HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No C4 of 2024

BETWEEN: **HIS HONOUR JUDGE SALVATORE PAUL VASTA**
Appellant
and
MR STRADFORD (A PSEUDONYM)
First Respondent
and
COMMONWEALTH OF AUSTRALIA
Second Respondent
and
STATE OF QUEENSLAND
Third Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: The Issues

2. The issues arising in this appeal are:

(a) whether under the common law of Australia, the principle of judicial immunity applies differently as between a judge of a superior court of record and a judge of an inferior court of record such as the Federal Circuit Court of Australia (**FCCA**); and

(b) alternatively, whether pursuant to s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) (***FCCA Act)*** a judge of the FCCA has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempt of the High Court with effect that:

(i) in making orders to punish the first respondent (**Mr Stradford**) for contempt the appellant (**Judge Vasta**) was protected by the same judicial immunity as a judge of the High Court of Australia; and / or

(ii) the orders were, as with an order made by the High Court of Australia, valid unless and until set aside.

Part III: Section 78B of the *Judiciary Act* (Cth)

3. The appellant certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth).[1]

Part IV: Judgment Below

4. The judgment of the Federal Court the subject of appeal is unreported: *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 (**Primary Judgment**).[2]

Part V: Facts

5. Judge Vasta was at all relevant times a judge of the FCCA. The FCCA was established in 1999 as the Federal Magistrates Court constituted by appointed 'Federal Magistrates'.[3] In 2013, it was renamed the FCCA and the title of its judicial members changed to Judge.[4]

6. On 7 April 2017, Mr Stradford filed an initiating application in the FCCA seeking property adjustment orders under s 79 of the *Family Law Act 1975* (Cth) (***FL Act***) in respect of the matrimonial assets owned by him and his then wife ([18]; **JCAB 261**). The FCCA had jurisdiction in relation to the matter because it had jurisdiction to determine "matrimonial causes" of the kind referred to in the *FL Act*: s 39(1A) of the *FL Act*; s 10(1) of the *FCCA Act* ([19]; **JCAB 261**).

7. In the course of the matter, an issue arose with respect to disclosure of documents thought to be relevant to the property settlement involving Mrs Stradford and her young children. This included compliance by Mr Stradford with orders made by Judge Spelleken on 19 June 2018 and following which Judge Vasta made orders on 10 August 2018 requiring 'full and frank disclosure' of, inter alia, gambling account statements, and adjourning the

[1] A notice was sent by the second respondent in the trial below on 15 October 2021 and by the Attorney General of the Commonwealth in this appeal on 12 December 2023.

[2] In these submissions all paragraph [#] references are to the Primary Judgment, unless otherwise stated.

[3] *Federal Magistrates Act 1999* s 3(1).

[4] In 2021, the FCCA and Family Court of Australia merged through the establishment of the Federal Circuit and Family Court of Australia (**FCFCA**). In substance, the FCCA continues as Division 2 of the FCFCA. In these submissions, references to statute are to the law in force at the time of the relevant proceedings.

matter for mention ([22] – [24]; **JCAB 261 - 263**). The context was that a million or close to a million dollars appeared to have gone through Mr Stradford's gambling accounts ([37]; **JCAB 266 - 267**) which he had not disclosed or adequately disclosed, and that in the order of $300,000 or $400,000 was required to be added to the matrimonial pool ([139]; **JCAB 290 - 291**). The matter returned before a different judge (Judge Turner) at which time issues were raised as to Mr Stradford's compliance with the disclosure orders ([27]; **JCAB 264**). Judge Turner ordered that the matter be adjourned to "the hearing of the contempt application" ([28]; **JCAB 264**). On 6 December 2018, the matter came on for hearing before Judge Vasta. As before, Mr and Mrs Stradford were unrepresented ([29]; **JCAB 264**). Judge Vasta submitted below that he was, at that time, under the misapprehension that Judge Turner had already found that Mr Stradford had not complied with the disclosure orders and was therefore in contempt ([32]; **JCAB 265**).[5] Judge Vasta indicated that he would adjourn the proceeding briefly to allow the parties to discuss whether they could reach an amicable settlement, failing which he would proceed to deal with Mr Stradford for contempt ([33]; **JCAB 265**). The hearing resumed after a short adjournment, without settlement ([34]; **JCAB 265**). His Honour delivered an ex tempore judgment in which he found that Mr Stradford was in contempt of the orders made on 10 August 2018.[6] He ordered that Mr Stradford be sentenced to imprisonment for a period of 12 months, to be served immediately, with Mr Stradford to be released from prison on 6 May 2019 and the balance of the sentence to be suspended for a period of 2 years ([36]; **JCAB 266**). The imprisonment was effected by the second and third respondents.

8. On 12 December 2018, the Contempt Orders were stayed by Judge Vasta pending an appeal. He ordered that Mr Stradford be released forthwith from custody ([50]; **JCAB 269**). His Honour effectively conceded that he erred in finding that Mr Stradford was in contempt and erred in sentencing him to imprisonment ([50]; **JCAB 269**) and appeared to accept that he incorrectly assumed that Judge Turner had already found that Mr Stradford was in contempt ([50]; **JCAB 269**). On 15 February 2019, the Contempt Orders were set aside by the Full Court of the Family Court of Australia ([56]; **JCAB 271**).

9. Mr Stradford commenced proceedings in the Federal Court of Australia against the appellant and the second and third respondents, relevantly seeking damages for false

[5] A point the primary judge said was unnecessary to decide ([130]-[133]; **JCAB 288 – 289**).

[6] *Stradford & Stradford* [2018] FCCA 3890 (**JCAB 151 – 160**).

imprisonment. Judge Vasta pleaded that he was protected by judicial immunity. Before the primary judge, he submitted that the Court should hold that there is no difference between the judicial immunity afforded to inferior and superior court judges. The primary judge declined to do so, noting that: "the role and duty of a single judge exercising the original jurisdiction of this Court is to apply the law, not change it" ([332]; **JCAB 339 - 340**). The primary judge found that Judge Vasta had committed the following errors: (a) failure to make a finding that there had been a breach of court orders ([80]; **JCAB 276**); (b) failure to comply with Pts XIIIA and XIIIB of the *FL Act* ([103]; **JCAB 282**); (c) failure to follow r 19.02 of the FCCA Rules ([110], [115]; **JCAB 284**); (d) denial of procedural fairness ([117]; **JCAB 285**); and (e) pre-judgment ([134] – [135]; **JCAB 289**). He held Judge Vasta was not protected by judicial immunity ([374]; **JCAB 349**). He held that the contempt orders were not valid until set aside because they were made by an inferior court ([184]; **JCAB 302**) (see also [190]; **JCAB 303**). He held that s 17 of the *FCCA Act* did not apply and that it did not, in any event, make the orders valid until set aside ([193]; **JCAB 304**) or confer on Judge Vasta the judicial immunity of a superior court judge ([357]; **JCAB 345**).

Part VI: Argument

A. Judicial Immunity

The Submission in Summary

10. The Court should hold that the principle of judicial immunity applies equally to a judge of a superior court and a judge of an inferior court such as the FCCA. No decision of the High Court has ever considered whether the distinction is, or ought to be, part of the common law of Australia. The reasons for judicial immunity are the protection of judicial independence and finality. The reasons for the immunity are the same for both superior and inferior courts. Absent some rational basis, the same principle should not result in different rules. We address below the following topics: (a) the inferior court exception; (b) the High Court and the common law of Australia; (c) absence of authority; (d) purpose; (e) academic criticism of the exception; (f) certainty; (g) change over time; (h) insufficiency of historical explanation; (i) anomalies and (j) legislation.

The Inferior Court Exception

11. A judge of a superior court is protected by judicial immunity. This means that the judge is not liable for anything he or she does while acting judicially ([206]; **JCAB 306**). A judge of an inferior court is also protected by judicial immunity. The primary judge found that for such a judge, the immunity is more limited ([343] – [346]; **JCAB 342 – 343**). He held that the immunity does not apply to an inferior court judge who acts *outside of jurisdiction*, even where they did so unknowingly.[7]

12. The meaning of 'jurisdiction' in this context is unclear, though it means something other than jurisdictional error in the administrative law sense. The primary judge concluded that a judge of an inferior court would be acting 'outside of jurisdiction' in circumstances including where, despite having jurisdiction over the general subject matter of the proceeding, the judge acted in a manner identified at ([344] – [346]; **JCAB 343**).

The High Court and The Common Law of Australia

13. The High Court, as the ultimate court of appeal, has a special role in the Australian constitutional system. While its primary role is to resolve disputes between parties, it "does so by developing the law in a principled way that aims to guide both the public and the lower courts".[8] Judicial immunity is a principle of judge-made law. It is, to adopt the words of Gageler J (as the Chief Justice then was) in *Bell Lawyers Pty Ltd v Pentelow*,[9] "entirely appropriate for this Court in its capacity as the ultimate custodian of the common law of Australia" to determine the content of the principle, including any exceptions.

14. In *Bell Lawyers*, the High Court decided that the *Chorley* exception should no longer be recognised as part of the common law of Australia. This was an exception, to the benefit of solicitors, from the general rule that a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation. The Court held that the exception was "anomalous" and "an affront to the fundamental values of equality of all persons before the law" and that the exception "cannot be justified by the considerations

[7] Unless the judge had no means of knowing or ascertaining the facts that relevantly deprived the judge of jurisdiction ([343]; **JCAB 342 – 343**).

[8] *Minerology Pty Ltd v Western Australia* (2021) 274 CLR 219 at [103] (Edelman J).

[9] *Bell Lawyers Pty Ltd v Pentelow* (***Bell Lawyers***) (2019) 269 CLR 333 at 355 - 356 [63] (Gageler J).

of policy said to support it" and accordingly "should not be recognised as part of the common law of Australia."[10] The reasons in that case are instructive.

15. Where, unlike the present case, it is sought that the Court "review and depart from its earlier decision", relevant considerations include whether earlier decisions (a) did not rest upon a principle carefully worked out in a succession of cases; (b) achieved no useful result but rather led to considerable inconvenience and (c) had not been acted upon in a manner militating against reconsideration.[11]

16. Other relevant justifications for change to, or clarification of, the common law include where a "specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change"[12] or where "change is necessary to maintain a better connection with more fundamental doctrines and principles".[13] If continuation of a state of affairs which "discredits the Australian legal system, be maintained by precedent, then it is the task of [the High Court] to look into the authorities said to constitute that precedent."[14] Particular care should be taken before overruling longstanding authorities where "parties have ordered their affairs in reliance, over a long period of time, on the effect of the authority in question".[15]

Absence of Authority

17. A confined judicial immunity for inferior court judges is not a rule or principle carefully worked out in a succession of cases. The distinction has never been held by the High Court of Australia to be part of the common law of Australia. No intermediate appellate court has ever determined whether or not the distinction is, or should continue to be, part of the common law of Australia. No intermediate appellate court in Australia appears to have applied the distinction as part of the *ratio decidendi* for a decision in well over a century,

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[10] *Bell Lawyers* at 339 – 340 [3] (Kiefel CJ, Bell, Keane and Gordon JJ).

[11] *Bell Lawyers* at 346 – 347 [29] (Kiefel CJ, Bell, Keane and Gordon JJ), referring to *Johns v Federal Commissioner of Taxation* (1989) 166 CLR 417.

[12] *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617 at 633 (Mason J (Stephen and Aikin JJ agreeing)), cited by Gleeson CJ in *Brodie v Singleton Shire Counsel* (***Brodie***) 206 CLR 512 at 535 [39].

[13] *Imbree v McNeilly* (2008) 236 CLR 510 at 526 [45] (Gummow, Hayne and Kiefel JJ).

[14] *Brodie* at 560 [107] (Guadron, McHugh and Gummow JJ).

[15] *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [218] (Steward).

since perhaps the decision in *Wood v Fetherston*[16] (where the distinction appears to have been assumed without argument).[17]

18. The logic of the distinction was powerfully criticised by two judges of the English Court of Appeal in *Sirros v Moore*.[18] In that case, Denning LJ concluded that: "Whatever may have been the reason for this distinction, it is no longer valid".[19] Ormrod LJ agreed and said further that "it is impossible to maintain double standards in so important a matter as a personal liability of judges, and that, accordingly, the old rules should be modified by giving judges of inferior courts (including magistrates) enhanced protection."[20] In *In re McC*,[21] a case that concerned the position of Magistrates in Northern Ireland, the House of Lords declined to adopt the approach suggested in *Sirros* in circumstances where the common law had been displaced by statute addressed to the liability of such magistrates and which conferred them with a statutory indemnity.

19. Unsurprisingly, since *Sirros*, doubts have been expressed as to the validity of the distinction under Australian law. In *Zanatta v McCleary*,[22] Samuels JA said: "I may say that I doubt that the distinction drawn between superior and inferior courts is a valid one".[23] In *Yeldham v Rajski*,[24] Hope JA said "the law may now have changed and that judges of inferior courts and magistrates may be in the same position as judges of superior courts". In *Wentworth v Wentworth,*[25] Heydon JA carefully observed that: "There is authority ***before*** *Sirros v Moore* that judges of courts other than superior courts are not immune if they act outside jurisdiction whether or not they did so knowingly" (emphasis added). In other cases, judicial immunity has been referred to without reference to any

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[16] *Wood v Fetherston* (***Wood***) (1901) 27 VLR 492.

[17] As to which, see *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13].

[18] *Sirros v Moore* (***Sirros***) [1975] QB 118.

[19] *Sirros* at 136.

[20] *Sirros* at 149.

[21] *In re McC (a minor)* (***In re McC***) [1985] AC 528.

[22] *Zanatta v McCleary* (***Zanatta***) [1976] 1 NSWLR 230 at 237.

[23] Referred to in *Rajski v Powell* (***Rajski***) (1987) 11 NSWLR 522 at 529 (Kirby P).

[24] *Yeldham v Rajski* (***Yeldham***) (1989) 18 NSWLR 48 at 67. See also Kirby P at 61.

[25] *Wentworth v Wentworth* [2000] NSWCA 350 at [195] (note [195] is not contained in the reported decision (2001) 52 NSWLR 602), see also at [260] where Heydon JA said it was ultimately not necessary in that case to "examine the important questions of what the tests are for judicial immunity from suit".

distinction between superior and inferior court judges: [26] see, in particular: *Re East: Ex Parte Nguyen*. [27] None of the cases referred to in the reasons of the primary judge take the matter any further.[28] The position under Australian law is fairly summarised by Enid Campbell and H. P. Lee in *The Australian Judiciary* with the conclusion that: "it is difficult to conclude whether *Sirros v Moore* stands as authoritative common law principle in Australia".[29]

Purpose

20. The purposes of judicial immunity are the same for both superior and inferior courts. The purposes include judicial independence, which is: "a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as humanly possible from all other influences that may affect their impartiality".[30]

21. If a judicial officer fears legal retaliation for certain remarks, decisions, or reasoning processes, then impartial adjudication according to law and evidence might be inhibited.[31] Decisional independence is a necessary condition of impartiality.[32] For this reason, judicial immunity exists to "preserve the integrity, independence and resolve of the judiciary and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion – not influenced by any apprehension of personal consequences."[33] In the words of Denning LJ in *Sirros,* the immunity "is so [the judge] should be able to do his [or her] duty with complete independence and free from fear".[34]

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[26] *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 69 at 720-721; *Gallo v Dawson* (***Gallo***) (1988) 82 ALR 401 (Wilson J). *Gallo v Dawson (No 2)* (1992) 109 ALR 319 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

[27] *Re East: Ex parte Nguyen* (1998) 196 CLR 354 at [30].

[28] *Raven v Burnett* (1985) 6 QLJ 166 was ultimately decided on the basis of a statute. In *Wood*, a limited immunity appears to have been assumed. *Spautz v Butterworth* (1966) 41 NSWLR 1 turned on an applicable statute, and the court refused leave to raise common law immunity which had not been argued below.

[29] Enid Campbell and H P Lee, *The Australian Judiciary,* (Cambridge University Press) at 218.

[30] Sir Ninian Stephen, *Judicial Independence the Inaugural Oration in Judicial Administration*, at 6.

[31] Enid Campbell and H P Lee, *The Australian Judiciary*, (Cambridge University Press) at 90.

[32] *State of South Australia v Totani* (***Totani***) (2010) 242 CLR 1 at [62] (French CJ).

[33] *Rajski* at 528 (Kirby P).

[34] *Sirros* at 132, referred to by Wilson J in *Gallo*.

22. To similar effect, in *Fingleton v The Queen*,[35] Gleeson CJ referred to the public interest in maintaining the independence of the judiciary by security against "retaliation by persons or interests disappointed or displeased by judicial decisions." As to judicial immunity, his Honour said:

> This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour.

23. In *Forge v ASIC,*[36] Gummow, Hayne and Crennan JJ observed: "[t]hat a judge is immune from suit serves a number of purposes, not least the need for finality of judicial decisions. But it is also a principle which forecloses the assertion that the prospect of suit may have had some conscious or unconscious effect on the decision-making process or its outcome."

24. In *D'Orta Ekenakie v Victoria Legal Aid*[37] the Court observed that: "judicial immunity and the immunity of witnesses were, and are, ultimately, although not solely, founded in considerations of the finality of judgments" and that a "central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances." This reflects "the central concern of the exercise of judicial power [that] is the quelling of controversies".[38]

25. An arbitrary difference in immunity between judges does not 'achieve any useful result'. As Denning LJ said in *Sirros*, "If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank".[39]

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[35] *Fingleton v The Queen* (***Fingleton***) (2005) 227 CLR 166 at 186 [38] – [39].

[36] *Forge v ASIC* (2006) 228 CLR 45 at 244 [75].

[37] *D'Orta Ekenakie v Victoria Legal Aid* (***D'Orta***) (2005) 223 CLR 1.

[38] *D'Orta* at [32].

[39] *Sirros* at 136.

Academic Criticism

26. It has not gone unnoticed that, in an Australian context, the distinction is not supported by principle. In 'Inferior and Superior Courts and Courts of Record'[40] Professor Enid Campbell suggested:

> While there may be differences of opinion about the extent to which judges should be protected against legal liabilities, there is surely no longer any good reason why the extent of that protection should vary according to the status of the court to which a judge belongs.

Certainty

27. Where parties, including commercial parties, have ordered their affairs on a settled understanding of the common law, that may be a powerful consideration against change. That does not apply here. For one thing, as detailed above, the common law is presently uncertain. More fundamentally, judicial immunity is not a principle by which the world of commerce, or other actors, could plausibly be said to have ordered their affairs.[41]

28. The scope and content of the limited immunity for an inferior court judge is itself uncertain. This is a further powerful reason for it to be discarded. The primary judge found that the immunity will be lost for an inferior court judge if, inter alia, 'acting without jurisdiction'. But as was pointed out by Heydon JA in *Wentworth*:[42] "Precisely what "acting outside jurisdiction" means in this context is obscure". The primary judge acknowledged the "daunting" task in identifying the scope of the immunity ([341]; **JCAB 342**) and further acknowledged that the relevant principles "may not be entirely pellucid and to that extent may be said to be somewhat unsatisfactory" ([341]; **JCAB 342**).

29. Mr Stradford invited the primary judge to decide the case only by reference to whether the specific errors made by the judge fell within the scope of the immunity as it had been applied in other cases ([211]; **JCAB 307 – 308**). This provides no principled basis upon which the scope of the immunity may be identified or explained. He accepted that some jurisdictional errors may cause the immunity to be lost but that other jurisdictional errors would not ([210]; **JCAB 307**). Such distinctions are uncertain and incoherent because they

[40] (1997) 6 Journal of Judicial Administration 249 at 253.

[41] *Bell Lawyers* at 365 [86] (Edelman J).

[42] [2000] NSWCA 350 at [195].

are not grounded in any guiding purpose for the judicial immunity itself. Obscure rules or rules whose application cannot confidently be predicted have a public cost.[43]

Change over Time

30. The distinction has not kept pace with two fundamental, and related, developments. **First**, increased recognition of the importance of judicial independence, including in an Australian context, under the Commonwealth Constitution. **Second**, the increasing jurisdiction, professionalism and independence of judges of inferior courts.

31. The distinction under English law between the immunity of a judge of a superior court of record, and any other judicial officer, appears to have emerged over the course of the mid-late 17th century.[44] At that time, and for many years thereafter, judicial independence was a more limited proposition: tenure only being guaranteed to some senior judges in the aftermath of the Glorious Revolution by the Act of Settlement in 1701. Things then progressed in a halting and fragmented way: "It should not be thought that with the Act of Settlement there was suddenly created a system which produced secure and independent judges. In some respects, it was a rather slower movement than that".[45]

32. In 1975, Denning LJ in *Sirros* pointed out: "There has been no case on the subject [judicial immunity] for the last one hundred years at least. And during this time our judicial system has changed out of all knowledge".[46] That is particularly true of the Australian context, which gives constitutional recognition to the separation of powers, in a manner that does not distinguish between inferior and superior courts. The FCCA is invested with federal jurisdiction.[47] As a Ch III Court, it must exhibit the minimum characteristics of such a court including judicial independence.[48] It has a broad jurisdiction.[49] Its Judges are legally

[43] *Pere v Apand Pty Ltd* (1999) 1998 CLR 180 at 215 (McHugh J).

[44] See *The Case of the Marshalsea* (1612) 10 Co Rep 68b; 77 ER 1027: *Gwinne v Poole* (1692) 2 Lutw 935; 125 ER 522.

[45] The Honourable Susan Kiefel, *Judicial Independence*, 30 May 2008, at 1.

[46] *Sirros* at 136.

[47] *FCCA Act* s 10; *FL Act* s 39(1A)).

[48] For a state court see *Totani* at [58] (French CJ).

[49] Its jurisdiction extends to subject matter including family law, employment, migration, social security, intellectual property, bankruptcy, admiralty, competition and consumer law, privacy, as well as judicial review and review of decisions of the Administrative Appeals Tribunal.

qualified.[50] They are not part of the public service.[51] Tenure is protected.[52] It has been observed that "its judges are amongst the hardest working judges in the country and, in most cases, carry a judicial docket ranging anywhere between 300 and 500 matters" and that the daily, weekly and monthly pressures on its judges "are relentless."[53] As has been observed in the United Kingdom, "Magistrates are better selected, better trained and better advised than they were in the days when Palmerston tried poachers".[54] The FCCA forms part of the unified federal judicial system established under the Constitution. Inferior courts will be, for a majority of the public, their only interaction with the legal system.

Historical Explanation not Sufficient

10 33. The historic reason why the distinction emerged is unclear. It is likely, as suggested by Gleeson CJ, that "[i]t was bound up with the development of the law relating to excess of jurisdiction".[55] Two related explanations have been suggested by the learned author of *Suing Judges: A Study of Judicial Immunity*: **First**, that "whilst the jurisdiction of a judge of an inferior court was limited in scope by subject-matter or persons or place, there was no such limitation on the jurisdiction of a superior court."[56] **Second**, "the nature of the controls to which each type of court was subject" because "Judges of inferior courts were answerable to the superior courts for excesses of jurisdiction, but judges of superior courts were answerable only to God and the king." In this regard, "[t]he difference between the superior courts and the inferior courts has been thus expressed":

20 > The king's judges stand next to, or with the king, or for him, appointed by him, and responsible to him … the inferior judges stand under, and represent the authority of subjects and are subject to the control and direction of the superior courts.

34. Both explanations, in the context of the Australian legal system, are anachronistic. As was pointed out in *Macks, Re; Ex parte Saint*:[57] "There can … be no unthinking transplantation

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[50] *FCCA Act* Sch 1, Part 1, s (1)(2).

[51] As is now the case of the Magistracy, for which see *Totani* at [53]ff (French CJ).

[52] *FCCA Act* Sch 1, Part 1, s 9.

[53] Federal Circuit Court of Australia, *Annual Report 2018 – 2019,* at 3.

[54] *re McC* at 559 (Lord Templeman).

[55] *D'orta* at [40].

[56] Abimbola Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford University Press, 1993) at 20.

[57] *Macks, Re; Ex parte Saint* (2000) 204 CLR 158 at [329] (Hayne and Callinan JJ).

to Australia of the learning that has built up about superior courts of record in England". In *Kirk v Industrial Court of NSW*,[58] French CJ, Gummow, Hayne, Crennan Kiefel and Bell JJ explained (citations omitted):

> As Isaacs J pointed out in *Tramways Case (No 1)*, notions derived from the position of the pre-Judicature common law courts of Queen's Bench, Common Pleas and Exchequer as courts of the widest jurisdiction with respect to subject-matter and identity of parties (and in that sense "superior courts of record") find no ready application in Australia to federal courts. And at least since federation, the state Supreme Courts have not been courts of unlimited jurisdiction.

35. In any event, whatever the historical *reason* for the distinction, its contemporary *purposes* are judicial independence and finality.

Anomalies

36. A limited immunity for inferior court judges is anomalous compared to other immunities that also serve the same principles of judicial independence and finality. In this regard: **(a)** absolute privilege attaches to all statements made in the course of judicial proceedings, whether made by the parties, witnesses, legal representatives or by the judge.[59] The law protects witnesses and others, not for their benefit, but for a higher interest, namely the advancement of public justice;[60] **(b)** no action lies against juries in respect of their verdicts, including verdicts in inferior courts; **(c)** advocates immunity applies in all curial proceedings, again including those in inferior courts;[61] **(d)** a judge is not a compellable witness;[62] and **(e)** a judge could not owe a duty of care in negligence to a litigant because, inter alia, it would give rise to conflicting duties.[63]

37. In none of these examples is the 'immunity' or protection of the judge, or other participant in legal proceedings, conditioned upon that person not making an error. That is because

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[58] *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at [107]. See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 630–631; Mark Aronson, Matthew Groves, Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) at 40 - 43 [2.80]; *Wentworth* at [25].

[59] *Mann v O'Neill* (1997) 191 CLR 204 at 211.

[60] *Cabassi v Villa* (1940-1941) (1940) 64 CLR 130 at 141 (Starke J). See also *Gibbons v Duffell* (1932) 47 CLR 520 at 252 (Duffy CJ, Rich J and Dixon J (as he then was)).

[61] *D'Orta*.

[62] *Zanatta* at 234 (Street CJ).

[63] See *Sullivan v Moody* (2001) 207 CLR 562.

the underlying purpose is a *public* purpose directed towards the proper administration of justice. It is therefore anomalous if the judicial immunity of an inferior court judge depends upon that judge not making an error of a relevantly jurisdictional nature.

38. Moreover, each of the privileges or immunities above are intended to avoid re-litigation, which is destructive of finality and public confidence. This includes avoiding a judicial officer, such as Judge Vasta was in this case, being placed in the invidious position of facing serious allegations and, assuming he was a competent witness, needing to choose between his private interest in giving evidence and the public interest in a judicial officer not giving evidence about his or her judicial decision making.

39. The FCCA and the Family Court have concurrent jurisdiction over family law matters. A matter might therefore be determined by a superior or an inferior court of record. Whether the relevant judicial officer will or will not have the full protection of judicial immunity is unrelated to the purpose of the immunity.

40. Another illustration is appeal. A judge of the FCCA may make a decision that is subject to appeal by way of rehearing. The appellate court may dismiss the appeal and, in doing so, repeat an error (made 'outside jurisdiction') by the judge at first instance. Can it be justified that the principle of judicial immunity applies differently for the judge at first instance than it does to the judges of the appellate court? A further illustration is jurisdictional fact review. Some jurisdictional facts involve inherently contestable propositions. Does it make sense for the protection of judicial immunity, which exists for a public purpose, to depend upon whether the relevant judge reached the 'correct' answer on a question of jurisdictional fact?

41. There should be coherence in relevant principles of immunity. As the court explained in *D'orta* at [45]:

> Rather, the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind. No argument was advanced to this court urging the abolition of

> judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. **An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind**. (emphasis added)

42. A further example is provided by *Wentworth.* An issue before the Court was whether a Registrar of the Supreme Court of New South Wales was entitled to the same immunity as a judge. Fitzgerald JA approached the issue in a principled way at [58] (citations omitted):

> If judicial immunity is afforded to a judge in respect of his or her exercise of the court's power and jurisdiction, there is no rational justification for denying the same immunity to a master or a registrar when he or she performs judicial functions in the exercise of the court's jurisdiction and powers. The rationale behind the doctrine of judicial immunity is equally applicable to Judges and court officers. It is the **nature of the function being performed and the connection of that function with the judicial process** which determines whether or not immunity attaches. (emphasis added)

43. The same reasoning applies here.

Legislation

44. Before the primary judge, Mr Stradford argued that the Commonwealth Parliament should be understood to have made a deliberate legislative 'choice' in the *FCCA Act*, by deciding not to expressly provide that a judge of the FCCA is to have the same immunity as a judge of a superior court. That contention should not be accepted. It is belied by the rapid response by the Commonwealth Parliament to address the consequences of the Primary Judgment.[64] There is nothing in the *FCCA Act*, or any of the relevant extrinsic materials, to indicate such a legislative 'choice'. The Act states that the Court is a court of record and is a court of law and equity and does not declare it to be a superior court of record. This may refer to any number of features of such courts, as recognised by the common law from time to time. The Act simply does not deal with the judicial immunity of a judge of the FCCA, one way or the other.[65] Having not dealt with the matter by statute, the 'choice' is to leave the matter to the development of the common law. Moreover, at the

[64] The *Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023* was passed on 15 November 2023 and inserted s 277A into the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

[65] The *FCCA Act* contained provisions for protection of the Chief Judge exercising functions or powers (s 12(6A)), provisions extending protection and immunity to mediators (s 34(5)) and arbitrators (s 35(5)), and provisions extending protection in relation to complaints and complaint handlers (s 118A).

time that the FCCA was established the scope of immunity was, as it continues to be, in a post *Sirros* state of uncertainty. The Parliamentary 'choice' could equally have been to accept that the distinction was, or at least might no longer be, good law as suggested by, inter alios, Hope JA in *Yeldham*.

45. With respect to many state courts, the distinction has effectively been abolished, or significantly mitigated, by legislation. Such remedial legislation does not "freeze the development of the common law of Australia".[66] Indeed, the immunity has also been extended to other officers of superior courts and to administrative functions of such courts. The legislative tide is all one way. Writing extra judicially, Justice Leeming has referred to the "gravitational pull" of statutes in the following terms: "Legislation can be a catalyst for change in judge-made law. It is well established that a "consistent pattern of legislative policy" may inform a change to judge-made law".[67]

Conclusion

46. If Judge Vasta is protected by an unqualified judicial immunity, it is a complete defence to the errors found by the primary judge. Mr Stradford did not allege that Judge Vasta had acted in bad faith or knowingly without jurisdiction and the primary judge accepted that "the Judge did not act with malice and did not appear to be conscious of his wrongdoing at the time" ([645]; **JCAB 415**).[68] Mr Stradford did not submit that if the judicial immunity afforded to Judge Vasta was the same as that of a superior court judge, he would not have been protected. He has not filed any notice of contention to that effect. Out of an abundance of caution, Judge Vasta in his Notice of Appeal has appealed from the primary judge's finding that he erred by way of pre-judgment. In light of the concessions and findings referred to above, that factual issue does not appear to be material. Finally, Judge Vasta understands that the Commonwealth will advance alternative submissions to the effect that the immunity extends to any case where an inferior court judge has 'subject matter' jurisdiction. He refers to those submissions without further elaboration.

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[66] *Brodie* at [132].

[67] M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 124.

[68] See also ([149]; **JCAB 294**).

B. Statute

47. In the alternative to Part A above, by reason of s 17 of the *FCCA Act*, in making the imprisonment orders Judge Vasta had the same immunity as a judge of the High Court in respect of contempts of the High Court; and/or the imprisonment orders were valid until set aside.

48. Section 17 provided:

> **Contempt of court**
>
> (1) The Federal Circuit Court of Australia has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.
>
> (2) Subsection (1) has effect subject to any other Act. …

49. Section 24 of the *Judiciary Act* 1903 (Cth) provided:

> **Contempt**
>
> The High Court shall have the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England.

Context

50. **First**, a statute may have the effect that an inferior court may become a superior court for a particular purpose:[69] As Lathan CJ said in *Cameron v Cole*:[70]

> An inferior court, such as a county court, may be made a superior court for a particular purpose. Thus, where a court is described in a statute as a branch of a principal court and is also given the jurisdiction of the court of Chancery for purposes of bankruptcy jurisdiction, it may, though a county court (and therefore an inferior court) in its ordinary jurisdiction, be a superior court in relation to bankruptcy proceedings…

[69] *Day v R* (1984) 153 CLR 475.

[70] *Cameron v Cole* (1943) 68 CLR 571 at 585.

51. **Second** the legal effect of court orders (unless and until set aside) is ultimately a question of statutory construction.[71] A statute may confer some legal effect on an order of an inferior court attended by jurisdictional error.[72]

Submission

52. The effect of s 17 is to confer, or confirm,[73] the power of the FCCA to deal with contempt. It does so by providing that the FCCA has the "same power" to deal with contempt as is possessed by the High Court. The same words as in s 17 are used with respect to the contempt power of both the Federal Court of Australia and the Family Court of Australia.[74]

53. By conferring the "same power", the Parliament contemplated that the exercise of that same power would have the same consequences. It is not the "same power" if the validity or enforceability of the orders thereby made is different (validity until set aside), or if the potential liability attending the exercise of the power is different (immunity).

54. It is significant that the subject matter of the power is contempt. Contempt orders have a fundamental purpose in vindicating the authority of the Court. They may also, as in this case, require enforcement by third parties. In *Kable (No 2)*,[75] a case that concerned an order of a Superior Court, the plurality observed (citations omitted):

> In this case, if the detention order made by Levine J was not effective until set aside, those apparently bound by the order were obliged to disobey it, lest they be held responsible for false imprisonment. On Mr Kable's argument, the order was without legal effect and should not have been obeyed. The decision to disobey the order would have required both the individual gaoler and the executive government of New South Wales to predict whether this court would accept what were then novel constitutional arguments. More fundamentally, as the legal philosopher Hans Kelsen wrote, "[a] status where everybody is

[71] See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [8] (Gleeson CJ), [154] (Hayne J). See also *Director of Public Prosecutions Edwards* [2012] VSCA 293 at [180], [187] and [206] (Weinberg JA and Williams AJA).

[72] *Jadwan Pty Ltd v Secretary, Dept of Health and Aged Care* (2003) 145 FCR 1. See further: *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at [11]; *Minister for Immigration and Multicultural Affairs v Bhardwa* (2002) 209 CLR 597 at [8] (Gleeson CJ) [154] (Hayne J).

[73] See *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395 [16] (Gleeson CJ and Gummow J), Hayne J agreeing at 429 [113].

[74] See s 31 of the *Federal Court of Australia Act* 1976; s 35 of the *FL Act* as in force in 2018; ss 45 and 142 of the *Federal Circuit and Family Court of Australia Act 2021* in respect of Divisions 1 and 2 of that court respectively.

[75] *New South Wale v Kable* (***Kable (No 2)***) (2013) 252 CLR 118 at [40].

authorised to declare every norm, that is to say, everything which presents itself as a norm, as nul, is almost a status of anarchy".

55. It has been observed that "it might sometimes be difficult in policy terms to confine *Kable (No 2)*'s result to the orders of superior courts of record".[76] It ought not apply to an inferior court that, for a specific purpose, has "the same power" as a superior court.

56. Section 17 applies "subject to" any other Act. The primary judge further held that s 17 did not apply by reason of Pts XIIIA and XIIIB of the *FL Act* that dealt separately with contempt for non-compliance with Court orders and contempt ([95]-[97]; **JCAB 280 – 281**). This was a clear error. Those parts contain provisions dealing with specific matters, being procedural and other requirements attending the punishment of contempt in family law matters. This cannot be regarded as a code with respect to matters that it does not address expressly nor implicitly (being validity and immunity). There is no reason to suppose that by sidewind,[77] it was intended for Pt XIIIA or XIIIB to detract from features of the contempt power conferred by s 17.

Part VII: Orders sought

57. The appellant seeks orders comfortably with his Notice of Appeal.

Part VIII: Time estimate

58. The appellant estimates he will require two hours to present his argument, including reply.

Dated: 28 March 2024

S J Wood
Aickin Chambers
03 9225 8512
swood@vicbar.com.au

Ben W Jellis
Aickin Chambers
03 9225 6592
jellis@vicbar.com.au

T Katz
Owen Dixon Chambers
03 9225 6210
tamir.katz@vicbar.com.au

[76] Mark Aronson, Matthew Groves, Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) at 794 [13.50].

[77] *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404.

Annexure

List of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions

Title	Provisions / sections	Version / date
Judiciary Act 1903 (Cth)	Section 24	Current
Federal Circuit Court of Australia Act 1999 (Cth)	Sections 10, 17, 12, 34, 35, 118A; sections 1 and 9 of schedule 1	Repealed (193 of 1999, version 1 Sep 2018 – 31 Dec 2019 (compilation 36))
Federal Magistrates Act 1999 (Cth)	Section 3	Repealed (193 of 199 (version 12 Dec 2012 – 11 Apr 2013))
Federal Court of Australia Act (1976) (Cth)	Section 31	Current
Family Law Act 1975 (Cth)	Sections 35, 39, 79, Parts XIIIA and XIIIB (sections 112AA – 112AP)	Superseded (53 of 1975, version 22 Nov 2018 – 9 Mar 2019 (compilation 87))
Federal Circuit and Family Court of Australia Act 2021 (Cth)	Sections 45, 142	Superseded (12 of 2021, version 1 Sep 2021 to 17 Feb 2022 (compilation 1))
	Section 277A	Current
Federal Circuit Court Rules 2001	Rule 19.02	No longer in force (compilation 25, version 4 Aug 2018 – 25 Sep 2020)