IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G0093 OF 2020

BETWEEN:

BILIKA HARRY SIMAMBA

PLAINTIFF

AND:

THE ATTORNEY GENERAL

1ST DEFENDANT

THE GOVERNOR OF THE CAYMAN ISLANDS

2ND DEFENDANT

AND

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G0161 OF 2020

BETWEEN:

BILIKA HARRY SIMAMBA

PLAINTIFF

AND:

THE HONOURABLE JUSTICE IAN KAWALEY

1ST DEFENDANT

BRIDGET MYERS

2ND DEFENDANT

Appearances:	**Mr. Tom Lowe Q.C. instructed by Ms. Reshma Sharma, Solicitor General and Ms. Heather Walker for the Applicants**
Before:	**The Hon. Justice St. John-Stevens (Actg.)**
Hearing:	**4th May 2021**
Draft Judgment Circulated:	**28th July 2021**
Plaintiff's response[1] to Draft:	**No response received**
Defendants' response[2] to Draft:	**2nd August 2021**

[1] On the 16th August 2021 the Court requested via email the Plaintiff's response to both this Judgment and the "Restraint" Judgment. Mr. Simamba's letter in response to the Court's email makes reference to two (2) paragraphs of the Restraint Judgment only. Therefore the Court, for the sake of good order, waited for a further period for the Plaintiff's response to the Draft Judgment in this matter. No response was received.

[2] This was an 11-page document which addressed in detail ninety (90) paragraphs of the Draft Judgment.

HEADNOTE

Civil Law *–* ***Application for Strike out -*** *Defendants seek Order that Statements of Claim be struck out pursuant to GCR O.18, r.19(1) or the inherent jurisdiction of the Grand Court - The basis being that they either disclose no reasonable cause of action, and/or are scandalous, frivolous or vexatious, and/or an abuse of process of the Court*

JUDGMENT ON APPLICATION TO STRIKE OUT

Materials before the Court

1. The materials in this case have been helpfully combined into two electronic bundles. Firstly; "*G93 and G161 of 2020 and G 17 of 2021 - Electronic Hearing Bundle.pdf*"- (Running to 880 pages), and secondly *"Cause Nos.93 of 2020 and 161 of 2020 - Electronic Authorities Bundle.pdf"* References to these bundles will be *[EHB; tab/page/para]* & *[EAB; tab/page/para]* respectively.

Parties to the Proceedings

2. Each Defendant, by way of summonses issued on 1st and 2nd February 2021 (amended 15th February 2021)[3] seeks an Order that the Statements of Claim in both G 0093 of 2020 and G 0161 of 2020 be struck out. The basis upon which the said order is pursued is either pursuant to the Grand Court Rules (***GCR) O.18, r.19(1)*** and/or the inherent jurisdiction of the Grand Court. The basis being that they either disclose no reasonable cause of action, and/or are scandalous, frivolous or vexatious, and/or an abuse of process of the Court.

3. During the course of a directions/case management hearing on the 22nd February 2021 the court canvassed with the parties the possibility and desirability of consolidating the two Causes. Each were in agreement to that course. It was further determined upon the agreement of the parties that the application to Strike Out would be heard first, then as part of a composite hearing, the application for a Restraint Order (G0017 of 2021) would be heard[4]. Consequently judgment on the applications to Strike Out and the Restraint Order would be given together.

[3] [*EHB; tabs 11, 12, 14*]
[4] (*See Order at [EHB; tab16])*

Consideration of the Case

4. The Court, having considered the oral submissions at the directions hearing, and the written material, made further case management directions consequent upon the fixing of the hearing to be on the 4th May 2021. That date was the first identified date convenient to the parties and the court for the hearing of both the application to strike out and the restraint application. The Court set a timetable for the exchange of written submissions.

5. The Court made further case management directions of its own motion; mindful of dealing with The Overriding Objective , as set out in the preamble to the ***GCR***, to deal with cases justly and at proportionate cost, which includes, so far as is practicable, allotting to each case an appropriate share of the court's resources.

6. In the result, this Court directed that, having received helpful written submissions and attendant material, the Court would permit sixty minutes to each party to make oral submissions upon the consolidated application to strike out, and a like period in relation to the application for a Restraint Order. The Court also stated that it would not be assisted by, nor indeed permit, simple repetition of written submissions[5]. Mr. Simamba, in an email, expressed some disquiet as to not being permitted to repeat his written submissions orally. The Court observed the need to engage the word "simple". Of course the parties were permitted to, and did, repeat written submissions, augmenting them with oral submissions.

[5] (*Note of directions @ [EHB; tab18*])

The Oral Hearing - 4th May 2021

7. Prior to the hearing, the Court had indicated that it would permit Mr. Simamba (The Plaintiff/Respondent) to appear remotely via "Zoom."[6]. Upon Mr. Simamba's invitation, the Court directed that the hearing would be open to the public. In the interests of ensuring both access to justice and open justice, the Court indicated it would permit attendance by the parties via Zoom and would permit interested observers to log in on the same Zoom link.

8. During the hearing Mr. Simamba invited the Court to allow him to have a little more than an hour to present his oral submissions. He also indicated he would take less than an hour in relation to his oral submissions in response to the application for a Restraint Order. The Court of course acceded to that request. The Court was satisfied that Mr. Simamba, by a combination of his written skeleton arguments and the oral submissions, had a fair opportunity to present his case; there was no indication to the contrary from him.

9. It should be noted that in such a hearing a judge may ask questions by way of clarification or invite elaboration. It is not incumbent on a judge to indicate to either advocate if a submission does or does not find favour. This is particularly so when the court has afforded the parties time to reduce their positions to written submissions. It is an adversarial process.

[6] *(As he did at the hearing on the 22nd February)*

This Judgment

10. The purpose of this Judgment is to set out the Court's reasons for its decision, and what conclusions have been reached on the principal controversial issues. That does not include every issue, but only those that are determinative in some measure of the applications.

11. Not all issues will be referred to in this judgment, nor will mention be made of each authority, even though all issues and authorities have been subject to careful consideration by this court. Any omission of an issue or authority is not indicative that it has not been considered.

12. The case management of the hearing ensured that each party had time to reduce their submissions to writing - inviting the parties to concentrate on the principal controversial determinative issues.

13. The Court has read and considered all the written material, augmented by oral submissions from the parties.

14. This Judgment is not a treatise, nor will it be discursive on matters which may be pertinent, or are on the very margins of determinative relevance. It focuses on those matters that materially affect the outcome - that is, those being, or possibly being, dispositive of this application.

15. The Court reminds itself of the authoritative guidance, such as in ***South Bucks DC v Porter (No. 2)***[7]

[7] [2004] 1 WLR 1953 [36] - *[EAB; tab,10]*

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues."

16. This court is mindful of the Plaintiff's criticism of the questioned judgment of Kawaley J within the Statement of Claim in this matter. Paragraph 62[8] of the Claim reads:

"I was taken aback by the shear brevity of a ruling on such a complex case is. It was a 29-page ruling in a case which, in my view, on the basis of certain comparisons dealt with below, should have been well over 100 pages, perhaps close to 200 pages. The decision was disproportionate to the issues that had been placed before the court."

17. This court rejects the bald assertions that the sufficiency of a ruling can be measured by the number of pages. Indeed when considering principal important controversial issues, the ruling turned upon a single issue - the requirement for expert evidence.

Default Judgment - Application re: G0161 2020

18. The Plaintiff raised in his oral submission to the Court that he sought to enter Default Judgment in this cause. (By email dated 27th January 2021). The application and documents detailing the lodging of the same are at *[EHB: Tabs 46-52]*. The determination of this application was made by Ramsay-Hale J on the 1st February 2021. I have read an attachment to an email (dated 5th June 2021) from the Plaintiff, that he invited this Court to consider. This provides a chronology of the matter and reports that Ramsay-Hale J determined that, as an Acknowledgment of Service with

[8] *[EHB;tab.9/p.115/para 62]*

Notice of Intent to Defend had been filed on the 18th December 2020, the application was refused.

The Genesis of these Proceedings

19. In 2014 the Plaintiff in this case filed a claim in the Grand Court (*Simamba v the Health Services Authority of the Cayman Islands* Cause No. G 0032 of 2014).

20. This was instituted by writ dated 6th March 2014 - the substance being a personal injury claim. The Plaintiff in this cause alleged that he suffered loss and damage as a result of medical negligence by the Cayman Islands Health Services Authority (HSA).

21. Mangatal J and Kawaley J each presided over hearings in the life of this cause. On the 17th June 2019 Kawaley J delivered his ruling in this cause, indicating that the Plaintiff's claim was bound to fail in the absence of medical evidence. However it must be noted that the cause was not struck out, but, instead, the judge made an immediate case management hearing order requiring the Applicant to file the specified expert evidence. The Applicant/Plaintiff, having requested a further opportunity to serve expert evidence, the Learned Judge, in the exercise of his discretion, permitted the same; directing that medical and dental evidence be served by 31st October 2019. The Judge reserved costs of the application. The period of time granted for service of this expert evidence was, upon the application of the Plaintiff, extended until the 31st March 2020.

22. This Court is particularly cognisant of the fact that there was no final decision on the Immunity Issue; the determination was "*adjourned with liberty to apply*[9].

[9] *[EHB; Tab 9/p. 428/para(d)]*

23. By a Case Management Order (dated 13th November 2019) as a result of, *inter alia*, *"the Plaintiff indicating in correspondence that he required time to raise funds"*[10] the court ordered that:

> *"The time fixed by paragraph 2 of this Court's Order dated 17 June 2019 for the Plaintiff to file expert evidence in support of his Medical Case and/or Dental Case shall be extended by ~~three~~ five months until 31 March 2020.*
>
> *Unless the Plaintiff files expert evidence in support of his Medical case and/or his Dental Case on or before 31 March 2020 his claim shall be struck out and the Defendant shall be awarded the costs of the action to be taxed if not agreed on the standard basis."*

24. The sole basis on which the action was ultimately struck out was as a consequence of the Plaintiff's failure to adduce expert evidence, despite being given time, and an extension of time, to serve any such material; the Plaintiff being fully aware that his case would be struck out if he failed so to do.

25. This Statement of Claim in this cause is founded upon the Plaintiff's claim of a breach of the Plaintiff's right to a fair hearing - protected by s.7, Part 1 of Schedule 2 to the ***Cayman Islands Constitution Order 2009*** ("the ***Bill of Rights***").

26. The "Introduction" of the Statement of Claim within this cause[11], summarises the foundation of the Plaintiff's position:

> *"6 (a) In consequence of those events, [the striking out of the PI Claim - words added for clarification] the Plaintiff claims damages arising from denial of a fair right to a trial, breach of statutory duty, defamation by way of slander of title (defamation), abuse of process, abdication of responsibility and conspiracy. Some case law will be included in this pleading as it demonstrates the failure to grant a fair trial.*

[10] *[EHB;Tab.28/p.432-3]*
[11] ref. Para.6 G 0161 of 2020 - *[EHB; Tab 9/ p. 99]*

(b) Specifically the judgment is defamatory in relation to my profession in that anyone reading the judgement (sic) of Justice Kawaley would hold me in odium, contempt or ridicule as an attorney at law as it has painted me, falsely and maliciously, as having brought the case that was frivolous and vexatious and did not conduct it in a manner that was worth taking seriously."

27. The Statement of Claim details, *inter alia*, the actions, inactions, decisions and conduct of both Justices Mangatal and Kawaley in respect of the medical negligence claim. The decision of Justice Kawaley of 17 June 2019 is given particular focus[12].

28. The Plaintiff pursued his complaint as to the process and outcome of this cause. Subsequent causes, including the two instant Causes, share a commonality of subject matter and grievance.

The Two Applications before the Cayman Islands Court of Appeal (CICA) relating to the original Medical/Dental Negligence action

29. On the 12th November of 2019 the Plaintiff filed with the CICA an *"Application for leave to file Constitutional Motion (pursuant to section 26 of the Constitution)."*[13]

30. This application - *Simamba v The Health Services Authority/Simamba v The Attorney General and Governor of the Cayman Islands* CICA Cause No 36 of 2019 - was adjudicated upon, and refused. The Certificate of Order and Reasons for Decision of Justice of Appeal Beatson is dated 5 August 2020[14].

[12] *[EHB; tab27]*
[13] *[EHB: Tab29]*
[14] *[EHB:Tab30/p. 454]*

31. However before that (CICA) matter was determined the Plaintiff filed with this Court what he described as an "*Application for Leave to File Constitution Petition, (pursuant to section 26 of the Constitution)"* - filed on the 12th June 2020[15].

32. On the 19th June 2020 the Plaintiff filed with the CICA an *"Application for Leave to Appeal of out of Time"*; the Respondent being the HSA. This application sought leave to appeal the decision of Mr. Justice Kawaley – the medical/dental negligence case G 0032 of 2014.

33. The decision of the CICA is to be found at *[EHB; tab32]*. The application for leave, dated 19th June 2020, over a year after the order was made, was refused. Within this Certificate of Order and Reasons, which must be read in conjunction with the parallel document relating to an application for leave to file a Constitution Motion, Justice of Appeal Beatson considers factors repeated in the causes before this Court.

34. On the 21st August 2020 the **"***Constitutional Petition***"** was, by Order of McMillan J[16]., to be treated as a Writ endorsed with a Statement of Claim pursuant to GCR O.77A - *Simamba v The Attorney General and Governor of the Cayman Islands Cause No G0093 of 2020*).

35. In relation to both applications within *CICA Cause No G0036 of 2019* and *Cause No G0093 of 2020,* both the Attorney General and Governor of the Cayman Islands are defendants. A careful consideration of the substance of the grounds for each cause reveals that they are without material distinction. Indeed the affidavit in support of each was the same[17]. It is acknowledged however that the Plaintiff's judicial criticism has broadened to include Mangatal J, and her decisions, and delay.

[15] *[EHB: tab 7]*)
[16] *[EHB; tab15]*
[17] *[EHB; tab 24]*

36. The Plaintiff appears to accept that the cause of action to be considered by the CICA was in all intents and purposes the same as that averred in Cause No G0093 of 2020. Such can be gleaned from the Plaintiff's Skeleton Argument in this matter[18]:

> *"[8](b) While my Constitutional Motion was pending before the Court of Appeal and after the Attorney General responded, the President of the Court of Appeal sent communication asking that the HSA make submissions if they wished to. In that communication, the President said something to the effect that "As the Attorney General says, I think this application is out of time". Unless one is trying to pander to the Attorney General, judges should not make statements like this while submissions are still being made. It undermines their appearance of impartiality. At that point I got the idea that in order to preserve my cause of action under section 26 of the Constitution, I should file that action in order to do so. That is not being a pesky litigator. It is just trying to preserve my rights."*

37. Additionally in the "Applicant's" affidavit in support of the application to file a constitutional petition, at para 2 he states he relies upon his First Affidavit filed in CICA 36/19[19].

38. On 28th October 2020 Cause G0161 of 2020 began its life with the Plaintiff joining the Honourable Justice Ian Kawaley and his assistant, Miss Bridget Myers, as Defendants in a personal action - *Simamba v The Honourable Justice Ian Kawaley and Bridget Myers Cause No. G 0161 of 2020*[20] - this personal action being filed when his *Constitutional Petition* (G 0093 of 2020) was still pending before the Grand

[18] *[EHB; Tab4/p.42./para 8]*
[19] *[EHB; Tab8/page94]*
[20] *[EHB: Tab 9]*

Court. In the Personal Action the Plaintiff, in the main, recycled the complaints which had been the subject of his Constitutional Motion and which had already been dismissed by Beatson JA.

39. It is contended by the Defendants in each of the two causes before this Court that the Plaintiff merely repeated and recast the complaints which had been the subject of his unsuccessful Constitutional Motion, and the application to appeal out of time (*CICA Cause No G0036 of 2019)* dismissed by Beatson JA.

40. These four causes enjoy a commonality. From the first proceedings (Cause No.32 of 2014|) flowed the second, third and fourth - the second, being the First Defendant's consideration of the first, and the third and fourth seeking, in the main, to engage the court in the reconsideration of the first and the rejection of the second.

Application pursuant to GCR O.18, r.19(1)

41. Each Defendant relies upon ***GCR O.18, r19(1)(a)(b) & (d):***

> *"r. 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of the process of the court,*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

42. Engagement of this rule provides a party a prompt and summary route to disposal of actions.

43. It is of note that the Applicants do not rely upon r.19(1)(c).

GCR O.18, r.19(1)(a)

44. The primary position of each Defendant is that each Statement of Claim fails to disclose any reasonable cause of action, accordingly each cause of action falls to be struck out.

45. In determining this position pursuant to ***GCR O.18, r.19(1)(a)*** the court must be mindful and adhere to the engagement of ***GCR O.18, r.19(2),*** to wit:

> "*No evidence shall be admissible on an application under subparagraph (1)(a).*"

46. This is a question of law, no evidence is admissible to resolve the issue. The Court must only consider particulars in the claim and not affidavit evidence.

47. The court must also consider the power to order the remedial amendment of the pleadings when considering the existence, or possible existence, upon amendment of a reasonable cause of action. (***GCR O.18, r.19(1)).***

48. The question for the court to consider is: Is it plain and obvious that the action is certain to fail and that the defect cannot be remedied by amendment, considering only the allegations in the proceedings?

49. To approach that from the other perspective: If the statement of claim discloses an alleged cause of action that has some chance of success, an application to strike out will fail. Such an approach was enunciated in ***Taylor v Royal Bank of Canada Trust***

***Company (Cayman) Limited, Royal Bank of Canada (Channel Islands) Limited and Royal Bank of Canada*[21]**, a Judgment of Acting Justice Hellman. The report of the case in the Cayman Islands Law Reports (CILR) states:

> *"(9) Grand Court Rules O.18, r.19(1) provided that the court could at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action on the ground that (a) it disclosed no reasonable cause of action; (b) it was scandalous, frivolous or vexatious; (c) it might prejudice, embarrass or delay the fair trial of the action; or (d) it was otherwise an abuse of the process of the court.*
>
> *The power to strike out a claim should only be exercised in plain and obvious cases, particularly where there were issues as to material primary facts and the inferences to be drawn from them. In such cases, a defendant must show that there was no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts."*

50. The correct approach and the need for caution in determining the question of a cause of action was considered in ***Electra Private Equity Partners v. KPMG Peat Marwick***[22].

> *"It is trite law that the power to strike out a claim under RSC Ord 18, r 19 or in the inherent jurisdiction of the court should only be exercised in 'plain and obvious' cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits."*

No reasonable cause of action - Not Justiciable (r. 19. (1)(a))

51. The Defendants invite the Court to consider whether any of the particularised complaints fall within the jurisdiction of this court. If they are not justiciable then

---

[21] [2018] 1 CILR 412 at page 417 *[EAB: Tab.5/p 120/para 9]*
[22] [2001] 1 BCLC 589, per Auld L.J. at page 613 (e) *[EAB;tab.7/p.191/paras e-g]*

they could not disclose a reasonable course of action[23] and would amount to an abuse of process[24].

52. The Defendants submit that this court is being invited to revisit identical issues adjudicated upon by the Grand Court and the CICA; in effect wishing to review previous decisions of the Grand Court and the CICA in relation to the Plaintiff's medical/dental negligence case.

53. In relation to reconsideration of the Grand Court decision of Kawaley J, relating to Plaintiff's medical/dental negligence case, the Defendants submit this court has no jurisdiction; Judicial Review does not lie against any decisions of the Grand Court. The Grand Court's status as an Superior Court of Record emanating from the ***Cayman Islands Constitution[25]:***

"Constitution and jurisdiction of the Grand Court

> *94. (1) There shall be a Grand Court for the Cayman Islands which shall be a superior Court of Record and shall have such jurisdiction and powers as may be conferred on it by this Constitution and any other law."*

54. The foundation of this submission is that the Grand Court is a superior court of record, and, in consequence, could not be subject to the control of any other court other than its Appellate court. Such a principle is enunciated in ***Suratt v AG of Trinidad and Tobago[26]*** in which Baroness Hale observed:

> *"49. The courts below do not appear to have attached much importance to the provision that the tribunal "shall be a superior court of record" (section 41(1)) although Archie JA does refer, at para 32, to "the unlimited potential scope of its jurisdiction". Jowitt's Dictionary of English Law, 2nd ed. (1977), vol. 1, by John Burke, provides, at p 493, a*

[23] per GCR O.18r.19(1)(a)
[24] per GCR O.18 r.19.(1)(d)
[25] *[EAB]; tab.3A/p.69*
[26] *[2008] 1 AC 655 [EAB; tab.4/p.91] (@[EHB; tab.4/p.110]*

helpful explanation of what is generally meant by a superior court of record: "Courts are of two principal classes-of record and not of record. A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has the authority to fine and imprison for contempt of its authority ... Courts are also divided into superior and inferior, superior courts being those which are not subject to the control of any other courts, except by way of appeal ..." Thus the decisions of the tribunal, as a superior court, would not be subject to judicial review, unlike the decisions of inferior courts of record such as the English county courts (although these days appeal is regarded as the more appropriate method of challenge)".

55. The Defendants further submit that it is an abuse of the court to dress up an impermissible judicial review as an ordinary action and invite the court to review or re-adjudicate decisions on grounds already determined.

56. The Plaintiff contends, in short, that the first decision was so flawed, as was the process and the derogation of the constitutional right to a fair trial, that it permits new or fresh causes. It is my view that the relief sought in para 2.1 and 2.2 of the Constitutional Petition in relation to the Constitutional Cause is ill-founded by virtue of s.94(1) of the Constitution, the Grand Court being a superior court of record. *Certiorari* and *Mandamus* lie only against the decision of inferior courts.

Scandalous, frivolous or vexatious (r. 19.(1)(b))

57. The Defendants submit that the allegations that Justices Mangatal and Kawaley failed to make a decision conscientiously according to the law, failed to display intellectual honesty in their reasoning, and acted in bad faith and in a biased manner are also scandalous, frivolous and vexatious, providing a further or alternative basis on which those grounds may be struck out.

58. It must of course be recognised that for a pleading to be "scandalous" it must allege conduct not relevant to an issue in the case and conduct which is not admissible to show the truth of an allegation pleaded. This is indeed the Defendants' contention in relation to the Plaintiff's claim.

59. There may be some overlap between frivolous and vexatious on the one hand, and that which amounts to an abuse of process of the court on the other. In the result of the Court's conclusion in relation to r.19(1)(a) & (e) is that it is otiose to make any final determination as to whether either one or both cause amounted "scandalous frivolous or vexatious"[27].

Abuse of the process of the Court (r. 19 (1)(e))

60. The Defendants submit that there are two heads upon which it would be an abuse of process to permit either case to continue.

61. It is proscribed to dress up an impermissible judicial review as an ordinary action and invite the Grand Court to review the validity of decisions on the grounds suggested by the Plaintiff. Such grounds can only be advanced by way of appeal.

62. It has already been decided by CICA that the complaints have no merit whatsoever and it is an abuse of process for these complaints to be recycled again in the Constitutional Petition and in the Personal Action.

Relevance of CICA 36 of 2019 Applications

63. The CICA, as set out earlier in this judgment, considered the Plaintiff's application for :-

[27] (r.19(1) (b)).

i. Leave to file a Constitutional Motion (in relation a claim that the Plaintiff's right to a fair trial had been breached in relation to the negligence action, and the decision and conduct of Kawaley J.)

ii. Application for Leave to Appeal out of Time (the Respondent being the Cayman Islands Health Services Authority (HSA) – this, seeking leave to appeal the decision of Kawaley J again in relation the medical/dental negligence case G0032 of 2014).

64. The Defendants submit that complaints within the instant causes are "a mere re-hash" of those considered by the CICA. That Appellate Court dismissed the both applications. In doing so it found the complaints and/or basis were without merit and, consequently, it would be an abuse of process for the complaints to be recycled, and a basis to strike-out both causes before the court (*The Personal and Constitutional actions*).

65. The Plaintiff, Mr. Simamba, takes issue with the status of the "Reasons" allied to each CICA Certificate of Order. At *[EHB; Tab 4/p.47]* the Plaintiff avers at para.16 of his Skeleton Argument:

> *"16. Reliance has been placed heavily on what Justice Beatson says is evidence that my arguments and complaints have already been dealt with in CICA 36 of 2019. This is wrong in law. The nature of the document is unclear. It has a Certificate of Order signed by the Registrar, which essentially just says that the application for leave is denied. It is then followed by an unsigned statement of Reasons. It is a separate document with a separate heading, and it is not signed either by the Registrar or the judge."* {*This Court's emphasis*}."

66. This Court does not find favour with the bald submission that the "Reasons" are an unsigned unattributed separate document, and as such should be ignored. Such is not borne out when the Reasons are given careful consideration. The "Certificate of the Order of the Court" page is the signed page, in relation to each[28]. Having set out what the court "considered" the document states:

> "*It is hereby ordered by Justice of Appeal Beatson that for the reasons stated below:*
>
> *The Application for leave to file a Constitutional Motion pursuant to section 26 of the Constitution is refused"* (in relation to the Constitutional Motion); and
>
> *The Application for Leave to Appeal out of time is refused"* (in relation to the Application for Leave to Appeal)."

67. Therefore on the face of the page certifying that leave is refused it specifically refers to and incorporates the Reasons – with these Reasons appearing on subsequent pages headed "Reasons". The conclusion that this forms a single document is further supported by the fact that the continuous and duplicated footnote on the certificate and each subsequent page reads:

> *"CICA (Civil) Appeal 36 of 2019 Simamba v AG et al Certificate of Order and Reasons for Decision"*

68. This footnote has the clear effect of conjoining each page to form a single signed and certified document.

69. In relation to the Constitutional Motion Order, the Plaintiff also submits that even if the entire document forms part of a single certified document, the "observations" by the court cannot be dispositive of any issues to be resolved in the instant matters. Such a submission is predicated on the basis that once the CICA declined jurisdiction

[28] *[EHB; tab30/p454] & [EHB; tab 32/page 484]*

to hear the matter, it was in effect *functus*, and the judge should not have to address the other grounds raised by the Applicant and the relief he seeks.

70. At para 18 of the Plaintiff's "Skelton Argument"[29] the Plaintiff submits that when Beatson JA dealt with other grounds and relief, it was:

> *"... highly improper"* and *"At worst they are an abuse of authority in that they have now prejudiced me and are being used to defend wrongdoing"* and went on further, stating *"The comments are themselves a denial of my right to a fair trial".*

71. This Court in the strongest terms rejects such assertions – there being absolutely no basis whatsoever that Beatson JA acted in any way improperly, abused his authority, or, used his authority to defend wrong doing or the denial of a fair trial.

72. It is clear to this Court that *that* submission does not properly examine the structure of the document or the importance of considering the Reason for the Decisions in <u>both</u> applications for leave - namely in relation to the appeal and the constitutional motion.

73. Within the Reasons refusing Leave to File a Constitution Motion, consideration is given to whether the court has jurisdiction and its reasons. This required an examination of all of the grounds of the application. Once a determination was made it is correct that at para.4[30] Beatson JA stated:

> *"In view of my conclusion that there is no jurisdiction in the Court of Appeal to assume the role of the Grand Court in an application under section 26 of the Constitution, it is not necessary to address the other grounds raised by the applicant and the relief he seeks but I do so briefly in the following paragraphs."*

[29] *[EHB; tab.4]*
[30] *[EHB; Tab.30 /p456]*

74. However, prior to that position, it is clear from the Reasons that the Appellate court had come to a settled conclusion on Grounds 10 and 14, and the allegation of bias of the whole Grand Court judiciary.

75. Whilst Beatson JA states that it was *"not necessary"* to address other grounds, *that* does not prevent a court setting out their findings. Indeed, such adds clarity and a degree of finality to the overall position. It therefore negates the necessity for another court to consider matters that have been considered in the round at the Appellate level.

76. This court is perfectly entitled to have regard to Beatson JA's statements and act upon them - if this court is satisfied that nothing has materially changed that would alter such findings.

77. The Plaintiff also refutes the ability of the CICA to come to conclusions as it did not have all material/evidence before it. The Plaintiff submits, in addition, that the actions of Mr. Justice Kawaley – in not providing sufficient reasoning for his decision, and being "party to falsifying or making misleading statements as to fact in his ruling" – prevented the Appellate court from being able to determine the applications fairly or make any "observations" on other grounds.

78. In reflecting upon this submission it is important to reflect upon the materials the CICA considered in relation to both applications before the CICA.

Constitutional Motion

79. The CICA stated:[31]

> *"And having considered the documents filed in this case including the Application filed on 9 November 2019 for leave to file a Constitutional Motion:*
>
> **i.** *The affidavit in support;*
> **ii.** *The Response to that Application dated 22 April 2020;*
> **iii.** *The Reply to that Response dated 27 April 2020;*
> **iv.** *The Further Submissions as to Jurisdiction dated 8 July 2020; and the*
> **v.** *Applicant's Reply dated 11 July 2020 to those Further Submissions;*
>
> *"And [for] the Application dated 19 June 2020 for leave to Appeal out of time from the Judgment and Order of the Hon. Justice Kawaley dated 17 June 2019 in Simamba v Cayman Islands Health Services Authority [the Court considered]: …*
>
> **1.** *the affidavit in support,*
> **2.** *the Respondent's Response dated 22 June 2020, and*
> **3.** *the Reply to that dated 23 June 2020."*

Appeal out of time from the Judgment and Order of the Hon. Justice Kawaley

80. The CICA stated[32]:

> *"The Court considered the documents filed in this case including the Application dated 19 June 2020 for leave to Appeal out of time from the Judgment and Order of the Hon. Justice Kawaley dated 17 June 2019:*
>
> **i.** *The affidavit in support;*
> **ii.** *the Respondent's Response dated 22 June 2020, and*
> **iii.** *the Reply to that dated 23 June 2020;*
>
> *And [for] the Application filed on 9 November 2019 for leave to file a Constitutional Motion against the Attorney General and the Governor of the Cayman Islands [the Court considered]:*
>
> **1.** *the Response to that Application dated 22 April 2020,*
> **2.** *the Reply to that Response dated 27 April 2020;*
> **3.** *the Further Submissions as to Jurisdiction dated 8 July 2020, and*
> **4.** *the Applicant's Reply dated 11 July 2020 to those Further Submissions."*

GRAND COURT CRIMINAL DIVISION CAYMAN ISLANDS

[31] *[EHB; Tab.30 /p.454]*
[32] *[EHB; Tab.32 /p.484]*

81. This confirms that the Appellate Court of course appreciated the fact and importance of, duplication of materials.

82. It is clear that the Appellate Court considered all materials in relation to both applications in coming to its conclusion on each, and upon both, of the applications before it.

83. This court is in no doubt that this is a correct conclusion. Indeed, specific reference is made to the materials within both the Reasons relating to the Constitutional Motion and the application for leave to appeal. Para 6 of the Reasons reads:

> *"The submission that the Judge should not have required additional medical evidence in the case against the HSA, but should have allowed the matter to proceed to directions was raised in the Notice of Appeal on 19 June 2020 and, for the reasons given in the Order on that Application is unarguable."*

84. This court is not to, nor indeed cannot, be used as a court of review to re-engage in decisions of the Appellate jurisdiction. Indeed such a course would be an abuse of process of this Court.

The Judicial Immunity Question

85. An issue has arisen in this case as to the extent of judicial immunity. Each Defendant submits that Mr. Justice Kawaley is immune from suit in respect of judicial "decision-making".

86. The Defendants rely upon the well-known case of ***Sirros v Moore and Others***[33], and in particular the words at pp.132-133 per Denning MR[34] to wit:

[33] *[1975] Q.B. 118*
[34] *[EAB; tab.17/p467/para.D]*

> *"Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden C.J. in Garnett v. Ferrand (1827) 6 B. & C. 611, 625: "This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be." Those words apply not only to judges of the superior courts, but to judges of all ranks, high or low. Lord Tenterden C.J. spoke them in relation to a coroner. They were reinforced in well-chosen language in relation to a county court judge by Kelly C.B. in Scott v. Stansfield (1868) L.R. 3 Exch. 220, 223; and to a colonial judge by Lord Esher M.R. in Anderson v. Gorrie [1895] 1 Q.B. 668, 671"*

87. It should be noted that the heading and sub-heading immediately before this quoted passage reads "*The liability of the judge" - "1. Acts within jurisdiction"*

88. The Plaintiff describes the defendants' submission as "*frivolous and vexatious*"[35].

89. The Court would couch the position as two tenable positions which the court may be invited to consider.

90. The Plaintiff's view is that the statutory position is clear that judicial immunity is not absolute but qualified. He submits that the proper position in the Cayman Islands is to be decided, not according to case law existing in countries where they do not

[35] *[EHB; tab.4/p43]*

have a similar statutory provision, but by the governing provision from the ***Grand Court Act (2015 Revision)***:

91. The Grand Court ***Act*** provides:

> *"29. (1) Neither the Chief Justice nor any Judge nor any person acting as Chief Justice or Judge under section 97 of the Constitution shall be liable to be sued in any civil court for any act done or ordered to be done by him-*
>
> *(a) when acting within his jurisdiction and in the discharge of his judicial functions; or*
>
> *(b) whether or not within the limits of his jurisdiction, provided that he, at the time and in good faith, believed himself to have the jurisdiction to do or order the act complained of, unless it is proved that he acted maliciously and without reasonable cause."*

92. The Plaintiff further submits that paragraph '(a)' confers absolute immunity but not '(b)'. The latter confers only qualified immunity, and therefore it is not within a judge's jurisdiction to tell a lie or blatantly refuse to consider matters placed before him and then falsify the record by misrepresenting what was before him. The Plaintiff stated that the Judge said his submissions were statements of "broad principle", which was *a blatant lie*.

93. The Court reminds itself in particular of the "Grounds" in relation to Mr. Justice Kawaley[36].

94. The Court also reminds itself of a Plaintiff's position and the relationship between the issues of jurisdiction, bad faith and immunity. For ease of reference I refer to the helpful "Speaking Notes" prepared for the oral hearing[37]. Helpful assistance was given in relation to the issue of immunity and in particular "bad faith" and its

[36][EHB; tab.7/p80-93]
[37] [EHB;tab.6p.67-68]

definition allied to the actions/inactions in his case. Within the Plaintiff's Skeleton Argument assistance on this issue is provided, with analogy drawn from s.12 of the ***Health Services Authority Act***, to support the proposition of qualified immunity as follows:[38].

> *"12. Neither the Authority, nor any director or employee of the Authority, nor any Committee member, shall be liable in damages for anything done or omitted in the discharge of their respective functions or* ***duties unless it is shown that the act or omission was in bad faith.*** *(Emphasis added)."*

95. The Court notes the "qualification test" is lower - it being merely to be shown to be in bad faith, rather than the added requirement of a rebuttable assumption of immunity unless it is proved to be done ***maliciously and without reasonable cause***[39]**.**

96. The legislative wording demands careful consideration.

97. The Plaintiff accepts paragraph (a) confers absolute immunity; this relating to judicial acts within jurisdiction. The *"unless',* which qualified words within paragraph (b) has no bearing upon paragraph (a). This construction gleaned from the plain word "or" rather than "and" at the conclusion of paragraph (a). The words in paragraph (b) are clear, being, *"limits of jurisdiction"* rather than *"jurisdiction"* as in paragraph (a).

98. In short, paragraph (a) relates to absolute immunity when the acts are within jurisdiction and paragraph (b) relates to acts without jurisdiction. Such a distinction is consistent with Lord Denning's analysis in the ***Sirros***[40] case. However it is of note that within *that* case, a distinction is drawn between inferior courts and superior

[38] [EHB; tab.4/p.44]
[39] s.29 Grand Court Act
[40] *[1975] Q.B. 118* - [EAB; tab.17/p/468]

courts of record. The Grand Court, clearly being a superior court of record would enjoy absolute immunity, on the basis of the authority.

99. Lord Denning and Ormrod L.J[41] did not find favour with the immunity distinction between inferior and superior courts of record.

100. The Defendants submit that in this case the acts complained of levelled at Kawaley J were, incontrovertibly, acts when he was acting within his jurisdiction and, therefore, fall squarely within paragraph (a) of the Cayman Legislation (unqualified immunity) .

101. In relation to the alleged failings, including lies: I do not find any basis to accept any such failings, including the alleged lies, on the part of Kawaley J. All the actions arose when the Judge was acting within his jurisdiction. It is my view that they do not take his acts *without* his jurisdiction. Any questioned acts within jurisdiction are, of course, susceptible to Appellate scrutiny.

102. The Court finds favour with the Defendants' submission and, therefore, Kawaley J has immunity from suit in his judicial decision making in this case as he was acting within his jurisdiction. There is absolutely no basis in the submission that he acted outside his jurisdiction. There is no basis that he acted "*maliciously and without reasonable cause*".

103. I reject the Plaintiff's submissions on this point.

104. I now address one point specifically, namely, the submission that it is very clear from the matters pointed out in relation to Kawaley J that there was malice or at least a

[41] [EAB; tab.17/p.454.para.C]

prima facie case calling for a full hearing on the issue of malice and reasonable cause.

105. The Plaintiff submits that a *prima facie* case has already been indirectly admitted by the response of the Attorney General and the Governor to his Constitutional Motion where they said:

> *"34. The Respondents further note with considerable concern the content of the Applicant's evidence submitted by way of an affidavit sworn on 10 November 2019. His evidence appears to raise significant allegations….."*[42]

106. This is not an indirect admission, it is simple a statement acknowledging the serious nature of the complaint but not the veracity, nor any question of immunity. I refer also to HE the Governor's letter in response[43] - which clarifies this position and makes it clear he was not making admission to the matters. It is incumbent on this Court to make such an independent assessment.

<u>The Constitutional Petition G 0093 of 2020</u>

107. Within the "Petition" for this cause[44] is set-out, with clarity, the decision and omissions in respect of which relief is sought. I purpose not to set it out in detail. In summary, it is alleged that there is a systematic breach, and threat of continued breach, by the Grand Court, of the applicant's (the Plaintiff's) right to a fair trial[45].

[42] *[EHB tab4/p.43]*
[43] *[EHB; tab.37/p.564]*
[44] *[EHB; tab7]*
[45] (s.7 of the ***Cayman Islands Constitution***)

"Fair trial" includes a determination by an independent and impartial court within a reasonable time.

108. It is averred that Madam Justice Mangatal, in failing to deliver a judgment, and then recusing herself after 3 years and 10 months, is a breach of s.7 and also amounts to a violation of the Judicial Code of Conduct[46]. It is further submitted that there is no justification in law for the delay nor recusal.

109. In relation to Kawaley J. a declaration is sought that he failed to act in a fair, independent and impartial manner.

110. In relation to His Excellency the Governor: The Plaintiff demands that he adjudicate upon a complaint as to the conduct of Mr. Justice Kawaley and/or refer the same to the Judicial & Legal Services Commission.

111. The petition/writ sets in detail the "Grounds"[47] - which the court have with care considered; which include:

a. Breaches of the Judicial Codes of Conduct of the Caribbean Court of Justice and of the Cayman Islands on the part of both Mangatal J and Kawaley J[48];

b. Bad faith on the part of both Justices[49];

c. Bias on the part of both Justices[50];

[46] (See [EHB; tab7 p.73, para(a) - (c)])
[47] *[EHB; tab7]*
[48] [EHB; tab7 paras 2.1(b) and 2.2(b) and (c) and Grounds 1 and 6]
[49] Grounds 2 and 10 [EHB; tab7]
[50] (Grounds 3 and 11 [EHB; tab7])

d. Refusal on the part of both Justices to follow certain lines of authority[51];

e. Failure on the part of both Justices, either individually or cumulatively, to decide the case within a reasonable time contrary to section 7 of the ***Bill of Rights***[52];

f. Refusal on the part of Kawaley J to reflect all relevant facts and deal properly with all issues raised by the Applicant[53];

g. Failure on the part of Kawaley J to give a reasoned judgment in accordance with the law[54];

h. The decision of Kawaley J is *Wednesbury* unreasonable[55];

i. Breach of the Applicant's legitimate expectation[56]; and

j. Failure on the part of His Excellency the Governor to properly determine a complaint made by the Applicant in relation to the conduct of Kawaley J or, in the alternative, a failure to give sufficient reasons for the manner of disposal of that complaint[57].

112. The Court has particular regard to the cumulative effects of the actions particularised within the grounds and the impact upon the fairness of the trial/proceedings. It has scrutinised with care detailed particulars within each Ground and the apposite authorities referenced.

[51] (Grounds 4, 14 and 16 [[EHB; tab7]])
[52] (Grounds 5, 15 and 24 [EHB; tab7])
[53] (Grounds 17 and 18 [EHB; tab7])
[54] (Ground 20 [EHB; tab7])
[55] (Ground 12)
[56] paras 2.1(b)
[57] (Ground 23)

The Court's Determinations in relation to the Grounds

113. Grounds 7, 8, 12, 14 and 16 – *failure to give reasons and refusal to follow authorities on part of Kawaley J*

a. It is contended that Kawaley J failed to give meaningful reasons and that this prejudiced the Plaintiff's right of appeal (Grounds 7 and 8); that his decision was *Wednesbury* unreasonable (Ground 12); or that he 'blatantly and persistently refused to follow clear authorities (Grounds 14 and 16).

b. The heart of these complaints lies in the approach to and the reasons, or paucity of reasons of Kawaley J in relation to the immunity issue – which, the Plaintiff submits, is illustrated by his failure to explicitly address 52 cases, and 7 arguments, which had been drawn to the Judge's attention by the Plaintiff, in relation to the immunity question.

c. It is submitted further that authorities in support of the Plaintiff's position were wilfully ignored.

d. In this regard the Court pauses to reflect upon the fact that Kawaley J explicitly did not reach a final determination on this issue, but gave liberty for the issue to be addressed later. Also that the correct course of action would be to appeal the questioned decision. The Plaintiff failed to follow this correct course, although did attempt to seek to obtain leave out of time, which was refused.

e. The relevance of this is that it is clear to this Court that the Plaintiff in the instant causes is attempting to re-litigate matters founded on identical bases to those which were before the CICA within the application to seek leave to appeal and in relation to the Constitutional Motion.

f. Such can be demonstrated by a comparison of Ground 16 in the instant case with what was Ground 10 of the CICA Leave to file a Constitutional Motion; both Grounds being in identical terms.

i. Ground 16: *In making the ruling on the need or otherwise for medical and dental issue, Justice Kawaley has deliberately ignored authorities. This is clear from my marked-up copy of his draft ruling, Exhibit BHS 4 to my 1st Affidavit.*

ii. Ground 10: *In making the ruling on the need or otherwise for medical and dental issue, Justice Kawaley has deliberately ignored authorities. This is clear from my marked-up copy of his draft ruling, Exhibit BHS 4 to my 1st Affidavit. [EHB;tab.29 p.449]* - {It is noted that within this document there are two paragraphs numbered "10"and the Reason of Beatson JA refers to Ground 10 as the "reasonable time" ground; see [EHB; tab30/p457]}

g. The Court is in no doubt that that there is no realistic prospect of the Plaintiff establishing a cause of action on these grounds.

h. Such was also the finding of the CICA - by the Order of Justice of Appeal Beatson of 5th August 2020 refusing the Plaintiff leave to have his Constitutional Motion.

i. In refusing the Plaintiff leave to appeal Beatson JA again found the complaint that Kawaley J had failed to deal with the 52 cases cited, and the 7 issues raised on the immunity issue, to be 'unarguable', as were the complaints that Kawaley J had failed to give meaningful reasons, that this prejudiced the Applicant's right

of appeal, that his decision was *Wednesbury* unreasonable and that Kawaley J 'blatantly and persistently refused to follow clear authorities.'

j. Beatson JA[58] reasoned:

> *"Grounds 2, 3, 7 & 9, that Kawaley J failed to give meaningful reasons, that this prejudiced the Applicant's right of appeal, was Wednesbury unreasonable, and that he blatantly and persistently refused to follow clear authorities, are unarguable. The substance of the complaint appears to be that he did not deal with the 52 cases and 7 Issues raised by the Applicant. It is, however, not necessary for a judgment to identify and explain each and every factor which weighed with the judge or to provide multiple citations for a single proposition, particularly on a point, such as the immunity point, on which no final decision was reached. "It Is not necessary to address every single argument let alone provide a detailed answer to every point made…" Zuckerman, Civil Procedure: Principles and Practice, 3rd ed. § 3-202. What need to be identified are the issues the resolution of which were vital to the judge's conclusion and the manner they were resolved: English v Emery Richmond [2002] EWCA Civ. 605 at [19]. The reasons in the judgment "enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal Important controversial issues'" and thus fully meet the requirements of the classic test in South Bucks DC v Porter (No. 2) [2004] UKHL33 at [36]".*

k. These Grounds were also addressed in the CICA Application for Leave to Appeal[59]. That court identified, what is beyond dispute that is, that Kawaley J expressly refrained from making any adverse finding on the immunity issue. Then within the Reasons of Beatson AJ he found that:

> *"Failure to deal with the 52 cases cited and the 7 Issues raised on the Immunity issue (grounds 1 & 2): This is unarguable:*
>
> *(a) Since (see 7 above) no final decision was reached on the immunity issue there was no need to deal with the cases identified in "BHS-2" and listed in "BHS-3" or the unaddressed issues referred to In "BHS-2".*

[58] [EHB; tab.30/p455]
[59] [EHB; ta.32, p.487]

l. It is clear that Kawaley J's judgment on the application for strike-out/summary judgment in the medical negligence claim runs to some 29 pages[60]. It is abundantly clear from that decision why he concluded that the Defendant had succeeded in establishing that it was entitled to summary judgment and/or that the Plaintiff's claim was liable to be struck out, that is to say because:

> *"… in the absence of expert evidence from an Urologist in his Medical Case or a Dentist in respect of his Dental Case, his claim has no realistic prospect of success and/or is bound to fail;"*[61].

m. Beatson JA dismissed the complaint on its merits[62].

n. The Plaintiff submitted and continues that there was *prima facie* expert medical evidence. Kawaley J addressed this point[63]:

> *"30. The Plaintiff has filed an Expert Report from Forensics Pharmacologists Dr Stephanie Sharp and Dr Paul Skett of the Glasgow Expert Witness Service Ltd. They opined that Terazosin, the drug prescribed to the Plaintiff, "is known to commonly cause erectile dysfunction in the male.*
> *However they very properly admit that it is outside their expertise to offer an opinion on;*
> *(a) the duty of the Urologist prescribing the drug;*
> *(b) whether the majority of urologists would mention side effects;*
> (c) *the UK practice in relation to prescribing physicians warning of side-effects*."

o. This material presented by the Plaintiff being countermanded by the Defendants' expert evidence[64].

p. Once such a purported expert adopts the position that they cannot opine, it being outside their expertise, they fall away as capable of providing expert evidence.

---

[60] [HW-8].
[61] [HW-8, para 85(a)]
[62] [EHB; Tab 32]
[63] *[EHB; tab.27/p.409/para.30]*
[64] *[EHB; tab.27/p.409/para.31].*

To the extent that it is the Plaintiff's argument that Kawaley J failed to adequately explain why it was necessary for him to adduce expert medical and dental evidence for his claim to proceed then, again, that is manifestly without merit. Relevant authorities were cited in support of the need for expert evidence to opine that the professional standards of care were not met and that the injuries complained of were caused by the alleged breach of the duty of care[65].

q. I reject the Plaintiff's assertion that Kawaley J's judgment failed to give meaningful reasons and that this prejudiced the Plaintiff's right of appeal[66].

r. The Judgment was clear and concise and explains the positions of the parties and the issues. The sole dispositive issue, being the necessity for expert evidence, was identified and reasons explained. There is no question that the Court adopted the correct approach in law as to the general principles governing applications to strike out. Kawaley J's judgment, on any view, cannot be described as unreasonable in the *Wednesbury* sense, that is to say a decision "*that no reasonable body could have come to.*"[67].

s. Again it must be acknowledged that, not least because the immunity issue which centres the Plaintiff's complaints was not decided against him, he was afforded a further opportunity to file the necessary expert evidence.

t. It is unarguable, and hence does not form a basis to disclose a reasonable cause of action.

[65] [*EHB*;*Tab 27*/HW-8, paras 43 – 48]
[66] (Grounds 7 and 8) *[EHB; Tab 7/p.85]*
[67] *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1.K.B. 223,* per Lord Greene M.R.at page 230 *[EAB; tab11/p.288]*

114. ***Grounds 17 and 18 – failure to reflect all relevant facts and abuse of judicial authority on the part of Kawaley J.***

a. The Plaintiff's basis for this ground is that Kawaley J failed in his judgment to reflect relevant "facts", even when the same were identified in the Plaintiff's comments and proposed track changes on the draft judgment. The Plaintiff therefore claims that, in the result, the judge abused his judicial authority.

b. Again these were properly matters to be dealt with by way of appeal. The Plaintiff applied for leave to appeal (out of time) on this ground and it has been dismissed by Beatson JA as "utterly unarguable"[68]:

> *"Failure to give a fair summary of the facts and arguments (ground 3): This is utterly unarguable: (a) Each section of the judgment introduces the issue and identifies the positions of the parties. (b) I have considered the criticisms identified principally by the Applicant's comments on a tracked copy of the draft judgment. For the reason given at 8(b) above and in view of the reasons given at 5(a) - (c) and 7 above, they are misplaced."*

c. This Court concurs. These grounds are unarguable, and hence do not form a basis of a reasonable cause of action.

115. **Ground 4 – refusal to follow clear authorities on the part of Mangatal J**

a. By order dated 19th July 2017[69], Mangatal J determined that the Plaintiff's medical negligence claim should be stayed pending a decision of the Court of Appeal in ***Thompson***[70]. The Plaintiff contends that this refusal to engage with the Plaintiff's arguments as to why his case should proceed, notwithstanding the pending appeal of Williams J's decision in ***Thompson***, provides a basis for a cause of appeal.

[68] *[EHB;tab32/p. 488/para.9]*
[69] *[EHB;tab.22/p.204]*
[70] Cause G 0190/2013; (2016) 1 CILR 93

b. Again, there is no realistic prospect of the Plaintiff establishing a cause of action on this basis. Careful consideration of the judgment reflects a considered position being arrived at, cognisant of the Plaintiff's position. That is, in all the circumstances, the appropriate course of action was to await the Court of Appeal's determination.

c. The abstract from that ruling providing evidence as to the basis of Mangatal J's Ruling is as follows[71]:

> *"17. It was the Plaintiffs position that I should proceed with the Defendant's application before the outcome of the appeal in Thompson. Further, that the reason for awaiting the decisions in Thompson 2 was so that the parties could now argue matters they had not argued at the initial hearing, and also so that they could address matters not dealt with in Thompson 1 and Thompson 2. It was also the Plaintiffs submission that his case is different from the Thompson 2 case, because the question of whether the amending section 12 of the Health Services (Amendment) Law 2016 would apply to pending cases where no ruling on the issue of immunity had been made (such as this one) was not settled, since in Thompson 1 the ruling had already been made……*
>
> *18. I can fully understand the Plaintiff's eagerness to have his matter determined, and his frustration with awaiting further decisions in Thompson 1 and Thompson 2. However, in all of the circumstances it does seem to me that it would not be the best use of the Grand Court's scarce resources, nor would it be cost-effective, for me to press on with determining the Defendant's application to strike out in advance of the determination of appeals in Thompson.*
>
> *19 It seems clear that any such hearing would take at least a week, and I would have to be considering in detail the Judgments of a Judge of co-ordinate jurisdiction whilst those Judgments will likely be under consideration by the Court of Appeal in due course, in relation to extremely important areas of the Law. The Court of Appeal's determinations will be authoritative and binding on the Grand Court and it plainly would be inappropriate for me to press on to a hearing in advance of the Court of Appeal's determination.*

[71] [EHB;tab.22/p208-]

> *20 Further, given my present caseload, it is very unlikely that such an extensive hearing could be fixed before the end of the year.*
>
> *21 In all of the circumstances, I am of the view that the most just way of dealing with this case is to stay the proceedings, pending the determination of any appeals in the Court of Appeal in the Thompson case."*

116. If the Plaintiff believed there was a proper basis to question this decision then the course would have been to seek leave to appeal the decision[72].

117. Once again this court is driven to the conclusion that this ground would be an abuse of process to allow it to found a course of action.

Grounds 5, 15, 20 and 24 – failure to decide the case within a reasonable time, or at all

118. The Plaintiff's position is that there was culpable failure to decide the case within a reasonable time pursuant to s. 7 of the ***Constitution***, and that the overarching position is that the deliberate delay occasioned by the both Mangatal J and Kawaley J frustrated justice and is breach of the Constitution.

119. The plaintiff cited The Privy Council's ruling in the case of ***Oliveira v Attorney General of Antigua and Barbuda***[73] as being supportive of Plaintiff's position – in that, one year was too long for immigration authorities to take to decide a matter. The court also said that this delay entitles one to damages.

120. I am cognisant of the fact that Justice Mangatal did not decide the Plaintiff's matter for 2 years and 10 months and then at that point recused herself.

[72] (Pursuant ***Court of Appeal Act (2011 Revision)*** s.6(f) and CoA r.12(6)(l) being an interlocutory)
[73] [2016] UKPC 24 Privy Council Appeal No 0022 of 2015

121. I am invited by the Plaintiff to consider The Judicial Code of Conduct for the Cayman Islands Judiciary, issued by the Judicial and Legal Services Commission (2 March, 2012), which states that:

> *"[36] A Judge should strive to deliver reserved judgments as soon as possible and in any event within such period as may from time to time be prescribed by the Chief Justice or the President of the Court of Appeal, as the case may be. If the judge becomes aware that his or her Judicial commitments (or other circumstances) may prevent him or her from delivering Judgment within that time, he should alert the Chief Justice to that possibility."*

122. Pursuant to this provision, the Learned Chief Justice issued Practice Direction No. 1 of 2012, which states that reserved judgments must be delivered within 2 to 3 months[74].

123. The Defendants submit that there is no realistic prospect of the Plaintiff establishing a cause of action based on the length of time to determine the matter on the part of either Mangatal J or Kawaley J.

124. In addition, these grounds were fully considered by the CICA within the two applications. Beatson JA found then as "unarguable".

125. Within the CICA Order on the application for Leave to Appeal the following is stated[75]:

> *"11. Failure to decide case within a reasonable time: This is also not a ground raised in the Notice of Appeal but a matter the Applicant has chosen to raise in his application to file a Constitutional Motion: see ground 10. However, to the extent that it is relevant to the grounds of appeal:*
>
> *a) it is utterly unarguable that the Judge's Judgment and Order dated 17 June 2019 was as the Applicant submitted in grounds 10 and 14 of his application to file a Constitutional Motion "in*

[74] *[EAB;tab.22]*
[75] at para 11. *[EHB; tab.32/p.488]*

law no decision at all" and "a refusal to decide the matter according to law"; and

(b) In the period between March 2016 and October 2018 when Mangatal J recused herself after the Applicant's complaint about her to the Judicial and Legal Services Commission and the Governor, the Applicant did not appeal against any of her decisions to adjourn the matter pending a decision in the appeal from Williams J's decision in Thompson v HSA."

126. Reference is made to the Grounds 10 and 14 of the Plaintiff's application to file a Constitutional Motion. This was dealt with at para.7 of that Order[76].

"7. Grounds 10 and 14, that Kawaley J and before him Mangatal J failed to decide the case within a reasonable time, are also unarguable. In relation to Mangatal J, it is regrettable that almost three years had passed since the first hearing before her in December 2015, but in view of the centrality of the "immunity issue", Williams J's decision in Thompson v HSA in February 2016, and the pending appeal from that decision, it is not surprising that account was taken of the progress of that case. Moreover, in the period between March 2016 and October 2018 when Mangatal J recused herself after the Applicant's complaint about her to the Judicial and Legal Services Commission and the Governor, the Applicant did not appeal against any of her decisions to adjourn the matter pending a decision in the appeal. …"

127. The Plaintiff should, if aggrieved by Mangatal J's interlocutory decisions, have applied for leave to appeal them but chose not to do so.

128. Reflecting upon this position, s.7 of the ***Bill of Rights*** requires that proceedings determining a person's civil rights are to be disposed of in a 'reasonable time'. Reasonableness has to be assessed according to the particular circumstances of the case, and features such as the complexity of the case, and indeed all the features and chronology of the case and others that may have a bearing, are all relevant to what is reasonable.

[76] *[EHB;tab.30/p,457]*

129. In this context I have considered ***Frydlender v. France***[77] where it states:

> *"42. The applicant submitted that the length of the proceedings had been excessive. The Government left assessment of this point to the Court's discretion.*
>
> *43. The Court notes that the length of the proceedings complained of, which began on 28 February 1986 with the first application to the Paris Administrative Court and ended on 26 October 1995 when the Conseil d'Etat's judgment was served on the applicant, was nearly nine years and eight months.*
>
> *It reiterates that the "reasonableness" of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among other authorities, Comingersoll SA v Portugal [GC], no. 35382/97, para. 19, ECHR 2000)."*

130. The particular circumstances of this case that the Defendants invite the Court to consider are:

> *"At the time that the Plaintiff's medical negligence claim came before Justice Mangatal, the law as to the Health Services Authority's immunity from suit was in a state of flux. It was already the subject of proceedings before the Grand Court and, subsequently, the Court of Appeal in* ***Thompson***[78]*. As a starting point, it is clear that lack of clarity and foreseeability in domestic law may contribute decisively to extending the length of proceedings: Ref:* ***Lupeni Greek Catholic Parish and Others v. Romania*** *[2016] ECHR 76943/11, [150]*."

131. The approach and reasons behind the effluxion of time come nowhere near providing a foundation for basis of unreasonable delay; this either being when considering individual delays or indeed the life of this element of the proceedings.

[77] Appeal No.-30979/96 [2000] ECHR 353, *[EAB; tab.12/p303]* para42-43]
[78] Cause G 0190/2013; (2016) 1 CILR 93

132. The Court also finds that it is also unarguable that Kawaley J's judgment (17th June 2019) was *"no decision at all"* and *"a refusal of the Grand Court to decide the matter according to the law"* (Grounds 15 and 20).

133. Within the CICA decision on the application for Leave to Appeal[79] the CICA records this conclusion:

> *"11. Failure to decide case within a reasonable time: This is also not a ground raised in the Notice of Appeal but a matter the Applicant has chosen to raise in his application to file a Constitutional Motion: see ground 10. However, to the extent that it is relevant to the grounds of appeal:*
>
> *(a) It is utterly unarguable that the Judge's Judgment and Order dated 17 June 2019 was as the Applicant submitted in grounds 10 and 14 of his application to file a Constitutional Motion* ***"in law no decision at all"*** *and* ***"a refusal to decide the matter according to law".***

134. I have carefully reflected further upon in particular Ground 24:

> "*Even if for the sake of argument the individual actions by the two judges are held not to have been a violation of section 7, cumulatively they amounted to a violation in that, after waiting for a total of 3 years 6 months for a ruling, when it came it was not a reasoned judgement taking into account all the cases and arguments advanced and failing to allow the applicant a meaningful opportunity to be heard.*"

135. Taking account of the cumulative effect of this overarching ground, there is simply not the basis to sustain this cause.

<u>Grounds 1, 2, 6, 10 and 22 – breach of Judicial Codes and bad faith on the part of both Justices</u>

136. The Plaintiff avers:

[79] at para 11. *[EHB; tab.32/p.488]*

a. Ground 1: Breach of judicial codes: Hon Justice Mangatal breached both the Judicial Code of Conduct (for Cayman) and the Judicial Code of Conduct (for the CCJ) in the following respects:

b. Ground 1.1: Failure to make a decision conscientiously according to law

c. Ground 1.2: Failed to display intellectual honesty

d. Ground 1.3: Failure to give me a hearing (by refusing to render a ruling)

e. Ground 2: Bad faith: Justice Mangatal's refusal to grant a supplementary hearing after the ***Thompson*** case was decided in February 2016.

f. Ground 6.1: Failure to make a decision conscientiously according to law. Justice Kawaley does not mention a single one of the 52 cases cited aimed at demonstrating that the application of the literal rule In ***Thompson v Cayman Islands Health Services Authority*** (2016) 1 CILR 93 was misconceived in law.

g. Ground 6.2: Failed to display intellectual honesty. Not addressing the 52 cases cited in relation to the immunity issue and the 7 issues raised.

h. Ground 6.3: Failure to give me a meaningful hearing. By unilaterally cancelling the 2-day hearing, even after the defendant had expressed a lack of objection to a video link hearing, and then hearing the matter *ex parte* for 30 minutes, he failed to act in a manner that a fair minded and informed person would consider to be beyond reproach.

i. Ground 10: Bad faith: The reasons set out above (failure to even acknowledge even one of the 52 cases cited let alone consider them in his reasoning) show that Justice Kawaley has acted in bad faith.

j. Ground 22: It is wrong in law to deliberately frustrate justice and then challenge the litigant to appeal the matter if they are dissatisfied. The approach of the Chief Justice and Justice Kawaley, to suggest that my only remedy is to appeal the matter is contrary to principle in that an appeal procedure assumes that the court below was acting in good faith.

137. Those matters upon which the Plaintiff identifies a breach - both the Judicial Code of Conduct (for Cayman) and the Judicial Code of Conduct (for the CCJ) - are without the jurisdiction of this Court. In accordance with s.106(1B)(a) of the ***Cayman Islands Constitution Order 2009***, the exercise of disciplinary control over judges of the Grand Court vests in the Chief Justice. The Court therefore has no jurisdiction; this emanating from ***The Cayman Islands Constitution (Amendment) Order 2016*** *[EAB;3b/p88]* which provides amendment of section 106 of the Constitution: -

"(3) Section 106 of the Constitution is amended by,—

(a) ...

(b) after subsection (1), inserting the following—

"(1A) ....

(1B) Power to exercise disciplinary control over any person holding or acting in the office of—

(a) magistrate or judge of the Grand Court, other than the Chief Justice, shall vest in the Chief Justice; and

(b) ….”

141. The breaches maybe demonstrative of unfairness however I do not find any of the alleged breaches are in any shape or form sustainable and arguable. This aside from the judicial immunity as identified earlier in this judgment.

142. *Ground 6.3*: Failure to give me a meaningful hearing was considered by the CICA at para 6 of the Order on the Application to File a Constitutional Motion[80]*;*

“In relation to the submission that the Judge did not give the Applicant a meaningful hearing, while not every judge would have decided to proceed by written submissions rather than to adjourn the hearing listed for 6 May, for the following reasons, 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:

(a) The Applicant stated (his tracked suggested addition to [5] of the draft judgment) that because, after his indication to the court office in March 2019 that if he was not able to travel for the 6 May hearing he would request a hearing by video link, the HSA's representatives stated they would not object, he "assumed that the hearing would be by video link".

(b) It thus appears, as stated in the Judgment at [5], that the application for him to attend the hearing by video link was first made very shortly before the hearing and only after the court office sent an email to the parties about the hearing: see para 10(19) of Applicant's Reply to Respondents' Response to Constitutional Motion. At that stage, it was not practicable to make the administrative arrangements for a videoconference hearing: Judgment [6].

(c) The circumstances taken into account by the judge and the reasons for his decision were that the application turned primarily on points of law, detailed written arguments had been submitted on both sides, and the Applicant wished the case to proceed rather than being adjourned: Judgment [6] and [7]. The Applicant stated that his submissions amounted to at least 75 pages and those of the HSA to about 45 pages: para. 67 of Affidavit in support of the Constitutional Motion.

(d) The oral submissions by those representing the HSA on 6 May took approximately half an hour and the time allowed for such submissions by the Applicant on 3 June was approximately the same.”

[80] *[EHB;tab.30/p.456]*

143. Ground 10: Bad faith: Whether the reasons set out above (*failure to even acknowledge even one of the 52 cases cited let alone consider them in his reasoning*) show that Justice Kawaley has acted in bad faith, has been already determined as unarguable; there being no basis for this bald assertion.

144. Grounds 3 and 11 – bias on the part of both Justices: Allegations of bias have been considered in relation to breaches of Judicial Codes - and have, in that context been addressed.

145. As to them standing alone; the Plaintiff submits that:

> "*Ground 3: Bias: In continuing to cave to the demands of the defendant in the Simamba Case to keep postponing the matter without giving due consideration of the countervailing arguments, such as that that the Health Services Authority (Amendment) Law 2016 was now relevant to my case, and, sometimes, in open court agreeing with the submissions of the defendant's attorney even before I addressed the court on an issue, she displayed bias, which formed part of my complaint to the JLSC.*
>
> *And;*
>
> *Ground 11: Bias: The facts indicated in my 1st affidavit show bias. Further and In the alternative, there is at the very least, perceived bias, making the decision in relation to the Applicant liable to judicial review as per the principles in, among many cases, R v Sussex Justice ex parte McCarthy [19241 I KB 259 - [EAB;tab18.p487]; and Metropolitan Properties Co Ltd v Lannon [1969] I KB 577."*

146. Once again this court has no jurisdiction to determine either Ground in or of itself; the Grand Court being a Superior Court of Record. ***R v Sussex Justice ex parte McCarthy***[81] is not supportive of the proposition that the Grand Court can judicially review, in effect, itself.

147. These complaints ought to have been advanced, if at all, by way of appeal. There is no claim upon which the Grand Court can adjudicate.

148. Contrary to the Plaintiff's suggestion, it is not possible to judicially review a decision of a Grand Court judge and, considering the acts complained of, it is unarguable that because Mangatal J indicated that she agreed with the submissions of the HSA's attorney, even before hearing submissions, there was apparent bias in her decision making. In considering the question of bias, the Court reminds itself of the applicable principles, the question being whether the fair-minded and informed observer having considered the facts would conclude that there is a real possibility of bias[82].

149. Similarly, in relation to Kawaley J the Plaintiff has simply failed to adduce any basis to support the view that the fair-minded observer would arrive at the conclusion that there was a real possibility of bias in his decision making.

150. The CICA considered the question of bias when dealing with the Constitutional Motion Application.

151. Such was the attack upon the bias of the judiciary by the Applicant (The Plaintiff) that it extended to all Grand Court Judges and Acting Grand Court Judges - this of

GRAND COURT CRIMINAL DIVISION CAYMAN ISLANDS

[81] [1924] 1 KB 259 [A/Tab 18]
[82] *Per Porter v Magill [2001] UKHL 67 at [103]*

course including and requiring that the Court consider Judges, including Kawaley J. and Mangatal J., within the reasons for dismissing the application[83]:

> "3. *At para 15 of his Reply to the Respondents' Response dated 27 April 2020 the Applicant states that there is no point in him "going to the Grand Court again because there was no likelihood that [he] would get a fair trial". This in substance is a submission that all the judges of the Grand Court are persons of whom the fair minded and informed observer having considered the facts would conclude that there is a real possibility of bias and who are therefore disqualified: see Porter v Magill [2001] UKHL 67 at [103]. I have carefully considered all that the Applicant has said in his various documents, but have concluded that it is not arguably the position in this case that all six judges of the Grand Court and all Acting Judges are persons who would not satisfy the test in Porter v Magill."*

152. This Court having considered all material is driven to the same conclusion as Beatson JA.

153. To the extent that the Plaintiff seeks damages in respect of alleged bias on the part of either Mangatal J or Kawaley J, again, both are immune from suit.

154. *Ground 13 – denial of the right to a fair trial pursuant to section 7 of the Bill of Rights*: The Plaintiff avers in Ground 13:

> *"Denial of the right to a fair trial under section 7 of the Constitution: In addition to what has been outlined above, Justice Kawaley has denied me the right to a trial, and he has done so in the following ways:*
>
> **(a)** *He denied me a right to an oral hearing, I only had about 30 minutes to address him in this matter. A matter raising similar Issues of immunity was argued over 8 days in the Grand Court and was*

[83] *[EHB;tab 30/p455/para3]*

set down for 4 days in the Court of Appeal though it was not ultimately heard, the matter having been settled.

(b) *My matter is well-pleaded and no part of my pleading was ever challenged."*

155. The Plaintiff then sets out the basis that, in summary, had medical evidence been in place to cover the principal part of the suit, it would have been fair to, if any additional evidence were necessary, obtain it as part of the General Directions.

156. The Plaintiff submits further that the judge refused to allow this and insisted that he will dismiss the matter if additional evidence is not provided. The judge also glossed over aspects of the Plaintiff's case. The Plaintiff maintains that he provided a level of *prima facie* evidence, at the very least, and therefore he should have allowed the matter to proceed to directions.

157. The Defendants submit that the Plaintiff has no realistic prospect of establishing a cause of action on the basis that Kawaley J. did not afford him a meaningful hearing. Again, such a complaint ought to have been advanced if at all by way of appeal. There is no claim upon which the Grand Court can adjudicate.

158. In considering this Ground, complaint is made that the Plaintiff was denied a right to an oral hearing, he having only had about 30 minutes to address the Judge in this matter. He allies this time period to the fact that a similar immunity issue was argued over 8 days in the Grand Court and was set down for 4 days in the Court of Appeal. Again this comparison is misconceived as the Court did not make a final adjudication on the immunity question.

159. As for the question as to the requirement for expert evidence, which was dispositive of the application: The Plaintiff was afforded slightly more time than the Defendant and, as the Plaintiff accepts, his position was well pleaded.

160. The Plaintiff also complains that the Court refused to accept his "*prima facie*" medical evidence and the submission surrounding their sufficiency at the stage of the application.

161. This same ground was ventilated before the CICA during the Plaintiff's Application for leave to Appeal out of time[84]. Beatson JA stated:

> *"5. The grounds relating to expert evidence (grounds 5, 7 & 8): There is no real prospect of successfully maintaining that the Judge erred in stating at [43]ff that the Applicant's case is bound to fail if he is unable to adduce expert evidence from an urologist and a dental surgeon and proceeds on the basis of the existing reports from forensic pathologists.*
>
> *(a) In a medical negligence claim where the critical issues are as to the standards expected, whether the injuries were caused by the alleged negligence, and as to the risks of which the patient should have been warned, the expert evidence would be expected to come from a clinician in the same profession: as well as the passage from Bolam v Friern Hospital [1957] 1 WLR 582, 586 cited by the Judge at [47] (See Sansom v Metcalfe Hambleton [1998] PNLR 542, 549 (CA)).*
>
> *(b) The forensic pathologists stated that it was outside their expertise to offer an opinion on (i) the duty of a urologist prescribing Terazosin, the drug prescribed to the Applicant, (ii) whether the majority of urologists would mention the side effects, or (iii) UK practice concerning prescribing physicians warning of side effects: Judgment [30]*
>
> *(c) It is utterly unarguable that the way the Judge dealt with the immunity issue (as to which see 7 below) meant that he had no jurisdiction to require the production of additional evidence (ground 7) or that, if he had jurisdiction, it was lost after the decision of the Court of Appeal in Deputy Registrar of the Cayman Islands v Day Bush on 7 November2019 (ground 8)."*

[84] *[EHB; tab32.p486.para5]*

162. Section 7 of the ***Bill of Rights*** does not require that every interlocutory application is dealt with by way of an oral hearing; both parties had submitted extensive written argument.

163. Again, such a complaint ought to have been advanced, if at all, by way of appeal. There is no claim upon which this Court can adjudicate.

164. *Ground 23: Failure on the part of the 2nd Defendant (His Excellency the Governor of the Cayman Islands) to make a decision or to give reasons*: The Plaintiff's position is that The 2nd Defendant has failed to make a decision and/or give reasons for the decision not to constitute a tribunal to investigate Kawaley J. Under s.19(2), reasons having been requested, the 2nd Respondent has failed or neglected to give reasons to comply with the level of detail enunciated in the House of Lords decision of ***R v Secretary of State for the Home Department ex parte Doody***[85] or to give reasons that are adequate according to the principle in that authority.

165. This Court accepts in broad terms the rationale of ***Doody*** as set out in this ground. Although the level of detail, as suggested by the Plaintiff, is dependent upon the power being exercised in making administrative decisions, Lord Mustill made it clear that the law did not then recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may, in appropriate circumstances, be implied. Perhaps the guarded approach of that court were based upon concerns related to disclosing material pertinent to adjudicating upon life sentences that may be sensitive, and not in the public interest to disclose.

[85] (1994) 1 AC 531

166. In the instant case, written reasons were given for H.E. the Governor's refusal to refer the matter of Kawaley J's conduct to the Judicial and Legal Services Commission[86].

167. In any event, the proper avenue for challenging H.E. the Governor's decision was by way of judicial review for which the Plaintiff is now out of time.

168. Once again the CICA considered this ground when considering the application for leave to file a Constitutional Motion. Beatson JA in refusing the application reasoned that[87]:

> *"In relation to ground 17, the reason for the Second Respondent's decision is contained in his letter to the Applicant dated 23 October 2019. Although the letter is succinct, it is clear from the reason given why the Second Respondent decided the complaint in the way that he did within the test in South Bucks DC v Porter (No. 2) on which see para. 5 above. In any event, a challenge to that decision should be made by way of an application for judicial review to the Grand Court and not by a Constitutional Motion to the Court of Appeal."*

The Personal Action G 0161 of 2020

169. This action is, for all intents and purposes a reiteration of the grounds in the Constitutional Action (G 93 of 2020). There is a greater focus on the infringement to the right to a fair trial.

170. In summary the Plaintiff's Grounds can be summarised as follows:

Summary of duties breached by the First Defendant affecting the right to a fair trial:

[86] *[EHB; tab.37/p.563]*
[87] *[EHB;tab.30/p.457/para.8]*

a. ***Breach of constitutional duty***:

i. The First Defendant, being a public official, had the duty under s.19 of the ***Constitution of the Cayman Islands*****,** which he owed to the Plaintiff, to ensure that his decisions were, "*lawful, rational, proportionate and procedurally fair.*"

b. ***Breach of Grand Court Act:***

i. Under s.29 of the ***Grand Court Act***, it was the duty of the First Defendant to act within his jurisdiction, with reasonable and probable cause, in good faith and without malice. In doing so, or by not doing so, or ordering to be done or not to be done, the things herein pleaded, the First Defendant acted outside his jurisdiction and outside the *bona fide* exercise of his judicial functions and, further, acted in bad faith, not believing himself to have the jurisdiction to do or not to do, or order the doing or not doing, of those acts, and furthermore acted maliciously and without reasonable cause.

c. ***Breach of Judicial Codes of Conduct***

i. The First Defendant owed a duty to the Plaintiff to deliver justice to him by complying with the Judicial Code of Conduct for Cayman and the Judicial Code of Conduct for the CCJ.

ii. The First Defendant is guilty of a failure to make a decision conscientiously according to law in breach of the Judicial Code of

Conduct of the Caribbean Court of Justice [88] which provides in paragraph 2 as follows:

1. "Principle:

An independent judiciary is indispensable to impartial justice under law. A judge should therefore uphold and exemplify judicial independence in both its individual and institutional aspects."

2. *Code:*

A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."

iii. In the same vein, the Code of Conduct for the Cayman Islands Judiciary[89] provides in paragraph B 10 that:

"No judge can be directed as to his or her own judicial decision by any other judge. Consultation with colleagues when points of difficulty arise is important in the maintenance of standards. In performing judicial duties, however, the judge shall be independent of judicial colleagues and solely responsible for his or her decisions."

iv. The Plaintiff contends that in his ruling, the First Defendant did not mention a single one of the 52 cases the Plaintiff cited. Such analysis in the ruling as is undertaken does not show any real reasoning or analysis of the very detailed arguments the Plaintiff made. The judge also did not specifically address at least 7 issues raised in the skeleton arguments.

[88] *(25 July, 2013, issued by Rt. Hon. Sir Dennis Byron, President Caribbean Court of Justice - the CCJ Code)*
[89] *(9 March 2012, issued by the Judicial and Legal Service Commission - the Cayman Code)*

v. It is further suggested that Kawaley J was dismissive of all the Plaintiffs cases and arguments. That he blindly followed the ruling of Williams J as correct. In so doing, he abdicated his responsibility to decide the case *"in accordance with a conscientious understanding of the law, free of any extraneous influences"* (CCJ Code) and failed to assert his duty to *"be independent of judicial colleagues and be solely responsible for his decisions".*

vi. The Plaintiff also alleges that Kawaley J displayed intellectual dishonesty by not addressing the 52 cases cited in relation to the immunity issue and the 7 issues raised. He also maliciously failed to give the Plaintiff a meaningful hearing, that is, in law failed to give him a hearing. The CCJ Code provides in paragraph 3 as follows:

> "*Principle:*
>
> *Integrity is vital to the proper discharge of the judicial office.*
>
> *Code:*
>
> *A judge shall ensure that his or her conduct is above reproach in the view of reasonable, fair-minded and informed persons.*
>
> *The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not only be done but must also be seen to be done.*"

vii. The Plaintiff alleges that the Judge's failures were evidenced by how the judge did not sufficiently or at all deal with the issues in his judgment.

d. <u>Other duties breached by the First Defendant</u>

i. The Plaintiff submits that by failing to give a reasoned decision, the First Defendant prejudiced the Plaintiff's right of appeal in that the Court of

Appeal did not get a chance to examine how Kawaley J dealt with the cases.

ii. The Plaintiff also submits: And further, by failing to give a reasoned judgment, the First Defendant failed to be accountable to the public. The failure to even acknowledge even one of the 52 cases cited shows that the First Defendant acted in bad faith. Further the Plaintiff avers that Kawaley J demonstrated bad faith by not amending his draft judgment which adversely affected the decisions of the CICA. (This matter was specifically addressed by the CICA as follows:

> "*The Applicant's reaction to the draft Judgment which went far beyond identifying typographical and other obvious errors of that sort was entirely inappropriate: see R (Chorion pic) v Westminster CC [2002] EWCA Civ. 1126 at [5] - (6]. The opportunity is not to be used for the purpose of attempting to reargue points, which is something that is for an appeal.)"*[90]

iii. The Plaintiff further submits that the First Defendant denied the Plaintiff the right to a fair trial under s.7 of the ***Constitution***. In relation to this submission the Plaintiff states that in addition to what has been outlined above, the First Defendant denied him the right to a trial. The Plaintiff said the First Defendant has done so in the following ways. He said Kawaley J denied him a right to an oral hearing, they only had about 30-minute hearing, the matter was well-pleaded and no part of his pleading was ever challenged. The Plaintiff reiterates the ground submitted in the Constitutional Action in relation to the ignored authorities and the *prima facie* evidence that he had available. The Plaintiff said the First

[90] *[EHB;tab.32/p.488])*

Defendant blatantly and persistently failed to reflect all relevant facts and that the First Defendant abdicated his judicial responsibility.

171. The Defendants' (Applicants for the Strike out Application) response is that the fact that the Respondent/Plaintiff has persisted in instituting further proceedings in which the same grounds of complaint are repeated extensively, even after Beatson JA had rendered his decisions on 5th August 2020, and whilst his complaint in G 0093 of 2020 was still pending, demonstrates the Plaintiff's determination to consistently abuse the Court's process. G 0161 of 2020 should in any event be struck out.

172. In addition they invite the Court determine that Kawaley J is immune from suit in respect of decision making. This is a matter the Court has dealt with earlier in this judgment.

173. The Defendants submit that no cause of action is disclosed in relation to the questioned decision of Kawaley J which should have been subject to appeal. They note that each of the matters raised were before the CICA in the Applications for Leave to Appeal and Constitutional Motion.

174. The substance of these grounds have been dealt with earlier in this judgment - they being a re-casting of the grounds in the Constitutional Cause.

175. No cause of action is disclosed in relation to the questioned decision of Kawaley J which should have been subject to appeal. It is utterly unarguable that Kawaley J's decision-making was flawed, was not made conscientiously according to the law, that he failed to display intellectual honesty according to the law, failed to display intellectual honesty in his reasoning, and acted in bad faith and in a biased manner.

The Position in relation to Bridget Myers (2nd Defendant – G0161 of 2020)

176. As averred by the Plaintiff:

> "*The Second Defendant is a Personal Assistant to the First Defendant. Her duties, among other things, consist in receiving correspondence meant for the First Defendant and sending out under her name correspondence from the First Defendant. She was appointed under the Public Service Management Law as read with section 7 of the Grand Court Law*".

177. This Court has considered carefully the Plaintiff's position in relation to Bridget Myers[91].

178. The Plaintiff alleges breaches of the ***Public Service Management Act*** - and attendant ***Public Servant's Code of Conduct***. He alleges a breach of s.5(2)(a) of the ***Public Service Management Law Act*** that a public servant must *" behave honestly and conscientiously, and fulfil his duties with professionalism, integrity and care"* and that Ms. Myers did not act in good faith. It is suggested that such breaches are evidenced by her in writing the emails, and in relation to the Attachment to the Statement of Claim, and, in doing so, acted in a conspiracy with the First Defendant or, in the alternative, acted alone without the knowledge, consent or direction of the First Defendant, thereby denying the Plaintiff the right to be heard. Overall, and in the alternative, the Plaintiff pleads that the emails sent by Bridget Myers were not directed by the judge but sent by her on her own volition without informing the judge.

179. It is also pleaded that she breached s.5(2)(c) which prohibited her from engaging in conduct that brings, *"the public service or the government into disrepute"*.

[91] at paras 32-34 of the Writ of Summons *[EHB; tab.9/ page.107]*

180. Further, the Plaintiff alleges that, in writing and sending the emails aforesaid, Bridget Myers was again in breach of the ***Public Servant's Code of Conduct*** which states that, *"a public servant must obey the law and comply with all lawful and reasonable directions",* making it irrelevant whether or not she was directed by the First Defendant.

181. And finally the bald assertion that *"overall and in the alternative, Bridget Myers acted maliciously and in bad faith"* is made by the Plaintiff.

182. The Defendants' position is that in respect of Miss Myers, the Plaintiff's alleged breach of the ***Public Service Management Act*** (2018 Revision) and, specifically, the alleged failure to comply with the ***Public Servants' Code of Conduct***, does not give rise to any private law cause of action on the part of litigants in the Grand Court. Enforcement of the ***Public Service Management Act*** and ***Public Servant's Code*** is not a matter which falls within the jurisdiction of the Grand Court and, therefore, discloses no reasonable cause of action against her.

183. Furthermore, Miss Myers was at all material times acting in the course of her duties and on the instructions and as agent of Justice Kawaley, exercising his judicial office.

184. This court has considered carefully the chronology and substance of the emails the Plaintiff seeks to rely upon, and has reminded itself of the oral submissions advanced in relation to alleged lies told by Mr. Justice Kawaley[92].

a. "*Lie Number 1*": The Plaintiff pleaded that Learned Judge lied when dealing with how the Plaintiff would participate in a two-day hearing. I have considered the 12 emails[93]. The Plaintiff simply asks the question "*why is Bridget Myers*

[92] *[EHB; tab 6/ page 68]*
[93] (Exhibit 3 Plaintiffs First Affidavit under (G 0017 of 2021).

saying she was just doing what she was told? Why is she not saying that the judge is telling the truth and I am lying?"

b. "*Lie Number two*": This relates to the video hearing. It is suggested by the Plaintiff that when the Judge said the link was requested "*shortly before the hearing*", this was false, and it was a fabrication specifically stated in a vague manner with the intention to mislead persons into thinking that the request was made minutes before the hearing. The Plaintiff raises the same issues here. "*Why is Bridget Myers saying she was just doing what she was told? Why is she not saying that the judge is telling the truth and I am lying*?"

185. In the premise this Court determines that no action lies against Bridget Myers (2nd Defendant).

186. The Court does however observe that there is absolutely no basis whatsoever to call into question the good standing of Bridget Myers. She has, without question, acted and behaved at all times honestly and conscientiously, fulfilling her duties with professionalism, integrity and care. No action of hers could possibly bring, the public service or the government into disrepute. She at all times, as a public servant, obeyed the law and complied with all lawful and reasonable directions, and at no time acted maliciously and in bad faith.

187. The Court did not make any final determination as to whether either one or both cause(s) was "scandalous frivolous or vexatious"[94].

[94] {(O.18 r. 19. (1) (b))}

Conclusions

188. What is beyond doubt is that lying behind both causes is a deep and genuinely held view by Mr. Simamba that he was deprived of a fair hearing in relation to his medical and dental actions against the HSA (Cause G 0032 of 2014). Such was his belief that he has sought to ventilate this cause before the CICA with two applications and within the two causes before this Court.

189. This court has considered with great care each ground in and of itself and stood back and looked at the alleged cumulative effect in its determination of both causes. It reinforces in its mind that striking out a cause is a position to be driven to only in plain and obvious cases. Such an approach can be taken in the context of the Court's statutory power and its inherent jurisdiction; mindful to ensure there is no erosion of Constitutional rights and safeguards.

190. In both of these causes the Court has considered whether each Defendant has shown, as they must, that there was no realistic possibility of the Plaintiff establishing a cause of action.

191. The court is in no doubt that neither of these Applications is within the category of case where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts.

192. For the reasons already set out it is clear that in some instances this Court has no jurisdiction - for example where the only justiciable route is by way of application to appeal or judicial review; or where judicial immunity defeats any cause.

193. It is also plain and obvious that simple reiteration of the same issues, when there has already been an adjudication upon them, and indeed considered by an appellate court would, in my judgement, amount to an abuse of process of this Court.

194. The power to strike out cases is a power vested in the court to be used sparingly, only in the plain and obvious cases. However in such category of causes engagement of this rule provides a party a prompt and summary route to disposal of actions.

195. **It is ORDERED:**

a. In relation to The Constitutional Petition G 0093 of 2020:

i. That the Statement of Claim be struck out pursuant to GCR O.18 r.19(1) and/or the inherent jurisdiction of Grand Court on the ground that it discloses no reasonable cause of action ~~in~~ by the Plaintiff and/or is, an abuse of the process of the court.

ii. That the Defendants' Costs of the proceedings and of this application and Order be paid by the Plaintiff to be taxed if not agreed.

b. In relation to The Personal Action G 0161 of 2020:

i. That the Statement of Claim be struck out pursuant to GCR O.18 r.19(1) and/or the inherent jurisdiction of Grand Court on the ground that it discloses no reasonable cause of action by the Plaintiff and/or is an abuse of the process of the court.

GRAND COURT CRIMINAL DIVISION CAYMAN ISLANDS

ii. That the Defendants' Costs of the proceedings and of this application and Order be paid by the Plaintiff to be taxed if not agreed.

Dated this the 28th day of October 2021

Justice St. John-Stevens
Acting Judge of the Grand Court