CAUSE NO: G2024-0067

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

THE KING

(ON THE APPLICATION OF LURLANE BERRY and OTHERS)

Applicants

-and-

(1) PUBLIC LANDS COMMISSION CAYMAN ISLANDS GOVERNMENT

(2) CAYMAN ISLANDS ATTORNEY GENERAL

Respondents

Appearances:	**Mr Rupert Wheeler instructed by H Phillip Ebanks for the Applicants**
	Mr Nigel Gayle, Dr Jevon Alcock, Mrs Anna Russell-Knee and Miss Alexandria Fatta of the Attorney General's Chambers for the Respondents
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**15 August 2024**
Ex tempore Judgment delivered	**15 August 2024**
Finalised judgment approved	**16 August 2024**

Civil procedure—leave to appeal—approach to grant of leave to appeal on public interest ground

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JUDGMENT ON LEAVE TO APPEAL

A. Introduction

1. This is my judgment on an application by the Respondents by summons filed on 7 August 2024 for leave to appeal under section 6(f) of the Court of Appeal Act and also for a stay of the substantive application for judicial review pending the determination of the appeal. The summons was filed by the Respondents in respect of a judgment that I handed down on 19 July 2024 in this matter, dealing with the issue of the effect of GCR O.53, r.5(2) and the implications of the 7-day time limit set out in that rule for service of an application for judicial review. For the reasons set out in detail in that judgment, I found in favour of the Applicants and determined that where a notice of motion has not been filed and served within the 7-day time limit, rather than such proceedings being a nullity they are irregular and the irregularity is capable of cure by a prompt application for an extension of time.

2. The Respondents wish to appeal against that judgment, and rely, amongst other things, on the fact that my judgment conflicts with an earlier judgment of Carter J in *Anderson v Utility Regulation and Competition Office* (unreported 20/04/24), which I will refer to as *Anderson*.

3. The Respondents were represented by Mr Gayle, who said everything that could possibly be said in support of the application, and the Applicants were represented by Mr Wheeler.

4. I have listened, as Mr Gayle acknowledged a moment ago, very carefully to the submissions made on behalf of the Respondents and I have heard very briefly from Mr Wheeler on behalf of the Applicants in relation to the application for leave to appeal and for the stay.

5. Mr Gayle relies on, and has taken me to, first of all, the Court of Appeal Rules and in particular paragraph 4 of the Explanatory Notes to the Court of Appeal (Amendment) Rules 2009. I do just record that those Explanatory Notes are not of statutory effect and are not part of the Court of Appeal Rules, and the Explanatory Notes make that clear. However, the Explanatory Notes, and in particular paragraph 4, encapsulate the existing case law on the circumstances in which leave to appeal should be granted by a first instance court. In particular, they build on the judgments in:

5.1 *In the Matter of Universal and Surety Company Limited* [1992-93] CILR 157

5.2 *Telesystem Intl Wireless Inc v CVC Opportunity Equity Partner LP* [2001] CILR Note 21

5.3 *Select Vantage Inc v Cayman Islands Monetary Authority* [2017] (2) CILR Note 4

6. The effect of those three judgments and paragraph 4 of the Explanatory Notes to the Court of Appeal Rules, and I think this is common ground between the parties and it is certainly regularly cited before the court, is to impose essentially a two limbed test: first of all is there a ground of appeal with a real prospect of success; and secondly, exceptionally, is there a public interest aspect that requires the Court of Appeal to consider and examine the issues dealt with by the judge.

7. I record that those are disjunctive, so either of those limbs on their own is sufficient for the court to grant leave to appeal.

8. As I have said, I have listened very carefully to Mr Gayle's lengthy submissions on both of those grounds, realistic prospect of success and public interest and I will deal with the first ground first.

B. Realistic Prospect of Success

9. I am not satisfied that there is any ground of appeal with a realistic prospect of success. I appreciate the warning that Mr Gayle gave to me about being a jury in my own cause in this respect but, standing back, for the reasons I set out at some length in my substantive judgment in this case, it does seem to me with a high degree of confidence that Carter J was led into error in her approach to the proper construction of GCR O.53, r.5(2) in *Anderson*, especially in circumstances where she did not have the benefit of considering *Cayman Islands Urgent Care Ltd. v HM Director of Customs* [2021] (1) CILR 445. Having read through the grounds of appeal advanced or proposed to be advanced in the summons for leave to appeal, I have not reached the conclusion that there is a realistic prospect of any of those grounds succeeding.

10. If the Court of Appeal disagrees and considers that there may be some real merit in an appeal then the Court of Appeal can itself give leave to appeal. And if the Respondents wish to pursue their arguments on substantive merit, then they are completely free to do so by an appropriate application to the Court of Appeal.

C. Public interest

11. Moving on, then, to the question of public interest, first of all, I do not agree with Mr Gayle that the result of the current position is that there is real uncertainty for practitioners on the current state of the law. Essentially for the reasons that I set out in my substantive judgment when I addressed the decision of Mangatal J in *Re China Shanshui Cement Group Ltd* [2015] (2) CILR 255, it seems to me that practitioners, both on the applicants' side and on the respondents' side, now have some clear guidance from my judgment as to the appropriate way forward. The principles as to what practitioners and other judges should do when there are decisions of judges of coordinate jurisdiction who have reached different conclusions are themselves well settled and should not cause any difficulty for practitioners or other judges to know how they should apply, and decide which of those two judgments is the applicable one to follow.

12. I now turn purely to the public interest issue. In considering this issue, I make the underlying assumption that there is no meritorious ground of appeal established. I say that because if there were any meritorious ground of appeal, then I would have granted leave already on that basis, and public interest, which is properly described as an exceptional reason, would not arise at all.

13. On the basis that there is no substantive merit in the proposed appeal, I am not satisfied that there is a public interest which requires that I should grant leave in this case. It seems to me, as I queried in the course of argument, that to the extent that there are real substantive issues on the proper interpretation of GCR O.53, r.5 those will be before the Court of Appeal as a result of the appeal in *Anderson* in any event, and the Court of Appeal can make whatever pronouncements of general principle that they wish to make on the back of their decision in *Anderson*. I pause here to say that if the Court of Appeal concludes that there is real merit in an appeal against my decision then the Court of Appeal will have granted leave for the Respondents to pursue that appeal in any event, and so the public interest consideration would again not arise. It therefore necessarily assumes that there is no substantive merit in an appeal against my decision in this case which the Court of Appeal would entertain.

14. In other words, to the extent that the Court of Appeal finds it necessary to issue general guidance on the proper approach to GCR O.53, r.5 they can do that in the context of the outstanding appeal in *Anderson*. The Court of Appeal does not need this case formally before it in order to do so.

15. It is not as if my decision will not be put before the Court of Appeal. When it is hearing argument in the course of *Anderson*, it is inevitable that the Court of Appeal will review my judgment, either as an authority setting out arguments contrary to the approach of Carter J in *Anderson* and helping the Court of Appeal to frame its view of the public policy and public interest arguments; alternatively, if the Court of Appeal thinks there is real merit in an appeal, it will have granted leave on an application made by the Respondents in this case in due course.

16. Finally, I record that I am concerned whether it is really in the public interest that these Applicants should be tied up in an appeal that does not serve their personal interests, and which will necessarily involve them or the Legal Aid Fund having to incur costs in resisting the appeal in circumstances where it really is not necessary for that to happen given that *Anderson* is going to be considered by the Court of Appeal in any event.

17. However, it does seem to me that I should give the Respondents an opportunity to make an application to the Court of Appeal for leave to appeal. What I intend to do therefore is to grant a stay of the further conduct of the substantive judicial review application for 14 days for the Respondents to file any application to the Court of Appeal for leave to appeal. If an application is filed within that time, the stay is to continue until the determination by the Court of Appeal of the application for leave to appeal, at which point the Court of Appeal can order a further stay. If an application is not filed within that time, the stay will automatically terminate at that point.

Dated 16 August 2024

THE HONOURABLE JUSTICE JALIL ASIF KC

JUDGE OF THE GRAND COURT