



CAUSE NO: G2022-0185

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

BETWEEN:

THE KING (on the application of GT RETAIL SUPPLIERS LTD)

Applicant

-and-

- (1) CAYMAN ISLANDS DEPARTMENT OF COMMERCE AND INVESTMENT**
- (2) THE LIQUOR LICENSING BOARD**
- (3) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

Respondents

Appearances:

Ms Kathleen Ryan for the Plaintiff

Ms Celia Middleton of the Attorney General's Chambers for the Respondents

Before:

The Honourable Justice Jalil Asif KC

Heard:

10 June 2024

Judgment:

21 June 2024

Judicial review—Time for serving proceedings under GCR O.53, r.5(2)—When does time start to run—Whether claim time barred

JUDGMENT

1. This application for judicial review was listed before me on 10 June 2024 for argument as to whether the Notice of Originating Motion had been served within the time allowed by the Grand Court Rules. The discrete question before me is whether the application has been served in time. It is therefore not necessary to go into the details of the Applicant's complaints about the decision-making which is being challenged and the Respondents' answers to those complaints.
2. I regret that I must commence this judgment noting that this is another judicial review application that has come before me where there has been substantial unjustifiable delay in its pursuit, and which I strongly deprecate. In this case, the order giving leave to pursue judicial review was sealed on 21 September 2022. The Applicant served the Notice of Originating Motion and supporting documents on 30 September 2022, with a hearing date endorsed on the Notice of Originating Motion of 10 November 2022. It appears that the hearing on 10 November 2022 did not proceed. It is unclear from the documents I have seen whether it was formally vacated. The Respondents wrote on 3 October 2022 raising the issue that the application was out of time. On 22 November 2022, the Respondents served an affidavit in response repeating that the application was out of time, as well as responding to the substantive complaints. Since then, the parties have taken no real steps to progress the matter or to determine the time-bar question.
3. The case was listed before me for directions on 5 March 2024. I considered that the time-bar question needed to be determined as a preliminary issue. I made orders for service of evidence and skeleton arguments with a view to hearing argument on the time-bar question during the week of 22 April 2024, but even then, the hearing was not in fact listed until 10 June 2024.
4. I repeat the comments that I made in *The King (on the application of Fernando Soto) v Police Service Commission* (unreported 31 May 2024):



“18. *It is useful to start with a reminder of the requirements in judicial review proceedings for expedition and the strict application of time limits, based on the underlying public policy considerations. These were explained by Lord Diplock in O’Reilly v Mackman [1983] 2 AC 237 at 284 as being:*

‘... the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law.’

*Whilst O’Reilly v Mackman has been subject to subsequent criticism, **this description of the policy considerations and the need for “speedy certainty” remains relevant and helpful.***

...

21. *It is self-evident that challenges to public law decisions by way of judicial review are likely to have wider effects than on just the applicant and respondent. A challenge to the validity of primary or secondary legislation is an obvious example. But a challenge of the kind in this case, for example, concerning an administrative decision not to promote the Applicant, also has wider effects. If allowed, it has the potential to impact those other officers who were promoted in preference to the Applicant as well as other candidates for promotion who may be deferred if the Applicant’s challenge is successful, and he is promoted, or a promotion exercise has to be run again. It also has direct impact on the Respondent’s autonomy to make its own decisions as to the allocation of limited resources within its operations.*

22. ***It is therefore essential that judicial review proceedings are started promptly, are prosecuted swiftly and are determined without delay so that the decision can be upheld or quashed as quickly as possible. The overall time from commencement to conclusion should not be more than 6 months in the absence of good reason.***” (emphasis added).

5. All cases should be actively progressed by the attorneys on both sides, in accordance with the requirements of the overriding objective, but the need to do so is enhanced in judicial review proceedings for the reasons to which I have already referred. If attorneys do not have the capacity or the ability to do so, or if other factors prevent them from giving such cases proper attention, then they should cease to act and transfer the matter to another attorney who is able to progress it expeditiously.

6. In addition, where the respondent considers that it has a knock-out answer to the application for judicial review, particularly on the basis that the respondent alleges that the application has not been brought promptly or is out of time, it is vital for the interests of justice and the parties that that objection is raised and determined at the outset. It is extremely unsatisfactory that this question is only now before the Court in this case, some 20 months after the proceedings were commenced, and only because the Court raised it at the directions hearing as being a preliminary issue that needed to be determined.



7. I turn now to the question whether the application has been commenced in time.
8. The relevant evidence before me comprised the third affidavit of Mr Philson George, the director of the Applicant, and the second affidavit of Ms Claudia Brady filed on behalf of the Respondents. I am grateful to Mr George, who I understand has done the majority of the work of preparing the Applicant's case, Ms Ryan and Ms Middleton for their helpful written and oral submissions.
9. It is necessary to set out the chronology concerning the grant of leave and service of the papers in detail in light of the arguments that were advanced before me.

08-Sept-22 Acting Justice Walters considered the application for leave to pursue judicial review on (Thurs) the papers and granted leave.

09-Sept-22 The judge's PA notified Mr George that the judge was prepared to grant leave and that (Fri) Mr George does not need to attend a hearing previously fixed for 15 September 2022. She provided a copy of the Minute of Order and indicated the Minute of Order will also be available for download via the Folio e-filing system. She requested that Mr George prepare a draft order.

12-Sept-22 Mr George uploaded a draft order via the Folio e-filing system for signature and sealing (Mon) and notified the judge's PA. Mr George asked whether he should file the Notice of Originating Motion after he receives the signed order.

13-Sept-22 The judge's PA notified Mr George that the judge had amended the Minute of Order, (Tues) provided a copy and indicated that the draft order filed by Mr George would be referred to the judge for signature. The judge's PA did not respond to Mr George's query about when to serve the Notice of Originating Motion.

14-Sept-22 Mr George uploaded a revised draft order to reflect the amended Minute of Order. (Wed)

20-Sept-22 The judge signed the draft order (as per the version uploaded on 12 September 2022). (Tues)

21-Sept-22 The signed order was filed on the e-filing system and sealed. The e-filing system sent an (Wed) automated email to Mr George to notify him that the sealed Order is available. Mr George downloaded a copy.



23-Sept-22 Mr George uploaded the Notice of Originating Motion for sealing.
(Fri)

29-Sept-22 The e-filing system sent an automated email to Mr George to notify him that the sealed
(Thurs) Notice of Originating Motion is available. Mr George downloaded a copy.

30-Sept-22 Mr George arranged for the sealed Notice of Originating Motion and supporting
(Fri) documents to be served on the Respondents.

10. Against this background, the essence of the Respondents' submission is that the Applicant failed to comply with the requirement in GCR O.53, r.5(2) that the Notice of Origination Motion and supporting documents shall be served within 7 days of leave being granted. The Respondents contend that the grant of leave therefore lapsed, and the proceedings are a nullity.

11. In more detail, the Respondents' argument is:

11.1 GCR O.53 is a special self-contained Order. Other rules within the GCR do not apply except where expressly incorporated – see Anderson v Utility Regulation and Competition Office (unreported 20/03/24). Examples are:

- (a) GCR O.53, r.3(6), which expressly gives the court power to allow an amendment to the claim “*without prejudice to its powers under Order 20, rule 8*”.
- (b) GCR O.53, r.5(1), which makes available the powers in GCR O.32, r.13 to direct that a chambers hearing shall take place in open court and to adjourn back into chambers;
- (c) GCR O.53, r.7(2), which applies GCR O.18, r.12 concerning particulars to claims for damages brought within judicial review proceedings; and
- (d) GCR O.53, r.8(2), which refers to applications under GCR O.24 (discovery), O.26 (interrogatories), O.38, r.2(3) (evidence may be given by affidavit and court may order cross-examination) and orders granting relief or dismissing the proceedings by consent.

11.2 The time limits in GCR O.53 are to be strictly applied, with potentially grave consequences: see Anderson.



11.3 GCR O.53, r.5(2) is mandatory in nature. Unless it is strictly complied with, the leave to pursue judicial review lapses and cannot be renewed: see Anderson.

11.4 However one looks at it, service of the Notice of Originating Motion on 30 September 2022 was not within 7 days:

- (a) The Applicant was granted leave to apply for judicial review on 8 September 2022 (22 days before 30 September 2022).
- (b) The Applicant was informed of the decision and the Minute of Order was provided on 9 September 2022 (21 days before 30 September 2022).
- (c) The Order recording that leave was granted was signed by the judge on 20 September 2022 (10 days before 30 September 2022).
- (d) The Order giving leave was sealed on 21 September 2022 (9 days before 30 September 2022).

12. The Applicant's position is that:

12.1 GCR O.53, r.3(3) requires that "*the Clerk of Court shall serve a copy of the Judge's order on the applicant.*"

12.2 In fact, the court did not do that here until 21 September 2022. Further, the version of the Order that was served was incorrect in that it was not in the form of the revised draft order uploaded on 14 September 2022 and therefore failed to reflect the judge's amendment to the Minute of Order made on 13 September 2022. This was an irregularity that should have been corrected and the revised Order should have been re-submitted to the judge for signing.

12.3 It is not correct to consider that leave was granted on 9 September 2022 sufficient to trigger the obligation in GCR O.53, r.5(2) to serve on the Respondents bearing in mind that the court provided an amended Minute of Order on 13 September 2022 and there was a hearing still in the calendar at that time for 15 September 2022.

12.4 Until the Order was sealed and filed, the judge had power to change his decision: see Re Herald Fund SPC v Primeo Fund [2016 (2) CILR 44], applying Re Barrell Enterprises [1973] 1 WLR 19 and Re L and B (Children) [2013] UKSC 8:



“19. It is not in dispute that a judge has power to change his decision unless and until a written order has been drawn up, signed, sealed and filed ...”

- 12.5 For the purpose of GCR O.53, r.5(2) time therefore only started to run once the Order was sealed and filed, and the judge’s decision became final and unalterable, i.e. on 21 September 2022.
- 12.6 Leave cannot be considered to have been granted until 21 September 2022, when the Court served the Order upon the Applicant, in purported compliance with GCR O.53, r.3(3) – “purported” because the Order as sealed did not incorporate the judge’s amendment to the Minute of Order.
- 12.7 Working from 21 September 2022, the Applicant served the application and supporting papers on the Respondents in time, not counting the intervening Saturday and Sunday, as permitted by GCR O.3, r.2(5).
- 12.8 GCR O.2 rr.2(1) and (2) require that a party who seeks to set aside any proceedings for irregularity must make an application within a reasonable time, and before the party has taken any fresh step after becoming aware of the irregularity. The Respondents have not done so and have therefore lost their right to complain.
13. I raised with Ms Middleton in argument whether it is correct to describe GCR O.53 as a self-contained Order that does not admit any of the other provisions of the Rules by implication. She conceded, rightly, that certain aspects of GCR O.3 do apply to judicial review proceedings notwithstanding that they are not expressly incorporated into GCR O.53:
- 13.1 Ms Middleton accepted that GCR O.3, r.2, dealing with the reckoning of time, applies to judicial review proceedings. Relevantly in this case, this includes GCR O.3, r.2(5), which provides that when a period for compliance with a Rule, judgment, order or direction is 7 days or less, weekends and public holidays are not counted.
- 13.2 She accepted that GCR O.3, r.4 also applies to judicial review cases, which provides that where time for an action at the court office expires on a Saturday, Sunday or other day when the court office is closed, the relevant action is in time if performed on the next day when the court office is open.



14. It seems to me that it goes significantly too far to describe GCR O.53 as a self-contained Order, which only incorporates other provisions of the Rules where expressly incorporated. In addition to Ms Middleton’s concessions regarding GCR O.3, the following examples suffice to make good the point:

14.1 It cannot sensibly be disputed that the overriding objective, as set out and explained in the Preamble to the Grand Court Rules, applies with equal force to judicial review proceedings brought under GCR O.53 as to any other type of proceeding.

14.2 GCR O.1, r.2 provides:

- “(1) Subject to the following provisions of this rule, these Rules shall apply in relation to all proceedings in the Court.*
- “(2) Except for Part I of O.52 (Committal), O.53 (Applications for Judicial Review), Part III of O.62 (Wasted Costs Orders) and O.103 (Confidential Information Disclosure Act, 2016, these Rules shall not apply to any criminal proceedings.”*

The plain reading of GCR O.1, r.2(1) is that the Grand Court Rules apply to all proceedings in the Grand Court, except where otherwise stated in GCR O.1, r.2. There is nothing in GCR O.1, r.2 that excludes the application of the Rules to GCR O.53 or to judicial review proceedings generally. (The effect of GCR O.1, r.2(2) is to extend the application of GCR O.53 to criminal proceedings, whereas in general the Rules do not so apply. There is no other express reference to GCR O.53 in GCR O.1.)

14.3 GCR O.2, r.1, dealing with the result of non-compliance with the Rules, expressly provides that it applies to “... *any proceedings* ...”. Again, there is no carve out for judicial review proceedings or for GCR O.53. GCR O.2, r.1 must be taken as meaning what it plainly says.

14.4 GCR O.3, r.5 states:

- “(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.”*

This Rule is not limited in its scope – there is nothing in GCR O.3 that provides that it does not apply in judicial review proceedings under GCR O.53.

14.5 GCR O.4, dealing with assignment of proceedings between Divisions of the Court and to specific judges, must obviously apply to judicial review proceedings.



- 14.6 GCR O.5, setting out the Rules concerning the mode of commencing proceedings, and the practicalities of electronic filing and sealing requirements, clearly applies to judicial review proceedings otherwise proceedings within GCR O.53 would be completely unregulated.
- 14.7 GCR O.8, dealing with the formal requirements for an originating notice of motion, must apply to judicial review proceedings for the same reason.
- 14.8 The language of GCR O.53, r.3(6), relied on by Ms Middleton, “... *without prejudice to its powers under Order 20, rule 8*”, in my view, proves the opposite of her proposition. The fact that GCR O.53, r.3(6) gives the Court an additional power to allow amendments which is “*without prejudice*” to its general power in GCR O.28, r.8, is a clear indication that the general powers regarding amendments apply, and would have, in any event.
15. In my judgment, the better view, which has recently been adopted by the Crown in another judicial review case being argued before me, is that the Rules generally apply to proceedings within GCR O.53 except where that would be inconsistent with the specific Rules in GCR O.53 itself.
16. I now turn to the specifics of the proper construction of GCR O.53, r.5(2). The Rule is in the following terms:
- “(2) *Within 7 days of being granted leave, the applicant shall serve copies of —*
- (a) *the notice of motion;*
- (b) *the supporting affidavits;*
- (c) *the order for leave; and*
- (d) *the Form No. 53 of the Grand Court Rules - Vol II - Forms (as amended and revised) application*
- upon the defendant and all other persons directly affected.*”

17. I consider that there are two questions to be addressed:

17.1 What is the meaning of “*the order for leave*” in Rule 5(2)(c)? Does it mean: a minute of order? an order signed by the judge without more? or an order signed by the judge (or the Clerk of Court on the judge’s behalf), filed and sealed with the Court’s seal?



- 17.2 What amounts to “*being granted leave*”, so as to trigger the 7-day period for service? Does it mean: when the judge concludes that leave should be given? when that decision is communicated to the applicant? when a minute of order is prepared? when the judge (or Clerk of Court) signs the order? or when the signed order is filed and sealed with the Court’s seal?
18. In my judgment, the answer to the first question must be that “*the order for leave*” means the finalised order, as sealed by the Court.
- 18.1 Firstly, I accept Ms Ryan’s argument, based on *Herald Fund SPC*, that unless and until the order is signed by the judge and sealed, the judge still has power to change his or her mind, and is not *functus officio*. A minute of order, a draft order and even an order that has been signed by the judge, can still be recalled and revised by the judge. As an example, in this case, the judge prepared an amended Minute of Order during the course of the process.
- It follows that it would be premature for the applicant to attempt to commence judicial review proceedings on the basis of a minute of order, a draft order or a signed but unsealed order.
- 18.2 Secondly, from the point of view of a respondent and the administration of justice, the respondent needs to have confidence that the jurisdiction of the Court has properly been invoked. In my view, that is achieved by a requirement that it is a sealed order that must be served. Anything less than that leaves uncertainty for the respondent whether leave has actually been granted by the Court. It is the application of the Court’s seal that authenticates the order and gives it its force – that is, without the seal, it is merely a piece of paper.
19. As to the second question:
- 19.1 The first point is that the Rules must be construed in a way that gives them practical effect and certainty of application.
- 19.2 In my view, what amounts to “*being granted leave*” cannot be any of: when the judge concludes that leave should be given; when that is communicated to the applicant; when a minute of order is prepared; or when the judge signs the order.



- 19.3 This is because in each of these situations there is the possibility for delay within the Court administration such that the 7-day period for service could expire before the Clerk of Court serves the sealed order on the applicant pursuant to GCR O.53, r.3(3). This would have the result that it is impossible for the applicant to comply with the requirements of GCR O.53, r.5(2) because the time would have expired before the applicant has all of the documents in his or her possession that are required to be served.
- 19.4 I bear in mind here the Crown's reliance on Anderson as mandating a strict application of GCR O.53, r.5(2), so that a failure to serve all four documents specified would undoubtedly be met with a complaint that the applicant has failed properly to comply with the Rules.
- 19.5 The practical difficulties are demonstrated by the facts in this very case: the judge reviewed the papers and indicated he would grant leave on 8 September 2022. Mr George uploaded a draft order on 12 September 2022, 4 days after the judge's decision (but only 2 working days later, allowing for the weekend). The judge signed the order on 20 September 2022, i.e. 8 days after the draft was uploaded and 12 days after he granted leave. Thus, on any other construction of GCR O.53, r.5(2), the Applicant's time for serving the documents required had already expired before the judge even signed the order, let alone before it was sealed by Court.
- 19.6 This would be an absurd and wholly unjust result and demonstrates that these postulated constructions of GCR O.53, r.5(2) must be wrong.
- 19.7 I am reinforced in construing GCR O.53, r.5(2) in this way by the overriding objective, which requires me to deal with every cause or matter in a just way and to give effect to the overriding objective when interpreting the meaning of any Rule, and to construe the Rules liberally to secure the just determination of every cause or matter on its merits.
- 19.8 I therefore conclude that "*being granted leave*", so as to trigger the 7-day period for service means receipt by the applicant of the sealed order granting leave, so that time for service of the documents starts to run on that date.



20. However, this approach to GCR O.53, r.5(2) does give rise to an apparent conflict with GCR O.42, r.3. That Rule provides:

- “(1) ... a judgment or order of the Court takes effect from the day of its date.*
- (2) Such judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some earlier or later day, in which case it shall be dated as of that other day.”*

Thus, GCR O.42, r.3 applies a “relation back” approach to the dating of judgments and orders, i.e. they are treated as having been granted when pronounced by the judge, even if the written document recording the order made is prepared later.

21. In my judgment, this is a situation where there is a conflict between the requirements of GCR O.53 and the other Rules in the GCR such that the specific requirements of GCR O.53 take precedence and exclude the operation of the “relation back” of the order that would otherwise apply as a result of GCR O.42, r.3. Again, the reason why this must be right is that otherwise an applicant could easily find that the time for serving the documents required by GCR O.53, r.5(2) has expired before they have the documents in their possession. I repeat the example in this very case that the judge signed the order 8 days after the draft was uploaded and 12 days after he had indicated he would grant leave.

22. I consider that the construction of GCR O.53, r.5(2) that I have set out is fully consistent with, and promotes, the overriding objective, and that any other construction would have the opposite result.

23. It follows from this that:

23.1 Time for the Applicant to serve its Notice of Originating Motion and other documents started to run on 21 September 2022.

23.2 The Applicant served the documents required by GCR O.53, r.5(2) in time, not counting Saturday and Sunday, as required by GCR O.3, r.4.

23.3 The judicial review proceedings have been validly commenced in time.



24. Finally, I note that, in this particular case, the Applicant uploaded the Notice of Originating Motion on Friday 23 September 2022 for sealing, but it was not sealed by the Court until Thursday 29 September 2022, 6 days after it was uploaded. There was therefore a real risk that the application could have been timed out if the Notice of Originating Motion had not been sealed on that day or 30 September 2022 (1 and 2 October 2022 being the weekend). Whether this is truly the effect of GCR O.53, r.5(2), and whether there is no discretion in the Court in such a case to extend time (cf the effect of Anderson, as contended for by the Crown), is not in issue in this case but may need to be grappled with if raised on the facts of another case.

25. I will hear counsel further on consequential matters.

Dated 21 June 2024



**THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT**