



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

G0046 OF 2023

GREGG VANGARD ANDERSON

Plaintiff

AND

UTILITY REGULATION AND COMPETITION OFFICE

Defendant

IN CHAMBERS

Coram: The Hon. Justice Marlene Carter

**Appearances: Mrs. Marilyn Brandt, Deputy Solicitor General and Mr. Nigel Gayle, Senior
Crown Counsel**

Mr. Chris Perry of KSG

Heard: 28 June 2023

Draft circulated: 13 March 2024

Judgment Delivered: 20 March 2024

HEADNOTE

***Civil Law – GCR, Order 53 – Leave for Judicial Review – Time for filing Notice of Originating Motion
– validity of Motion***

JUDGMENT

1. The Defendant issued a summons to Strike the Notice of Originating Motion filed herein on 28 April 2023 in its entirety for being, in law, a nullity and/or being declared a nullity and invalid.
2. The Defendant set out the grounds of the application as follows:

“(a) the Plaintiff applied to the Grand Court ex-parte for Leave to apply for judicial review and was granted such Leave on 10 March 2023. The Order granting Leave was effective from 10 March 2023, the date it was made or given. The Leave was granted under GCR Order 53, Rule 3. GCR Order 53, Rule 5(2) stipulates clear condition that the Notice of Motion must be filed within 7-days of being so granted.

(b) the Plaintiff's Notice of Motion was filed on 28 April 2023 (and served 4th and 5th May 2023), in breach of GCR O. 53, r. 5, the Notice of Motion being filed after the expiration of the conditional Leave; and is a nullity, invalid, and of no legal effect. It is therefore neither meritorious, nor is it capable of disclosing any arguable case, and its filing and service, further constitute an abuse of the process of the Court.

(c) having obtained Leave to apply for judicial review on 10 March 2023, pursuant to GCR O. 53, r. 5(2), the Leave was not absolute and was conditional on the filing of the judicial review motion/claim, within the time stated in the GCR, that is, within seven (7) days of obtaining the leave /7 days of receipt of the grant of the Leave. The Notice of Originating Motion was not filed until 28 April 2023, several weeks (more than a month), and in any event, after the conditional Leave had lapsed.

(d) since the condition as outlined under GCR O. 53, r. 5(2), that is, the Mode of applying for judicial review was not satisfied by the Plaintiff, then the Leave was no longer valid at the time of the filing of the Notice of Motion. In fact, the Leave expired once the 7-day statutory time-period ended without the Notice of Motion being filed. Any judicial review motion/claim filed outside of that period is a nullity/invalid. Thus, the Plaintiff's Notice of Motion filed 28 April 2023 is a nullity, is invalid and of no legal effect, and there is no valid judicial review claim/motion on which the Court may adjudicate, or exercise discretion or such jurisdiction.

(e) once Leave to apply for judicial review has been granted under GCR Order 53, and subsequently lapses, without the Notice of Motion being filed, the Leave cannot be renewed. Under GCR O. 53, r. 3(4), only refused Leave may be renewed. By necessary

implication, granted Leave (even if expires) cannot be renewed, especially since this matter (an employment matter) does not relate to liberty of the subject or a criminal cause.

(f) at no material time has there been a stay of the proceedings, timeline, or the obligation to file judicial review motion/claim, ordered by the Court, or any such stay agreed by the Parties (by themselves and/or through their attorneys), even if a stay were even lawfully permissible.”

3. At paragraph (g.) the Defendant submitted:

“...that ...general provisions in the GCR ...providing the court with a general discretion to extend time for compliance are inapplicable to the special self-contained Rules (GCR Order 53) governing judicial review; Those general provisions cannot prevail over the specific rules/time-deadlines under Order 53, including the provisions for leave and specifically, do not apply to permit extension of the time fixed under GCR O. 53 r. 5(2).”

4. The Defendant further contended that Judicial Review is a remedy of last resort, and the Plaintiff has available alternative remedy/redress, that he has not exhausted all available avenues of appeal; here referencing a private law employment claim for unfair dismissal under the Labour Act, before seeking redress through Judicial Review.

5. The Defendant seeks declarations that the Grand Court has neither the discretion nor the jurisdiction to hear or determine the Notice of Originating Motion invalidly filed, and in particular, to extend time for compliance. The Defendant also seeks a declaration that the grant of Leave to proceed to Judicial Review under GCR Order 53 is provisional, not absolute, in that it imposes a condition on an applicant to file his Notice of Originating Motion within seven (7) days of the grant of Leave with the effect that any Notice of Motion filed thereafter is a nullity and of no legal effect.

6. The application was supported by the affidavit of Celia Middleton, Crown Counsel (**the “Middleton affidavit”**), dated 17 May 2023. The Middleton affidavit states inter alia:

“1. The Plaintiff was granted leave to apply for Judicial Review against the Defendant, on two grounds, on 10 March 2023, ...

*3. The Plaintiff filed the Notice of Originating Motion for Judicial Review on **April 28, 2023**, some 48 days after leave was granted, and 41 days after the time limited by the Grand Court Rules Order 53, Rule 5(2) had expired.”*

7. The Middleton affidavit confirmed that there had been no stay of the Judicial Review proceedings, nor agreement regarding filing of the notice of Originating Motion by the parties or ordered by the Court, and that all *“discussions had prior to and subsequent to the leave being granted ...have been without prejudice (to the litigation), save as to costs.”*
8. In oral submissions before this Court, the Defendant submitted that, unlike ordinary civil proceedings, the specialised Rules for Judicial Review do not allow for any general or other Rule or other statutory time limit provision to apply to permit any extension or restriction of time, that the use of the word *“shall”* in Order 53 Rule 5 (2) is mandatory in nature, and creates only a provisional permission to apply for Judicial Review and further that the use of the word *“condition”* or *“conditional”* can be deduced from the word *“shall”* in that Rule.

The Plaintiff’s Response

9. Counsel for the Plaintiff rejected the Defendant’s submission that the Leave granted on 10 March 2023 was conditional upon the Originating Motion being filed at Court within seven (7) days or that the Leave has expired, rendering the Motion a nullity. Counsel asked the Court to note that the Grand Court Rules differ from Rules in other jurisdictions and that Order 53 Rule 5 (2) does not specify any time limit for the filing of a Motion, and arguably, neither does it relate to the filing of a Motion at all.
10. Counsel argued that Order 53 Rule 5 does not provide for sanction or support to the proposition that the proceedings will become a nullity in the event of default. He went further:

“Since the rule relates to service after the event and not the actual commencement of the proceedings, it cannot be said to affect the validity of the Motion once filed.”

11. Counsel invited the Court to consider and contrast GCR Order 53 Rule 5 with the equivalent CPR Rule 56.4 in the Supreme Court of Jamaica Civil Procedure Rules, and O.53, r.5 of the old United Kingdom Supreme Court Rules in this regard.¹
12. Regarding the Defendant’s reliance upon authorities from the Court of Appeal of Jamaica and the High Court of Antigua and Barbuda, Counsel submitted that as the applicable Rules in Jamaica and Antigua and Barbuda differ significantly from the GCR, these authorities do not assist the Court. He invited the Court to consider that if it were intended that Order 53 Rule 5 (2) should be interpreted in the manner suggested by the Defendant, the Rule would have been drafted in such terms.

¹ These are both referenced further later in this judgment.

13. Counsel referred the Court to the provisions of Order 53 Rule 5 (7), which provide:

“If on the hearing of the motion the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice may be served on that person.”

14. In support of his argument against the interpretation which the Applicant/Defendant asked the Court to adopt, Counsel suggested that if:

“...a lack of service renders the Motion invalid on account of a failure of service, O.53, r.5(7) would be rendered otiose since the Court would lack any jurisdiction to make an order for service of a Motion that had become extant because it had not been served.”

15. Counsel asked the Court to find that *“(contrary to the rules applicable in other jurisdictions) non-compliance with O.53, r.5 has no automatic effect on the validity of the Motion.”* He stated that to find otherwise:

“...would create significant procedural uncertainty since O.53, r.5 relates to the service of documents that might not be available within the 7-day period. As in the instant case where the sealed Notice of Motion and Order were only received from the Court on 4 May 2023, the order having been made on 10 March 2023.”

16. Counsel further submitted that GCR Order 2 Rule 1 applies to ‘any proceedings... at any stage’. Similarly, Order 3 Rule 5 allows a discretion in respect of ‘any act in any proceedings.’ These Rules, he argued, are applicable in this case.

17. The Plaintiff submitted that the Court should exercise its discretion in favour of the Plaintiff for the following reasons:

“1. The Defendant knew that leave had been granted on 10 March 2023 and took no issue with lack of service until 28 April 2023. It can be said that a question of estoppel arises in circumstances where the Defendant seemingly acquiesced as to the procedural position whilst discussions remained ongoing.

2. The Defendant has not demonstrated any prejudice that has been suffered by reason of the delay.

3. *The Plaintiff made a pre-emptive request that the hearing of the application for leave be delayed by 28 days to allow for ADR to take place. It is trite law that the Court should be more 'sympathetic' to requests for additional time made pre-emptively.*
4. *The Defendant's pre-action correspondence (annexed to the application for leave) heavily criticised the Plaintiff for applying for leave without engaging in ADR. The Defendant now seeks to criticise the Defendant for not taking steps in prosecuting the Judicial Review whilst ADR was ongoing.*
5. *Allowing the Defendant's application for strike out would be disproportionate and unjust in the circumstances of this case."*

Court's considerations

18. Two main issues arise for determination:

- (i) Is the grant of leave to apply for Judicial Review conditional upon the Notice of Originating Motion being filed within a stipulated time period after such grant; and
- (ii) Do Order 2 Rule 1 and Order 3 Rule 5 apply to applications under Order 53 Rule 5 (2) to allow the Court to exercise a discretion to extend time for filing of the Notice of Originating Motion once Leave is granted.

Issue 1:

19. Order 53 Rule 5 of the Grand Court Rules states:

- "(1) In any cause or matter, where leave has been granted to make an application for judicial review, the application shall be made by originating motion to a Judge sitting in open Court, unless the Court directs that it shall be made to a Judge in Chambers. Any such direction shall be without prejudice to the Judge's powers under Order 32, rule 13.*
- (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 53 application*
- upon the defendant and all other persons directly affected.*
- (3) Where the application relates to any proceedings in or before a Court and the object of the application is either to compel the Court or an officer of the Court to do any act in relation to the proceedings or to quash them or any order made therein, the documents specified in paragraph (2) must also be served on the Clerk or Registrar of the Court and, where any*

objection to the conduct of a Justice of the Peace or Magistrate is made, on such Justice of the Peace or Magistrate.

- (4) Unless the defendant and all other persons served agree, the first hearing of the notice of motion shall be treated as a directions hearing.*
- (5) Unless the Court granting leave has otherwise directed, there must be at least 14 days between the service of the notice of motion and the first hearing.*
- (6) An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion must be filed before the motion is listed for hearing and, if any person who ought to be served under this rule has not been served, the affidavit must state that fact and the reason for it.*
- (7) If on the hearing of the motion the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice may be served on that person.”*

20. Order 53 Rule 5 (1) is mandatory in its terms. It compels an applicant for Leave for Judicial Review who has been successful on such an application to make an application by Originating Motion to a Judge in open Court.
21. By the terms of Order 53 Rule 5 (2), the successful applicant for Leave is further compelled to serve copies of the documents noted therein within seven (7) days of being granted Leave. One of the documents to be served is “*the notice of Motion*”. This is without doubt the Notice of Originating Motion to which the “notice of motion” in Rule 5 (1) refers. It has not been argued otherwise on the instant application.
22. The necessary implication is that the Notice of Motion must be filed within the seven (7) days of the grant of Leave. The further implication is that the Notice of Motion required to be filed within this time limit, the grant of Leave is conditional upon this time limit being adhered to. If this is the correct interpretation and effect of these Rules, in the present case, the Notice of Originating Motion, having been filed outside of this time period, would be a nullity.
23. If, however, the Leave granted is not conditional on the Notice of Motion being filed within seven (7) days, the Court must consider whether it has a discretion to allow for the extension of time which would validate the Notice of Motion filed by the Defendant.
24. It is not in issue that Order 53 Rule 5 is distinct from Rules governing Judicial Review applications in other jurisdictions, where the fact that the grant of Leave is conditional upon the Notice of Originating

Motion being filed within a stated time limit is clearly set out. Order 53 Rule 5 (2) requires the successful applicant *to serve* the Notice of Motion and the supporting affidavits.

25. The Supreme Court of Jamaica Civil Procedure Rules states: -

“R.56.4(12) Leave is conditional upon the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.”

26. Under Order 53 Rule 5 of the old United Kingdom Supreme Court Rules, there appeared a similar provision,

“O.53, r5(5) A motion must be entered for hearing within 14 days after the grant of leave.”

27. While this latter provision did not expressly state that the filing of the Motion within the stipulated time was conditional upon Leave being granted, the Rule clearly mandated the time within which the Motion was to be filed.

28. A number of authorities were referred to in the course of the hearing on the issue of whether Leave for Judicial Review was conditional upon the claim for Judicial Review being filed within a specific time. These include *Andrew Willis v. The Commissioner of Taxpayer Audit & Assessment Dept.*; *Antigua and Barbuda Fisherman Co-operative Society v. The Financial Services Regulatory Commission*, *Chester Hamilton v. Commissioner of Police Service*; *Golding (Orrett Bruce) & The Attorney General of Jamaica v. Simpson Miller (Portia)*, and *Minister of Finance & Planning & Public Service (The) et al v. Bailey-Latibeaudiere (Viralee)*.

29. In *Willis*² the Court of Appeal upheld the Order of the first instance Judge who found Leave having been granted to apply for Judicial Review, the condition under the Rules for the applicant to make a claim within fourteen (14) days had not been satisfied with the result that the claim filed was invalid and could not be renewed. The Court of Appeal stated:

“13. There are 2 stages to the application to obtain an order for judicial review. Firstly, one must obtain leave in order to file the claim, Pursuant to the rules, once that leave is obtained, it must be acted on and if the claim is not filed within 14 days of obtaining the leave, it lapses. The leave is conditional on filing the claim within the time stated in the rules, which is 14 days of receipt of the grant of leave. If the condition is not satisfied,

² *Andrew Willis v. The Commissioner of Taxpayer Audit & Assessment Dept. App. No. 190/2009 (19 January 2010)*

then the leave is no longer valid. Any claim filed outside of that period is invalid. I do not see any merit whatsoever in the submissions on behalf of the applicant.

14. Rules 42.2 and 42.8 make it very clear that the Order is effective once it is made. Even if it is an oral ruling, it is binding. To obtain the order granting judicial review, however, the order for leave must be served with the application for leave and the affidavit in support, on all those persons directly affected not less than 14 days before the day fixed for the first hearing. (See Rule 56.11 (1) – (4)).

15. The court cannot therefore exercise its inherent jurisdiction to grant relief when the rules are clear and have been promulgated for just that reason, so that there can be certainty in litigation. I do not accept that there are no express rules to guide the litigants in this regard.”

30. The case of **Hamilton v Commissioner of Police**³ involved an appeal where the appellant, having obtained Leave to make a claim for Judicial Review, filed a Fixed Date Claim Form within the time required by the Rules and served the same within the time required by the Rules together with an affidavit which had been filed in support of the application to obtain Leave. The affidavit was not refiled after the Order granting Leave. The Judge, at first instance, found that the claim form was a nullity, it not having been accompanied by an affidavit at the time that it was filed. The claim was, therefore, dismissed.

31. Relevant to this appeal, the Court noted that:

“It is important to note that rule 56.4 (12) does not specifically state that leave is condition[al] on the filing of an affidavit with the fixed date claim form or otherwise. The condition refers to “making a claim”. There is also no mention of the claim being a nullity for failure to comply with the specific provision. The leave as stated is not absolute, it is conditional, and is inchoate unless the claim is made within 14 days of the grant of leave.”

32. In **Hamilton**, the Court of Appeal held that the failure to file the affidavit with the Fixed Date Claim Form did not render the claim a nullity, since the claim had been made and therefore Leave became absolute, and *“the failure to file the affidavit would not ...have invalidated any step taken in the proceedings.”*

³ *Chester Hamilton v. Commissioner of Police Service [2013] JMCA Civ 35 (July 31, 2013)*

33. In *The Minister of Finance and Planning & Public Service and Ors. v Bailey-Latibeaudiere*⁴, one of the issues before the Court of Appeal related to the validity of a Fixed Date Claim Form. Fixed Date Claim Form applying for Judicial Review was filed some twenty-five (25) days after Leave to apply for Judicial Review was granted by the Court. When objection was taken that the claim was not filed within fourteen (14) days of the grant of Leave, the Learned Judge held that it had been filed within time since Leave had been granted during the court vacation, and hence time did not begin to run until the next court term began. The Court of Appeal noted that the court below had accepted that Part 56 of the Rules relating to Judicial Review was silent on this point and that the Learned Judge had taken the following view:

*“The true position would seem to be that where there are rules of general application in the CPR and a specific part does not address an issue or provides a rule contrary to the general rule then that general rule applies unless there is some compelling logic to hold otherwise.”*⁵

34. Morrison J.A. considered a number of authorities and concluded:

“[100] These cases therefore establish that (i) under the CPR, judicial review proceedings are in a different category from ordinary civil proceedings; (ii) save where otherwise specifically indicated in the rules themselves, Part 56 of the CPR provides a specific procedure for the conduct of judicial review proceedings which should be adhered to; (iii) leave to apply for judicial review is conditional on a claim for judicial review being filed within 14 days of the grant of leave; and (iv) if this condition is not satisfied, the leave lapses and any claim filed outside of that period is invalid.”

35. He noted further referring to the course adopted by the first instance Judge:

“[109] It seems to me, with respect, that by importing these general provisions of the CPR into Part 56, the learned judge failed to have sufficient regard to the special nature of judicial review proceedings and the fact that Part 56, as consistently interpreted by the courts, was plainly intended by the framers of the rules to be, save where otherwise indicated, a self-contained code for the conduct of such proceedings.

...

[111] It is against the backdrop - and as an integral part - of this general theme of expedition, it seems to me, that rule 56.4(12) falls to be considered. The "compelling logic", to

⁴ *Minister of Finance & Planning & Public Service (The) et al v. Bailey-Latibeaudiere (Viralee) [2014] JMCA Civ 22 (9 June 2014)*

⁵ The issue in the appeal was whether the Judge was correct in treating the 14-day filing requirement of rule 56.4(12) as being subject to rules 2.2 and 3.5.

borrow the judge's phrase, of the entire scheme of Part 56 is what clearly suggests to me that a provision that the time for filing a statement of case, which would include a fixed date claim form for judicial review, does not run during the long vacation, cannot have been intended by the framers of the rules to apply to judicial review proceedings. As Miss Larmond pointed out, one startling consequence of the judge's decision is that an applicant who obtained leave at the beginning of the long vacation would not be obliged to move the application along by filing his claim for judicial review until the beginning of the Michaelmas Term six weeks later, thus wholly defeating the objective of expedition.

[112] For these reasons, I considered that, on the material that was before him in this case, the learned judge ought to have upheld the preliminary objection, on the basis that, the respondent's claim for judicial review not having been filed within the 14-day period prescribed by rule 56.4(12), the leave granted to her for that purpose had lapsed.”

36. In *Antigua and Barbuda Fisherman Co-Operative Society v. The Financial Services Regulation Commission and another*⁶, the claimant in that matter sought to rely on the provisions of the CPR concerning extension of time and the overriding objective, a submission that was opposed by the defendants, who submitted that reliance could not be placed on those provisions as the claim, having been filed after the expiration of fourteen (14) days from the Order granting Leave to appeal, was null and void, the conditional leave having expired.

37. The Court held:

“Having reviewed the submissions and authorities of both counsels, the court is of the view that there is no authority under the provisions of the CPR relied upon by the claimant to extend the time limit set out in Part 56.4 (11). In the court’s view the provisions in Part 26 referred to by the claimant are general provisions which are inapplicable to the provision for leave and specifically to extension of the time fixed in 56.4 (11). Once the claim is filed, Rule 56.11 indicates that the provisions of Parts 25 to 27 apply to directions to be given by the Judge at the first hearing. Without a similar express provision, the general provisions for extension of time cannot be applied to Rule 56.4 (11). Further, the fact that the court's order does not contain the word condition cannot change the fact that leave under the Rule 56.4 (11) is conditional on the claim being filed within 14 days.”

⁶ Claim No. ANUHCV2016/0167 – Judgment delivered on January 4, 2018

38. In *Golding (Orrett Bruce) & The Attorney General of Jamaica v Simpson Miller (Portia)*⁷, the Court of Appeal set aside an Order granting extension of time to file and serve a Fixed Date Claim Form applying for Judicial Review. The Court did so, adhering to the interpretation of Order 56 which allowed that Rules governing the procedure of Judicial Review are special procedures which must be strictly adhered to, save where otherwise specifically indicated.
39. This Court is mindful that, in the authorities cited, the particular Rules that were being considered contained provisions which stated clearly that the grant of Leave was conditional upon the actual claim being filed within a particular time for its validity, unlike GCR Order 53 Rule 5 (2). Of relevance to this application is the underlying approach in each of the cases to the nature of the Judicial Review application and the need for strictness in the interpretation of the Rule under consideration.
40. GCR Order 53 Rule 5 (1) does not specifically state a time for filing of the Motion. However, if the successful applicant is to serve copies of the Notice of Motion within seven (7) days, Rule 2 must be read as presupposing that the Notice of Motion would have been filed between the time that Leave was granted and service of that document. It has been the practice in this jurisdiction for the Notice of Motion to be filed and served within such time period, i.e. seven (7) days.
41. Counsel for the Plaintiff submitted that Rule 5 (2) does not, in clear terms, relate to the filing of a Motion at all and should be considered as referring only to service after the event and not the actual commencement of the proceedings. Counsel raises this argument in support of his further proposition that because the Rule relates only to service, it cannot be said to affect the validity of the Motion once filed.
42. I cannot agree with this submission. To do so would mean, in effect, that Order 53 Rule 5 would impose no time limit within which a successful applicant for Leave would be compelled to institute the claim for Judicial Review. This would run counter to the approach regarding timelines and Judicial Review. Rule 5 (2) clearly mandates service of the Notice of Motion within a set time frame. The validity of this Notice is dependent upon it having been filed within seven (7) days of the grant of Leave. The grant of Leave is therefore conditional upon the filing and service of the Notice of Motion within the time limited for so doing by Order 53 Rule 5 (2). The effect of the Notice of Motion being filed outside the time limit required by the Rule is that the Notice so filed is invalid since the Leave to apply for Judicial Review had, in essence, lapsed. The Plaintiff cannot pursue the application for Judicial Review.

Issue 2

⁷ SCCA No. 3/08 (April 11, 2008)

43. In oral submissions before this Court, the Defendant submitted that, unlike ordinary civil proceedings, the specialised Rules for Judicial Review do not permit any extension or restriction of time except where such is specified in the Order. Senior Crown Counsel argued that:

“GCR Order 53 being self-contained, means therefore that no other rule of the GCR which is general in nature and thus outside of GCR O. 53 is applicable in order to find a discretion outside of these specific rules to allow this Honourable Court to have the discretion to grant an extension [of time].”

44. While Counsel conceded that provisions such as Order 53 Rule 5 (7) give the Court a discretion regarding time on the issue of service of the Notice of Motion and the first Hearing, he argued that the Court could not, because of the nature of Judicial Review proceedings, seek to find a discretion where none is prescribed in the Order itself. Counsel submitted that where the Court retained its overriding discretion, the particular Rule specifically referred to same. He drew the Court’s attention to Order 53 Rule 3 (6) in which the powers of the Court, under Order 20 Rule 8 were specifically preserved, notwithstanding the terms of that Rule. So too, Order 53 Rule 5 (1), which specifically retained the Court’s powers under Order 32 Rule 13 pertaining to the Court’s discretion to direct that a matter be heard in Court or adjourned to Chambers.

45. For these reasons, Counsel submitted that Order 2 Rule 1 and Order 3 Rule 5 (2) are Rules of general applicability that do not impact the clear terms of Order 53 Rule 5 (2) so as to assist the Plaintiff. Counsel’s submission was that the Court should find that implicit in the fact that Order 53 had incorporated only certain general Rules, it was the case that no other Grand Court Rules, including these Rules importing a discretion should affect the application of its clear provisions.

46. On the converse, Counsel for the Plaintiff argues that if Order 2 Rule 1 and Order 3 Rule 5 (2) were not to apply to Judicial Review proceedings, the Order would have specifically restricted their application in clear terms. Where there was no such restriction, these general Rules granting the Court a discretion should be found to apply to allow for an extension of time regarding the filing of the Notice of Motion.

47. In ***Golding***,⁸ the Court referred to this issue in its consideration of Rule 26.1 of the Civil Procedure Rules, which enables the Court to extend or shorten the time for compliance with any Rule, Practice Direction for or direction of the Court, even if the application for an extension is made after the time for

⁸ SCCA No. 3/08 (April 11, 2008)

compliance has passed. The Court found that the failure to make a claim for Judicial Review within the time stipulated by Rule 56 (13) had had the effect that the Leave had lapsed and had so become invalid.

48. The Court stated, *“unless a particular rule so provides the court may not exercise its general powers of case management at any stage before the substantive proceedings have commenced.”*

49. Where, as in this case, Counsel for the Plaintiff sought to argue that the Court could look at the provisions of Order 53 Rule 5 (7), which enables a Court on the hearing of a Notice of Motion to order the Notice of Motion to be served on any person who, in the opinion of the Court, ought to have been served, as lending support to the submission that a lack of service cannot render the Leave invalid, his argument fails to grasp the fundamental point that it is not the lack of service which renders the Motion invalid. Rather, it is the failure to file the Notice of Motion within the time limited for same. There is no issue of rendering Order 53 Rule 5 (7) otiose if the Court interprets Order 53 Rule 5 (2) as being mandatory, for the document contemplated by that Rule is a Motion already filed and in compliance with Order 5 Rule 2.

50. The Hong Kong Civil Procedure Rules, at 3/5/2, it is stated as follows:

“Where mandatory time limits are provided by statute it is not possible to invoke the inherent jurisdiction of the court or the provisions of O.3 r.5 (1) to extend the same.”

51. Order 53 Rule 5 (2) imposes a mandatory time limit. This is not a Rule which gives the Court a discretion to extend time, such as Order 5 Rule 6 (4), which states that the time for filing of affidavits shall be within 56 days *“unless the court otherwise directs.”*

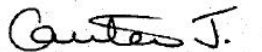
52. In *Vinos*⁹ the Learned Judge stated: *“Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored.”* The Provisions of Order 53 should be strictly construed given the nature of Judicial Review proceedings. Contained within this Order itself are rules which specifically retain the Court’s powers and discretion. This Court cannot employ the discretion to extend the time for filing of the Notice of Motion. Order 53 confers no such discretion upon the Court regarding such filing.

53. Strict compliance with the time limits must be adhered to by applicants who seek to make a claim for Judicial Review. The Court was not provided with any authority which allowed for the interpretation sought by Plaintiff. In this case, the Plaintiff has intimated to the Court that after the Leave was obtained, they continued to engage with the Defendant with a view to resolving the issues in dispute. There is no

⁹ (2001) 3 All ER 784

indication that the Plaintiff sought an undertaking from the Defendant that it would not take issue with the filing of the Notice of Motion outside of the time limited for doing so because of those discussions. There was nothing to preclude the Plaintiff from filing the Notice of Motion and continuing to engage with the Defendant thereafter.

54. I am satisfied that the grant of Leave to proceed to Judicial Review under GCR Order 53 is provisional, not absolute, in that it imposes a condition on an applicant to file his Notice of Originating Motion within seven (7) days of the grant of Leave with the effect that any Notice of Motion filed thereafter is a nullity and of no legal effect. I am also satisfied that the Court has no jurisdiction to hear or determine the Notice of Originating Motion invalidly filed outside the 7-day time limit, nor the discretion to extend time for compliance.
55. Pursuant to Order 18 Rule 19 (1) (d), the Notice of Originating Motion filed herein on the 28 April 2023 is struck in its entirety. There is no Order for costs.



The Hon. Justice Marlene Carter
Judge of the Grand Court