 499; 502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in Dawkins v. Prince Edward of Saxe-Weirmar indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant."**

57. In **Magistrate Janet Bullard** (supra), the Court of Appeal was tasked with considering this very same issue. The Respondent, Jairam Mangra, a practising attorney, appeared before the Appellant, Magistrate Janet Bullard for trial. During the course of trial the Respondent got into a heated argument with the Appellant. The Appellant found that the Respondent was in contempt of court and he was ordered to be detained at the police

station for one hour. The Court dismissed the Appellant's submission that the Respondent had a right of appeal therefore he should have pursued that route.

58. At para. 36 of the judgment, Evans JA (Acting) stated,

> **36. Finally, we note the submission of Mr. Mackey that the Respondent had a right of appeal and should have pursued that route. However, on the pleadings so far the allegation is that the purported punishment for contempt has already taken place and as such an appeal at this stage cannot if successful result in adequate redress. The Respondent's claim is for compensation by way of redress. It will be for the trial judge to determine whether there is merit in his allegations and if successful to determine what the appropriate compensation will be."**

59. Similarly, the Plaintiff here has purportedly already been punished for the finding of contempt by the First Defendant. The only redress available should she be successful would be to seek damages for a breach of the Plaintiff's constitutional rights not to be deprived of her liberty and her right to a fair hearing pursuant to Articles 19 and Articles 20 of the Constitution, respectively as provided for under Article 28 of the Constitution.

60. Having considered the evidence and submissions of both parties, I find that the Plaintiff's decision to forego an appeal of the First Defendant's decision to find and sentence her to contempt and instead initiate the present action for constitutional relief was not an abuse of the process of the court.

CONCLUSION

61. I therefore find that:

62.1 Despite the Amended SOC not being properly pleaded, it was not so incurably bad that no cause of action could be gleaned. Therefore, there is a reasonable cause of action in the Amended SOC and the Plaintiff should make the necessary application to amend the same.

62.2 The First Defendant's contention that it has an absolute defence against the Plaintiff's claims in tort as she was acting in a judicial capacity when she exchanged words with the Plaintiff, is an issue that must be addressed at trial. Accordingly, I do not accede to the Defendants' application to strike her from the action.

62.3 Further, as was stated above, I do not accede to the Defendants' application to strike the Second Defendant therefrom and accordingly, the claim against the Second Defendant remains.

62.4 The Plaintiff's action for constitutional relief is not an abuse of the process of the Court as an appeal would not have remedied the First Defendant's decision to imprison the Plaintiff after a finding of contempt.

62. A case management conference will be scheduled at the convenience of the court and both parties.

63. I will hear the parties on costs.

Dated the 20th day of October 2021

Hon. Madam Justice G. Diane Stewart