**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**CICA 020 of 2021**
**G0093 of 2020**

**BETWEEN:**

**BILIKA HARRY SIMAMBA**

**Proposed Appellant**

**AND**

**THE ATTORNEY GENERAL**

**Proposed First Respondent**

**THE GOVERNOR OF THE CAYMAN ISLANDS**

**Proposed Second Respondent**

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**CICA 021 of 2021**
**G0161 of 2020**

**BETWEEN:**

**BILIKA HARRY SIMAMBA**

**Proposed Appellant**

**AND**

**THE HONOURABLE JUSTICE IAN KAWALEY**

**Proposed First Respondent**

**BRIDGET MYERS**

**Proposed Second Respondent**

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**CERTIFICATE OF THE ORDER OF THE COURT**

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**UPON** the application of the Proposed Appellant to appeal the judgment of the Honourable Justice Phillip St John-Stevens dated 28 October 2021

**AND UPON** reading judgment of St John-Stevens J dated 28 October 2021; notice of appeal (with annexed grounds) dated 11 August 2021; notice of preliminary objection dated 19 November 2021; skeleton argument of Proposed Appellant dated 1 December 2021; application for leave to file constitutional petition dated 3 June 2020 (G0093 of 2020); writ (with annexed statement of claim) dated 28 October 2020 (G0161 of 2020); judgment of Mangatal J dated 25 July 2017; judgment of Kawaley J dated 17 June 2019; certificates of order of Beatson JA (with annexed reasons) dated 5 August 2020 (refusal of leave to appeal); and certificate of order of Beatson JA (with annexed reasons) dated 5 August 2020 (refusal of leave to file constitutional motion).

**IT IS HEREBY ORDERED** by Justice of Appeal Martin that for the reasons set out below:

(1) The Appellant is not entitled to pursue these appeals as of right;

(2) Leave to appeal is necessary if the appeals are to proceed;

(3) Leave to appeal is refused.

**Given under my hand and Seal of the Court this 22 day of December 2021**

Jenesha Simpson
Registrar of the Court of Appeal

## Reasons

1. Although the Notice of Appeal is headed as "being made as of right under section 26(3) of the Constitution", the Appellant (an expression I shall use for convenience notwithstanding my decision that he is not entitled to maintain these appeals) is not entitled to appeal under that subsection. That is for the following reasons:

   (a) Cause No G0161 of 2020 (Simamba v Kawaley and Myers) does not arguably raise any issue under section 26(1) of the Bill of Rights, and section 26(3) cannot apply to that Cause.

   (b) Cause No G0093 of 2020 (Simamba v Attorney General and Governor of the Cayman Islands) does purport to raise such an issue, so that section 26(3) is capable of applying to that cause. However, the subsection provides an appeal as of right to the Court of Appeal only "from any final determination of any issue by the Grand Court under the Bill of Rights". An order striking out proceedings is an interlocutory determination, not a final determination. Rule 12(6)(j) of the Court of Appeal Rules (2014 Revision) ("the Rules") specifically so provides. Moreover, rule 12(3) provides that "a judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it". That is not the case here: if the judge had refused the strike-out application the causes or matters – ie the Appellant's two sets of proceedings - would not have been finally determined but would have continued. These rules apply "for all purposes connected with appeals to the Court of Appeal": rule 12(1).

   (c) If, contrary to my view, the order appealed from is to be regarded as a final determination under section 26(1) of an issue under the Bill of

Rights, there is nevertheless no appeal as of right to the Court of Appeal under section 26(3). That is as a consequence of the concluding words of section 26(3): "no appeal shall lie from a determination by the Grand Court under this section dismissing an application on the ground that it is frivolous or vexatious". The judge did not in terms strike out the Appellant's proceedings on the ground that they were frivolous or vexatious, taking the view that it was otiose to determine whether or not to do so in the light of his conclusion that they disclosed no reasonable cause of action and/or were an abuse of process: paragraph 59 of the judgment under appeal. However, that paragraph recognises that within Order 18 rule 19(1) of the Grand Court Rules "there may be some overlap between frivolous and vexatious on the one hand, and that which amounts to an abuse of the process of the court on the other"; and in my view it is plain that a determination that proceedings which purport to raise an issue under section 26 of the Bill of Rights do not in fact disclose a reasonable cause of action and/or are an abuse of the process of the court is necessarily also a determination that the proceedings are frivolous or vexatious within the meaning of section 26(3).

2. If, as I consider, the judge's decision was not a final determination of an issue under the Bill of Rights, any appeal from it is subject to the ordinary regime governing appeals to the Court of Appeal set out in the Court of Appeal Act (2011 Revision) ("the Act") and the Rules. Section 6 of the Act provides that no appeal shall lie "(f) without the leave of the Grand Court, or of the Court, from an interlocutory judgment made or given by the Judge of the Grand Court", with certain immaterial exceptions. As already indicated, rule 12(6)(j) of the Rules provides that "an order striking out an action or other proceedings or any pleading under GCR Order 18 rule 19 or under the inherent jurisdiction of the court" is to be treated as interlocutory. Leave to maintain this appeal is accordingly necessary.

3. In their Notice of Preliminary Objection dated 19 November 2021, the Respondents contend that leave is also required by the terms of the litigation restraint order made by the judge in related proceedings (Cause No G0017 of 2021). However, that order is subject to an appeal (CICA 22 of 2021) which the Appellant is entitled to bring as of right; and, since it is not necessary for me to do so (because leave to pursue this appeal is in any event necessary for the reasons stated above), I prefer not to deal with the matter on this basis.

4. Leave to appeal will be given only if the appeal has a reasonable prospect of success. In my view, there is no possibility that this appeal will succeed. The grounds of appeal, which I consider below, do not – whether taken individually or cumulatively – give rise to an arguable case that the judge's conclusion, in his careful, comprehensive and well-argued judgment, was wrong.

5. In the welter of complaints and accusations advanced by the Appellant, it is easy to lose sight of the overall picture. This is as follows.

   (1) The essence of the Appellant's complaint is that he has been denied a fair and timely resolution of his negligence claim against the HSA ("the HSA claim").

   (2) The HSA claim – Cause No 0032 of 2014 - was commenced on 6 March 2014. It gave rise to two main issues: (a) whether the HSA was immune from suit ("the HSA immunity issue") and (b) whether the expert evidence adduced by the Appellant was if accepted sufficient to establish the HSA claim ("the expert evidence issue"). The Appellant needed to win both these issues in order to succeed in the HSA claim: failure on either of them would be fatal to the whole claim.

   (3) In December 2015 Mangatal J heard applications in the HSA claim. These applications were by the Appellant for directions and by the

HSA for the HSA claim to be struck out or for summary judgment in favour of the HSA. The HSA's application raised both the HSA immunity issue and the expert evidence issue. In April 2016, before Mangatal J was able to give judgment on the applications, it became clear that the HSA immunity issue was capable of being affected by decisions of Williams J in *Thompson v CI HSA* to the effect that the HSA enjoyed immunity in the absence of bad faith, and by the outcome of prospective appeals against those decisions. For that reason Mangatal J stayed the HSA claim, against the Appellant's opposition, pending determination of the *Thompson* litigation. See judgment of Mangatal J dated 25 July 2017. The Appellant did not appeal against her decision.

(4) In the event, the appeals in *Thompson* were compromised. Mangatal J recused herself from further consideration of the HSA claim (as a result of a complaint made against her by the Appellant). Williams J was assigned to deal with the case; but the Appellant objected to his dealing with it, on the ground that he was the judge in *Thompson*. The Appellant says that Dobbs J was at some point to hear the matter, but did not do so. Kawaley J ultimately took over conduct of the case, and in May and June 2019 dealt with the HSA's application to strike out the HSA claim or for summary judgment on it. As before, that application raised both the HSA immunity issue and the expert evidence issue.

(5) By judgment dated 17 June 2019, Kawaley J held (a) that the HSA was entitled to summary judgment on the HSA claim or to have that claim struck out, on the basis that the HSA claim had no realistic prospect of success in the absence of further expert evidence; but (b) that the Appellant should have a further opportunity to serve and file additional expert evidence on or before 31 October 2019; and (c) that determination of the HSA immunity issue should be adjourned: paragraph 85 of the judgment. As to (c), although Kawaley J

expressed some views about the HSA immunity issue, he made clear in paragraph 82 that he was postponing entering any formal decision on that issue.

(6) The time given to the Appellant for obtaining additional expert evidence was subsequently extended to 31 March 2020, over nine months after Kawaley J's decision; but, the Appellant having failed to obtain any such evidence, the HSA claim was then struck out.

(7) The Appellant's application to the Court of Appeal for leave to appeal Kawaley J's judgment out of time was rejected by Beatson JA on 5 August 2020. The Appellant had the opportunity to challenge that rejection before the full court, but did not do so. It follows that Kawaley J's determination that the HSA claim had no realistic prospect of success in the absence of further expert evidence must be taken to be correct. In turn, it follows that the HSA claim was throughout its life defective for lack of evidence and liable to be struck out on that ground regardless of the outcome of the HSA immunity issue. In further turn, it follows that if the HSA claim had been determined at any earlier time – as the Appellant says it should have been – it would have foundered on the expert evidence issue whether or not the Appellant was right on the HSA immunity issue.

(8) The position accordingly is that the HSA claim failed, and was always bound to fail, because the Appellant could not obtain expert evidence sufficient to support it. It did not fail because of the HSA immunity issue, which was never decided. Nor did it fail because of any delay in dealing with it; and the correctness of the basis on which it did fail cannot now be disputed.

6. Viewed in the light of this history, it can be seen that the Appellant's complaint that he was denied a fair and timely resolution of the HSA claim is fundamentally flawed. Any fair resolution of the HSA claim, whenever it

occurred, would have resulted in the dismissal of the Appellant's claim on grounds which he cannot now challenge. No fair and timely resolution of the HSA claim would or could have resulted in the Appellant succeeding in that claim. Even if there were anything in the Appellant's complaints of procedural unfairness, which there is not, no difference in the procedures adopted by Mangatal J or Kawaley J could have affected the determination of the HSA claim against the Appellant.

7. Put simply, the position is that the Appellant did not lose the HSA claim because of any failures of the judicial system; he lost it because he could not support it with adequate evidence.

8. Although it is in theory possible that the Appellant's complaint is that he has suffered loss or been otherwise prejudiced because his claim against the HSA was not dismissed earlier than it was, the reality is that his complaint is that the HSA claim did not succeed. That is made clear in paragraph 23 of his statement of claim in G0161 of 2020, and in ground 13 of the "grounds on which relief is sought" in G0093 of 2020. But it is not now possible for the Appellant to challenge the outcome of the HSA claim, either directly or by the sort of collateral attack made in the proceedings which the judge struck out.

9. Against that background, I turn to consider the grounds of the proposed appeal. In doing so, I bear in mind that it is not enough for the Appellant to fault – if he can – some aspect of the judge's reasoning; he must demonstrate that the fault (on its own or in conjunction with others) arguably vitiates the judge's decision to strike out the claim.

10. The grounds of the proposed appeal may be summarised as follows:

    (1) <u>Ground 2</u>: the judge was wrong to take into account and rely on Beatson JA's reasons.

        (a) The first point made is that the reasons were not an authentic part of the order. This is nonsense. The requirements of section 34 of the

Act and rule 27 of the Rules relate to the operative part of the order, not to the reasons for it. This is why Civil Form 5 (referred to in rule 27) requires certification of the *order* that was made. In any event, the reasons were incorporated in the certificate by express reference. Nothing in the statutory regime precludes that. The judge's consideration of this contention in paragraphs 65 to 68 of the judgment cannot be faulted.

(b) The second point made is that Beatson JA had no authority to comment on the merits once he had decided that the Court of Appeal had no jurisdiction to deal with the Constitutional Motion. This too is nonsense. In the first place, the point can at best only apply to the reasons given by Beatson JA when rejecting the application for leave to file the Constitutional Motion; it cannot apply to the reasons given by him when refusing leave to appeal against the decision of Kawaley J, or to the parts of those reasons which consider as potential grounds of appeal issues arising from the Constitutional Motion. In the second place, remarks made by a judge that are not fundamental to the decision – *obiter dicta* – are of persuasive authority. As the judge said in paragraph 76 of the judgment appealed against, he was "perfectly entitled to have regard to Beatson JA's statements and act upon them".

(c) The third point made is that Beatson JA's reasons contained "several key factual inaccuracies". The two which the Appellant identifies are dealt with in subparagraph (4) below, and are neither inaccurate nor key; but if the Appellant wanted to contend that either or both sets of reasons contained inaccuracies that vitiated the conclusions he should have sought a review of Beatson JA's decision. He did not do so.

This ground of appeal is unarguable.

(2) <u>Grounds 1, 5 and 6</u>. These grounds relate to judicial immunity of Kawaley J. The essence of them is the contention that the judge misinterpreted, or failed to interpret, section 29 (1) of the Grand Court Act and instead applied English case law to override the Cayman statute. The Appellant is right that section 29(1) is the governing provision; but he is wrong both in his interpretation of that provision and in his identification of how the judge dealt with this issue.

(a) Section 29(1) of the Grand Court Act (2015 Revision) is set out in full in paragraph 91 of the judgment under appeal. The Appellant's contention is that subsection (b) is to be read as qualifying subsection (a), so as to impose liability in any case where it can be proved that the judge acted maliciously and without reasonable cause. The judge rejected this contention in paragraph 98 of the judgment under appeal, and he was right to do so. The Appellant's construction deprives the unqualified words of subsection (a) of any meaning: if, as the Appellant suggests, the words "whether or not within the limits of his jurisdiction" in subsection (b) have the effect that that subsection applies to all judicial acts regardless of the existence of jurisdiction, subsection (a) is entirely otiose. Any construction of the section which requires a complete subsection to be ignored must necessarily be wrong. The word "or" separating subsections (a) and (b) clearly indicates that the subsections are intended to deal with different situations; and when these matters and the structure of the section are taken into account it is clear beyond argument that subsection (a) relates to matters done with jurisdiction and subsection (b) to matters done without jurisdiction.

(b) The contention that the judge failed to construe the section is unjustified. In paragraph 96 of the judgment under appeal, he said that "the legislative wording demands careful consideration"; and that is what he gave it in paragraphs 97 and 98.

(c) The conclusion as to the meaning of section 29 (1) reached by the judge was, as he remarked (paragraph 98), consistent with the English Court of Appeal case of *Sirros v Moore* [1975] QB 118. He did not, as the Appellant contends, rely on that case in preference to adopting the proper meaning of section 29 (1).

These grounds of appeal are unarguable.

(3) Ground 3: having decided that Kawaley J had immunity, the judge should not have considered the merits when deciding whether or not to strike out the case.

Again, this is nonsense. In the first place, the point can at best only apply to the claim against Kawaley J, not to the claims against the Attorney General, the Governor and Ms Myers. Moreover, the claim against Ms Myers is partly based on allegations of a conspiracy with Kawaley J, so that some aspects of his conduct are relevant notwithstanding that he has immunity in respect of them. In the second place, the judge is entitled to provide alternative reasons for his decision; and a finding of immunity does not, as the Appellant appears to suggest, mean that the judge making that finding "lacks jurisdiction to hear the merits of the matter". In the third place, the judge's correct finding that Kawaley J had immunity was in itself sufficient to justify striking out the case against him; so that, even if (contrary to my view) the judge was not entitled to consider the merits, his decision would nevertheless be justified on that basis. An appeal against it would accordingly have no reasonable prospect of success.

This ground of appeal is unarguable.

(4) Grounds 4, 8 and 10: the judge did not properly analyse the facts relied on by the Appellant to show that Kawaley J acted maliciously and without reasonable cause in denying the Appellant a hearing and lying about it.

(a) These grounds are directly contrary to the Appellant's contention (Ground 3) that the judge was not entitled to consider the merits of the claim against Kawaley J.

(b) They also depend upon the Appellant being right in his assertion that Kawaley J had only qualified immunity; but he is wrong about that (see (2) above). It is nevertheless desirable to say something about these complaints.

(c) The complaints relate to the way in which Kawaley J dealt with the hearing of the HSA's application on 6 May 2019. That hearing was conducted in the presence of the HSA's lawyers but in the absence of the Appellant, although he had provided written submissions. The reasons for this are mentioned below. The hearing lasted about half an hour. After the Appellant had complained that he had not been allowed to make oral submissions, a further hearing of the application was held on 3 June 2019. At that hearing, which the Appellant attended remotely, he addressed the judge for about one hour. In his extensive written submissions, and to a lesser extent orally, the Appellant cited and discussed 52 cases and raised 7 additional issues.

(d) The Appellant's first complaint concerns the fact that he was not permitted to be present in person or remotely at the hearing on 6 May 2019. He says that he asked for a videoconference hearing, that the judge initially raised no objection but insisted on personal attendance when it was too late for the Appellant to do anything about it, and that the judge then lied about what had occurred. The second complaint is that the judge failed to deal in his judgment with the cases and issues addressed by the Appellant in his written submissions, either in detail or by reference to the principles disclosed by the cases, instead lying about the effect of the submissions. The failure to deal with the cases is the main thrust of Ground 10. The effect of the matters raised in the

first and second complaints is, so the Appellants says, that he was denied a fair or meaningful hearing.

(e) Three points may be made at the outset. (i) First, the Appellant was not in fact denied a meaningful hearing. Although he was not present on 6 May 2019, he was subsequently provided with a recording of the proceedings on that occasion. He was present by video link on 3 June 2019 and had on that occasion the opportunity to supplement the points made in his written submissions by addressing the judge orally in the light of the submissions made by the HSA's lawyers on 6 May 2019 (of which he knew from the recording). In the circumstances, the Appellant was not substantially disadvantaged by his absence from the first hearing; far from being denied a hearing, adequate arrangements were made to provide the Appellant with a proper opportunity to present his case in full knowledge of what had occurred in his absence. (ii) Secondly, the 52 cases and 7 issues related almost entirely to the immunity issue. Since Kawaley J did not decide that issue, there was no need for him to deal with cases and issues relevant to it. The same reasoning applies to the extent that the cases and issues related to the making of unless orders: Kawaley J did not make an *unless* order at that stage, and so did not need to refer to authorities relevant to such orders. (iii) Thirdly, almost all of these complaints have already been dealt with by Beatson JA in rulings which, I repeat, have not been challenged. The substance of the complaints about the hearing was considered by him in paragraph 10 of his reasons for refusing leave to appeal, as well as in paragraph 6 of his reasons for refusing leave to file the Constitutional Motion. His conclusion was that "the judge's decision to proceed in the way that he did was not outside the margin afforded to a judge in all the circumstances of this case". The complaint about the failure to deal with the 52 cases and 7 issues was considered by Beatson JA in paragraph 5 of his reasons for refusing leave to file the Constitutional Motion and described by him as unarguable. In doing so, he referred to the fact that the cases and

issues related to the immunity issue. It is not open to the Appellant now to revisit these matters.

(f) It is, however, necessary to deal with the allegations that Kawaley J lied. He is said to have done so in two respects: in relation to the Appellant's request to attend the hearing on 6 May 2019 remotely, and by describing (in paragraph 75 of the judgment of 17 June 2019) the Appellant as having elaborated his summary submissions as to why *Thompson* was wrong "primarily through statements of broad principle". The second of these is, once again, nonsense. Kawaley J may not have dealt with the 52 cases and 7 issues in the way in which the Appellant would have wished him to, but his failure to do so does not come close to indicating that his reference to "statements of broad principle" was a deliberate untruth. This is an area where Beatson JA's reasons are said to be factually inaccurate in describing the 52 cases and 7 issues as "multiple citations for a single proposition"; but such misstatement as there may be in that summary is of no significance whatever. The relevant point, as Beatson JA clearly identified, was that the cases and issues related primarily to a single issue – the HSA immunity issue – which was not decided by Kawaley J.

(g) The first allegation that Kawaley J lied is founded on paragraph 5 of the judgment of 17 June 2019. The relevant part of that paragraph is in the following terms:

> "The Court accommodated his request to participate in a short case management hearing via video-link, which hearing took place on January 9, 2019. He was abroad and it seemed obvious that requiring his personal attendance at a perfunctory hearing would be disproportionate in terms of the expense he would incur in travelling from Canada. How the Plaintiff would participate in the two-day hearing of the Defendant's Summons was not expressly

addressed by the parties or by the Court. Shortly before the hearing fixed for May 6, 2019 with no directions having been given to exempt the Plaintiff from the usual requirement of personal appearance in Court, the Plaintiff formally requested permission to participate remotely."

The Appellant says that the statements that the issue of the video link "was not expressly addressed by the parties or by the Court" and that the Appellant's request was made "shortly before the hearing fixed for May 6, 2019" are inconsistent with emails passing between Ms Myers and the HSA's lawyers on 14 and 18 March 2019 which are premised on the court having "received a request from the [Appellant] for him to participate remotely via video-link". The Appellant contends that in the circumstances "it is either that Justice Ian Kawaley is deliberately lying, is excessively lazy, or, if he is being honest, has serious cognitive problems".

(h) This allegation is based on an obvious misunderstanding of the plain meaning of paragraph 5 of the judgment. It is clear from the context that the sentence "How the Plaintiff would participate in the two-day hearing of the Defendant's Summons was not expressly addressed by the parties or by the Court" means that the topic was not addressed at the case management hearing on 9 January 2019. This is confirmed by paragraph 9 of the judgment ("I could myself have avoided any misunderstanding by expressly raising the mode of his attendance at the directions hearing"). At that time, the Appellant had made no request, formal or otherwise, that his attendance at the hearing of the applications be by video link. It is also clear from the context that the focus of the words "Shortly before the hearing fixed for May 6, 2019 … the Plaintiff formally requested permission to participate remotely" is on the necessity for a formal request, something again confirmed

by paragraph 9 ("I was persuaded that the Plaintiff did not appreciate that a formal application was required to exempt him from the usual requirements of attending the scheduled hearing"). The Appellant has not quoted in the notice of appeal the request on which the emails between Ms Myers and the HSA's lawyers were premised, or summarised its contents; but subsequent emails from Ms Myers to the Appellant dated 1 and 3 May 2019 asking him to give reasons why he could not appear in person suggest that no reason had initially been provided. In the circumstances, the statements made in paragraph 75 are true: the topic of the Appellant's appearance at the substantive hearing was not addressed on the summons for directions, and the Appellant's earliest request of sufficient formality, stating a reason (that he was not feeling well), was not made until 3 May 2019, which was indeed shortly before the hearing fixed for 6 May 2019 – or "very shortly", as Beatson JA put it in a phrase which the Appellant wrongly suggests was inaccurate. Again, the matters complained of come nowhere near to establishing that the statements made in paragraph 5 of Kawaley J's judgment were deliberate untruths. The judge declined to accept the allegation that Kawaley J had lied (paragraph 101 of the judgment under appeal), and he was right to do so.

These grounds of appeal are again unarguable.

(5) Grounds 7 and 11: the judge did not adequately consider the role of Mangatal J, or that her failings and those of Kawaley J were part of a continuing violation of section 7 of the Bill of Rights. Although this complaint is improperly embroidered with a number of matters wholly extraneous to the Appellant's proceedings, in substance it is primarily a complaint that Mangatal J initially delayed resolving the HSA claim, then adjourned it pending decisions of Williams J and the Court of Appeal in *Thompson*, and then recused herself from dealing with the applications. This resulted in the passage of 2 years and 10 months without

determination by her of a matter she had first heard in December 2015, and meant that a period of 3 years and 6 months elapsed between the first hearing before Mangatal J and the judgment of Kawaley J.

(a) It is necessary first to analyse the delay said to have occurred while Mangatal J had conduct of the case. The first hearing of the HSA's applications was on 3 December 2015, at the conclusion of which Mangatal J reserved judgment. The first judgment of Williams J in *Thompson* was handed down on 19 February 2016. At some point thereafter the HSA applied to supplement its applications in the light of that decision, and Mangatal J directed a further hearing, which was held on 8 April 2016: see paragraphs 5 and 6 of the judgment of 25 July 2017. The matter was then successively adjourned while the *Thompson* litigation proceeded, with further hearings taking place in front of Mangatal J on 4 October 2016 and 13 July 2017 and an email exchange between the parties and the judge in early January 2017. Mangatal J's decision to adjourn the case while the *Thompson* appeal proceeded was a case management decision plainly within the scope of the discretion afforded to her; and, as both Beatson JA and I have pointed out, there was no appeal against her decision. The Appellant cannot now say that her decision was wrong. There can accordingly be no proper complaint of delay while the matter was adjourned to await the outcome of the Thompson litigation – that is to say, between 8 April 2016 and 25 October 2018 (when Mangatal J recused herself). The time between 3 December 2015 and 8 April 2016 is just over 4 months, which takes no account of the events occurring after 19 February 2016 which resulted in the hearing on 8 April 2016. That delay cannot conceivably be a proper ground of complaint. Nor can there be any proper complaint about Mangatal J's decision to recuse herself: it is obvious that, once the Appellant had complained to the Judicial and Legal Services Commissioner and the Governor about her conduct, she could not continue to deal with the case and was bound to recuse herself. The complaint about Mangatal J's conduct

was described by Beatson JA as unarguable (paragraph 7 of the reasons for refusing leave to file the Constitutional Motion), and it is not open to the Appellant to revive it.

(b) The fact that it took 3 years and 6 months for the HSA's applications to be resolved is not in itself indicative of any failure. No complaint is made of delay by Kawaley J, so the period to be considered is from 3 December 2015 to (at the latest) 9 January 2019, when Kawaley J held a directions hearing. Until 25 October 2018 Mangatal was the assigned judge, and I have already said that no proper complaint can be made of delay against her. In the ensuing two and a half months, delay was caused by the Appellant's objection to Williams J taking over the case – an objection driven by the Appellant's misplaced belief in the overriding importance of the HSA immunity issue. Any other delay that occurred in that period is plainly insufficient to give rise to complaint.

(c) In any event, the Appellant cannot sensibly be said to have been prejudiced by the delay in the resolution of the HSA claim. As I have pointed out, if Mangatal J had at any time determined the HSA claim the only determination she could have made consistently with the law would have been that the Appellant failed on the expert evidence issue, regardless of the outcome of the HSA immunity issue. The Appellant cannot be heard to say that she would or might in fact have made a determination in his favour, since such a determination would have been wrong in law.

This ground of appeal is likewise unarguable.

(6) Ground 9: the judge was wrong to conclude that a judge of the Grand Court could not review a decision of a judge of equivalent jurisdiction under section 26 of the Bill of Rights. I am prepared to accept that there may be circumstances in which the Grand Court exercising jurisdiction

under section 26 will have to decide whether or not the conduct of a judge of equivalent standing contravenes a litigant's right to a fair trial under section 7 of the Bill of Rights. An example might be a refusal by a judge to make a decision at all, if that refusal were not dealt with by other means. But it is not the task of the court on a section 26 application to determine the law applicable to other litigation, or decide the merits of another case: that is a job for the courts exercising their ordinary jurisdiction. In the present case, as I have repeatedly said, it is not open to the Appellant to dispute two critical matters: Mangatal J's decision to adjourn the HSA's applications while the *Thompson* litigation continued, and Kawaley J's decision on the expert evidence issue. Those matters are determinative of the adequacy of the reason for the delay while Mangatal J was handling the matter, and of the correctness of the outcome of the HSA claim. Having regard to those matters, and the reasoning underlying the determination of them, there was nothing that the Grand Court could legitimately review on an application under section 26 of the Bill of Rights.

This ground of appeal is unarguable.

(7) Ground 12: the judge created a record that was not fair and accurate. Once more, this is nonsense.

(a) The Appellant complains that the appearance of lack of merit in his case is exaggerated, but the HSA claim has been conclusively determined to have no merit. The fact that the Appellant now has what he says is a favourable urological report is of no consequence: the time for provision of such a report is long past.

(b) The judge was well aware of what the Appellant said about the response of the Governor and the Attorney General, but rejected the suggestion that it constituted an admission. In any event, as the judge

pointed out in the final sentence of paragraph 106 of the judgment under appeal, it was he, not the Governor or the Attorney General, who was the arbiter of the matter.

(c) I have already dealt with the emails relating to the Appellant's appearance at the hearing on 6 May 2019; and the judge did not need to consider bad faith, malice or unreasonableness once he had (correctly) decided that Kawaley J was immune from suit.

This ground of appeal too is unarguable.

(8) Ground 13: objects to the judge's statement in paragraph 11 of the judgment under appeal, in relation to that same judgment, that "omission of an issue or authority is not indicative that it has not been considered". This ground, which is a good example of the Appellant's failure to indicate why what he objects to has the effect of invalidating the judge's decision, is also nonsense: the judge is doing no more in this and the surrounding paragraphs than setting out the general parameters of his decision. His conclusions are throughout well reasoned, address all relevant issues and are where necessary adequately supported by authority.

This ground of appeal is once again unarguable.

11. Leave to appeal is accordingly refused.

Hon John Martin, Justice of Appeal
22 December 2021