IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-002008
[2015] NZHC 607

BETWEEN	EBR HOLDINGS LIMITED (IN LIQUIDATION) Plaintiff
AND	MCLAREN GUISE ASSOCIATES LIMITED First Defendant
	NIGEL DALE HARRISON Second Defendant

Hearing:	23 March 2015
Appearances:	P Murray and K Kuang for the Plaintiff/Respondent J N Bierre for the Defendants/Applicants
Judgment:	30 March 2015

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
30.03.15 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

[1] The defendants have applied to strike out the plaintiff's claims against them. The defendants say the plaintiff (the company) cannot succeed on any of the three causes of action pleaded.

Background of pleaded facts

[2] Prior to the liquidation of the company on 30 January 2009 the defendants provided it with accounting services. They, and in particular Mr Harrison for McLaren Guise prepared financial statements for the company for the year ended 31 March 2008. Those were the last set of financial statements before liquidation.

[3] The company's proceeding takes issue with affidavit evidence provided by Mr Harrison at a summary judgment hearing in the District Court when the liquidator sued to recover funds from the company's directors and shareholders (the Van Duyns).

[4] Later, on 8 December 2010 the liquidators summonsed Mr Harrison for examination under s 261 of the Companies Act 1993 (examination). During that examination, Mr Harrison adopted the position and affirmed the statements made in his affidavit and in an Updated Summary (which recorded that the company was not [any longer] owed the current account debts recorded in the 2008 Accounts).

[5] The financial accounts had recorded, among other things that current account debts were owed by the Van Duyns to the company.

[6] On 13 November 2008, a few months prior to liquidation, Mr Harrison advised the Van Duyns that "the shareholders current accounts are overdrawn and should the company be liquidated the overdrawn shareholders current accounts became assets to the company which the liquidator could call on".

[7] When on 15 June 2009 (after liquidation) the company made demand for payment of the current account debts, Mr Harrison advised the Van Duyns that he could prepare interim accounts which showed the current account debts as having been repaid by way of set off against debts owed by the company to related trusts.

[8] On 22 September 2009 Mr Harrison advised that a series of journal entries could be entered into the company's accounts to extinguish the current account debts.

[9] In the District Court proceeding the Van Duyns opposed the liquidator's claims on grounds that the current account debts recorded in the 2008 accounts prepared by Mr Harrison and McLaren Guise were incorrect; that payments made by the company to a third party, Fidelity Life, in relation to loans and insurance and investment policies, and recorded as drawings by the Van Duyns, were in fact payments on behalf of trusts associated with the Van Duyns.

[10] The company pleads the affidavit and Updated Summary contained false representations. It also pleads that, based on the information available to Mr Harrison prior to swearing the affidavit, that he and McLaren Guise knew the representations were false, had no belief in the truth of those, and/or were at least reckless as to their truth.

[11] The company says it has incurred significant costs to investigate and respond to the false statements, and has suffered loss due to the defendants' conduct.

[12] The company pleads three causes of action against its former accountants, being claims under the tort of deceit/injurious false representations, misuse of confidential information, and negligence.

Strike out principles

[13] For this court's purposes these include:

(a) Pleaded facts are assumed to be true.

(b) A cause of action must be clearly untenable if it is to be struck out.

(c) Difficult questions of law should not preclude a strike out option.

(d) The Court should be wary of striking out a claim in a developing area of law.[1]

Summary of defendants' application for strike out

[14] The defendants say the strike out application turns solely on questions of law relating to the operation of the principle of witness immunity; that in this case the company's claim is founded on alleged false representations made in an affidavit presented to the District Court as evidence in a civil proceeding, the contents of which were later positively affirmed in a liquidator's examination.

Pleaded causes of action

[15] In this case the first cause of action alleged the affidavit contained false representations. In the alternative the third cause of action alleges those representations were negligently prepared.

[16] The second cause of action alleges that prior to and following the company's liquidation the defendants misused confidential information about the company for the purpose of reducing the claim against the Van Duyns.

[17] The defendants' case is that what was contained in Mr Harrison's affidavit provided to the District Court proceeding, and what was said in the examination (which was an affirmation of what had been contained in the District Court affidavit) is protected by witness immunity. Whilst the second cause of action does not directly refer to either of those factors it is, the defendants say, vague and surely must be connected to those events.

[18] The defendants submit strike out is appropriate because a trial judge hearing all the evidence would be in a no better position to determine the issues arising.

[1] *Couch v Attorney-General* [2008] NZSC 45.

Witness immunity is a settled principle

[19] Regarding the need for caution in strike out claims which involve a developing area of law it is argued for the defendant that we do not here have that concern because this case involves a straightforward assessment of the operation of a broad and long-standing common law principle; that the absence of previous Court decisions addressing witness immunity in this specific fact scenario does not warrant putting the defendants to the cost of defending legally untenable claims at trial.

[20] Mr Bierre submits that witness immunity, as a common law concept, has a long history. Its purpose is to protect the witness from civil proceeding in respect of evidence they give in judicial proceedings and in respect of things said or done in the course of preparing evidence for such proceedings.[2]

[21] The leading New Zealand authority on witness immunity is *Dentice v Valuers Registration Board*[3]. In that case Eichelbaum CJ held the rationale for the Rule is the advancement of public justice to ensure the free and unfettered availability of witnesses in any cause by providing absolute immunity from civil action whether or not the evidence given was true or false or given in good faith or with malice.[4]

[22] The reference to malice is significant submits Mr Bierre because he says it means that witness immunity extends to encompass claims alleging deliberate wrongdoing such as the company's first cause of action alleges.

[23] As Mr Bierre submits New Zealand Courts do not appear to have considered witness immunity in any length since but did, in *Lai v Chamberlains*[5] appear to acknowledge its existence in New Zealand law in the context of a decision abolishing barristers immunity from suit by their clients.

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[2] *Halsbury's Laws of England* (4th ed) Vol 17 at [261].
[3] [1992] 1 NZLR 720.
[4] Ibid 724.
[5] [2007] 2 NZLR 7 at [17] and [25].

Whether Mr Harrison gave evidence as an expert

[24] It is the company's position that Mr Harrison gave evidence as an expert witness and that the United Kingdom Supreme Court's decision in *Jones v Kaney*[6] abolished witness immunity for expert witnesses. Mr Murray for the company has submitted that decision arguably ought to be and is likely to be followed and applied in New Zealand.

[25] In response, Mr Bierre says the defendants do not accept Mr Harrison's evidence was given as an expert. He submits that whilst the Court cannot by reference to affidavit evidence alone decide which account is correct, the defendants say that even if Mr Harrison's affidavit should be treated as expert evidence, the *Jones v Kaney* decision did not, as the company claims, abolish witness immunity for expert witnesses. Rather, Mr Bierre submits the scope of that decision was more limited because witness immunity was only abolished in respect of claims of negligence brought against expert witnesses by their own clients i.e. the party that retained them to provide the expert evidence.

Did the English authority of Jones v Kaney limit the scope of witness immunity?

[26] Mr Bierre submits that all other aspects of witness immunity were left intact including claims against experts by a party who had not retained that person who provided the expert evidence.

[27] Mr Bierre submits the company's assertion to the contrary is inconsistent with express statements in the judgment and in particular that of Lord Collins, stating:

> This appeal is concerned only with the liability of the so-called "friendly expert" to be sued by the client on whose behalf the expert was retained… Nor of course is there anything in the present decision which affects the position of the adverse expert. It is not sufficient to say that the adverse expert presents no problem because the expert owes no duty to the client on the other side. There are wider considerations of policy which ought to prevent adverse experts from being the target of disappointed litigants, even if the scope of duty in tort were to be extended in the future. It is true, as McHugh J said in D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12,

[6] [2011] UKSC 13.

> (2005) 223 CLR 1, [100], that except for the purpose of classification it may not matter whether the lack of legal liability stems from characterising it as an immunity or as an absence of duty of care. But it would be preferable to treat it as an immunity to emphasise the strong element of policy involved.[7]

[28] Mr Bierre submits that statement confirms that witness immunity is a higher policy principle which applies irrespective of whether an adverse expert owed the company a duty of care to "avoid acts or omissions which (they) could clearly foresee would likely injure the company" – as the company pleads Mr Harrison did, presumably in his capacity as accountancy advisor to the company.

[29] Mr Bierre submits that whilst McLaren Guise would have owed a duty of care in carrying out work for the company, there is no suggestion the defendants were engaged by the company to give evidence in the District Court summary judgment application.

Whether the company*'s case is really about a claim for wasted costs*

[30] Mr Bierre submits this case is about a disappointed litigant seeking damages against an expert witness in an earlier proceeding. It is different he says from the precedent provided by the decision of the Chancery Division of the England & Wales High Court in *Phillips v Symes (No.2)*[8]. In that case the Court held an expert witness could in principle be susceptible to a wasted costs order if they were grossly negligent or reckless in dereliction of their duty to the Court.

[31] Mr Bierre says r 14.1 of the New Zealand High Court Rules would provide the appropriate means for recovering such costs.

[32] Mr Bierre comments that *Phillips v Symes (No.2)* does not appear to have been accepted nor indeed even considered by New Zealand Courts. If followed in New Zealand, Mr Bierre submits that in principle the company would be able to apply for a non party wasted costs order against Mr Harrison in the separate proceeding between the company and the Van Duyns but that that did not assist the

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[7] *Jones v Kaney* (supra) at [71] to [73].
[8] [2005] 4 All ER 519.

company's efforts to establish it has the right to bring separate civil proceedings against the defendants in respect of that evidence.

Claim of misuse of confidential information

[33] Regarding the company's second pleaded cause of action it is said it relates to matters that are independent of Mr Harrison's evidence or the preparation of that evidence. Mr Bierre questions whether the allegations of misuse of confidential information should be treated any differently to other claims in the proceeding. He says it is hard to see how the claim could be based on anything other than the using of alleged confidential information in the course of giving evidence in the summary judgment application. He queries suggestions that Mr Harrison misused confidential information by answering questions during his examination under oath and because Mr Harrison had been compelled to attend the examination as a result of a notice served on him by the company's liquidators.

Evidence given at the examination

[34] Regarding claims by the company that witness immunity did not cover the false representations alleged by Mr Harrison to have been made during his examination by the liquidators, Mr Bierre submits those statements during his examination under oath are sufficiently connected to a judicial proceeding to be covered by witness immunity.

[35] Mr Bierre relies on the English decision in *Mond v Hyde*[9]. In that case the trustee of a bankrupt estate sought to sue the Official Receiver for a statement he made in the course of administering the bankruptcy, to the effect that he had not waived any interest in a cause of action that the estate otherwise had a right to.

[36] The bankrupt sought a declaration that the Official Receiver had waived the interest. The trustee, acting in reliance on the statement by the Official Receiver that there had been no such waiver, unsuccessfully defended Court proceedings. The Court concluded, despite the Official Receivers evidence to the contrary, that it was

[9] [1998] 3 All ER 833.

satisfied the Official Receiver had disclaimed all rights to the proceeds of the claim at issue.

[37] In the claim brought against the Official Receiver the Court held the Official Receiver was immune from the trustees action and noted:

> By their nature bankruptcy proceedings tend to be protracted with substantial parts of the procedure being carried out under the control and direction of the Court rather than a formal hearing or proceeding. Moreover, in carrying out his functions as an officer of the Court, the Official Receiver will have to embark on many enquiries and make many statements which are not formally part of the proceedings.

[38] The Court went to state that:

> The getting in of the assets of the bankrupt's estate for the purpose of being distributed to the creditors is part of the bankruptcy proceedings and accordingly I would hold that in making the statements on which reliance is placed by the appellant the Official Receiver is entitled to immunity from suit.

[39] Mr Bierre submits the same reasoning applies to any person summoned to provide a liquidator with information for the purpose of the liquidation. The liquidator is appointed by the High Court. The Court maintains ongoing powers to supervise the liquidator's conduct (s 284 of the Companies Act 1993).

The examination is a Court administered process

[40] Mr Bierre submits that pursuant to s 253 of the Companies Act 1993 the principal duty of a liquidator is to, in a reasonable and efficient manner, take possession of, protect, realise and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with the Act; and to distribute any surplus in accordance with s 313(4) of the Act. Mr Bierre submits the power to compel a party to attend an examination under oath, as was Mr Harrison, should generally be targeted towards the performance of this principal duty. Therefore Mr Bierre concludes that on the basis that the bringing in of the company's assets is part of the liquidation proceedings and all statements made during that examination are sufficiently connected to those proceedings to attract

witness immunity, therefore the company's claims in respect of the examination should also be barred.

[41] Also, it is submitted that the claims in respect of the examination are the same as the claims in respect of Mr Harrison's evidence given in the summary judgment application for the company alleges Mr Harrison made false representations during the examination by making "separate statements that affirmed the statements as recorded in the affidavit and the Updated Summary". He submits that civil proceedings based on a subsequent affirmation of evidence already given in a judicial proceeding constitute a proceeding "in respect of" that evidence.

[42] Otherwise Mr Bierre submits that if it were to be held that giving evidence in a judicial hearing is protected by witness immunity but that by affirming that evidence during an examination under oath by a liquidator that evidence is not protected then liquidators would be able to get around witness immunity in every case by arranging the witnesses examination and at that examination asking them to confirm the evidence they had given in the judicial proceeding.

Submission summary

[43] In summary Mr Bierre submits the company's claim should be struck out in its entirety; that if however the claims in respect of examination under oath are not protected by witness immunity but the remainder of the causes of action are then essential amendments would be needed to certain paragraphs of the statement of claim.

[44] Mr Bierre submits that even if the claims regarding the examination under oath are not barred by witness immunity they are still flawed because the loss claimed appears to relate to costs incurred in pursuing the separate proceedings against the Van Duyns. Therefore statements made at the subsequent examination and after the summary judgment application had failed, could not have caused the loss of those pre Court hearing costs.

[45] The defendants say the company's proceeding is in essence all about what is contained in Mr Harrison's District Court proceeding affidavit, and what later he said in the liquidation examination when affirming the contents of his affidavit; that whilst the company's pleadings have also addressed in rather general terms allegations of misuse of information and wrongful actions when acting in his capacity as an accountant first for the company and then for the Van Duyns, the focus of the claim against the defendants is really quite narrow.

[46] Mr Bierre submits that those actions of Mr Harrison in regards to what he said in his examination and what he expressed by his affidavit and what actions he undertook in those are properly subject to witness immunity. In his submission the current state of New Zealand law provides Mr Harrison with that protection.

Considerations

[47] Some assessment of the pleaded causes of action is required, as is some consideration of the state of witness immunity law in New Zealand.

The pleadings

[48] The amended statement of claim comprises 60 pages. The factual background is reviewed in some 23 pages. Primary factual focus is upon the District Court proceeding affidavit of Mr Harrison.

[49] The first cause of action pleads that the affidavit contained false representations. The extent of those was reviewed over some 9 pages by reference to statements contained in the affidavit and the evidence it is claimed disproves those.

[50] The second cause of action is entitled: Misuse of confidential information. It pleads that the company provided to the defendants the necessary information needed for the provision of accounting services and that that information should have been only used for those purposes. It says instead the defendants before and following liquidation used the information against the company and for the benefit of the Van Duyns.

[51] The third cause of action deals with what Mr Harrison said in the s 261 examination when affirming the affidavit and the false representations it contained.

[52] In its pleadings the company describes Mr Harrison's role, by the affidavit he provided, as that of an expert witness. Although not agreeing, Mr Bierre accepted for present purposes that description is provable.

[53] In overview it appears the company's proceeding is about the circumstances of the company's claim against the Van Duyns and about the company's payments to the Fidelity Life. What is in dispute regarding those is for whose benefit were those payments were made. The Van Duyns said they were incorrectly recorded as drawings on the shareholders current accounts. In a very detailed manner the company has described why it says Mr Harrison's affidavit statements were false. Further, and since then and despite clear evidence having been given to Mr Harrison regarding the truth, the company says Mr Harrison repeated those falsehoods when giving evidence at the examination.

[54] The first cause of action is about the affidavit and covers a broad range of other conduct pleaded in connection with the alleged falsehoods contained in it.

[55] The second cause of action focuses on the scheme devised it is said by Mr Harrison to defeat or deflect the company's claim for repayment from the Van Duyns, including preparation of the financial accounts and later the Updated Summary. In that regard the company says the defendants misused its confidential information in a number of different ways unconnected with the District Court proceeding. That pleading asks the Court to look at the defendants' actions as a whole, and not specifically in connection with the District Court proceeding.

[56] The third cause of action espouses general breaches of duty of care in connection with the affidavit, the financial accounts and Updated Statement, and in the examination.

The state of witness immunity in New Zealand

[57] This judgment has in some depth reviewed Mr Bierre's assessment of the current state of New Zealand law as regards to witness immunity. In this Court's view there is a degree of settlement of position because little has happened since the judgment of Eichelbaum CJ in *Dentice v Valuers Registration Board.* In the 23 years since only the barrister's right of immunity from suit seems to have been affected.

[58] For consideration here is whether the case of *Jones v Kaney* has more recently demonstrated that the immunity of expert witnesses has been affected. Mr Bierre submits that case only reduced the availability of the immunity to expert witnesses. In that regard he relied on what Lord Collins had said. However, and as Mr Murray has submitted the loss of immunity may extend further and indeed may be much broader than Mr Bierre submits.

[59] The principal judgment in *Jones v Kaney* was delivered by Lord Phillips. His Lordship's judgment noted that immunity for expert witnesses had not been challenged in the past but had been accepted as part of the general immunity protecting witnesses. His Lordship offered a number of reasons when concluding that the immunity should be abolished, namely:

(a) There was no justification for assuming that abolishing immunity would discourage expert witnesses from testifying;

(b) That in any event those witnesses were already at risk of being sued in their capacity as a professional for which reason they retain professional indemnity insurance[10];

(c) That immunity was not required to ensure expert witnesses give full and frank evidence because they had an overriding duty to the Court to do so anyway. In that regard reference was made to the position of barristers and the abolition of barristerial immunity[11].

[10] Ibid at [52] – [54].
[11] Ibid at [57].

(d) The evolution of expert witness immunity would unlikely result in a proliferation of vexatious claims.[12]

(e) There would unlikely be any risk of multiplicity of suits.[13]

[60] Lord Phillips made his position clear when he concluded:

> [61] …no justification has been shown for continuing to hold expert witnesses immune from suit in relation to the evidence they give in Court or for the views they express in anticipation of Court proceedings…
>
> [62] …it follows that I consider that immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in the Court process should be abolished.

[61] It appears, as Mr Murray has submitted, that *Jones v Kaney* does not only partially abolish witness immunity for claims in negligence by the party that retained the expert but rather that it appears clear from the judgment that all immunity from suit for expert witnesses was abolished and in this respect is consistent with the evolution of barristerial immunity.

[62] Mr Murray has drawn the Court's attention to the review by Stephen Todd in *Tort – A to E of New Zealand Law.* In discussing Lord Phillips judgment Mr Todd noted "Lord Phillips concluded, for these various reasons, that the immunity from suit for expert witnesses in relation to their participation in legal proceedings should be abolished". There is no suggestion therein that the immunity was only partially abolished.

[63] It seems our present case has provided the first opportunity to consider the decision of *Jones v Kaney* in New Zealand. Reference was earlier made to the judgment of Eichelbaum CJ in the *Dentice* case but since then the principle appears not to have been subject to significant judicial attention.

[64] Mr Murray submits decisions in New Zealand regarding witness immunity have placed heavy reliance on English authorities. Regarding the abolition of

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[12] Ibid at [58] – [59].
[13] Ibid at [60].

barristerial immunity the New Zealand Supreme Court in *Lai v Chamberlains*[14] followed the decision of the House of Lords in *Hall v Symonds*. As Mr Murray submits *Jones v Kaney* repeatedly drew parallels between that decision and the issue before them; that the justifications for abolishing immunity for expert witnesses were in a large part the same as those applied in *Hall v Symonds*.

[65] Mr Murray submits it is reasonably arguable that New Zealand will adopt the same approach as the United Kingdom as indeed they have done previously. It follows he submits that it is reasonably arguable that the company's claims will not be barred by any immunity. Clearly, in New Zealand claims about the absolute nature of witness immunity have not yet been the subject of judicial scrutiny.

Conclusions

[66] In our case the defendants bear the onus of proof to establish whether witness immunity applies and if so to what extent. This will need to be established on the evidence. And, even if immunity applies then there would likely be limits regarding things said or done in the preparation for the judicial proceedings that would not qualify for immunity.

[67] Regarding the company's breach of confidence action which it says is not protected by witness immunity (because it was advice given to the Van Duyns as directors and shareholders). Mr Bierre submits that:

(a) The company's expression of those actions is vague;

(b) The company's suggestions that the financial statements in question ought to have been kept secret and confidential from the Van Duyns are unrealistic;

(c) That the Van Duyns would have had access to those financial statements in any event through the affidavit of the liquidator filed in

[14] [2007] 2 NZLR 7.

support of the company's summary judgment application against the Van Duyns.

[68] As was said by Lord Mackay in *Darker v Constable of the West Midlands Police*[15]:

> The essential character of the immunity… limits the application of the immunity to conduct which can be called in question only by a founding on a statement in court or a statement which is part of the preparation of evidence for court proceedings.

[69] Our present case is about the defendants conduct relating to the affidavit, the Updated Summary and the examination in the context of actions taken to assist the Van Duyns and the affects of those upon the company. Arguably that action involved the taking of steps before and after the affidavit was sworn and may not have totally been connected to the District Court proceeding.

[70] In that context things said by Mr Harrison in the examination may not necessarily be a reiteration of the affidavit. It might indeed be considered a new statement.

[71] Mr Bierre suggested that it would be against public policy for witness immunity to be circumvented through the examination process available to liquidators. Mr Bierre submits that Lord Mackay's statement in *Darker* confirmed the availability of witness immunity which is what the company's claim against the defendants is founded on. Mr Bierre submits the broad allegation is that Mr Harrison unlawfully gave evidence which caused the company to lose its summary judgment application and therefore incur costs in pursuing the proceedings. No cause of action, he submits, could be more closely connected with evidence given in judicial proceedings.

[72] If immunity is available and if that immunity should extend to a statement or a reiteration made in the subsequent Court process then that is a matter for assessment of all the facts. Without that knowledge it cannot be as easy as Mr Bierre suggests for an immunity to apply. Also in our case there is evidence that after the

[15] [2001] 1 AC 435 at 452.

affidavit and before the examination Mr Harrison's attention was drawn to the company's analysis of reasons why issues of honestly and deceit surfaced in connection with sworn statements made in the affidavit. It could be arguable in that event that any immunity would no longer apply when the examination was conducted.

[73] Likewise in respect of the other impugned conduct of the defendants (that not directly connected to the affidavit or the examination) further enquiry is needed to see if the immunity would attach.

[74] This Court considers there are matters that require an examination of the evidence and that should be a matter for a trial Judge. Having the benefit of hearing the evidence and full argument would permit the making of such assessments of fact and degree as are required.

[75] In this Court's view witness immunity, as a matter of policy, is not intended to have an expansive and unlimited scope. The opposite appears clear from the view of the House of Lords in *Darker*. As Lord Clyde said[16]:

> Rather, the immunity should only be allowed with reluctance, and should not be readily extended, and should only be allowed where it is necessary to do so.

Summary

[76] In this case distinct causes of action are connected to what was contained in an affidavit and what was later said in a liquidator's examination, and in between what was done by the defendants in breach of obligations to the company. Witness immunity is claimed to provide a defence to these claims because the affidavit was offered as evidence in a District Court proceeding and the examination evidence was provided in response to a direction given as part of a Court supervised process.

[77] In this Court's view a factual enquiry is needed which the present affidavits do not adequately provide for.

[78] Witness immunity is a longstanding principle. It is not now quite the same as it has been. Documented change is evidenced by relatively recent English decisions suggesting that principles are not clear enough for our present purposes.

Judgment

[79] The strike out applications is dismissed.

[80] Costs are fixed on a 2B basis and are payable to the company. The Court will fix these if counsel cannot agree how those should be calculated.

[81] The Court directs the defendant's to file and serve a statement of defence within **20 working days** of the date of this judgment.

Associate Judge Christiansen