International FAMILY LAW GROUP LLP

Judicial Immunity: An Extraordinary Case and a Worrying Warning from Australia

Executive summary

An extraordinary decision in August 2023 of the Federal Court of Australia has highlighted for English judges the risks of being sued for damages and the potential inadequacy of the defence of judicial immunity.[1] In the case the judge's actions were found to be an affront to justice. A litigant in person was sentenced to 12 months' imprisonment for contempt for breach of disclosure orders, spent 6 days in custody, sued the judge and the judicial authorities, was cleared and received substantial damages. The colossal judgment, 852 paragraphs, goes back through hundreds of years of case law to examine this complex subject. This article looks at the headlines, drawing attention to safe and good practice then gives a warning for all Family Court judges. Should English first instance judges be worried?

The judgment

The case is *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 [2] with a judicial summary by Justice Michael Wigney. [3]

The judgment is 852 paragraphs. The list of legislation, cases and references takes up 7 pages with the oldest being from 1600 with many others in the 17th- and 18th-centuries; this is very much a case for legal historians and constitutional law experts.

Although legislation has now been passed to cover the situation hereafter, there are believed to be presently cases against Australian Family Court judges in respect of their actions and potential damages claims. But in essence the Federal Court was clear: judges who exceed their jurisdiction, their power in law, [4] are at risk. Where the boundaries of judicial power can be complex with technical rules, the risk of being sued is not insignificant, even if it is a long way from the excessive facts of this case.

Short background to facts and first instance decision

For many judges, having two litigants in person, especially in the context where one party may be wilfully refusing to comply with orders, is the worst possible situation. The judge naturally wants to bring about a just and fair outcome. But help in getting to that outcome is just not there. An interventionist approach is invariably necessary and yet how far does the judge go? Not as far as this judge!

In April 2017, Mr Stradford, a pseudonym, brought financial remedy proceedings in the Australian circuit court. Specific directions were given in court orders, supplementing the Family Court rules which under Australian law include comprehensive disclosure as would also be expected under English law. The final hearing was supposed to be on 10 August 2018 with both parties unrepresented. The husband had not disclosed his financial circumstances. This raised the ire of Judge Vader. [5] He said he would have no hesitation in sending him to prison if he did not comply with further disclosure orders. In one of several quotes which does not show the judge in a particularly good light, he said:

> [redacted]
> *consequences, because that's what I do. If people don't comply with my orders there's only [one] place they go.* [redacted]
> *complying with my orders …"* (emphasis shown and added here and throughout)

In a further exchange, when the judge indicated he would order further disclosure, he said to the husband:

> [redacted]*if it is that she comes here, and she complains that she has asked for things and you have not given them to her, bring your toothbrush.*[redacted]

Directions were made for further disclosure. It was adjourned for a mention on 26 November 2018 on the basis that if the court was the opinion that there had not been full and frank disclosure, the husband would be dealt with for contempt on 5 December 2018. It came before another judge, Judge Turner, who listened to the husband and adjourned the case to 6 December for the hearing of the contempt application. This judge did not make any findings of non-disclosure or breach of orders nor had any contempt application been filed. It came back before the original judge. He seems to have been of the opinion that Judge Turner had determined that the husband had not complied with the disclosure obligations and was in contempt. This was a mistake. Even so, the wife had not filed a contempt application or even submitted the husband should be found in contempt. Moreover, the husband was saying, perhaps predictably, that he had now complied with the orders and given satisfactory disclosure.

Nevertheless, the judge said that he would deal with the contempt. The wife made it very clear she did not want the husband to go to jail unnecessarily. She just wanted disclosure. The judge adjourned the case briefly for them to discuss whether they could reach an amicable settlement, failing which he said he would deal with the contempt.

On resuming with no settlement, the judge said that he would deal with the matter later in the morning and expressed the hope that the husband had brought his toothbrush! The wife protested that she did not want imprisonment. The judge made it very clear that the decision was his and his alone and not that of the wife. It would be the judge sending the husband to prison, not the wife.

When the hearing fully resumed just before midday, the judge repeated what he thought the previous judge had said about the husband being in contempt. The husband said he had disclosed all he was able to disclose but the judge dismissed the protestations. There was no questioning of the husband about his disclosure since the August hearing. He gave a short judgment finding the husband in contempt and ordered 12 months' imprisonment, starting immediately with 6 months inside and 6 months suspended. In his *ex-tempore* judgment, set out at para 37 of the reported decision, he made clear it was for him to assess criminality of contempt, the husband could have made disclosure and had chosen not to do so. He went on that there were few weapons at judicial disposal to ensure orders were complied with [6] and the court must show all litigants and the

whole community there will be serious consequences and give condign (appropriate) punishment to those who flouted the orders of the court.

Two security guards, employed by a private company with the Court Service, took the husband and escorted him through the public concourse to a holding cell. The Queensland police arrived, and he was handcuffed and taken in a police van to a nearby police station. In fact, the police had already been alerted before the judge reconvened the hearing at which he was purporting to deal with the contempt. The following day the husband was transferred to the Brisbane Correctional Centre, the local jail.

On 12 December, 6 days later, with the husband now represented and an appeal lodged, the same judge stayed the imprisonment, conceded that he had been wrong in finding that the husband was in contempt and wrong to sentence him to prison, and accepted that he had incorrectly assumed the previous judge had found that he was in contempt. The husband was released forthwith.

Judicial action occurred swiftly. On 15 February 2019, 2 months later, the Full Court, the equivalent of the English High Court, delivered judgment unanimously allowing the appeal. They said as follows:

> [redacted]
> *so devoid of procedural fairness to the husband, and the reasons for judgment so lacking in engagement with the issues of fact and law to be applied, that to permit the declaration and order for imprisonment to stand would be an affront to justice …'* (para 56)

They found in summary, paras 58–66:

1. The judge proceeded in apparent ignorance or disregard for the legislative provisions which deal with punishment for contempt and the imposition of sanctions.
2. The judge had resolved or predetermined in advance of any finding that the husband had breached disclosure orders and irrespective of any application by the wife he would of his own motion treat his non-compliance as contempt and not, for example, failure to comply with orders.
3. The procedure adopted was fundamentally flawed on a number of levels including pre-determining the breach, acting as prosecutor and judge and not affording an opportunity for the husband to be heard.
4.

- In performing the role of prosecutor, witness and judge, he had failed to follow the mandated procedure in the court rules. He did not follow any procedure remotely resembling the required process.

5. He had proceeded on the erroneous premise of the determination by the previous judge even though it could not possibly be inferred that any such determination had been made.
6. Even putting to one side failures as above, the conduct of the judge constituted a clear denial of procedural fairness as set out in para 64.
7. The judge's conclusion that the husband had failed to comply with his August orders was without any evidential foundation. There had been no determination of whether there had been the disclosure. This constituted a profound denial of procedural fairness.

The contempt decision and the order for imprisonment were found to be a gross miscarriage of justice.

The court then went through the errors made by the judge, paras 67–74 in summary, then expanded in detail in paras 76–149. These are not repeated here and are mainly obvious from the summary above. However, they are on any basis staggering in their extent. They are salutary reading by family court judges worldwide in circumstances where one party has clearly or probably not complied with necessary court orders but the judge has to decide appropriately what is then the best course of action.

Clearly one error was the failure by the judge fully to understand what had happened at the hearing before the previous judge. This risk arises not infrequently. Sometimes orders do not physically reach the court file quickly. Having a digital portal on which all orders and other court documents lie assists in overcoming this problem – as long as all orders are filed on it! There is always a danger in relying on reports of what a previous judge may or may not have done, particularly with litigants in person who may not be able to update accurately the court on previous developments. Caution and good practice are always to have the relevant order. But this is fundamental in the realm of enforcement of any form.

Where Draconian steps are being taken, which include contempt and of course imprisonment, strict adherence with the rules and process is even more important and is paramount, as is repeated many times in English Family Court cases, as below. This saga from Australia merely emphasises to us in England how crucial this is when in the arena of contempt.

The errors by the judge were compounded by the fact that in the particular circumstances of this

case he may not have had the power to make the order. It can seem frustrating at times, particularly at District Judge level, that there are unnecessary levels of judiciary in the Family Court. In fact, it should act as a comfort and a cautionary brake in the knowledge that although non-compliance orders can be made, the contempt and consequential enforcement is before another judge, a new judge to the case, with the objectivity which can sometimes be difficult after dealing with parties in person over several hearings.

However difficult both parties or just one party may be, judicial conduct must be above reproach, respectful, civilised and fair. In this case, the judge was described as acting in a thoroughly unsatisfactory and unjudicial manner. He repeatedly interrupted, hectored, berated and bullied the husband. He also prejudged the outcome. For example, he had requested the attendance of the police before going into a hearing to consider the contempt; the Queensland police were told that the judge would be issuing a warrant for the husband to be held in custody before the hearing commenced which was, in theory at least, intended to consider what, or whether, this should happen in the case.

One unsatisfactory element is that before the hearing at about noon when he made the imprisonment order, he had adjourned for a short time for the parties, both in person, to consider a settlement of the entire financial claims, making it clear that in doing so the husband would avoid imprisonment. It was clear this was a lever to force the husband to capitulate and agree a settlement acceptable to the wife. The judge alleged he was merely giving the opportunity but the appeal court was satisfied it was thoroughly unjustified. They quoted from the transcript:

> *“So I’m going to adjourn just for five minutes and then I will let you talk to Mr Stradford and it will be only for five minutes. Then you can come back and you can tell me what you want to do. If it is that there’s not going to be a resolution, I’m going to proceed with the contempt hearing. It’s as simple as that. Okay. Thank you. Okay. All right.*'” (para 139)

Given that they had failed to settle over more than a year, it was not surprising they didn’t settle in 5 minutes even with the likelihood of imprisonment in default of settling. It was found this was thoroughly unacceptable judicial approach and pressure although, despite misgivings by the appeal court, the allegation the judge acted for an improper purpose was rejected.

The court then had to go on to consider torts of false imprisonment and collateral abuse of process. This part of the judgment, paras 150 onwards, is distinctively based in Australian process but crucial to the outcome, because the judge, along with the Court Service, had claimed immunity from suit, paras 199 onwards. The judge said that even if the case against him succeeded, he was

nevertheless entitled to the protection of judicial immunity available to lower-level judges, known in Australia as inferior courts [7] as distinct from higher courts. This was despite such errors being made. He said this immunity was the same as available to higher court judges and was not lost where the judge acted in bad faith or knowingly without jurisdiction. This argument in law took up a significant amount of the judgment. It was found that the position was not clear in Australian law or in common law. The court reached back to many English authorities of the 17th- and 18th-centuries, the oldest being from 1600. It is impossible for this article to do any justice to those arguments, nor probably are they of distinctive relevance in England in the Family Courts subject to what is the present position here.

It is paras 342–346 of the judgment, setting out the principles perceived in the case law, which have been most discussed within Australia.

Committal cases equivalent in England

In *Sanchez v Oboz*, [8] Cobb J in the English High Court set out some very useful guidance of factors to take into account in committal cases:

1. [redacted]
2. Whether the respondents have had sufficient notice to enable them to prepare for the hearing;
3. Whether any reason has been advanced for their non-appearance;
4. Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present;
5. Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation;
6. The extent of the disadvantage to the respondents in not being able to present their account of events;
7. Whether undue prejudice would be caused to the applicant by any delay;
8. Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents; and
9. The terms of the *"overriding objective"* [under] rule 1.1. FPR 2010 …' ([5])

Hammerton [9] held that proceedings for committal must not be heard at the same time as any

other application because of the absolute right of a person accused of contempt to remain silent. Being heard at the same time as other matters about which the alleged contemnor needs to give evidence places him in a position where he is effectively deprived to the right of silence, a serious procedural error.

Re G (A Child) (Contempt: Committal Order) [10] had some similarities with the Australian case in that the first instance judge was held to have committed several procedural flaws in the process leading to the committal order on his own initiative. The Court of Appeal held that although circumstances varied widely, a committal order was a last resort normally reserved for serious, intentional and in most cases repeated contempt of court which had been established by due process. Where a party might be in contempt of court by virtue of a breach of the general rules of confidentiality, but there had been no breach of a specific court order, there might be more than one method available for the court to deal with it. Committal on the court's own initiative was an exceptional course, particularly in family cases where time should normally be taken for reflection. The instant case was not an exceptional one of clear contempt which could not wait to be addressed. The errors included non-compliance with the relevant Practice Direction. The father was not represented nor given the opportunity of an adjournment to enable his representation and preparation of a defence, thus he was not afforded the minimum rights to which he was entitled. [11] The father was not informed that he was not obliged to give evidence for the purpose of a finding of contempt, nor was he given the formal opportunity to submit that what was alleged did not constitute contempt. Therefore, the process which led to the suspended committal order was seriously flawed and substantially unfair. For those reasons alone the suspended committal order had to be set aside, though in addition the order was defective as it failed in detailing the acts found to have constituted the contempt. [12]

Re LW (Children) (Enforcement and Committal: Contact); CPL v CH-W [13] has helpful information on the law of committal.

Family Procedure Rules 2010 (SI 2010/2955) (FPR) Part 37 sets out the steps to be taken in committal proceedings.

See also the exemplary way in which a not dissimilar situation was addressed by Moor J recently in *Williams*. [14] The judge sentenced the party, found to have knowingly failed to comply with disclosure orders including those with a penal notice, to a total of 56 days in prison, suspended for 14 days to allow one last opportunity for filing the Form E. See also immediate committal order by the same judge in *Hersman v De Verchere*. [15]

Although not a committal case, the author as a Deputy District Judge at the Central Family Court (CFC) found himself in similar difficulties to the judge in the Australian case in trying to make progress in the consistent absence of disclosure. In that matter, listed as a final hearing in the expectation that disclosure would have been granted, the hearing was adjourned with one last chance at specific disclosure but with an indication of what was likely to happen, including inferences, if the disclosure was not given. [16]

Outcome in the Australian case on appeal

Although the court found the husband had not shown a case for collateral abuse of process, he had made out his case for false imprisonment. The order for the imprisonment was infected by a number of serious and fundamental flaws on the part of the judge. The individual and cumulative effect was that the order was invalid and had no legal effect from the outset. It provided no lawful justification for the imprisonment.

The judge was not protected by any immunity given to inferior court judges at common law. Any such protection may be lost where the judge acted without or in excess of jurisdiction.[17] Although the judge may have had jurisdiction here to deal with the financial case, he acted without or in excess of jurisdiction in the imprisonment arising from contempt. He had found the contempt without looking at the facts of the breach. The judge was also guilty of a gross and obvious irregularity of procedure and denied the applicant any modicum of procedural fairness or natural justice.

The court was also not satisfied that the Commonwealth and Queensland, to include here the Court Service, had judicial immunity. Whilst at common law some court officers such as sheriffs may be able to justify their tortious actions by obedience of the court order, that defence did not apply to police and prison officers who were not officers of the court. [18]

The applicant was entitled to a not insubstantial award of damages but was refused an award of

aggravated and exemplary damages. The amount was about $309,000, about £150,000.

Subsequent developments in Australia

The outcome of a lack of judicial immunity for many first instance (lower level) judges rang inevitable and loud alarm bells and more through the Australian judicial system. Judges reportedly went on strike. They were openly angry and simultaneously anxious. Whilst the actions of the judge in this case were excessive, the court had framed the liability of the judges in quite wide terms, including any judicial actions beyond the powers and jurisdiction of the judge in question.

The problem is that with a significant amount of domestic court rules, in Australia even more so than England, it is very easy for a judge inadvertently to trip over jurisdictional boundaries, to make orders in circumstances where the judge in question may not have power. The Australian first instance judiciary were immensely unhappy at this risk.

The Australian government acted under pressure although not as quickly as many judges wanted. It introduced legislation [19] to give judicial immunity. But only for the future; it couldn't be retrospective. It is believed that in some cases appellants changed their grounds to include issues of jurisdiction and therefore leave open the possibility of seeking damages from judges and the court system.

The judge in question has appealed the decision as has the Queensland government and the federal government. The appeals were lodged on 27 September 2023. In February 2024 the case was transferred (leapfrog process missing out the equivalent of the Court of Appeal) to the High Court [20] with directions. The AG for South Australia has already applied to intervene. More can be expected before it reaches final appeal hearing. In the meantime, the judge is continuing in daily family court work. [21]

The Australian federal government when elected, May 2022, had promised to establish a Commission to investigate complaints about the ability and conduct of judicial officers, including judges. New South Wales already has a Judicial Commission which over watches the state judges, but nothing federal, intra Australian, is yet happening.

What about judicial immunity in England?

It cannot be said that the position in England is significantly clearer or much more satisfactory,

although there has been judicial guidance.

The starting point is an October 2007 document, *'The Accountability of the Judiciary',* [22] which followed changes in the constitution from the Constitutional Reform Act 2005. It says the following (page 8):

> [redacted] [23]

Sirros v Moore [24] talks about the distinction between immunity of judges of the superior and inferior courts, although it is a 1975 decision. But at least not from the 1600s!

Aamir Mazhar v The Lord Chancellor [25] is a claim against the Lord Chancellor alleging breach of the Human Rights Act 1988 arising out of a judicial act, namely an order by Mostyn J (as he then was) under the High Court's inherent jurisdiction in relation to vulnerable adults. In fact, the court held it didn't have the power to make a declaration against the Crown in respect of a judicial act, which should be pursued by way of an appeal instead.

Information on the Courts and Tribunal's Judiciary website on the question of 'Independence' [26] is realistic about the cynicism with which the public may treat judicial immunity:

[redacted]

However, judges are not above the law. Judges are subject to the law in the same way as any other citizen. The Lord Chief Justice or Lord Chancellor may refer a judge to the Judicial Complaints Investigations Office in order to establish whether it would be appropriate to remove them from office in circumstances where they have been found to have committed a criminal offence.

From all of this, English Family Court judges at first instance, the so-called inferior level, may decide that they may have more up-to-date guidance but not much more – or any more – protection.

What can be learned in England?

The inevitable response is to hope that this would never happen in England: the number of judges with whom to discuss difficult matters within the larger court centres, court orders found on the portal, judges coming out of the specialist family solicitors' firms or specialist family barristers' chambers who have been brought up on codes of practice which emphasise respect, integrity and settlement orientation, specialist enforcement courts, for example at the CFC, which deal with enforcement even though other judges have made initial orders, the different layers of judiciary with a specific higher-level required for contempt and imprisonment.

Yet much or all of this can be said equally of Australia. They have even more extensive rules than the English FPR. They have equally vigorous measures when dealing with Draconian steps. They have equally specialist Family Court judges coming out of the specialist family lawyer profession. So however much England may like to think it couldn't happen here, or indeed in any other country, it could.

This is the primary purpose of this article: a salutary warning to all judges, full time and part time, specialist Family Court or with a combined ticket, first instance or appeal.

One of the recent benefits of the family justice system in England is the greater use of reservation of cases to a particular judge for continuity of approach. But it has its problems. Sometimes one party can cause a judge to adopt an approach which they wouldn't on a one-off, first appearance, fresh hearing case. There is certainly an argument that after a certain number of hearings, a reservation to a judge may have played its part and it is then time to pass to another.

The judge in the Australian case had said that he used contempt and imprisonment because there were few weapons available in the face of non-compliance with disclosure orders. Australia has many weapons, using his terminology, as does England. Perhaps distinctively England will use the power of inference, the opportunity to infer a level of assets or income from lifestyle or what disclosure documents are available. Used often in big-money cases, it is also used from time to time and resourcefully in all cases before the Family Court in England. Perhaps this might have been a better remedy for the judge.

Even with access of the press, media, or even in Australia the public with the guarantee of anonymity, the reality is that the vast majority of Family Court cases are conducted with only the parties themselves present. [27] Nevertheless, perhaps as with other aspects of life, it is a useful warning for any judge to ask how they would feel if the hearing they are presently conducting was being beamed live to a television audience. If they would consequently change their behaviour, then almost certainly they should.

It is often said by lawyers later in their careers that the dramatic, colourful, extravagant personalities and characters once common place in the law have been driven out by regulation, red tape and codes of behaviour. It is far more monochrome and vanilla. The drama has gone. Whichever the truth, irascibility, bad temper, bullying and unacceptable behaviour by some judges in years gone by have no place in any modern family justice system. Whether against some litigants in person, in respect of gender or background. or other reasons. None are acceptable.

The risk of being sued as a judge is not perceived as a real and present danger in England. Very probably most judges, full time and part time, have not put their minds to the risk. They should now. Some may be anxious about the real width of risk in exceeding jurisdiction and power, as it is all too easy to occur unintentionally. Some will want to be clearer of the extent of judicial immunity under English law for first instance, non-High Court, judges, and perhaps more guidance and clarity

should be given. Not least, now this claim has happened in Australia, it may be only a matter of time before the same is considered by unhappy litigants in England.

First Published in the Financial Remedies Journal – Blog Summer 2024

Prof David Hodson OBE KC(Hons) MCIArb
dh@davidhodson.com
The International Family Law Group LLP
www.iflg.uk.com

Notes

[1] The author is grateful for the assistance of Georgina Huse, dual qualified English and Australian solicitor of The International Family Law Group. He has also had the benefit of a number of informal conversations with judges and lawyers in Australia concerning the outcome and practical consequences of this case.
[2] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca1020
[3] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca1020/summary/2summary
[4] The issue in the case was not whether the judge had jurisdiction in general terms but whether what occurred in that particular hearing was of such a nature that it was outside that jurisdiction and, consequently, whether that level of judge had general judicial immunity. The answer was 'no'.
[5] A federal circuit court (Div 2) judge, probably equivalent to a DJ or HHJ.
[6] Whether this is a true statement must be open to some doubt as Australia, like England, has many various opportunities to secure disclosure.
[7] Technically, Division 2 judges whose jurisdiction is in s 132 Federal Circuit and Family Court of Australia Act 2021 (FCFCOA). Division 2, formerly the Federal Circuit Court, is the single point of entry, but complex matters including Hague Convention, etc would be transferred up to the Division 1 level of judges. Not too dissimilar to the English gatekeeping process between DJ and High Court first instance.
[8] *Sanchez v Oboz* [2015] EWHC 235 (Fam)
[9] *Hammerton v Hammerton* [2007] EWCA Civ 248
[10] *Re G (A Child) (Contempt: Committal Order)* [2003] EWCA Civ 489, [2003] 2 FLR 58
[11]

Art 6(3) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 Human Rights Act 1998)

[12] *Danchevsky v Danchevsky* [1974] 3 All ER 934, *Ansah v Ansah* [1977] 2 All ER 638 and *Re M (Minors) (Breach of Contact Order: Committal)* [1999] 1 FCR 683 applied.

[13] *Re LW (Children) (Enforcement and Committal: Contact); CPL v CH-W* [2010] EWCA Civ 1253

[14] *Williams v Williams* [2023] EWHC 3479 (Fam)

[15] *Hersman v De Verchere* [2023] EWHC 3481 (Fam)

[16] *TYB v CAR (Non Disclosure)* [2023] EWFC 261 (B)

[17] Either general or specific within the case itself for the particular application.

[18] This outcome seems particularly harsh as the police and prison officers were only following instructions from the judge.

[19] Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023. There has also been a proposal to establish a federal judicial commission to investigate complaints against judges.

[20] Equivalent to a Supreme Court, including hearing appeals from State Supreme Courts. More at: www.hcourt.gov.au/cases/case_c3-2024

[21] He apparently had a very successful career at the criminal Bar, being appointed to the criminal bench then moving across to the family bench.

[22] www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf

[23] *Sirros v Moore* [1975] 1 QB 118 at 133, 148. See also *Re McC* [1985] AC 528

[24] *Sirros v Moore* [1975] 1 QB 118

[25] *Aamir Mazhar v The Lord Chancellor* [2017] EWHC 2536 (Fam)

[26] http://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc ind/independence/#:~:text=For%20example%2C%20judges%20are%20given,the%20course%20of%20

[27] Contempt applications are normally listed and held in public and there are strict guidelines if they are not.