Neutral Citation Number: [2025] CICA (Civ) 6

THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE COURT OF THE CAYMAN ISLANDS, CIVIL DIVISION

CICA (Civil) Appeal 13 of 2024
(Formerly Cause No. G2023-0046)

BETWEEN:

GREGG VANGUARD ANDERSON

Appellant

- and –

UTILITY REGULATION AND COMPETITION OFFICE

Respondent

AND

CICA (Civil) Appeal 20 of 2024
(Formerly Cause No. G2024-0067)

BETWEEN:

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
PUBLIC LANDS COMMISSION CAYMAN ISLANDS GOVERNMENT

Appellants

- and –

THE KING (OTAO LURLANE BERRY AND OTHERS)

Respondents

BEFORE:

The Rt Hon Sir John Goldring, President
The Hon John Martin KC, Justice of Appeal
The Rt Hon Sir Jack Beatson, Justice of Appeal

Appearances:

In CICA No 13 of 2024	**Mr Rupert Wheeler instructed by KSG Attorneys for the Appellant, and Mrs Marilyn Brandt, Deputy Solicitor General and Mr Nigel Gayle, Senior Crown Counsel for the Respondent**
In CICA No 20 of 2024	**Mrs Marilyn Brandt, Deputy Solicitor General and Mr Nigel Gayle, Senior Crown Counsel for the Applicants, and Mr Rupert Wheeler instructed by H Phillip Ebanks for the Proposed Respondent**
Date of Hearing:	**8 November 2024**
Date draft circulation:	**12 February 2025**
Date of Judgment:	**07 March 2025**

JUDGMENT

Beatson JA

A Overview

1. For an application for judicial review to be made in these islands, it is necessary to obtain the leave of the Court in accordance with GCR Order 53, Rule 3. This appeal and application for leave to appeal concern one aspect of GCR Order 53 Rule 5 about the mode of applying for judicial review after leave has been granted. Rule 5(1) provides that "*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 will be made to a judge in chambers*".

2. The question before the court is the effect of non-compliance with GCR Order 53 Rule 5(2) which provides that "*within 7 days of being granted leave"* to apply for judicial review pursuant to Order 53 Rule 3:

> " *… 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."

Does non-compliance with Rule 5(2) bring the proceedings to an end on the ground that the leave granted was conditional on compliance with it, the time limit in it is mandatory, and service of the specified documents thereafter is invalid and a nullity? Or is non-compliance only an irregularity which as a result of GCR Order 2 Rule 1 does not have that effect, so that it is open to an applicant to apply to the Court pursuant to GCR Order 3 Rule 5 for an extension of time to serve the specified documents?

3. On 20 March 2024, in *Anderson v Utility Regulation and Competition Office* (hereafter "*Anderson"*), Carter J held that the seven-day time limit in Rule 5(2) is mandatory, the grant of leave is conditional on complying with it, and that, unlike the position in ordinary civil proceedings, in judicial review proceedings the Court does not have a discretion to extend time to serve the specified documents. But on 19 July 2024, in *R (Berry & others) v Public Lands Commission Cayman Islands Government and Attorney General of the Cayman Islands* (hereafter *"Berry & others*") Asif J declined to follow *Anderson.*

4. Asif J stated that he was not bound to follow Carter J's decision for two reasons. First, the attention of Carter J had not been drawn to the earlier decision in *Cayman Islands Urgent Care Ltd* v *HM Director of Customs, Hill, Commissioner of the Royal Cayman Islands Police Service, and Chief Medical Officer* [2021] (1) CILR 443 (hereafter "*Urgent Care*"). In *Urgent Care* the consequences of non-compliance with Order 53 Rule 5(2) were in issue but McMillan J's reasoning and conclusion differed from that in *Anderson.* Secondly, after reviewing the arguments and authorities relied on in both decisions, Asif J concluded that the reasoning in *Urgent Care* was correct and that in *Anderson* was wrong. He held that an applicant who has not complied with the time limit in Rule 5(2) is able to apply for an extension of time in which to serve the specified documents, and he extended time in *Berry & others.*

5. Mr Anderson has leave to appeal against Carter J's decision, but the applications of the Respondents below, the Public Lands Commission Cayman Islands Government (hereafter "the Commission") and the Attorney General, for leave to appeal against Asif J's decision were refused by the judge and the President of this Court on respectively 15 and 28 August 2024.

6. Before this Court, Deputy Solicitor General Ms Marilyn Brandt and Mr Nigel Gayle made a renewed application for leave to appeal in *Berry & others* on behalf of the Attorney General and the Commission and appeared for the Respondent Office of Utility Regulation (hereafter "OfReg") in *Anderson,* as they had before Carter J.[1] They submitted that the principles enunciated by Carter J in *Anderson* be followed, that leave to appeal be granted in *Berry & others,* and that the appeal in that case should be allowed. Mr Rupert Wheeler appeared for the Respondents in *Berry & others* and for the Appellant in *Anderson*, but did not appear below in *Anderson*. The Court is grateful to all counsel for their written and oral submissions.

7. In broad terms, there are two principal issues before this court. The first is whether Order 53 is a self-contained procedural code which is not subject to the general provisions of the GCR unless Order 53 itself so provides. The second is whether the long-recognised need for promptness and expedition in the exercise of the judicial review jurisdiction justifies the court having no discretion to extend specified time limits unless specific power to do so is granted in Order 53 itself or whether failure to comply with the specified period is a curable irregularity.

B The substantive disputes

[1] Mr Gayle was also lead counsel for three of the four respondents in *Urgent Care* and at first instance in *Berry & others*.

8. In *Anderson* the substantive dispute concerns OfReg's decision not to renew the Applicant, Mr Greg Anderson's, one-year fixed term employment contract as Executive Director of Energy when it expired on 20 January 2023. On 24 February 2023, Mr. Anderson instituted judicial review proceedings challenging the decision. His grounds were procedural irregularity in failing to follow the established procedure for consideration of the appointment of staff and failure by OfReg to conduct a fair and open recruitment process as required by section 41 of the Public Authority Act (2020 Revision) because colleagues had been offered three-year fixed term contracts. Mr Anderson's affidavit stated that his contract was the ninth fixed term contract between him and OfReg since September 2017.

9. In *Berry & others* the substantive dispute concerns the Commission's refusal in letters dated 15 January 2024 of nine applications for beach vending licences at Public Beach on Seven Mile Beach, Grand Cayman on the ground that they did not meet the criteria under a new licensing regime. The *Seven Mile Public Beach Park Vendor Policy*, (hereafter the "SMPB policy"), was brought into effect in 2023. At that time, the Applicants had been operating businesses at Public Beach for periods ranging from 2 to 19 years. The letter notifying them of the decision required them to cease trading and leave the site by 14 February 2024. Their application for leave to apply for judicial review was filed on 12 February 2024. The SMPB policy was later amended to include a review process for applicants aggrieved by a decision of the Commission. The amended document is dated April 2024, but the written submissions of the Attorney-General and the Commission state that the amendment was in April/May 2024.

C The procedural history of the two cases

(i) Anderson

10. As stated, judicial review proceedings were launched on behalf of Mr Anderson on 24 February 2023. Carter J gave leave on 10 March 2023, and the Minute of the Judge's Order was served on OfReg on 17 March 2023.

11. On 28 April 2023, Mr Anderson submitted the Notice of Originating Motion and the Minute of the Judge's Order granting him leave to the Court Registry for filing.

12. On 4 May 2023, the Order granting Mr Anderson leave was digitally signed by the Court. That day he or his representatives sent the Notice of Motion, the supporting affidavit, the Form 53 application, and the digitally signed Order granting leave to OfReg's counsel by email.

13. On 5 May 2023, the Order granting leave was sealed by the Court and OfReg's counsel acknowledged receipt of the documents served the day before.

14. On 17 May 2023 OfReg filed a summons to strike out on the ground that the Notice of Originating Motion was not filed within 7 days of leave being granted as required by GCR 53 r. 5(2) but was 41 days out of time and was in law "*a nullity*" and "*invalid*".

15. The hearing before Carter J was on 28 June 2023 and the learned judge gave her decision on 20 March 2024. On 2 April 2024 Mr Anderson sought leave to appeal, and on 23 July 2024 Carter J granted leave by consent on two grounds. These were that Carter J erred in holding that (1) leave to apply for judicial review was conditional and failure to comply with GCR Ord 53 r. 5(2) rendered it a nullity, and (2) there is no discretion to extend time under GCR Ord. 3 r. 5.

(ii) Berry & others

16. On 12 February 2024 judicial review proceedings were issued *ex parte* but on notice. On 13 February the case came before Asif J who granted leave and stayed the order requiring the Applicants to cease trading and to leave the beach by 14 February. He also ordered each of them to file additional evidence as to the precise nature of the representations and/or promises allegedly made to them regarding the grant of a vendor's licence. The Order granting leave was also signed, filed and sealed on 13 February.

17. The Applicants did not file and serve their Notice of Originating Motion, and the other documents specified in r. 5(2) within the required 7-day period which ended on 20 February 2024. On 22 February they sent an email to the Respondents containing a link enabling the Respondents to download an electronic copy of the bundle on which they had relied when applying for leave. The bundle included Form 53 setting out the grounds relied on, and the primary affidavits filed. On 23 February 2024 they sought an extension of time to file the additional evidence the Judge had ordered. They were granted an extension until 26 February. The Registry rejected their attempt to file the supplemental affidavits because of defects of form and Asif J granted them a further extension to 27 February 2024.

18. On 27 February 2024, the Respondents informed the Applicants that they did not accept service of the leave bundle via the link to the electronic copy sent on 23 February and served a summons to strike out the claim for failure to comply with GCR Ord. 53 r. 5(2). The Applicants then served an electronic copy of the bundle by email rather than by a link.

19. On 29 February, the Applicants sought to file their Notice of Motion. They sent the Respondents an unsealed copy and a summons seeking an extension of time for service. Because of the strike out summons filed by the Respondents on 27 February, the application for an extension of time for service was not sealed by the Court.

20. The hearing before Asif J was on 13 June 2024 and the learned judge gave his decision on 19 July 2024. On 29 July 2024, the Attorney General and the Commission sought leave to appeal. In an *ex tempore* judgment on 15 August 2024 Asif J refused leave to appeal but stayed the further conduct of the substantive application for judicial review for 14 days to enable the Respondents to apply to this Court for leave to appeal. The Respondents' application for leave and a stay was refused by the President on 28 August.

D The judgments below

(i) Anderson

Issue 1: is the grant of leave conditional?

21. Carter J focussed on the mandatory nature of the language of GCR Rule 5. She stated at [20] that Rule 5(1) is mandatory in its terms, requiring an applicant who had been granted leave to apply for judicial review to make the application by originating motion in open court. At [21] she stated that Rule 5(2) further compels the successful applicant for leave to serve the specified documents and in [51] that it also imposes a mandatory time limit. She considered at [22] that the necessary implication is that the Notice of Motion must be filed within the seven days of the grant of leave, and the further implication of the requirement that it be filed within this time limit is that "*the grant of leave is conditional upon this time limit being adhered to*".

22. In reaching her decision, at [28] – [38] and [47] Carter J considered decisions of the Court of Appeal of Jamaica and the East Caribbean Supreme Court (hereafter "the ECSC") on the procedure for judicial review which referred to the special nature of judicial review proceedings.[2] She considered that the approach in these cases showed that rules governing the procedure applicable to judicial review must be strictly observed save where otherwise specifically indicated in statute or the rules, and that general procedural rules cannot be used to extend time limits set out in the rules governing judicial review. She in substance accepted OfReg's submission that the rules in Order 53 were "special self-contained rules".

23. The judgment recognised that GCR Ord. 53 Rule 5 differs from the rules governing applications for judicial review in those jurisdictions and that, unlike GCR Order 53 Rule 5(2), Rule 56.4(12) of the Jamaican Civil Procedure Rules and ECSC CPR 56.4(11) expressly state that leave is conditional upon the applicant making a claim within the specified time: see [24] – [25] and [39]. Carter J also referred at [26] to Order 53 Rule 5(5)

---

[2] The decisions of the Court of Appeal of Jamaica are *Golding & Attorney General of Jamaica v Simpson Miller* SCCA No 3/08, 11 April 2008, *Willis v Commissioner of Taxpayer Audit & Assessment Dept.*, 19 January 2010 an unreported application for permission to appeal, *Hamilton v Commissioner of Police* [2013] JMCA 35, *Minister of Finance and Planning & Public Service and ors. v Bailey-Latibeaudiere* [2014] JMCA Civ. 22. That of the ECSC High Court is *Antigua and Barbuda Fisherman Co-Operative Society v Financial Services Regulatory Commission* unreported 4 January 2018.

of the Supreme Court Rules which formerly governed the position in England and Wales. That (see SI 1977 No 1955) stated that "*the application must be entered for hearing within 14 days after the grant of leave".* She stated at [27] that "*While this ... 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*". She concluded that the absence of an express reference to the conditionality of leave in the English provision did not affect the clear specification in it of the time within which the "motion" or "application" was to be filed.

24. Carter J held at [42] that the effect of the Motion being filed outside the time limit is that the Notice that was filed is invalid since the leave to apply for judicial review had lapsed irremediably. She rejected the submission that because Rule 5(2) relates only to service, a failure to comply with the time limit in it could not be said to affect the validity of the Motion once filed. She stated that would run counter to the approach regarding time limits in judicial review proceedings because it would mean in effect that Order 53 Rule 5 imposed no time limit in which an applicant who had been granted leave would be compelled to institute the claim.

Issue 2: Is there discretion to extend time?

25. The judgment accepted OfReg's submission that, unlike ordinary civil proceedings, the specialised rules governing judicial review in Order 53 do not permit any extension or restriction of time except where that is specified in Order 53 itself, as in Rules 5(1) and 5(7): see [43] – [45]. At [53] Carter J stated that "*strict compliance with the time limits must be adhered to by applicants who seek to make a claim for judicial review*" and that the Court had not been provided with any authority which allowed for the interpretation sought on behalf of Mr. Anderson. She thus accepted OfReg's submission at [45] "*that Order 2 Rule 1 and Order 3 Rule 5 are rules of general applicability that do not impact the clear terms of Order 53 Rule 5(2) so as to assist*" Mr Anderson. She reiterated her earlier conclusion that Order 53 Rule 5(2) imposed a mandatory time limit and stated that it is not

a Rule which gives the Court a discretion to extend the time for filing the documents it requires to be served.

26. In support of her conclusion on this point, Carter J referred to *Golding & Attorney General of Jamaica v Simpson Miller* SCCA No 3/08, 11 April 2008, and *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 and to the Hong Kong White Book. In *Golding,* Smith JA at p 22 stated that "*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"*. In *Vinos,* May LJ at [20] stated that "*[i]nterpretation to achieve the overriding object 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 comment to Order 3 Rule 5(3) of the Hong Kong Civil Procedure Rules at 3/5/2 of the 2024 edition of the Hong Kong White Book stated that "*where mandatory time limits are provided by statute it is not possible to invoke the inherent jurisdiction of the court or the provisions of rd.3 r. 5 to extend the same"*.[3]

27. Earlier in her judgment, Carter J had referred to the judgment of the Court of Appeal of Jamaica in *Minister of Finance and Planning & Public Service and ors. v Bailey-Latibeaudiere* [2014] JMCA Civ. 22 and that of the ECSC in *Antigua and Barbuda Fisherman Co-Operative Society v Financial Services Regulatory Commission,* unreported, 4 January 2018. In the former, at [109] Morrison JA stated that importing general provisions of the CPR into judicial review proceedings, "*failed to have sufficient regard to the special nature of judicial review proceedings and the fact that Part 56, as consistently interpreted … was plainly intended … to be, save where otherwise indicated, a self-contained code for the conduct of such proceedings*". In the latter, at [9] Henry J stated *inter alia* that: "*the provisions in Part 26 [of the East Caribbean Supreme Court Civil Procedure Rules 2000] … are general provisions which are inapplicable to the provision for leave and specifically to extension of the time fixed in 56.4(11)*."

[3] On the use of this as an aid to the interpretation and application of the Grand Court Rules, see Practice Direction 2 of 2024 (5 March 2024).

(ii) Berry & others

The approach to inconsistent decisions of co-ordinate courts:

28. Asif J considered the approach a court should take to inconsistent decisions of co-ordinate courts in the light of the judgment of Mangatal J in *Re China Shanshui Cement Group Ltd.*, [2015] (2) CILR 25 at [19] – [21]. He concluded that if a relevant decision was not before a later court a third judge faced with the two inconsistent decisions had more latitude not to follow one of them without necessarily concluding that it is wrong, but that even if the earliest decision was not a relevant one, it was open to the third judge not to follow the second decision if, after giving appropriate weight to the need for legal certainty and judicial comity, was convinced that it is wrong.

29. He then set out his reasons for concluding that *Urgent Care* is a relevant decision at [35] and its six sub-paragraphs. He stated that the argument in *Urgent Care* that the non-compliance with the time limit set out in Order 53 Rule 5(2) "*had severe implications"* was based on the authorities from Jamaica that McMillan J stated were relied on before him. He also stated that it was safe to infer that the argument "*was to the same effect as was advanced in Anderson, and also before me, based on those same authorities*". At [35.2] he stated that:

> *"McMillan J clearly reached a conclusion that was contrary to the position advanced by counsel for the respondent in Anderson, both on the question of whether a failure to comply with GCR O. 53 r.5(2) renders the proceedings a nullity that cannot be saved by GCR O.2 r.1; and also on the question of whether it is appropriate to apply the practice to the time limit for commencing judicial review proceedings from Jamaica to the differently worded Grand Court Rules in the Cayman Islands".*

30. Asif J rejected the submission that what McMillan J said in relation to the position where no motion had been served in time was merely *obiter dicta*: see [35.3] – [35.5]. That submission had relied on the fact that the proceedings in *Urgent Care* were started in time so that McMillan J was exercising a power to allow amendments to an existing and valid notion of motion and that the Chief Medical Officer had only raised the point at a late stage.

Is the grant of leave conditional and is there discretion to extend the seven-day period specified in Rule 5(2)?

31. Asif J then considered whether he should reach a different decision to that in *Anderson.* His starting point was to assess whether Order 53 is a self-contained procedural code. It was argued that its "*architecture of rules"* is one to which general provisions of the Grand Court Rules do not apply unless Order 53 contains a specific provision that they do or (in his oral submissions below) where the general provision in question neither derogates from nor is inconsistent with Order 53.

32. This submission on behalf of the Commission and the Attorney General was rejected, essentially for four reasons. The first is that GCR Order 53 differs from procedural rules such as the Companies Winding-Up Rules and the Matrimonial Causes Rules, which are largely self-contained and separate from the Grand Court Rules, although having some overlap with them. Order 53 is more like the Rules catering for particular features of specialised types of proceedings which remain subject to the Grand Court Rules, so that they continue to apply to them except where otherwise stated.[4]

33. Secondly, to regard Order 53 as a self-contained code is inconsistent with the clear words of Order 1 Rule 2 that except where otherwise stated in that Rule, the GCR Rules apply to "*all proceedings of the [Grand] Court*": see [45]. The "*plain reading"* of Order 2 Rule 1's

[4] At [43] Asif J listed Orders 54-56, 72-76, 77A, and 82. These respectively govern habeas corpus, appeals from the Cabinet, Registrar of Lands, and any tribunal or other person, appeals by way of case stated, financial services proceedings, arbitration, applications under the Merchant Shipping Acts, admiralty proceedings, contentious probate, proceedings under sections 23 and 27 of the Constitution, and defamation actions.

provision that non-compliance with the Rules in "*any proceedings*" shall be treated as an irregularity, and shall not nullify the proceedings, and of the power given to the court by Order 3 Rule 5 to extend or abridge a period within which a person is required to do any act in "*any proceedings*" is also that the GCR apply to all proceedings in the Grand Court except where otherwise stated. There is nothing in those rules excluding their applicability to Order 53. Indeed, Order 1 Rule 2(2) extends Order 53 to criminal proceedings although in general the Grand Court Rules do not apply to such proceedings.

34. Thirdly, at [68] – [73] he rejected the broad submission that

> "*The architecture of GCR O. 53 cannot be diluted by any provision in the general body of the Grand Court Rules: to do so would make a mockery of the procedure for judicial review claims in GCR O. 53 and would provide countless loopholes for dilatory litigants and their attorneys."*

He did so because any power of extension would be exercised in accordance with the overarching requirement for expedition and speedy certainty in judicial review proceedings.[5] He also rejected a more focussed submission that the contrast of an express power in Order 53 Rule 4(1) to extend time with the absence of such a power in Order 53 Rule 5(2) indicated that there was no such power in Rule 5(2). He stated that Order 53 Rule 4 deals with delay in applying for judicial review and imposes a more demanding test for an extension than that in Order 3 Rule 5. It does not, however, follow from the fact that a more stringent test applies in one context that the general power in Order 3 Rule 5 has been entirely excluded from Order 53.

35. Asif J's fourth reason was a practical one. There are no provisions in Order 53 on matters such as the reckoning of time and what happens when time expires on a weekend, or a

[5] See [39] – [40] below for a summary of Asif J's approach at [120] – [134] to applications to extend time and [52(c)] for the approach he took in *R (Soto) v The Police Service Commission & The Commissioner of Police*, unreported, 31 May 2024.

public holiday and service out of the jurisdiction. It will therefore sometimes be necessary to look outside Order 53, to GCR Order 3 Rules 2, 4 and 11.[6]

36. Asif J then turned to the impact of the Jamaican and ECSC cases relied on before Carter J[7] and *Re Application by Tami Lee Driver* [2021] NIQB 83 and *KSK Enterprises Ltd v An Bord Pleanála* [1994] 2 IR 128, the Northern Irish and Irish cases relied on before him in support of the decision in *Anderson's* case. He concluded that those decisions concerned the construction of the very different terms of the particular legislative and procedural rules governing judicial review in those jurisdictions rather than general common law principles about the need for promptness and expedition in the exercise of the judicial review jurisdiction: see [88], [92], [100] - [101]. He also stated that the suggestion in *Tami Lee Driver's* case that it is open to an applicant to make a further application pointed away from the strict application of the time limits: see [95] and [103] – [106].

37. Asif J next considered and rejected the submission that proceedings commenced in breach of Order 53 Rule 5(2) are a nullity rather than merely being irregular: see [107] – [117]. He stated that the cases relied on by Mr Gayle either turned on a specific provision[8] or relied on analysis no longer applicable in the light of changes in the rules.[9] He also relied on McMillan J's view in *Urgent Care* that GCR Order 2 Rule 1 was available to cure non-compliance with 53 Rule 5(2) and, despite the different context, the statement of Rowe JA in *International Credit and Investment Company (Overseas) Ltd & Ors. v Adham & Ors* [1999] CILR 501 at 523 that *"Non-compliance with the rules of civil procedure do not automatically lead to the invalidity of the process. Non-compliance is to be treated as an irregularity.*"

---

6 This was ultimately accepted by Mr Gayle in relation to the effect of time expiring at weekends and holidays (see [49]) but apparently not in relation to service out of the jurisdiction (see [44]).

7 Listed at note 2 to [22] above.

8 In *Tami Lee Diver* the Northern Irish RCJ Order 53 Rule 5(5) expressly provided that the grant of leave shall lapse if the Notice of Motion is not issued within the specified time.

9 *Re Pritchard (decd)* [1963] Ch. 502 referred to in *Official Receiver v McDaid* [2016] NICA 62 concerned the situation before the disappearance of the distinction between nullity and mere irregularity in 1964 by the introduction of RSC Ord. 2 Rule 1.

From when does time under Order 53 Rule 5(2) run?

38. In the section of his judgment on how Order 53 rule 5(2) should be construed in principle, Asif J also stated that "notice of motion" and "order for leave" mean the notice and order as sealed by the court, that is when the applicant is in receipt of the sealed order and notice. I discuss his reasons and the public authorities' submission that his conclusion is contrary to Order 42 Rule 3, impractical, and subject to exploitation by applicants at [63] - [65] below. I observe that it was not necessary to decide this point in *Berry & others* because the order was sealed on the same day as the decision granting leave. The topic appears to have been introduced as one reason for rejecting a strict application of time limits without any discretion to extend them; i.e. that it was said to run from a time which could mean that it might be impossible for applicants to comply with the requirements of Rule 5(2) for reasons wholly outside their power: see [58] – [62].

Should time be extended in these proceedings?

39. Asif J recognised that the approach to extending time in public law proceedings is generally more restrictive than in general civil proceedings because of the policy in favour of expedition and speedy certainty. He, however, had regard to the factors taken into account in a number of such authorities, including the three factors identified by Mangatal J in *Bush v Baines* [2016] (2) CILR 274, the seriousness and significance of the default in this case, its cause, and all the circumstances of the case.

40. At [129] – [133], bearing in mind the less forgiving approach to delay in public law proceedings, he considered the application of those principles to *Berry & others*. The delay was six days. It was not deliberate. There was an acceptable reason for it, namely the need to coordinate the nine groups of applicants. There was no prejudice to the Respondents who were promptly put on notice of the proceedings and were served with most of the required documents on time, and there was no evidence before the Court of prejudice to third parties. Asif J also referred to McMillan J's statement in *Urgent Care* that the purpose of Order 53 Rule 5(2) is "*to discourage dilatory and potentially improper judicial review*

proceedings". He stated that the Applicants' proceedings were neither of these, and granted the extension of time requested.

E Discussion and conclusions

41. Common law jurisdictions have long recognised the need for promptness and expedition in the exercise of the judicial review jurisdiction. This is because, as Lord Diplock stated in *O'Reilly v Mackman* [1983] 2 AC 237, 280-281 "*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 the purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision*". Lord Diplock also referred (at 284) to the need for *"speedy certainty"* as to the validity of public law decisions which may affect many people and entities.

The questions before this Court

42. The main question in both cases is whether non-compliance with the specified time limit in Order 53 Rule 5(2) is always fatal or whether there is jurisdiction under the rules, including the general rules, to exercise a discretion extending time where a party has shown good reason for the extension. The different and irreconcilable decisions below on the main question mean that it is desirable for this court to determine which is correct and, for that reason, if the President and Martin JA agree, I would grant leave to appeal in *Berry & others*. There is a further but different question for decision in both cases. In *Anderson,* it is whether time under Order 53 Rule 5(2)(c) runs from the date on which the order is pronounced, given or made,[10] from the receipt of the signed minute of order, or only from receipt of the finalised order as signed and sealed by the Court. In their oral submissions, Ms Brandt and Mr Wheeler stated that counsel before Carter J accepted that time started to

[10] See GCR Order 42 Rule 3(2) discussed at [65] *et seq.*

run when the order was made. In *Berry & others,* the further question is whether, if there is discretion to extend time, Asif J erred in the way he approached its exercise.

43. The written and oral submissions in this court in both cases on the main question were substantially the same as those put to Carter J and to Asif J. Ms Brandt on behalf of the public authorities resisted the appeal against Carter J's decision in *Anderson* and submitted that in *Berry & others* leave to appeal should be given and the appeal allowed. She submitted that the effect of failure to comply with the seven-day time limit is that leave lapses and that Order 53 Rule 5(2) is not a Rule which gives the Court discretion to extend time. Mr Wheeler submitted that Mr Anderson's appeal should be allowed and that the decision in *Berry & others* should be upheld because there is discretion to extend time and Asif J exercised it in a permissible way.

44. Ms Brandt also submitted that Asif J erred in stating that the requirement in Rule 5(2)(c) meant only the finalised order as signed and sealed by the Court. She also criticised his reliance on *R (GT Retail Suppliers) v Cayman Islands Department of Commerce and Investment, The Liquor Licencing Board and the Attorney General,* 21 June 2024 (hereafter "*GT Retail*"), a decision of his on this point delivered about 10 days after the hearing in *Berry & others*. As stated at [38] above, in *Berry & others* it was not necessary to decide from when time under Order 53 Rule 5(2)(c) runs because the order was sealed on the same day as the decision granting leave. The point is, however, a live issue in Mr Anderson's appeal because, while leave was granted on 10 March 2023 and the minute of the judge's order was served on OfReg on 17 March 2023, the order was not sealed until 5 May 2023, almost two months after Carter J granted leave. Mr Wheeler submitted that Mr Anderson had in fact complied with the seven-day period in Order 53 Rule 5(2) because, on 5 May 2023, OfReg acknowledged receipt of the Notice of Originating Motion, the digitally signed Order granting leave, and the other documents served on it on 4 May 2024.

45. If the Court has discretion to extend time for compliance with Order 53 Rule 5(2), it was submitted that Asif J erred in his approach to the exercise of that discretion in the following ways. First, he failed to examine the merits of the substantive judicial review claim and the

relief sought because by the date of the hearing an alternative remedy by way of a review by the SMPB Policy Review Committee was available under the policy, and, by the date of the hearing, all the proposed Respondents had applied for a review. Secondly, Asif J failed to construe the refusal letters in conjunction with the amended SMPB policy. Thirdly, he failed to infer prejudice to the proposed Appellants who were liable to be sued by successful applicants for licenses. Fourthly, while apparently agreeing that the reasons the unsuccessful applicants had given for non-compliance with rule 5(2) were not "good reasons", he determined that neither the proposed Appellants nor any third-party licensee would be prejudiced by an extension. Finally, he failed to decide that the proposed Respondents should bear the burden of showing the substantive change in the *status quo* with the passage of time since proceedings were launched, and to permit additional evidence to be filed to update the Court.

Is there discretion to extend time for compliance with Order 53 Rule 5(2)?

46. I have carefully considered the analysis in both judgments and concluded that, on the main question, the reasoning of Asif J in *Berry & others* leading to the conclusion that there is jurisdiction to extend time for serving the documents specified in Order 53 Rule 5(2) is to be preferred to that of Carter J. My reasons are substantially the same as those given by Asif J in his admirably clear judgment. I therefore only emphasise the following four points.

47. First, to regard Order 53 as a self-contained procedural code to which other parts of the Grand Court Rules do not apply unless Order 53 contains a specific provision that they do or the general provision neither derogates from nor is inconsistent with Order 53 is not consistent with the clear words of Grand Court Rules Orders 1, 2 and 3 stating they apply to "*all"* or *"any"* proceedings in the Court.

48. Order 1 Rule 2(1) provides that "*subject to the following provisions of this rule, these Rules shall apply in relation to all proceedings in the Court"*. The only reference to Order 53 in Order 1 Rule 2 is in Rule 2(2) as one of three exceptions to the general inapplicability of

the Grand Court Rules to "*any criminal proceedings*". This would not be necessary if Order 53 was a self-contained procedural code to which the general rules do not apply.

49. Order 2 Rule 1 and Order 3 Rule 5, which refer to their application to "*any proceedings"*, are of particular relevance in the context of the issue in these two cases. Order 2 Rule 1 provides:

> "*where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein*".

Order 3 Rule 5 empowers the Court:

> "*on such terms as it thinks just, by order to 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*"

As Asif J said, there is nothing in Order 2 Rule 1 or Order 3 Rule 5 excluding judicial review proceedings under Order 53. I add that there is nothing specific in Order 53 Rule 5 excluding the powers in the parts of Orders 1-3 to which I have referred.

50. The conclusion that Order 53 is not a self-contained procedural code is also supported by two other factors. The first is that Order 53 is structurally located within the Grand Court Rules in order to cater for specific aspects of the procedure in public law proceedings by way of judicial review rather than in a separate body of procedural rules such as the Company Winding Up Rules and other rules referred to by Asif J. The second factor is that Order 53 contains no provisions on important practical matters such as the reckoning of time, the position where time expires on a weekend or public holiday, and service out of the jurisdiction. It is accordingly sometimes necessary to look outside Order 53.

51. At the commencement of the hearing below, the Commission recognised that provisions in the general rules of the GCR which do not derogate from the provisions of Order 53 can be read over and applied to judicial review proceedings. Before us, Ms Brandt gave as examples the rules governing how service should be done and the meaning of "days", i.e. how a specified time is to be calculated. That recognition does not sit comfortably either with the view that Order 53 is a self-contained procedural code or with the submission based on the particular importance of certainty and expedition in judicial review proceedings to which I turn.

52. Secondly, Ms Brandt submitted that a strict "pre-condition" approach is necessary for the application of judicial review rules because of the particular importance of certainty and expedition in judicial review proceedings. She maintained that, if discretions in the general provisions of the GCR applied to judicial review proceedings, there would have been no need for Order 53 itself expressly to state circumstances where there is discretion to extend time as in Order 53 Rule 4(1) in relation to delay in making the application for leave to apply for judicial review and in Rule 6(4) in relation to the time for filing affidavits. This is similar to the submission below[11] that allowing the architecture of Order 53 to be "diluted" by any provision in the GCR would provide countless loopholes for dilatory litigants and their attorneys. I make three observations: -

(a) In relation to the general civil procedure regime in the GCR the power to extend or abridge time applies both to rules concerning time which contain a discretion to extend or abridge time and those which, like Order 53 Rule 5(2) are silent on this. For example, Order 6 Rule 8, Order 12 Rule 5 and Order 8 Rule 2(2) respectively contain powers to extend the validity of a writ, the time for acknowledgement of service, and to vary the days between service and hearing, whereas many other provisions are silent. In those contexts, the fact that a procedural rule imposes a

[11] That submission reflected Panton P's statement in *Golding & Attorney General of Jamaica v Simpson Miller* SCCA No 3/08, 11 April 2008, at p 8.

time limit for doing an act has not been regarded as inconsistent with a power to extend that time limit in a meritorious case. The justification for the submission that an entirely different approach should apply to time limits and other requirements in judicial review proceedings is based on general statements about the nature of judicial review and the decisions in jurisdictions with different provisions rather than anything in the language of the Cayman provisions themselves.

(b) As Asif J stated at [70], the requirement in Order 53 Rule 4(1) that there be "*good reason for extending the period"* is a more stringent test than the power granted to the Court by Order 3 Rule 5 to extend or abridge time "*on such terms as it thinks just"*.

(c) The submissions about the need for a strict approach and avoiding "dilution" underplay the operation of what Asif J referred to at [72] of *Berry & others* as "*the overarching requirement for expedition and speedy certainty*" when considering whether to exercise any discretionary power to extend time. Asif J referred to his emphasis on these requirements in *R (Soto) v The Police Service Commission & The Commissioner of Police*, unreported, 31 May 2024. In that case, it was the respondents who wished the court to exercise its discretion by allowing them to file affidavit evidence after the expiry of the 56 days period specified in Order 53 Rule 6(4) "*unless the Court otherwise directs"*.

53. Thirdly, Carter J's conclusion as to whether leave is to be regarded as "conditional" on compliance with Rule 5(2) and to lapse if there has been no compliance depends on her analysis of it as mandatory in terms, and the implications she drew from that. At [27], she relied on the "*clear specification of time*" in Rule 5(2) in effect accepting OfReg's submission she had summarised at [8] that the use of word "*shall*" shows that there is only provisional and conditional leave to apply for judicial review, and on a number of Jamaican and ECSC cases.

54. Asif J stated that the word "*shall*" is used over 1,500 times in the GCR and that, if OfReg's submission is correct, many cases would become irregular and possibly nullities because of a procedural default by one of the parties: see [54] – [55]. I agree with him that while the use of "shall" shows that a provision creates a binding rule rather than mere guidance it does not of itself make compliance a pre-condition.

55. I also agree that the Jamaican and ECSC cases are of limited assistance because they concern rules expressly stating that the grant of leave is conditional. Rule 56.4(12) of the Jamaican Civil Procedure Rules provides that "*leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave"*. The almost identically worded Eastern Caribbean Supreme Court CPR Rule 56.4(11) provides that *"leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave"* (emphasis added).

56. It is clear that in *Golding & Attorney General of Jamaica v Simpson Miller* SCCA No 3/08, 11 April 2008 the Court of Appeal of Jamaica was addressing the construction of Rule 56.4(12) and the meaning of "conditional" in it rather than general common law principles about the need for promptness and expedition in the exercise of the judicial review jurisdiction. Thus, Panton P stated at pp 8-9 that "*one does not require the use of a dictionary to appreciate that 'conditional' means 'not absolute', 'dependent'. In the instant circumstances, the leave that was granted was dependent on the applicant making her claim within fourteen days of the order*". See also Smith and Harris JJA at pp. 15 and 33.

57. It is not surprising that in *Willis v Commissioner of Taxpayer Audit & Assessment Dept.*, 19 January 2010, an unreported application for permission to appeal, also relied on by Carter J, Phillips JA after referring to the conditionality of leave at [13], stated at [15] that "*the court cannot exercise its inherent jurisdiction to grant relief when the rules are clear and have been promulgated for just that reason*". Although also containing some more general statements, *Minister of Finance and Planning & Public Service and ors. v Bailey-Latibeaudiere* [2014] JMCA Civ. 22 and the decision of the ECSC High Court in *Antigua*

and Barbuda Fisherman Co-Operative Society v Financial Services Regulatory Commission unreported 4 January 2018 followed *Golding's* case.

58. The Northern Irish and Irish cases relied on by the public authorities I referred to at [36] above also turned on the construction of the very different provisions of the particular legislative and procedural rules governing judicial review in those jurisdictions. For instance, In *Tami Lee Diver* the Northern Irish RCJ Order 53 Rule 5(5) at issue expressly provides that the grant of leave shall lapse if the Notice of Motion is not issued within the specified time.

59. Carter J's approach in part reflected the authorities the parties put before her and OfReg's focus on the Jamaican and ECSC decisions and reliance on implications not clearly based on the language of the GCR. *Urgent Care,* to which I have referred, was not the only relevant case not before her which was later cited to Asif J. Another concerned English litigation referring to RSC Order 53 Rule 5(5), a provision to which she did refer. In *ex p. Andreou* the applicant was granted leave to apply for judicial review challenging his expulsion from the Institute of Chartered Accountants following disciplinary proceedings, but he did not file a substantive application for judicial review within the 14-day period required by RSC Order 53 Rules 5(3) and 5(5).

60. RSC Order 53 Rule 5(5), although differently worded to GCR Order 53 Rule 5(2), is similar in prescribing a time limit for entering the motion for hearing but neither stating that leave is conditional or that failure to abide by the time limit results in the leave lapsing. In the judicial review proceedings, Mr Andreou's application for an extension of time of some six months was refused and the proceedings were struck out. His application for leave to appeal against that decision was refused but the Court of Appeal ordered that the claim be continued as if begun by writ. In the subsequent private law proceedings, *Andreou v Institute of Chartered Accountants in England & Wales* [1998] 1 All ER 14, Lord Woolf stated at 17 that in the judicial review proceedings Popplewell J had refused the application for an extension of time "*on the grounds of unjustified delay*". As Asif J stated at [106], the case provides some support for the proposition that, under the former English rule in the

Rules of the Supreme Court on which GCR Order 53 Rule 5(2) is based, "*there was jurisdiction to grant an extension of time*" in such circumstances.

61. It follows from my conclusions that Order 53 is not a self-contained procedural code, that leave is not conditional so that it lapses if the documents required by Rule 5(2) are not served within 7 days of the grant of leave, and that proceedings commenced in breach of Order 53 Rule 5(2) are not a nullity. They are rather merely irregular, and the irregularity is capable of being cured by a successful application to the court under GCR Order 3 Rule 5 to extend time in a meritorious case.

From when does time under Order 53 Rule 5(2)(c) run?

62. For the reason given at [44] above, whether time under Order 53 Rule 5(2)(c) runs from the receipt of the signed minute of order or only from the finalised order as signed and sealed by the Court only arises in *Anderson.* Because the parties in that case agreed that time ran from the receipt of the signed minute of order, Carter J, understandably, did not address that question. In this Court Mr Wheeler supported Asif J's view that the references to the documents Rule 5(2) requires to be served must mean the finalised order and other documents as sealed by the Court.

63. Asif J's reasons are given at [66] and [67] of *Berry & others*. The first is that it is the sealing of the notice of motion and the order that gives them their status and authority. Without the court seal a respondent "*does not know that the court's jurisdiction has been properly invoked by the applicant, which … is the central purpose underlying the requirement for service of judicial review proceedings, as with any other form of process generally*". Secondly, in the case of the order granting leave, "*a contrary construction would have the unjust result that an applicant's time under GCR Ord. 53 r. 5(2) could expire before they are even in possession of the documents which GCR Ord. 53 r. 5(2) requires that they must serve".*

64. Fuller reasoning is to be found in his judgment in *GT Retail* delivered on 21 June 2024 to which he referred in *Berry & others* at [66]. In *GT Retail* at [18.1], accepting an argument based on *Herald Fund SPC v Primeo Fund* 2016 (2) CILR 44 at [19], he stated that, as well as sealing giving an order its authority, until a signed order is sealed the judge has power to change his decision, something that had occurred in *GT Retail* itself. The possibility of an unperfected judgment or order being amended creates uncertainty for both Respondents and Applicants and could result in time expiring before an applicant is even in possession of the documents which must be served. Asif J also stated that "*being granted leave"* occurred when the signed order is filed and sealed rather than when the decision is communicated to the applicant, or the judge or clerk of the court signs a minute of the order because "*the respondent needs to have confidence that the jurisdiction of the court has been properly invoked"* and anything less than a sealed order leaves uncertainty for the respondent.

65. In *GT Retail,* Asif J also considered the relationship between the requirements of Order 53 Rule 5(2) and Order 42 rule 3, which is headed "*Date from which judgment or order takes effect"*. Order 42 Rule 3(2) provides that a judgment or order shall be dated "*as of the date on which it is pronounced, given or made*" unless the court orders otherwise, and Rule 3(1) that it "*takes effect from the day of its date*". Asif J stated at [20] – [21] that there is a conflict between the requirements of Order 53 and Order 42 rule 3 which applies a "*relation back"* approach to the dating of judgments "*such that the specific requirements of Order 53 take precedence and exclude the operation of the relation back of the order that would otherwise apply as a result of Order 42 Rule 3*". If that were not so "*an applicant could easily find that the time for serving the documents required by GCR Order 53 Rule 5(2) has expired before they have the documents in their possession*". This was illustrated by the facts of *GT Retail* where the judge signed the order 8 days after the draft was uploaded using the e-filing system and 12 days after he had indicated he would grant leave, and the applicant uploaded the Notice of Originating Motion two days after he was informed that the sealed order was available.

66. The position of the public authorities is that to start the seven-day period in Order 53 Rule 5(2) when the order is sealed is contrary to Order 42 Rule 3. They maintained that the provision in Order 42 rule 3 that a judgment or order takes effect from the date on which a judgment or order is pronounced, given or made and time runs from then permits an alternative starting point which is not inconsistent with the form and scheme of order 53 and is therefore applicable to judicial review proceedings.

67. They also submit that starting time when an order granting leave is sealed is impractical and subject to exploitation by an applicant who could deliberately delay preparing and filing the order. The third element of their submissions on this aspect of the case is that Asif J's reliance on the decision in *GT Retail* which was only delivered after the hearing and about which they were not given an opportunity to make submissions violated the principle of fairness and deprived them of the opportunity to address or challenge that judgment's relevance or its implications.

68. As to the basic position, while submitting that the period under Order 53 Rule 5(2)(c) begins from the date on which a judgment or order is pronounced, given or made, and does not state that it be drawn up, signed, filed and sealed, the public authorities accepted that in practice time could commence with the receipt of a signed minute of order or a draft order that embodies the minute of order. If so, the public authorities appear to recognise that the operation of Order 43 Rule 3 may mean that an applicant is unable to comply with the requirements of Order 53 Rule 5(2) for reasons wholly outside his or her control. They also maintained that, if there is a delay by the court in providing the required documents, so long as a notice of motion has been filed the court does have a discretion to excuse a failure to serve a perfected order and to accept a signed minute of order as sufficient. This is in sharp contrast to their general position in the two cases before us that the requirements of Order 53 cannot be relaxed by the exercise of discretion save where specifically authorised within Order 53. It also wrongly assumes that the principle requiring expedition and speedy certainty in judicial review proceedings would not enable the court to manage the proceedings to prevent or sanction delaying conduct by the applicant.

69. Taken on its own, the language of Order 42 Rule 3 does provide some support for their submission. But to have as a consequence that time has expired before the applicants have received or could have received the documents cannot have been intended by the framers of the rules and is contrary to the overriding objective. For those reasons, I agree with Asif J's conclusion that the specific requirements of Order 53 take precedence and exclude the operation of the relation back that would otherwise apply as a result of Order 42 Rule 3.

70. The approach in Order 42 Rule 3 is to be contrasted with Rule 11 of the Court of Appeal Rules which precludes the possibility of time expiring before an applicant is able to comply with a procedural requirement. Rule 11(4) provides that for the purpose of lodging an appeal under section 19(1) of the Court of Appeal Act (2023 Revision) "*time shall be calculated from the date on which a judgment or order is filed in accordance with GCR Order 42 Rule 5*." The approach in Order 42 Rule 3 is also to be contrasted with provisions in the E-filing and E-service Practice Direction, PD 11 of 2020. §11.2 provides that a document to which an electronic certificate has been attached "*shall be deemed to be filed on the date and time that the document was submitted to the Platform or, where a document has not been accepted for filing and is resubmitted through the Platform",* the date and time of such resubmission.[12] §11.1(e) provides that the electronic certificate validates the authenticity of a document as duly filed.

71. As to the objection that starting time when the order is sealed would be subject to exploitation by an applicant delaying preparing and filing the order, the judge who grants leave can, when doing so, require the applicant to use best endeavours to have the order perfected promptly, and give liberty to the respondent public authority to apply for the order to be sealed. Since the remedies available in judicial review are discretionary,[13] delay is also relevant in relation to the grant of relief after the court has determined the merits of an applicant's case. Where there has been an unwarranted delay the court subsequently

---

[12] §11.2 is subject to §9.2 which provides that where the Platform becomes non-operational the time of filing will be regarded as the time ascribed to when the document was filed rather than when the process of filing was completed.

[13] See *de Smith's Judicial Review* 9th ed., §§18-047-18-53 and Fordham, *Judicial Review Handbook* 7th ed., §24.3

hearing the substantive claim may refuse to grant any relief sought or grant a declaration rather than a more coercive remedy if it considers that the grant of relief would cause substantial hardship or prejudice to the rights of any person or would be detrimental to good administration: see section 36(1) of the English Senior Courts Act 1981, incorporated as part of the jurisdiction of the Grand Court by section 11(1) of the Grand Court Act (2015 Revision) and *Golden Accumulator Ltd. & Coral House Ltd. v Cayman Monetary Authority* 2004-05 CILR 565 at [9] – [12] and [19]. It may also reflect that delay in a costs order.

72. The complaint about the reliance on *GT Retail* is made because the judgment in that case was delivered about 10 days after the hearing in *Berry & others* but about a month before the judgment was delivered. The public authorities submit that Asif J should not have relied on *GT Retail* without giving the parties the opportunity to make submissions before delivering his judgment in *Berry & others*. That submission has force. Courts should not do this, particularly on important points, but it does happen. *R v MacKreth* [2009] EWCA Crim 1849 at [32] (Rix LJ) and *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) at [206] (Leggatt J) are two examples, and, albeit in relation to the writings of academics rather than judgments, in *The Achilleas* [2008] UKHL 82 at [11] and [79] Lord Hoffmann and Lord Walker referred to and relied on several articles in law journals which had not been cited in argument. The guidance of the English Court of Appeal is that the citation of a decided case which had not been referred to during the course of the hearing is not in itself a serious irregularity or procedurally unfair.[14] However, not giving the parties an opportunity to comment on a decision not cited at the hearing before delivering judgment can amount to procedural unfairness where the decision is central to the decision and substantial prejudice has arisen from not giving the parties an opportunity to comment.

73. While unfortunate, in the circumstances of *Berry & others* I do not consider that the failure to give the parties an opportunity to make submissions on *GT Retail* after that decision was

[14] See *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] EWCA Civ. 1046 at [29] – [34] and [49] – [50] *per* Ward and Buxton LJJ with whom Mance LJ agreed, and *Clark v Clark Construction Initiatives Ltd.* [2008] EWCA Civ. 1446 at [11] *per* Sedley LJ.

delivered, fatally undermines the decision. Although at the time of the hearing the parties could not know of the decision in *GT Retail,* whether time under Rule 5(2) ran from the date of the sealed order or from some earlier date and the effect of delay in providing the documents were matters raised during the hearing: see e.g. [59] – [60] and [64]. The parties had an opportunity to deal with the issue and did so, although without the benefit of the fuller reasoning in the judgment in *GT Retail*. Secondly, as I have observed, it was not necessary to decide this point in *Berry & others* because the order was sealed on the same day as the decision granting leave to apply for judicial review. Thirdly, at the hearing before this Court it was stated that the Department of Commerce and Investment, the Liquor Licencing Board, and the Attorney General, the public authorities who were the respondents in *GT Retail,* did not apply to renew their application for leave to appeal against the decision that the judicial review proceedings were validly commenced in time.[15] So, the decision in *GT Retail* on that point stands as far as the parties to it are concerned, and it is a first instance decision which, unless we consider it to be wrong, we should follow.

74. In *Anderson* the time required by Order 53 Rule 5(2) for service of the order granting permission ran from 5 May 2023, the day it was sealed. Service was acknowledged by OfReg's counsel on that date. Accordingly, service was in time and the proceedings should not have been struck out without considering whether within that time the applicant had unjustifiably delayed in preparing and submitting the order or other document to the platform for filing and has thus did not comply with the principle requiring expedition and speedy certainty in judicial review proceedings.

The exercise of discretion to extend time in Berry & others

75. I reject the submission that Asif J erred in his approach to the exercise of discretion. He set out the principles in the authorities and did not err in his application of them. He recognised that a more restrictive approach is taken to extensions of time in public law proceedings.

---

15 The substantive hearing in the Grand Court was in November 2024 and judgment was reserved.

76. One of the submissions was that he failed to consider the merits of the substantive claim. He was, however, entitled to take account of the fact that leave had been granted and a judge (in this case himself) had concluded that there was a claim worth pursuing. He was also entitled to conclude that further analysis of the merits, for example the effect of the change made to the SMPB policy after leave was granted by the establishment of a Review Committee, risked descending into a mini trial at the interlocutory stage, something which should be avoided.

77. Asif J observed at [132] that, while it was common ground that the SMPB Policy had been amended, there was nothing before him to indicate the nature of the amendments to it and that Mr Gayle had indicated that it was the Applicants' duty to put such material before the court. That indication does not reflect the fact that it was the Commission which suggested that the establishment of the Review Committee may have rendered the substantive judicial review otiose. It is also surprising given the duty of candour which requires public authorities to provide full and accurate explanations of all the facts relevant to the issue that the court must decide.[16] The submission that Asif J erred in failing to construe the refusal letters in conjunction with the amended SMPB policy is in my view hopeless since the amended policy was introduced at least two months after the proceedings were launched.

78. I also reject the submission that Asif J erred in failing to infer prejudice to the Commission because it was liable to be sued by third parties who had been granted temporary licences on the basis that they would be given full licences in due course. In the absence of evidence filed on behalf of the Commission or those granted temporary licences, he was entitled to conclude that it was difficult to draw any useful inferences as to prejudice.

79. As to his agreement with the submission on behalf of the Commission that the negligence or difficulties faced by the applicants' lawyers was not a good reason to exercise the

[16] See e.g. *R v Lancashire CC, ex p. Huddleston* [1986] 2 All ER 941, 945 (Lord Donaldson MR); *R (Quark) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] (Laws LJ) and *R (Citizens UK v Home Secretary* [2018] EWCA Civ. 1812 at [106].

discretion to extend time, he was entitled to conclude that in the light of the other circumstances of the case neither was it a reason in itself to refuse to do so.

E Summary of Conclusions

80. For the reasons given in this judgment, I have concluded that:

(1) There is jurisdiction to extend the seven-day time limit required by Order 53 Rule 5(2) for service of the specified documents where, bearing in mind the requirement in judicial review cases of the need for expedition and speedy certainty, a party has shown good reason for the extension.

(2) The time for service of the documents required by Order 53 Rule 5(2) runs from the receipt of the order as signed and sealed by the court.

(3) Mr Anderson's appeal against the striking out of his action should be allowed and his case remitted to the Grand Court to consider whether there was a delay by him in preparing and submitting the order to the Platform for filing which meant that he did not comply with the principle requiring expedition and speedy certainty in judicial review proceedings and, if so, what, if any, consequences there should be because of that delay.

(4) The Commission and Attorney General should be given leave to appeal against the decision in *Berry & others,* but their appeal should be dismissed.

F Costs

81. My provisional view is that the costs of these appeals should be borne by the party which did not succeed on the substantive issue, to be taxed on the standard basis if not agreed. That is to say that in *Anderson* the costs should be borne by the Respondent, and in *Berry & others* by the Appellants. If any party wishes to seek a different order, they should do so in succinct submissions of no more than 10 pages, font size 12, within 10 working days from the circulation in draft of this judgment.

Martin JA

82. I agree.

Goldring P

83. I also agree.

84. I would however add this. It is most unfortunate that the decision of MacMillan J in *Urgent Care* was not drawn to Carter J's attention. Mr Gayle was aware of that case, having been counsel in it. The fact, as was submitted to us, that because in his view *Urgent Care* was not relevant to the issues in *Anderson* he was not obliged to draw it to the Court's attention was, I am bound to say, wholly untenable. *Urgent Care* was plainly relevant, albeit unfavourable to the submissions Mr Gayle was advancing in *Anderson*. It is axiomatic that counsel is professionally obliged to draw the court's attention to any relevant (or arguably relevant) authority, whether favourable to his case or not.