Neutral Citation Number: CICA (Civ) 7

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CICA (CIVIL) APPEAL No. 2 of 2024
CAUSE No. 167 OF 2023

IN THE MATTER OF THE MONETARY AUTHORITY ACT (2020 REVISION)
AND IN THE MATTER OF IBC

BETWEEN:

IBC

Applicant/Appellant

-and-

THE CAYMAN ISLANDS MONETARY AUTHORITY

Respondent

Before:

The Rt Hon Sir John Goldring (President)
The Hon John Martin KC, JA
The Hon Sir Richard Field, JA

Representation: Peter Hayden and Luke Burgess-Shannon of Mourant Ozannes (Cayman) LLP, for the Applicant/ IBC.

Neil Timms KC and Jodie Woodward, for the Respondent

Heard: 15 November 2024

Draft Judgment circulated: 13 March 2025

Judgment delivered 8 April 2025

Sir Richard Field, JA

Introduction

1. The principal issue raised in these appellate proceedings is whether the approach set out in an 1989 English Practice Note ("the Practice Note") dealing with applications to extend the time in which a respondent to judicial review proceedings must serve its evidence under RSC Order 53, r.6 (4) should be applied in the Cayman Islands to like applications under GCR Order 53, r.6 (4). Justice Kawaley ("the Judge" or "Kawaley J") held below that the Practice Note should not be followed in the course of granting the application of the respondent ("CIMA") for an eight week extension of the time in which its evidence must be filed in judicial proceedings brought against it by the applicant/appellant to whom I have given the name "IBC" pursuant to an anonymisation Order granted below.

2. The hearing before us was intended to be of a "rolled up" nature taking the form of an application for leave to appeal the Judge's Order to be followed by a hearing of the appeal if leave to appeal were granted. In the event, the parties were invited at the outset to make the full submissions they would make if the matter were a full-blown appeal, which they proceeded to do.

3. The underlying judicial review proceedings were brought by IBC against CIMA challenging the legality of a Direction served on it by CIMA on 2 August 2023 under section 53 of the Monetary Authority Act at the request of the US Securities and Exchange Commission ("SEC"). This request was made under both the International Organisation of Securities Commission ("IOSCO") and the Multilateral Memorandum of Understanding of May 2002 ("MMOU") to which both CIMA and the SEC are signatories and the separate Memorandum of Understanding between the SEC and CIMA ("the MOU"). The Direction Ordered the production of documents whose details were set out in a schedule. IBC declined to comply with the Direction on the ground that CIMA was not empowered to issue it since IBC had no presence in the US and was accordingly not subject to any supervision by the SEC.

4. On 14 September 2023, the IBC obtained ex parte leave from the Judge to bring judicial review proceedings challenging the lawfulness of the issue of the Direction and

proceeded to serve CIMA with its Notice of Originating Motion and associated documents within the 7 day period provided for in GCR Order 53, r. 5 (2). The Judge also granted IBC an anonymisation Order. After 2 August 2023, there were without prejudice exchanges between the parties that included an extension by CIMA of the time by which the documents were to be produced, to 18 September 2023 and service by IBC on CIMA on 15 September 2023 of IBC's application for leave to apply for judicial review and associated documents, including a supporting affidavit, the Order granting leave and a Notice of Motion dated 14 September 2023. About two months later, by letter dated 22 November 2023 to CIMA, IBC pointed out that the 56-day period within which a respondent to judicial review proceedings is required by GCR Order 53, r. 6 (4) to serve its evidence had expired (which indeed was the case).

5. On 28 November 2023, IBC issued a Summons for Directions seeking directions for the working out of the consequences for its judicial review proceedings following the failure of CIMA to comply with the prescribed timetable for the service of its evidence. On 9 January 2024 CIMA responded by issuing its own summons seeking an Order that IBC's judicial review proceedings be struck out on the grounds, inter alia, of IBC's failures to comply with: (i) the Practice Direction (PD) 4, 2013 Pre-action Protocol; (ii) the duty of candour arising from the ex parte nature of the application for leave to bring judicial review proceedings; and (iii) the duty to proceed without undue delay.

6. GCR Order 53 is headed: APPLICATIONS FOR JUDICIAL REVIEW.

Order 53, rule 6 (4) provides:

> "*Any respondent who intends to use an affidavit at the hearing shall file it as soon as practicable and in any event, unless the Court otherwise directs, within 56-days after service upon the respondent of the documents required to be served by paragraph (1)"* [viz copies of the notice of motion and statement in support of an application for leave for judicial review].

7. When the parties' respective summonses each came before the Judge on 12 January 2024 both sides recognised that, given the time allocated for the hearing and that directions

sought on CIMA's summons had been agreed, the issue to concentrate on was the consequences for IBC's judicial review application resulting from CIMA's failure to serve any evidence within the 56-days stipulated in Order 53, r. 6(4).

8. CIMA had not filed an application for an extension to the 56-days limit but in its skeleton argument it submitted that on a correct reading of GCR Order 53, r.6(4) the Court should make an Order, inter alia, for service of evidence within 8 weeks.

9. Counsel for IBC, Mr Peter Hayden, submitted that since GCR Order 53 replicated the wording of the Rules of the Supreme Court ("RSC") Order 53, the Court, when dealing with a failure by a respondent to comply with the 56-days limit, should follow the approach taken in England in such a situation during the period ending with the coming into force of the English Civil Procedure Rules ("CPR"). He referred the Judge in oral argument to: (i) the pre-1989 English cases of *R v Dairy Produce Quota Tribunal for England and Wales ex parte Vevers*[1] and *R v Secretary of State for the Home Department ex parte Obamwonji;*[2] (ii) paragraphs 1 and 2 of the headnote[3] in the report of the Court of Appeal's judgment in *R v Institute of Chartered Accountants in England and Wales ex parte Andreou;*[4] and (iii) the 1989 Practice Note[5] issued in England and Wales in 1989 by Lord Justice Watkins in the Queen's Bench Division which states, inter alia:

> "… [The increase in the time limit for filing an affidavit under RSC O. 53 r.6(4)] follows a general acceptance that the period of 21 days was unrealistically short and therefore, in many cases, unenforceable. The period substituted cannot be so characterised. It has been set realistically, having regard to the interests of both applicants and respondents, *and as such must be strictly adhered to. Although there is provision for extending this period- see Order 3 r.5-it must be clearly understood that extensions of time will be granted only in circumstances*

[1] [1988] Lexis Citation 1475
[2] [1989] Lexis Citation 1354
[3] "1. The purpose of the procedure governing applications for judicial review is to provide a simplified and expeditious means of resolving disputes arising in the field of public law; 2. This purpose would be frustrated if the relatively leisurely and casual approach to time limits which characterises civil litigation in the field of private law were to be adopted in the field of public law."
[4] (1996) 8 Admin LR 557
[5] Practice Note (Judicial Review: Affidavit in Reply) (1989) 1WLR 358

> *which are wholly exceptional and for the most compelling reasons. For all practical purposes respondents would be well advised to treat the period of 56-days as absolute…* The Crown Office will not accept respondents' affidavits outside the 56-day period unless an extension of time has first been obtained. Applications for extension of time will be considered in the first instance by the Master of the Crown Office. An appeal against his decision will lie to a judge hearing cases in the Crown Office List…. *Delays in lodging respondents' affidavits have hitherto caused severe prejudice to applicants and consequent damage to the administration of justice.* [Emphasis added]

10. Having told the Judge that to his knowledge most practitioners in Cayman keep a copy handy of the 1999 White Book because the Grand Court Rules ("GCR") do not include the notes that are included in that White Book, Mr Hayden submitted that the Judge should follow the wording of the Practice Note and rule that CIMA should be barred from relying on evidence at the hearing of the judicial review claim, bearing in mind that CIMA had not previously applied for an extension of time and/or provided a convincing explanation for the failure to comply with the 56-day time limit.

11. Ms Jodie Woodward for CIMA outlined in some detail her client's strike out case and submitted that, by the words "unless the Court otherwise directs," Order 53 r.6 (4) itself contemplates the grant of an extension to the 56-day limit and she drew the Judge's attention to paragraph 2 of the Preamble to the Grand Court Rules that requires the Court to give effect to the Overriding Objective when the Court applies, or exercises any discretion given to it by the Rules, or interprets the meaning of any Rule. She also prayed in aid the failure of IBC to issue a Summons for Directions expeditiously.

12. The Judge had before him the second affidavit of Ms Helen Spiegel, CIMA's Acting Deputy General Counsel, in which, in addition to setting out the interactions between CIMA and IBC, Ms Spiegel states that there had been regulator to regulator discussions with the SEC that were ongoing and it had not been practicable to serve an affidavit in 56-days. Ms Woodward related this state of affairs to the Judge telling him that the discussions were seeking to achieve an important balance between transparency and fairness to IBC whilst maintaining confidentiality pursuant to CIMA's statutory duty as

required under section 50 of the Monetary Authority Act. She stated that if CIMA had served evidence within the 56-day limit it would have been unable to go further than the explanations in the letters provided to IBC following the issuance of the Direction which had been exhibited by IBC in support of its judicial review application.

13. The Judge then observed that the Court should in principle adopt a strict approach when deciding whether to extend the 56-day limit where there is an admitted non-compliance with the time limit but it was not appropriate to apply the very strict approach set out in the Practice Note in the case before him in light of: (a) the fact that during the many years after the enactment of GCR Order 53 there had been no case or Practice Direction in Cayman mandating that that very strict approach be adopted; and (b) the distinctive background to the case and the mutual assistance content. He indicated that he would grant the eight weeks' extension sought for reasons that would follow.

Kawaley J's judgment at first instance (styled "Reasons For Ruling")

14. Having recited in paragraphs [4] – [7] the procedural history, the Judge set out in paragraphs [8] – [10] his preliminary view as to the interpretation and application of the time limit imposed by GCR Order 53, r.6 (4), which was that the Court had an unfettered discretion to extend time in light of:

(1) The words "*unless the Court otherwise directs"* in sub-rule (4);

(2) GCR Order 3, r. 5 which provides

> "***Extension, etc. of time (O.3, r.5)***
>
> 5. (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.
>
> (2) *The Court may extend any such period as is referred to in paragraph (1) although the application for extension*

> *is not made until after the expiration of that period.*
> [Emphasis added]
>
> (3) The period within which a person is required by these Rules, or by any Order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an Order of the Court being made for that purpose."

(3) In the absence of local case law or a Practice Direction mandating a special approach to the time limit under Order 53 rule 6(4) as read with Order 3 rule 5, this broad flexible extension of time jurisdiction would logically seem to apply.

15. The Judge then went on to deal with the strict approach to the Order 53 rule 6 (4) time limit in England and Wales and whether the practice should be followed in the Cayman Islands.

16. In paragraph [11] he says that IBC's counsel's attempt to debar CIMA from filing evidence based on a practice never having been recorded as having been followed before "appeared at first blush to be a swashbuckling type of submission because during the twenty years that Order 53 had been in force in identical terms in the two jurisdictions, England and Wales and the Cayman Islands, I have never encountered the rule of practice contended for". In his view,

> "It was apparent that because of specific concerns encountered by the English courts which prompted the promulgation of a Practice Direction, the time limit prescribed [in] the corresponding rule in that jurisdiction had been strictly construed. It seemed inherently unjust, if this strict rule had not been followed in a jurisdiction where similar abuses by respondents had not occurred, that it should be visited like a bolt of lightning from a clear sky on the unsuspecting Respondent in the present case".

17. In paragraphs [12] – [14] the Judge agreed that it was common place for local practitioners to have recourse to the Supreme Court Practice when construing the Grand Court Rules and in doing so they would have found three paragraphs of commentary on the 56-day time limit for service of the respondent's evidence, the first two of which stated that the limit is "strictly enforced"[6] with the third quoting from the Practice Note that "it must be clearly understood that extensions of time will be granted only in circumstances which are wholly exceptional and for the most compelling reasons …"[7]

18. In paragraph [13] the Judge stated, "[t]he hypothetical diligent lawyer seeking to ascertain how the GCR Order 53 rule 6 (4) time limit would be enforced in the Cayman Islands, would have concluded that the English practice of strictly enforcing the 56-day time limit was not based on the construction of the rule itself. Rather, the principle of strict enforcement derived from a Practice Note which explicitly circumscribed both the extension of time power contained in Order 53 rule 6 (4) itself and/or the flexible extension of time jurisdiction conferred by Order 3 rule 5."

19. In paragraphs [14] and [15], the Judge stated:

> "Practice Notes (or Practice Directions as we know them) are usually (but not invariably) issued with a view to resolving specific problems which have been identified in a particular court. Their aim is to expand upon the bare bones of a particular rule and to afford guidance as to how, going forward, the Court will exercise what is often formulated as an unfettered discretion." [14]
>
> "In my judgment, the Practice Note relating to the strict enforcement of Order 53 rule 6 (4) in England and Wales reflects the modification of the Rules of Court by way of a special practice rather than persuasive authority as to meaning and effect of a particular rule. For a similarly strict approach to be taken by this Court would require ideally a Practice Direction to be issued by the Chief Justice (at best) or (at a minimum) judicial guidance warning that in future the

[6] Paragraphs 53/14/6 and 53/14/74
[7] Paragraph 53/14/75

> discretion conferred by GCR Order 3 rule 5 will be narrowly exercised in Order 53 rule 6 (4) cases." [15]

20. In paragraph [16], the Judge accepted Mr Hayden's submission that the general scheme of GCR Order 53 is designed to promote timeliness in public matters stating that the clearest support for this proposition was the following passage in the judgment of Henry LJ in *ex parte Andreou* (op cit):

> "…*Public law deals with the identification and redress of public wrongs generally in disputes between the citizen and the State or its institutions. It provides under Order 53 a simplified and expeditious procedure which is essential to enable the Crown Office List fulfilling its purpose, while recognizing both the general importance of the issues at stake and the large numbers often potentially affected by them, and the necessity for an early resolution of them. If 'normal' private law delays and private law relaxed attitudes to rules time- limits creep into the Crown Office List, then the delays in that list will build to the point that it can no longer properly perform the important public duty entrusted to it. Public litigation cannot be conducted at the leisurely pace too often accepted in private law disputes*…"

21. In paragraph [17], the Judge stated that he agreed that these principles applied to the Cayman Islands Order 53 regime but he could not accept the "high level imperatives" derived from the Practice Note. Not only was there no Cayman Islands' Practice Direction articulating a modification of the flexible extension of time powers conferred by GCR Order 3 rule 5, there were no judicial decisions articulating concern about a "*relaxed attitude*" to time limits in public law cases. In his own experience over the last seven or so years, more often than not respondents were pressing to expedite the progress of public law proceedings rather than guilty of delay.

22. In paragraph [18] the Judge stated that the formal scope of the jurisdiction to extend time under Order 53 rule 6 (4) was accurately described in CIMA's submission that "the Rule gives the Court an absolute discretion to extend the period of 56-days if it feels it

is appropriate to do so. Although there is no fettering how the Court should exercise its discretion, it goes without saying that the period of 56-days should be extended if it is in the interests of justice to do so."

23. In paragraph [19], the Judge concluded that "the English approach to the 56-day time limit for respondents' evidence does not reflect Cayman Islands law or practice."

24. Paragraphs [20] and [21] of the judgment are headed: **Time limits and judicial review proceedings under GCR Order 53: the correct approach**. They read as follows:

> [20] For the reasons articulated by the English Court of Appeal in *ex parte Andreou*, the public policy function served by judicial review requires a stricter adherence with time limits by both applicants and respondents than in ordinary civil litigation. Indicators within Order 53 itself of the importance of expedition include (1) the presumption in favour of leave applications being dealt with on the papers (Order 53 rule 3 (3), and (2) the three months' time limit from the date of the impugned decision for commencing proceedings (Order 53 rule 4). Depending on which corner of the public law field a particular application traverses, delay may be more or less prejudicial to applicants or respondents.
>
> [21] Subject to any Practice Directions issued by the Chief Justice, the proper approach to judicial review applications will generally require the following procedural steps:
>
> (a) applicants will not without good cause request an oral leave hearing as the default position is that leave will be considered on the papers unless the applicant requests a hearing (Order 53 rule 3 (3));
>
> (b) the Court in its inherent jurisdiction will retain the right to list the leave application for an oral ex parte or inter partes hearing where the Judge is provisionally inclined to refuse leave on

the papers or doubtful about the merits of the application;

(c) if leave is refused at the ex parte stage, the applicant must renew the application within 10 days (Order 53, rule 3 (5));

(d) if leave is granted, the applicant must file and serve a notice of motion together with the leave papers on the respondent within 7 days of obtaining leave (Order 53 rule 5(2) and any statement of grounds (Order 53 rule 6 (1));

(e) if the respondent wishes to apply to set aside leave, any such application should obviously be filed promptly if an inter partes hearing is sought in advance of the substantive hearing of the notice of motion;

(f) unless the respondent and all parties served agree, the return date of the notice of motion will serve as a directions hearing (Order 53 rule 5 (4));

(g) there must be at least 14 days between the date of service of the notice of motion and the first hearing date (Order 53 rule 5 (5));

(h) within 56-days of service, unless the Court otherwise directs, the respondent must file its evidence (Order 53 rule 6 (4));

(i) implicit in Order 5 rule 5 (4) is the notion that in the normal course of events, the applicant will obtain a return date before serving the notice of motion and no separate summons for directions will Ordinarily be required.

25. In paragraphs [23] to [25], the Judge set out his findings that had led him to grant the extension of time sought by CIMA.

26. In paragraph [23] the Judge found that on any view IBC had "hastened slowly" in failing initially to issue the Notice of Motion with a return date and had belatedly issued the Summons for Directions but expressed the view this consideration was of marginal significance in terms of deciding whether CIMA should be given an extension of time for filing its evidence.

27. In paragraph [24] he stated that the most compelling consideration was that the impugned decision was made by CIMA, this country's primary financial services regulatory authority, pursuant to a request for international assistance from the SEC, a prominent United States regulatory body. IBC's case, while framed as a challenge to the lawfulness of CIMA's actions, was premised on the core assertion that the SEC had no jurisdiction to make the request.

28. The Judge then went on in paragraph [24] to set out the following matters that he had taken into account:

(a) the fact that the Applicant had been from the outset granted a stay;

(b) the fact that the parties had engaged in some without prejudice discussions;

(c) the fact that information the Respondent was seeking from the SEC was on its face far from straightforward;

(d) the obvious public policy importance of the Respondent's statutory obligations to respond positively, so far as the law permits, with international cooperation requests.

29. In paragraph [25] the Judge stated:

> I concluded that the factors in favour of granting the Respondent the extension of time it sought clearly outweighed both (1) any countervailing interest of the Applicant in an expeditious hearing and (2) any general policy need to uphold the time limit prescribed for filing responsive evidence under the Rules. The public policy imperative to avoid delay also justified the Court granting an

extension of time of its own motion without requiring a formal application to be filed.

The rival cases advanced by IBC and CIMA at the hearing on 15 November 2024.

IBC's case

30. Putting on one side for the moment a submission founded on the decision of Asif J in *R (Fernando Soto) v The Police Service Commissioner* (Unreported, 31 May 2024), IBC's case is that the Judge erred in law in the following respects in exercising the discretion conferred on the Court in favour of granting CIMA'S extension of time:

(1) The Judge wrongly declined to accept the "high imperatives" expressed in the Practice Note despite agreeing that the principles enunciated in *ex parte Andreou* applied to the Cayman Islands Order 53 regime and despite those principles having been consistently applied in England and the Cayman Islands for decades; see *R v The Home Department* [2012] EWHC 1217 (Admin) at [57]; *R v Department of Work and Pensions* [2023] EWHC 2259 (Admin) at [22]; *Ackermon v The Government of the Cayman Islands* 2013 2 CILR1 .

(2) The approach adopted by the Judge was contrary to:

(a) His own observation during the hearing before him that it was obvious that the Grand Court should in principle be guided by a similar approach to that taken in the English cases which a diligent lawyer in the Cayman Islands would have understood was subject to the Practice Note which was approved by Henry LJ in *ex parte Andreou*, where the Lord Justice stated that "[t]he philosophy behind the Practice Note has to my knowledge, never been criticised or questioned in any case or textbook and is unsurprisingly cited as representing the law in *de Smith, Woolf & Jowell,* 5th edition at 15-

028".[8]

(b) The Judge's statement during the hearing that there should be a strict approach if non-compliance with the time limit is admitted (as there was in the instant case).

(c) The Judge's acknowledgment that the approach to the three-month time limit for commencing judicial review proceedings (which is strictly applied in the Cayman Islands) and the corresponding 56-day time limit for responsive evidence must "as a matter of principle" work "both ways".

(3) The Judge wrongly found that the strict judicial approach in England derived from the Practice Note when the strict judicial approach in England pre-dated the issue of that Note.

(4) The Judge erred in concluding that for the strict approach set out in the Practice Note to apply in the Cayman Islands would require the issuance of a similarly Ordered Practice Direction by the Chief Justice (at best) or (at a minimum) judicial guidance warning that in future the discretion conferred by GCR Order 3 r. 5 will be narrowly construed in Order 53, r.6(4) cases.

(5) The Judge erred in granting an extension in the absence of a good explanation for the delay in accordance with the approach adopted in the Court of Appeal in *Regalbourne v East Lindsey* DC (1994) 6 Admin LR 102.

(6) The Judge erred in giving weight to the facts that the decision sought to be challenged by IBC was a decision made by a regulator following a request for assistance from a foreign regulator.

IBC's submissions founded on *R (Fernando Soto) v The Police Service Commissioner* (Unreported, 31 May 2024) (hereinafter *"Soto"*)

[8] *Ex parte Andreou* at 564D

31. IBC contends that the Judge should have applied the same degree of severity to CIMA's application for an extension of time as Asif J did in refusing an application to extend the GCR Order 53, r. 6 (4) 56-day limit in *Soto.*

32. In this case the applicant issued judicial review proceedings within the time prescribed by Order 53, r. 4 (i) challenging the decision of the respondent (the Police Service Commission) made on 1 November 2022 not to promote him. The applicant's Notice of Motion and supporting evidence were served on 9 October 2023, which meant that the 56-day limit for service by the respondent of its affidavit evidence expired on 4 December 2023. However, at this point the respondent had not served its evidence. The applicant applied by a summons dated 16 April 2024 for an Order debarring the respondent from adducing evidence at the hearing of his judicial review application. By a summons dated 8 April 2024, but not sealed until 8 May 2024, the respondent sought directions for it to file and serve any evidence upon affidavit and for such further direction as may be deemed necessary.

33. The respondent did not make any application for an extension of the 56-day limit before that limit was reached and nor did it make such an application at the hearing before Asif J. At that hearing the respondent was represented by Dr Jevon Alcock, the Deputy Solicitor General, who relied on the Overriding Objective stated in the Preamble to the GCR. He told the judge that the respondent had made a number of open offers to the applicant and the time limit had not been considered to be an issue because, in other judicial review proceedings in which he had been involved, no objection had been taken to evidence being filed after the limit had expired.

34. In paragraph [18] of his judgment, Asif J referred to Lord Diplock's well known observation in *O'Reilly v Mackman* [1983] 2 AC 237 at 284 that the interest of good administration and third parties affected by a challenged decision gave rise to the need "for speedy certainty" as to whether it has the effect of a decision that is valid in public law.

35. In paragraph [19] Asif J noted the competing interests at play in judicial review

proceedings identified in De Smith's Judicial Review (9th ed) [para 1-004], namely: the rules of law requiring that courts are accessible to people with grievances; the public interest in preventing the disruption in public administration from misguided challenges; and the court's interest in efficiency to prevent delays.

36. In paragraph [20], Asif J drew attention to provisions in GCR Order 53 that are driven by the public policy considerations mandating expedition, including: GCR Order 53, r.4(1) (application for leave to be made promptly and within 3 months); Order 53, r.5(2) (notice of motion and supporting documents must be filed and served within 7 days of the grant of leave); Order 53, rr.5(4), 5(5) and 8(1) (first hearing of the notice of motion to take place from 14 days after service of the application, to be treated as a directions hearing and all interlocutory applications to be made at that hearing; Order 53, r.6(4) (service of respondent's evidence as soon as practicable and in any event, unless the Court otherwise directs, within 56-days after service of copies of the statement in support of the application for leave for judicial review.)

37. In paragraphs [29] and [30], Asif J addressed the question whether an application for an extension to the 56-day limit must be made before the limit had expired. Noting that there was nothing in the wording of Order 53, r. 6(4) that obviously excluded a respondent from making a retrospective extension of time application, he concluded that it was permissible for a respondent to do so, but applying the overall aim of speedy certainty, such an application should be seen to be exceptional and therefore needing to be justified by good reason why the application had not been made before the expiry of the 56-day limit, together with the factors relevant to granting an extension of time generally that would depend on the facts of the case in question, particularly having regard to the position that the 56-day period is a long-stop, and the primary obligation is to serve the evidence "as soon as practicable" as provided in terms in Order 53, r.6(4).

38. In paragraphs [32] and [33], Asif J set out the following principles on which his discretion to extend the time limit was going to be exercised: (1) in a manner

that is just, expeditious and economical; (2) so that the normal advancement of the case is facilitated rather than being delayed, and interpreting that consistently with the particular need for speedy certainty in judicial review claims noted by Lord Diplock in *O'Reilly v Mackman;* (3) so that expense is saved; (4) so that the case is dealt with proportionately to its importance and complexity (since damages are not a kind of remedy directly available in judicial review claims, the amount of money at stake is not a relevant factor); and (5) giving the case a fair share of the Court's finite resources.

39. He also held that the view expressed in paragraph 16-059 of *De Smith* [op cit] that in considering whether to extend time, "the Court will consider whether there is an objective justification for the delay, the importance of the issues, the prospects of success, the presence or absence of prejudice to good administration and the public interest more generally" was a helpful summary.

40. In paragraph [33] Asif J reviewed the circumstances of the case before him noting first that the respondent had not made a formal application to extend time. Instead, counsel for the respondent in his reply submissions, had suggested for the first time that he was making an application orally but there was no properly formulated summons or supporting evidence. Further, the respondent had not put forward any evidence in support of its opposition to the applicant's summons. There was therefore no evidence as to: (a) why it had not been practicable to file its evidence promptly in October or November 2023, or no later than 4 December 2023, or before the middle of May 2024, or to make an application for an extension of time prior to the hearing; (b) the nature of the evidence intended to be relied on; (c) the presence or absence of prejudice to good administration and the public interest. There was therefore no material before him on which he could properly base the exercise of the discretion vested in him in favour of granting an extension and therefore he could not and did not do so.[9]

41. In his concluding paragraphs[10], Asif J made three notable observations. First, he

[9] Para [38]
[10] Paras [54], [55] & [56]

stressed the importance of judicial review proceedings being pursued promptly and brought to a conclusion speedily to provide certainty for those involved in making public law decisions and to avoid the corrosive effect on good administration of long outstanding challenges to previous decisions. Second, he referred to an alarming tendency that should not happen, for cases he had seen so far to plod towards a conclusion. It was incumbent both on attorneys acting for applicants and also on the Crown, to ensure that cases are progressed through the Court as quickly as possible to avoid knock-on effects on good administration and the interests of third parties, as well as in the interests of the applicant and respondent. Third, other than in exceptional cases, the final hearing of a judicial review application should be no more than 6 months from the grant of leave and should usually be quicker. If the parties are not going to meet that timescale, they should bring the matter back before the judge at the earliest opportunity to explain the reasons why and to obtain directions.

CIMA's case

42. CIMA submits that:

(1) The Judge was correct to find that the 1989 Practice Note represented a markedly stricter approach to adherence to the Order 53, r.6 (4) time limit than that taken in the pre-1989 English decisions.

(2) The Judge was entitled to hold, in light of the GCR Overriding Objective, which had been promulgated *after* the Practice Note had been issued, and the different judicial review scenarios obtaining in England and Wales and the Cayman Islands, that the Practice Note did not set the standard of strictness to be applied under GCR Order 53, r.6 (4) by the courts of the Cayman Islands. As the Practice Note itself makes clear, one of the principal reasons for its issuance was the hitherto severe prejudice to applicants and consequent damage to the administration of justice caused by delays in lodging respondents' affidavits. This is markedly different from the Cayman experience. Since 1st June 1995, when the Grand Court Rules came into force (i.e. nearly 30 years) there have been a relatively small number of

judicial reviews in comparison to England and Wales. The number of reported cases in the Cayman Islands is approximately 100. In fact, there were far fewer judicial reviews over this period of time in the Cayman Islands than in any quarter of 2023 in England and Wales. By contrast, in 2023 alone, there were in England and Wales 2,550 applications for judicial review; see the UK Ministry of Justice Civil Justice Statistics: 600 in Q1, 610 in Q2, 670 in Q3 and 670 in Q4.

(3) The Court had power on its own initiative to extend time in the absence of a formal application for such relief.

(4) The Judge's exercise of discretion is not susceptible to successful challenge. His decision was within the ambit of the discretion conferred on him by Order 53, r.6 (4), Order 3 r. 5 and the Overring Objective and he gave proper weight to the following competing factors: the public interest in the expedition of judicial review proceedings as distinct from private law proceedings; the interests of IBC and how it had conducted the judicial review proceedings against CIMA; the interests of CIMA bearing in mind in particular CIMA's role as a regulator and as a party to the IOSCO MMOU and the MOU and its explanation that the delay in serving its evidence was due to constraints on disclosure that depended on instructions from the SEC.

(5) Whilst it is accepted that lack of prejudice cannot itself justify granting an extension of time, it is to be noted that it was held by the JCPC in *Maharaj v National Energy Corp of Trinidad and Tobago* [2019] 1 WLR 983, a case concerned with delay in the commencement of judicial proceedings under the Trinidadian Judicial Review Act and Rule 56.53 of the Trinidadian Civil Proceedings Rules, that the test is not whether there was a good reason for the delay but whether there is a good reason for extending time.

(6) In regard to IBC's reliance on the judgment in *Soto*, since Asif J decided that on the facts he had no discretion to be exercised, his observations on the GCR Order 53, r.6(4) discretion are *obiter* and it is submitted he misconstrued the Overriding Objective and introduced an unnecessary fetter

on the discretion simply on grounds of applying the "overall aim of speedy certainty".

Discussion and decision

43. At the outset, I think it appropriate to recall that: (a) the 1965 Rules of the Supreme Court of England and Wales were replaced by the CPR (including the Overriding Objective) in October 2000 and that judicial review proceedings in England and Wales are now governed by Part 54 of the CPR, rule 54.14 of which provides that a party wishing to contest a judicial review claim must serve any written evidence within 35 days after service of the Order giving permission; and (b) the Overriding Objective of the Rules of the Grand Court came into effect many years after RSC O. 53 took effect.

44. In my opinion, the following issues arise for determination:

(1) Did the Judge err in deciding that the Practice Note as such was inapplicable in the courts of the Cayman Islands? ("The applicability of the Practice Note in the Cayman Islands issue").

(2) Did the Judge err in deciding that the level of strictness to be applied to CIMA's extension of time application to be derived from the principles identified in the passage from Henry LJ's judgment in *ex parte Andreou* recited by the Judge in paragraph [16] of his judgment, was not the same as that articulated in the Practice Note? ("The *ex parte Andreou* principles issue").

(3) On the basis that issues (1) and (2) are answered "no", did the Judge err in granting CIMA's extension of time application for the reasons he gave in paragraphs [23], [24] & [25] of his judgment? ("Was the Judge's exercise of discretion in granting the 8 week extension of time fatally flawed as submitted by IBC?")

<u>The applicability of the Practice Note in the Cayman Islands issue</u>.

45. I begin by expressing my agreement with the Judge's view that the level of strictness

articulated in the Practice Note is not the result of construing Order 53, r.6 (4) but is derived from the Practice Note itself which, in my opinion, is a kind of proxy for a judicial decision binding in England and Wales whose effect is not that the wording of Order 53, r.6(4) is to be strictly construed but rather is a direction as to how the discretion implicit in the words "unless the Court otherwise directs" and the wording of Order 3, r. 5 is to be exercised.

46. In my judgment, it is clear that the strict approach to the 56-day limit championed by IBC is exclusively derived full square from the Practice Note. The pre-1989 judicial approach in England to applications under RSC Order 53, r.6 (4) to extend the then 21-day limit are exemplified by the decisions in *R v Dairy Produce Quota Tribunal for England and Wales ex parte Vevers* (op cit) and *R v Secretary of State for the Home Department ex parte Obamwonji* (op cit).

47. In *ex parte Vevers,* the delay was something like a year and Popplewell J observed that the 21-day limit in Order 53, r.6 (4), "is there and is there to be observed". "The time had come to say quite firmly that the rules presently provide for 21 days and must be complied with"; "enough is enough … it would be quite wrong for the respondent to be allowed … a year out of time to put in an affidavit which will necessarily cause a further adjournment."

48. In *ex parte Obamwonji* Popplewell J refused to grant an extension of 5 months beyond the 21-day limit under RSC O 53 r.6(4) stating:

> I think that it is important that those concerned with judicial review should take very serious notice of the time limits which are allowed by the rules. The judges concerned with the Crown Office work are enormously familiar with the difficulties facing those who have to draft affidavits and prepare the work on behalf of government departments. It is equally very important to remember what an application for judicial review is about. It is a public matter. It is a matter of public administration and the timetable which the rules provide reflect the urgency with which it is intended these matters should be dealt with. The time limit applied

> to an applicant has to be strictly construed. The time limit, in my judgment, in relation to a respondent also requires to be strictly construed. If the period is now 56 days so much the better, but we are dealing here with five months. That seems to me to be of itself quite sufficient reason to say that this application for the affidavits to be put in should not be acceded to".

49. In my opinion, although these judgments talk of the time limits being "strictly construed" they clearly contemplated a level of strictness somewhat less stringent than that connoted by the wording in the Practice Note: *"[I]t must be clearly understood that extensions of time will be granted* ***only*** *in circumstances which are* ***wholly exceptional*** *and* ***for the most compelling reasons.*** *For all practical purposes respondents would be well advised to treat the period of 56 days* ***as absolute"***. The inescapable fact is that the Practice Note was deliberately issued to apply only to the time limit in Order 53, r.6(4) and not to any of the other time limits specified elsewhere in Order 53.

50. In my judgment, it was open to the Judge to find that the Practice Note in and of itself was not applicable in the Cayman Islands. I say this because it is manifest that the Practice Note was issued by the Queen's Bench Division of the High Court of England and Wales primarily as a response to the demands made on the curial resources in England and Wales assigned to handle judicial review proceedings by the high numbers of such applications, whereas the situation is quite different in the Cayman Islands where, as the Judge remarked: (a) the number of judicial review cases, although now beginning to rise somewhat, has been tiny compared with the situation in England; (b) there has been no judicial decision by any Cayman Islands court holding that the approach set out in the Practice Note was to be applied when dealing with extension of the 56-day limit; and (c) no Practice Direction replicating the English Practice Note has been issued in Cayman.

51. The Judge also expressed the view that to apply the approach articulated in the Practice Note would be unjust because it would be equivalent to a bolt of lightning from a clear sky being visited on the unsuspecting respondent in the present case. In my judgment, this colourful observation was not crucial to the Judge's reasoning. What was key was the matters referred to (a), (b), (c) in paragraph [50] above and accordingly, if it be

thought that this observation went rather too far, it would not in my judgment undermine the validity of the Judge's decision that the Practice Note was not applicable in the Cayman Islands.

52. My answer to the question posed in issue (1) is therefore: "no".

The *ex parte Andreou* principles issue.

53. I reject IBC's submission made in para [19] of its Skeleton Argument that the approach stipulated in the Practice Note applies generally to all time limits specified in the judicial review procedural rules because "the principles underlying that approach are of general application," so that, in the absence of a matching Cayman Islands Practice Direction, the approach prescribed in the Practice Note will nonetheless be applied to applications for extensions of time under GCR Order 53, r.6(4) and all other applications for the extension of other time limits prescribed in GCR Order 53.

54. I accept that the special need for expedition in judicial review proceedings driven by their potential impact on decisions made in the public sphere noted by Henry LJ in *ex parte Andreou*[11] informs all the time limits specified in GCR Order 53 but the Practice Note serves the additional specific purpose of avoiding the severe prejudice to applicants and consequent damage to the administration of justice caused by delays in lodging respondents' affidavits with the Crown Office and its wording, as I have held, noticeably imposes a higher level of strictness than that connoted by the general *ex parte Andreou* principles which also under lay the pre-1989 RSC Order 53, r.6 (4) cases such as *ex parte Vevers* and *ex parte Obamwonji.*

55. Further, Henry LJ's observation in *ex parte Andreou* that the philosophy behind the Practice Note has never been criticised or questioned is not to be taken, as it is by IBC in paragraph 21 of its Skeleton, as supporting the view that the wording of the Practice Note is applicable in the Cayman Islands to all applications to extend the time limits prescribed in GCR Order 53, including GCR Order 53, r.6(4) and GCR Order 53, r .4.

56. I would also observe that none of the three cases cited in paragraph [19] of IBC's

[11] See para [21] above

Skeleton -- *R v the Home Department;*[12] *R v Department of Work and Pensions*[13] and *Ackermon v Government of the Cayman Islands*[14] -- involved an application to extend time under Order 53, r.6 (4) and in none of them was anything said to suggest that the approach set out in the Practice Note was equally applicable to extension of time applications made under other provisions of RSC Order 53, including Order 53, r. 4 (1) which stipulates that applications for leave to apply for judicial review have to be made promptly and in any event within 3 months from the date when grounds for the application first arose. Likewise, it is in my view false reasoning to state that, because the 3 month time limit in Order 53, r. 4 (1) has to be strictly adhered to, this means that the wording of the Practice Note is applicable to applications to extend the 3 month time limit.

57. It is also important to appreciate that the emphasis in the *ex parte Andreou* principles on procedural expedition were essentially a repeat of well-known earlier observations on the need for judicial review proceedings to be speedily conducted, including Popplewell J's observations in *ex parte Obamwonji* and the following dicta of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision". [At p. 280H- 281A]
>
> "So to delay the judge's decision [in an action by writ] as to how to

[12] [2021] EWHC Admin 1217, at para [57]
[13] [2023] EWHC 2259, at para [22]
[14] [2013] 2 CILR 1

> exercise his discretion would defeat the public policy that underlies the grant of those protections [afforded by O. 53]: viz. 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". [At p. 284F]

58. I turn to deal with IBC's contention that the Judge should have adopted the same strict approach to the 56-day time limit as that adopted by Asif J in *Soto*. In my view, this is a far from straightforward contention because no mention is made at all of the Practice Note in Asif J's judgment and his refusal to grant an extension of time under GCR O.53, r. 6(4) was founded on the failure of the respondent to adduce any evidence in support of its contention that it should not be barred from relying on two unserved affidavits that it had chosen not to disclose to the judge and on the respondent's failure to apply for an extension of time.

59. Nonetheless, as related above, Asif J referred in his judgment to Lord Diplock's dictum that there needs to be "speedy certainty" in judicial proceedings and he noted that it was the public policy considerations mandating expedition that drove the time limits within which an application for judicial review must be made, the notice of motion must be served, the notice of motion must be heard and the respondent's evidence must be served.

60. Asif J also stated in his paragraph [22] that "it was essential that judicial proceedings are started promptly, are prosecuted swiftly and 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 six months".

61. In my view, although Kawaley J said nothing about judicial review proceedings being completed within six months, the aforementioned trenchant observations made by Asif J are broadly equivalent to what Kawaley J wrote in paragraph [20] of his judgment where he acknowledged that for the reasons articulated in *ex parte Andreou* the public policy function served by judicial review requires a stricter adherence with time limits by both applicants and respondents than in ordinary civil litigation and also noted

several indicators within GCR O.53 itself of the importance of expedition.

62. Accordingly, I am of the view that the judge did not err in deciding that the level of strictness to be applied to CIMA's extension of time application was that to be derived from the principles identified in the passage from Henry LJ's judgment in *ex parte Andreou* which reflected the importance of expedition but did not include "the high level imperatives" articulated in the Practice Note.

63. My answer to issue 2 is therefore "no".

Was the Judge's exercise of discretion in granting the 8 week extension of time fatally flawed as submitted by IBC?

64. As noted above, the discretion exercised by the Judge was conferred by the words "save unless the Court otherwise directs" in GCR O. 53 r.6(4,), GCR O. 3, r.5(2) and the GCR Overriding Objective, all of which came into effect *after* the promulgation of RSC O. 53.

65. The matters that the Judge took into account in exercising his discretion are set out in paragraphs [25] – [28] above[15]. It is to be remembered that he had before him the second affidavit of Ms Helen Spiegel, CIMA's Acting Deputy General Counsel, in which she set out the interactions between CIMA and IBC and deposed that there had been regulator to regulator discussions with the SEC that were ongoing and it had not been practicable to serve an affidavit within the 56-days.

66. I reject all of IBC's submissions that the Judge erred in law in coming to his decision to grant CIMA's extension of time application. In my judgment he came to a reasonable and proportionate decision that took into account the importance of expedition in judicial review proceedings and was well within the ambit that should be accorded to the discretion he was exercising. Issue (3) is therefore also answered "no".

67. For the reasons given above, I propose that whilst IBC should be granted leave to appeal the Judge's Order, the appeal herein should be dismissed with costs both here

[15] See also paras [23] – [25] of the judgment

and below.

Concluding remarks

68. It is important that the dismissal herein of IBC's appeal not be interpreted as signalling a relaxation of the long established "strict approach" to time limits founded on the need for expedition in judicial review cases.

69. As Asif J put it in paragraph 22 of his judgment in *Soto*, it is 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.

70. I also endorse Asif J's view that in other than exceptional cases, the final hearing of a judicial review application should be no more than six months from the grant of leave and should usually be quicker.

71. In addition, it should be appreciated that applications for extensions of the time limits in GCR Order 53, r. 6(4) will likely fail if there is no objective justification for the resulting delay and there are justifiable concerns as to the impact of extending time on the claimant and/or third parties and/or good administration.

The Hon. John Martin KC, JA

72. I agree

The Rt Hon Sir John Goldring (President)

73. I also agree. In doing so, I would particularly emphasise Field JA's concluding remarks in paragraphs [68] – [71] above.