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, 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: **13 June 2024**

Judgment: **19 July 2024**

Practice and Procedure—Grand Court Rules—GCR O.53, r.5(2)—time for serving claim for judicial review—whether failure to serve in time results in proceedings being a nullity—whether leave lapses if claim not started in time—whether court has power to extend time for service

Practice and Procedure—conflicting judgments of courts of coordinate jurisdiction—approach of court to reconciling the conflict

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JUDGMENT

A. Introduction

1. This case involves a direct challenge to the correctness of the recent judgment of Carter J in *Anderson v Utility Regulation and Competition Office* (unreported 20/03/24), in which the learned judge concluded that: (i) GCR O.53, r.5(2) imposes a mandatory time limit of 7 days from the grant of leave for commencing judicial review proceedings; (ii) there is no discretion to extend the time limit stated in the Rule; (iii) any grant of leave to pursue judicial review is conditional upon a notice of motion being issued and served in time; and (iv) if the notice of motion is not served in time, then the leave lapses, and cannot be renewed, so that the applicant automatically loses the ability to pursue any judicial review claim.

2. It is useful to set out the terms of GCR O.53, r.5(2) in full:

> *"(2) Within 7 days of being granted leave, the applicant shall serve copies of —*
> *(a) the notice of motion;*
> *(b) the supporting affidavits;*
> *(c) the order for leave; and*
> *(d) the Form No. 53 of the Grand Court Rules - Vol II - Forms (as amended and revised) application*
> *upon the defendant and all other persons directly affected."*

3. Mr Rupert Wheeler, who appears for the Applicants, instructed by H Phillip Ebanks, cogently argues that I am able to, and should, disagree with Carter J's conclusion. Mr Nigel Gayle, who appears for the Respondents, argues to the contrary that Carter J's decision is correct and that I should follow it and apply it in this case. I was told during the hearing that there is an outstanding summons for leave to appeal in *Anderson*, and that Carter J has not yet determined whether she will grant leave. Neither party invited me to defer the hearing in this matter or the completion of my judgment pending the determination of that application for permission to appeal, and any appeal if permission were to be granted.

B. Relevant background

4. The background can be briefly stated as follows. The Applicants are various persons who have been involved in operating businesses at Public Beach on Seven Mile Beach, Grand Cayman, for periods ranging from 2-19 years. During 2023, the Public Lands Commission brought into effect a new regime for licensing those who wish to trade on Public Beach. Each of the Applicants applied for a licence and was refused. Each of the Applicants was sent a letter dated 15 January 2024 notifying them of the decision and requiring that they cease trading and vacate the site by 14 February 2024.

5. On 12 February 2024, the Applicants filed a joint application for leave to commence judicial review proceedings and their supporting affidavits. The matter came before me in Chambers on Tuesday 13 February 2024 on an *ex parte* application but on informal notice to the Respondents. The Respondents did not attend. Having heard counsel for the Applicants, I granted leave to move. In addition, I directed that each Applicant should file further evidence by Friday 23 February 2024 giving further particulars of representations regarding their licences, which they allege were made to them by officials from the Public Lands Commission and on which they relied in support of their claim. Finally, I stayed the requirement that the Applicants should cease trading and vacate Public Beach until the judicial review has been determined.

6. My order confirming the grant of leave was signed, filed and sealed on 13 February 2024.

7. It is common ground that, having obtained leave on 13 February 2024, the Applicants did not file and serve their Notice of Originating Motion within the 7 days specified in GCR O.53, r.5(2). The Applicants' evidence demonstrates the following timeline of events:

   7.1 On Thursday 22 February 2024, the Applicants sent the Respondents by email a link to download an electronic copy of the bundle on which they had relied at the application for leave. This included the primary affidavits and the Form 53 setting out the grounds of the intended judicial review claim. The Applicants intended that this would be effective service of those documents upon the Respondents.

   7.2 On Friday 23 February 2024, the Applicants sought an extension of time from the Respondents to complete and serve the supplemental affidavits that I ordered on 13 February 2024. The

Respondents did not have instructions to agree, so the Applicants renewed their request to the court, and I granted them an extension to 26 February 2024.

7.3 On Monday 26 February 2024, the Applicants sought to file their supplemental affidavits, but these were rejected by the Registry for reasons relating to their form. The Applicants therefore sought an additional extension from the court to Tuesday 27 February 2024 for filing the supplemental affidavits, which I granted, and the affidavits were filed on 27 February 2024.

7.4 Also on 27 February 2024:

(a) The Respondents informed the Applicants that they did not accept service of the leave bundle via the link to the soft copies sent on 23 February 2024. There was not material before me to explain why this was not communicated to the Applicants sooner and, in particular, before time for service putatively expired.

(b) The Respondents served their summons to strike out the claim for failure to comply with GCR O.53, r.5(2).

(c) The Applicants served an electronic copy of the leave bundle upon the Respondents by email, instead of link, which is a mode of service permitted by the Respondents.

7.5 On Thursday 29 February 2024, the Applicants sought to file their notice of motion at court and sent the Respondents an unsealed copy and the supplemental affidavits, along with a summons seeking an extension of time for service.

8. Unfortunately, there was then a delay in having the two summonses listed before me, with the result that they were only heard on 13 June 2024.

C. Summary of the parties' arguments

C.1 The Respondents' submissions

9. By their summons, the Respondents complain that time for service of the Notice of Originating Motion expired on 23 February 2024, but nothing had been served by 27 February 2024, when their summons was issued. They ask that the proceedings be struck out. The grounds relied on are that the grant of leave was conditional on compliance with GCR O.53, r.5(2); the Applicants failed to comply with the 7-day time limit specified in GCR O.53, r.5(2); the leave therefore lapsed as a result of the

Applicants' failure; and the proceedings are therefore a nullity and should be struck out pursuant to GCR O.18, r.19(a) or (d) or the inherent jurisdiction. The Respondents rely on *Anderson* but also on the underlying substantive arguments that were advanced in *Anderson,* and which were accepted by Carter J.

10. In response to the Applicants' argument, summarised in paragraph 12 below, that I should not follow *Anderson*, Mr Gayle disputes that *Cayman Islands Urgent Care Ltd v HM Director of Customs* [2021] (1) CILR 443 (which I will refer to as *Urgent Care*) is a relevant judgment that should have been brought to Carter J's attention, and argues that it does not give me license to differ from Carter J. His position is that insofar as McMillan J made any potentially relevant comments, those were *obiter dicta*.

C.2 The Applicants' submissions

11. The Applicants' skeleton argument summarises their submissions as follows:

> *"4. The arguments in support of the Respondents' summons appear premised on the proposition that O.53, r.5(2) imposes a condition, and failure to abide by that condition results in leave lapsing and the action becoming a nullity. This is demonstrably incorrect. In short, the Applicants submit as follows:*
>
> *i. Leave to apply for judicial review is not conditional under O.53. Consequently, leave does not expire if the notice of motion and other documents are not served in accordance with O.53, r.5(2).*
>
> *ii. The failure to meet the timeframe stated in r.5(2) does not render the application a nullity. It renders it an irregularity pursuant to O.2, r.1.*
>
> *iii. If the timeframe has been missed in this instance, the Court should cure the irregularity rather than exercising its discretion to set aside the proceedings for irregularity."*

12. Mr Wheeler does not shy away from the fact that he is asking me to disagree with Carter J, and that that is a difficult argument for the Applicants to make. However, he submits that the law was not fully or adequately argued before Carter J. Mr Wheeler points out that the judge was taken only to cases from Jamaica and the Eastern Caribbean Supreme Court (ECSC). He says that she was not directed to the earlier judgment of McMillan J in *Urgent Care*, in which McMillan J reached the opposite conclusion to that of Carter J in *Anderson*.

13. Mr Wheeler concedes that he cannot say that McMillan J's judgment on this point is a comprehensive consideration of all relevant authorities, but he submits that McMillan J clearly received extensive written submissions, which he considered in detail.

14. Mr Wheeler submits that *Urgent Care* is a relevant judgment of a Grand Court judge to which Carter J should have been directed by the respondent before her but was not. He says that Carter J should have followed *Urgent Care* or, at the very least, taken it into account when making her decision, with the likely outcome that she would have reached a different conclusion.

15. As a result, he argues that I am in a position where there are two conflicting judgments of judges of co-ordinate jurisdiction in the Cayman Islands, the second of which was not fully argued, so that I am not bound to follow *Anderson* but, rather, must reach my own conclusion on the correct interpretation of GCR O.53, r.5(2).

16. Further, he argues that, in any event, there is nothing in the wording of GCR O.53, r.5(2) that supports the conclusion reach by Carter J, and that I should not follow *Anderson* because it is wrong.

17. Mr Wheeler submits that Carter J went astray because she placed too much weight on the approach in Jamaica and the ECSC circuit, where the applicable Civil Procedure Rules are significantly different from the Grand Court Rules in the Cayman Islands.

18. He contends that the authorities relied on by the Respondents before me, all of which addressed questions of construction of the procedural rules of the Supreme Court of Jamaica, the ECSC and Northern Ireland, and of Irish legislation, should not inform the interpretation of GCR O.53, r.5(2), which is in significantly different terms.

D. To what extent am I bound by *Anderson?*

19. In light of Mr Wheeler's argument, the appropriate starting point is to consider the approach I should take to Carter J's judgment in *Anderson*. On this point, Mr Wheeler draws my attention to the judgment of Mangatal J in *Re China Shanshui Cement Group Ltd* [2015] (2) CILR 255. In that case, Mangatal J was invited to disagree with the earlier decision of Jones J in *Re China Milk Products Ltd*

[2011] (2) CILR 61. Under the heading *"Approach to decisions of co-ordinate courts"*, the learned judge said this:

> *"60. In* 11 Halsbury's Laws of England, 5th ed.*, at paras. 98 and 99, as quoted in* In re Alibaba.com*, the following guidance is provided:*
>
> *'**98. Decision of co-ordinate courts.** There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if reached after full consideration of earlier decisions.*
>
> ***99. Decisions followed for a long time.** A long-standing decision of a judge of first instance ought to be followed by another judge of first instance, at least in a case involving the construction of a statute of some complexity, unless he is fully satisfied that the previous decision is wrong. Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before which the matter arises afterwards might not have given the same decision had the question come before it originally.'*
>
> ...
>
> *64. ... I appreciate that, in the interests of judicial comity and certainty, I would be inclined to follow the judgment, unless I am convinced that it is wrong. I am also, on the other hand, cognizant that if I am convinced the decision is wrong, I cannot shy away from not following it."*

20. I agree with and adopt this description of the approach that a first instance judge should take when asked to differ from an earlier decision of a judge of co-ordinate jurisdiction.

21. Applying those principles to this case:

21.1 Carter J's judgment in *Anderson* comes to a definite decision on a Grand Court Rule, which is not necessarily obvious in how it should be construed. One of the factors pointing towards following her decision is therefore in place.

21.2 Carter J was not shown *Urgent Care*. It is therefore necessary to review the judgment in *Urgent Care* carefully in order to determine whether, as Mr Gayle argues, *Urgent Care* is not a relevant decision at all. If I reach the conclusion that *Urgent Care* is relevant, then the fact that Carter J

did not have the opportunity to consider it in *Anderson* has the result that her decision was not reached after full consideration of earlier relevant judgments. It therefore potentially undermines the force of her reasoning and gives me more latitude not to follow *Anderson*, if I disagree with her judgment, without necessarily concluding that it is wrong.

21.3 *Anderson* was only very recently decided and has not yet been applied or followed in any cases of which I am aware. In addition, there is an outstanding application for leave to appeal, and a possible appeal to follow. The consequences for legal certainty if I were to disagree with Carter J are therefore likely to be extremely limited.

21.4 Even if *Urgent Care* is not a relevant decision that should have been shown to Carter J, I may still reach a different conclusion to Carter J if I am convinced that *Anderson* is wrong, but I should be cautious before forming that view, giving appropriate weight to the need for legal certainty and judicial comity.

E. Is *Cayman Islands Urgent Care Ltd v HM Director of Customs* [2021] (1) CILR 443 a relevant judgment?

22. *Urgent Care* is a judicial review case decided by McMillan J in 2021 arising out of the obtaining and exercise of search warrants and the seizure of cannabinoids, which the applicants had imported and prescribed pursuant to licences that had been granted to them. The applicants challenged the Chief Medical Officer's notice purporting to require medical practitioners to cease prescribing the use of cannabinoids by vaporisation, and the obtaining and execution of the search warrants by the Royal Cayman Islands Police Service.

23. In a section of his judgment running from paragraph [357] to [387], McMillan J considered an issue that only arose after the judge had heard oral closing arguments, whilst he was preparing his judgment, but on which he received extensive written submissions on behalf of the parties. The judge described the issue and how it had raised its head as follows:

> *"357. In the course of writing this judgment, the court became aware that the amended application for leave to apply for judicial review had not been formally filed with the court.*
>
> *358. The applicants were granted leave to amend the notice of motion/application for judicial review against the CMO on February 19th, 2020. The CMO had previously been added as the fourth respondent in the proceedings by order dated November 9th, 2019.*

> *359. Notwithstanding the technical irregularity as to the filing, the respondents fully engaged in the hearing on the basis of what was set out in the amended application and they were not in any conceivable way prejudiced or inconvenienced by doing so.*
>
> *360. Following the notification to counsel of the filing issue, the documentation was subsequently filed by the applicants on December 4th, 2020.*
>
> *361. That was not, however, the end of the matter.* ***There then followed unsolicited and extensive written submissions on behalf of the CMO dated December 22nd, 2020. The submissions were not accompanied by a summons or motion of any kind.***
>
> *362.* ***The CMO appeared to argue that due to an irregularity in the filing and service the time limit set out in GCR O.53, r.5(1) and (2) had not been met.****"* (emphasis added)

24. The above passage indicates that the question of whether there had been compliance with GCR O.53, r.5(2) was squarely in issue in *Urgent Care*.

25. Having set out the terms of GCR O.53, r.5, the learned judge continued:

> *"364. The point seems to be not that the CMO was not served and notified at all, but that the filed version of the relevant documentation was not served and notified to him.*
>
> *365. The CMO's argument is accordingly summarized at para. 6 of the submissions:*
>
> *'6. The issue of the failure to file Notice of Motion/Application for Judicial Review, in keeping with the Mode of such application under GCR O.53, r.5(2), within 7 days of receipt of leave to so file and to so add the Chief Medical Officer as the 4th Respondent, thereby bringing a claim for Judicial Review against the CMO (for the first time), has severe legal implications.'"*

26. Mr Gayle was counsel for the respondents in *Urgent Care*. He was one of the counsel team for the respondent in *Anderson* and was the lead counsel for the Respondent before me.

27. It appears that in *Urgent Care*, Mr Gayle ran the same argument that the counsel team later ran in *Anderson*, based on the approach to judicial review applications in Jamaica and the ECSC, and which Carter J accepted. This is apparent from the passage from [365] quoted in paragraph 25 above and a later passage in McMillan J's judgment at [383], where the learned judge said:

> *"383. Fourthly, in support of his arguments Mr. Gayle relies upon* Golding v. Miller *and upon* Bailey-Latibeaudiere v. Minister of Finance & Planning & Public Service *as dealing with the enforcement of judicial review time limits."*

These are two of the main cases from Jamaica on which the respondent relied before Carter J in *Anderson* and on which Mr Gayle relied before me.

28. The commonality between the argument advanced on behalf of the respondents in *Urgent Care*, *Anderson* and this case is confirmed by the language in the respondent's written submissions in

Anderson, filed by Mr Gayle on 23 June 2023, which is materially identical to the text quoted by McMillan J at [365] and set out in paragraph 25 above, namely:

> *"5. The issue of the failure to file Application / Originating Motion for Judicial review, in keeping with the Mode of such application under GCR O.53, r.5(2), within 7 days of receipt of leave to so file, has severe and fatal legal implications. The failure is more than a mere technicality. It is a breach."*

and by the Respondents' written submissions in this case which are again in materially identical terms to the previous written submissions:

> *"5. The issue of the failure to file (and/or serve) Application/Originating Motion of Judicial review, in keeping with the Mode of such application under GCR O.53, r.5(2), within 7 days of receipt of leave to so file, has severe and fatal legal implications. The failure is more than a mere technicality or irregularity."*

29. It is clear that McMillan J rejected the respondents' arguments in *Urgent Care* and that he reached the opposite conclusion to that which the respondent in *Anderson* argued that Carter J should reach. He gave four reasons for doing so. Relevantly, his second reason was as follows:

> *"371. Secondly, Mr. Austin-Smith has pointed out at para. 2 of his letter submissions dated December 23rd, 2020, non-compliance itself is by no means fatal to proceedings under the Grand Court Rules, and there is no basis, in terms of allowing and upholding an amendment as such to render an irregularity as somehow dispositive of these proceedings against the CMO."*

30. McMillan J then set out GCR O.2, r.1, and continued:

> *"373. There has been no irregularity here which in the circumstances of these proceedings has rendered them a nullity …*
>
> *374. GCR O.53, r.5(2) exists to discourage dilatory and potentially improper judicial review proceedings. It should not be used to stifle or suppress applications which in the face of sustained and wide ranging opposition from the first, third and fourth respondents have been pursued both expeditiously and thoroughly by the applicants.*
>
> *…*
>
> *377. Thirdly, in relation to GCR O.2, r.1(1) in respect of the power of the court to treat a failure as an irregularity and therefore to not nullify the proceedings the court notes carefully and with approval the following statement at Note 2/1/3 of the Supreme Court Practice, 1999 ed., vol. 1, at 10–11, as it pertains to identical English provisions:*
>
> > *'Defective service of proceedings, however gross the defect, and even a total failure to serve, where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the court by the exercise of discretion under O.2, r.1 (*Golden Ocean Assurance Ltd and World Mariner Shipping SA v. Martin, The Goldean Mariner *[1990] 2 Lloyd's Rep. 215. See too,* Fielding v. Rigby *[1993] 1 W.L.R. 1355; [1993] 4 All E.R. 294, service of writ after death of plaintiff but before personal representative appointed did not render proceedings a nullity but was an irregularity which might be cured under O.2, r.1.'*

> *378. It is made clear in the Editorial Introduction to O.2, at 9, that the former distinction between nullity and mere irregularity has disappeared. It states in relevant part:*
>
> > *'As a result of r.1., in relation to 'a failure to comply with the requirements of these rules', the distinction between nullity and mere irregularity disappears (the summaries of the cases falling on either side of the line made their final appearance in The Annual Practice 1965, pp. 11–13). The timely objection and waiver rules stated in the old O.70 survive in r.2.'"*

31. Thus, McMillan J explicitly rejected the argument, later advanced before Carter J in *Anderson*, that a failure to comply with GCR O.53, r.5(2) has the result that the proceedings are a nullity and cannot be saved by GCR O.2, r.1. It is also useful to note McMillan J's explanation that the purpose of GCR O.53, r.5(2) is not to stifle or suppress judicial review proceedings pursued expeditiously and thoroughly, but to discourage those which are dilatory and potentially improper.

32. McMillan J then specifically addressed as his fourth reason for rejecting the respondents' arguments whether the practice in Jamaica regarding the time limit for bringing judicial review proceedings applies in the Cayman Islands. He concluded that the Jamaican approach is distinguishable from the position here:

> *"384. ... in the former case of* Golding *it is clear that under the relevant Civil Procedure Rules leave to apply is 'conditional' on the applicant making a claim for judicial review within 14 days of the order granting leave (r.56.4(12)), a specific provision which does not appear in the Grand Court Rules. In addition, in the latter case of* Minister of Finance & Planning & Public Service *the relevant submission as to time limits was taken as a "preliminary objection" ...; and it was taken as a threshold ground (ibid., at para. 12). No preliminary or threshold ground has been taken in the present proceedings.*
>
> *385. In other words, the manner in which these authorities fall to be distinguished provides no support for Mr. Gayle's arguments."*

33. Mr Gayle argues that McMillan J's statements in *Urgent Care* set out above are not part of the *ratio decidendi* of his decision. Mr Gayle relies in particular on the following paragraphs in McMillan J's judgment:

> *"367. Had the point been taken at the relevant time, no doubt the appropriate arguments could have been made, but having been made fully aware of the applicants' case the CMO proceeded on that basis with no embarrassment or detriment ever having been alleged by him.*
>
> *...*
>
> *380. As the court has already made clear, the CMO's contentions were only raised at an extremely late stage and with no regard at all to doing so within a reasonable timeframe.*
>
> *381. Raising the point at this stage is not merely unreasonable and untimely but in the circumstances of these proceedings it is also unconscionable.*

> *382. The opportunity to take this point was not exercised at the relevant time or at any available time, and it is the opinion of the court that the opportunity is gone and that any merit which it may purport to have had is gone as well."*

34. In addition, Mr Gayle submits that *Urgent Care* is distinguishable. He submits that the proceedings in *Urgent Care* were started in time, that McMillan J was exercising the power in GCR O.20, r.8 to allow amendments to the notice of motion – a power which is expressly preserved by GCR O.53, r.3(6) – and, further, the amendments in that case were made by consent. Against this background, he argues that it was not necessary for the respondent in *Anderson* to bring *Urgent Care* to Carter J's attention.

35. Having set out above the passages from McMillan J's judgment in *Urgent Care* on this topic and the extracts from the respondents' skeleton arguments in each case, I reject Mr Gayle's submission that *Urgent Care* is not a relevant authority and did not need to be drawn to Carter J's attention in *Anderson*.

35.1 The argument put forward in *Urgent Care* was that GCR O.53, r.5(2) had *"severe legal implications"*, i.e. that the claim against the CMO could not proceed: see paragraphs 24 and 25 above. The argument was based on the authorities from Jamaica recorded by McMillan J as being relied upon by the CMO and, it is safe to infer, was to the same effect as was advanced in *Anderson*, and also before me, based on those same authorities.

35.2 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.

35.3 The passages that Mr Gayle relied on at paragraphs 380-382 of McMillan J's judgment formed the third of his four reasons for rejecting the respondents' arguments. In my view, it cannot be said that they alone form the *ratio decidendi* and that McMillan J's other three reasons for rejecting the respondents' position must all be treated as being *obiter dicta*.

35.4 Further, the fact that this issue was not formally raised before McMillan J by way of a summons is of no import, given that both sides clearly made detailed written submissions to the judge

(described by the judge as *"extensive"* as regards the respondents' submissions), which he considered in reaching his conclusion. This factor does not, in my judgment, mean that the issue was not properly before him or that his findings are merely *obiter dicta* for this different reason.

35.5 To the contrary, the passages I have set out clearly form an essential part of McMillan J's reasoning on the path to his conclusion on the case as a whole by disposing of an obstacle to the claim against the CMO proceeding, raised by the respondent at a very late stage of the case. They are not mere *obiter dicta*.

35.6 Accordingly, in my judgment, the respondent in *Anderson* was not justified in deciding not to draw the judgment in *Urgent Care* to Carter J's attention.

36. Of course, I cannot know what impact *Urgent Care* might have had on Carter J in *Anderson* but the failure to put it before her and, as a result, her lack of opportunity to consider its impact on her own reasoning, in my judgment, damages the authoritativeness of her decision in *Anderson*.

37. I conclude that Carter J's judgment in *Anderson* was not reached following any consideration of the earlier relevant decision in *Urgent Care*. As a result, I am in the position that there are two conflicting judgments of judges of co-ordinate jurisdiction with my own, neither of which fully considered all the relevant authorities. Accordingly, it is appropriate that I entertain Mr Wheeler's submission that I should consider reaching a different decision to that of Carter J in *Anderson*.

F. Is GCR O.53, r.5(2) a self-contained procedural code?

38. The first point to consider is whether GCR O.53 is a self-contained procedural code, as asserted by Mr Gayle, since the answer may impact the appropriate construction to be applied to the individual rules within GCR O.53.

39. Mr Gayle's submission is that:

> *"7. ... Order 53 contains a special self-contained architecture of rules. The general rules under Order 3 rule 5 are inoperative. The Applicant sought leave to apply for Judicial Review pursuant to GCR Order 53 which contains a special self-contained rule of administrative and/or public law. In contra distinction to ordinary civil proceedings, these*

> *specialised Rules are ones to which, unless specifically so provided within Order 53, no general or other Rule(s) operate (especially where there is inconsistency). …"*

40. Mr Gayle does not identify any specific authority to support this assertion and does not put forward any detailed explanation within his skeleton argument or in his oral submissions to me why GCR O.53 should be treated as being a distinct set of procedural rules, separate from the rest of the Grand Court Rules. However, language to this effect does appear in the cases from Jamaica on which Mr Gayle relies, where those courts describe the nature of the Civil Procedure Rules applicable in Jamaica.

41. In his oral presentation, Mr Gayle softened his position slightly to say that GCR O.53 is a self-contained procedural code which specifically preserves that some general rules apply, and that other general rules within the Grand Court Rules are applicable insofar as those general rules are relevant and neither derogate from nor are inconsistent with GCR O.53, including GCR O.53, r.5(2). However, he maintains the position that GCR O.2, r.1 and O.3, r.5 are inconsistent with GCR O.53, r.5(2) and are therefore inapplicable.

42. The Cayman Islands do have some sets of procedural rules which are separate from the Grand Court Rules, but which have some areas of overlap with them. Examples are the Companies Winding-Up Rules, the Probate and Administration Rules and the Matrimonial Causes Rules. These are largely self-contained procedural codes, but they draw on the Grand Court Rules in certain limited respects. GCR O.53 is a long way from being comparable with the CWR, PAR or the MCR. But notably, GCR O.1, r.2(4) preserves the applicability of GCR O.3, including the general power to grant extensions of time, to proceedings otherwise governed by the CWR or the MCR, giving an indication of the intended broad availability of GCR O.3.

43. It appears to me that judicial review proceedings within GCR O.53 are more akin to a number of other specialised types of proceedings, which have their own additional rules which cater for the particular features of proceedings of those types, but which also remain subject to the general rules in the Grand Court Rules. I have in mind GCR O.54 (habeas corpus), O.55 (appeals from Cabinet, Registrar of Lands etc), O.56 (appeals by way of case stated), O.72 (Financial Services proceedings), O.73 (arbitration proceedings), O.74 (applications under the Merchant Shipping Acts), O.75 (admiralty proceedings), O.76 (contentious probate proceedings), O.77A (proceedings under sections 23 or 26

of the Constitution), O.82 (defamation actions). The fact that proceedings of these types have additional provisions in the Rules specific to those proceedings does not have the consequence that the general rules do not continue to apply to them as well (except where specified within the applicable Order). I do not see a logical reason why GCR O.53 should be treated differently.

44. A practical example of the need to look outside the limits of GCR O.53 is that this Order does not include any provisions at all regarding service out of the jurisdiction. Whilst it is likely to be unusual to have to serve a respondent out of the jurisdiction in a judicial review case, it is conceivable that it may be necessary, for example where the chairperson of the decision-making body is no longer in post and has left the Islands.

45. Further, it seems to me that Mr Gayle's submission ignores the clear words of GCR O.1, O.2 and O.3, which expressly state the general applicability of the rules to all proceedings:

45.1 GCR O.1, r.2 provides:

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

The plain reading of GCR O.1, r.2(1) is that the Grand Court Rules apply to all proceedings in the Grand Court, except where otherwise stated in GCR O.1, r.2. There is nothing in GCR O.1, r.2 that excludes the application of the main body of the rules to GCR O.53 or to judicial review proceedings generally. To the contrary, the effect of GCR O.1, r.2(2) is to extend the application of GCR O.53 to criminal proceedings, whereas in general the Rules do not apply in the criminal context.

45.2 GCR O.2, r.1, dealing with the result of non-compliance with the Rules, and the question of irregularity or nullity, expressly provides that it applies to *"... any proceedings ..."*. Again, there is no exclusion for judicial review proceedings or for GCR O.53. GCR O.2, r.1 must be taken as meaning what it says.

45.3 GCR O.3, r.5 states:

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

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

46. Therefore, in my judgment, GCR O.2, r.1 and O.3, r.5 should in principle apply to judicial review cases, just as they apply to other kinds of proceedings, unless they are clearly excluded by individual rules within GCR O.53. I also disagree with Mr Gayle that GCR O.2, r.1 and O.3, r.5 are inconsistent with the overall scheme or architecture of GCR O.53 generally and are therefore inapplicable to it, and to GCR O.53, r.5(2) in particular.

47. Further, the application of the general body of rules to GCR O.53 proceedings, by virtue of the language in GCR O.1, r.2, as well as the specific terms of GCR O.2, r.1 and O.3, r.5, point against GCR O.53 being a self-contained procedural code.

48. I therefore reject the Respondents' submission that GCR O.53 is a self-contained procedural code, and that other rules within the Grand Court Rules are applicable to judicial review proceedings only insofar as those general rules are relevant and neither derogate from nor are inconsistent with GCR O.53 (including GCR O.53, r 5(2)).

49. As mentioned earlier, notwithstanding the robust position adopted by the Respondents in their written submissions that the Grand Court Rules generally only apply in respect of GCR O.53 where they are expressly referenced, Mr Gayle's position softened in response to questions from the Bench during oral argument. Having been asked whether, for example, GCR O.3, rr.2 and 4 apply in judicial review proceedings as regards the reckoning of time and what happens when time expires on a Saturday, Sunday or public holiday, Mr Gayle conceded that they do. When pressed, he accepted that the Grand Court Rules generally do apply to judicial review proceedings insofar as they do not derogate from and are not inconsistent with GCR O.53.

50. Finally, I note here that the Respondents' position as set out in their summons is that *"the ... 7-day period expired on 23 February 2024"*. Given that the order granting leave was sealed on 13 February 2024, it must follow that when preparing their summons the Respondents calculated the 7 days period for service as excluding Saturday 17 February and Sunday 18 February 2024 to arrive at 23 February 2024, i.e. that the Respondents applied GCR O.3, r.2(5) to the time period specified in GCR O.53,

r.5(2) notwithstanding that their case before me is that GCR O.3, r.5 does not apply to GCR O.53, r.5(2) because of its special self-contained nature and that GCR O.3, r.5 is inconsistent with GCR O.53, r.5(2).

51. The Respondents' skeleton argument was initially to the same effect as their summons. However, at the commencement of his oral submissions, Mr Gayle asked me to delete references to the last day for valid service being 23 February 2024, no doubt because he recognised the inconsistency in the position taken by the Respondents. As mentioned in paragraph 49 above, Mr Gayle then retreated to his original position in response to my questions. This does not give me confidence that the foundation for Mr Gayle's argument is built on rock, rather than sand.

G. How should GCR O.53, r.5(2) be construed in principle?

52. I turn next to the proper construction of GCR O.53, r.5(2), which I have set out in full in paragraph 2 above. The modern approach to construction is to give words their plain meaning, within the overall context of their location in the text, including any technical meaning if appropriate, and to have regard to the purpose of the rule or statute in question. If, and only if, that construction results in an absurd outcome or if there is some ambiguity in the words used, should the court look more widely for guidance or depart from the literal meaning of the text.

53. Mr Gayle relies on the use of *"shall"* GCR O.53, r.5(2), which he says has the effect of making compliance with its requirements mandatory.

54. Mr Gayle is right that *"shall"* is mandatory in nature and is usually treated as being synonymous with *"must"*. For example, it is used in this way in GCR O.1, r.2: *"... these Rules shall apply in relation to all proceedings in Court"*. *"Shall"* is used nearly 1,650 times in the Grand Court Rules, which reflects that the Rules are intended to be binding rules and not merely guidance. The purpose of the Rules is to set out the procedures to be followed by parties wishing to bring their disputes before the court for resolution, and to provide them with reasonable certainty about the procedures to be used.

55. However, the use of *"shall"* does not, of itself, make compliance with the rule a "pre-condition" as Mr Gayle submits. One can ask, rhetorically, a pre-condition to what? Unless the consequence is

clearly indicated, *"shall"* is an instruction but not a pre-condition. If Mr Gayle were correct, the Grand Court Rules would be replete with cases becoming irregular, and possibly nullities, because of a procedural default by one party or the other, and there would be endless arguments on whether the proceedings can be saved.

56. Mr Wheeler accepts that judicial review proceedings must be dealt with expeditiously, and that there is a clear public policy that requires participants to act speedily. He says that the need for speedy certainty affects the approach that the court should take to extending time, not its approach to the construction of GCR O.53, r.5(2). I agree.

57. Mr Wheeler further submits that there is nothing in the wording of GCR O.53, r.5(2), or anywhere else in the Rules, that states that leave is conditioned on compliance with GCR O.53, r.5(2), so that leave expires if there is non-compliance. I agree with this too. GCR O.53, r.5(2) does not specify any sanction or consequence for non-compliance with the time limit for service specified in that rule.

58. Next, Mr Wheeler points out that when the Grand Court Rules were adopted in 1995, and when their parent in the form of the Rules of the Supreme Court in England & Wales were adopted even earlier, in 1965, the courts used a paper-based system, and it was not uncommon for documents to take some time to be sealed. It is easily conceivable that a sealed order giving leave, or a sealed notice of motion might not be available to the applicant within 7 days (or 14 days, as per the English RSC).

59. Accordingly, Mr Wheeler submits, the current-day construction of GCR O.53, r.5(2) should be informed by its historical origin. The Respondents' construction makes no sense, and would be unfair and unjust, because an applicant may be completely unable to comply with the requirements of GCR O.53, r.5(2) for reasons wholly outside the applicant's power.

60. As an example of the potential injustice, Mr Wheeler puts forward that, as at the date of the hearing of the summons, there is still no sealed notice of motion. It appears that the Registry has not sealed it despite the Applicants having filed it on 29 February 2024, because of the Respondents' outstanding summons. The Applicants have therefore been unable to comply with GCR O.53, r.5(2) since 29 February 2024 as a result of the action of the Registry.

61. I think that there is a lot of merit in Mr Wheeler's submission. In my judgment, a construction of GCR O.53, r.5(2) that prefers the strict application of time limits, without any discretion to extend them, rather than promoting the proper determination of such claims on their merits, is contrary to the spirit of the overriding objective

62. In light of the above, I would not construe GCR O.53, r.5(2) as including any automatic consequence for a failure to serve within the 7-day period specified unless required to do so as a result of extraneous factors. In particular, in my judgment there is nothing in the wording of GCR O.53, r.5(2) that indicates that a breach of its requirements has the effect that the leave granted under GCR O.53, r.3 lapses or that the proceedings become a nullity by reason of that breach.

63. Before leaving this topic, I note that GCR O.53, r.5(2) requires that the applicant serves not just the notice of motion, but also the affidavits in support, the order for leave and the application for leave that was made using Form 53, all within the 7-day period specified.

64. I queried with Mr Gayle in oral argument the position if there were to be a delay within the court in providing the documents that GCR O.53, r.5(2) states must be served. Mr Gayle responded that so long as a notice of motion has been filed, the court does have a discretion, for example to excuse a failure to serve a perfected order. He says that GCR O.53, r.5(2) does not require that it is the perfected order for leave which must be served – he suggested to me hypothetically that a signed minute of order or a draft order that embodies the minute of order would be sufficient. He justified this on the basis that the purpose of the requirement in GCR O.53, r.5(2) for service of the order granting leave is so that the respondent knows that leave has been granted, as the other three documents required by the Rule are within the direct control of the applicant.

65. However, in my judgment, this is not a logical position to take: if the Respondents are right, then the strict requirements of GCR O.53, r.5(2) must apply just as rigorously to the other documents required to be served as they do to the notice of motion. In addition, whilst the preparation of the notice of motion is within the applicant's control, the sealing of it by the court is not.

66. In my recent judgment in *The King (on the application of GT Retail Suppliers Ltd) v Cayman Islands Department of Commerce and Investment* (unreported, 21 June 2024) I concluded that the 7-day

period for service runs from no earlier than when the order for leave is sealed: see paragraphs [17] to [22]. Briefly, this is because the reference in GCR O.53, r.5(2) to *"the order"* means the order as sealed by the court – which is what gives the order its authority; and that in this context, *"being granted leave"* means when the applicant is in receipt of the sealed order. A contrary construction would have the unjust result that an applicant's time under GCR O.53, r.5(2) could expire before they are even in possession of the documents which GCR O.53, r.5(2) requires that they must serve.

67. Similarly, I conclude that the reference in GCR O.53, r.5(2) to a notice of motion must mean a notice of motion sealed by the court office. It is the sealing of the document that gives it its status as an originating process – without the court seal it is simply a piece of paper. Without the court seal, a respondent does not know that the court's jurisdiction has been properly invoked by the applicant, which, as Mr Gayle submitted to me, is the central purpose underlying the requirement for service of judicial review proceedings, as with any other form of process generally.

H. Are GCR O.2, r.1 and/or GCR O.3, r.5 excluded in respect of GCR O.53, r.5(2)?

68. Mr Gayle argues that GCR O.53, r.5(2) must be strictly complied with. He says 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.

69. Mr Gayle notes that GCR O.53, r.4(1) gives the court power to extend time for making an application for leave. He says that this is to be contrasted with GCR O.53, r.5(2), which does not include any language giving power to extend time for service of the claim upon the respondent once leave has been granted. The absence of such language in GCR O.53, r.5(2), he says, is an indication that the court is not intended to have such a power in that context.

70. I disagree with this submission. In my judgment, the reason that GCR O.53, r.4(1) expressly addresses the power of the court to grant an extension of time under that rule is because it mandates the application of a specific test in that situation, namely that the court must be satisfied that there is *"good reason"* for granting the extension of time. This is a different and more demanding test from that applicable under GCR O.3 r.5, namely that the court can grant an extension *"on such terms as it*

thinks just". It is not a necessary consequence of the inclusion of a different test in GCR O.53, r.4(1) that the general power in GCR O.3 r.5 to allow extensions of time is excluded in respect of GCR O.53, r.5(2).

71. Moreover, I go back to the specific terms of GCR O.1, r.2, GCR O.2, r.1 and GCR O.3, r.5, emphasising their generality of application to all cases proceeding before the court, which rebuts Mr Gayle's argument.

72. The answer to Mr Gayle's concern that allowing the court to have discretion to extend the time specified in GCR O.53, r.5(2) would provide loopholes for dilatory litigants is not to say that there is no discretionary power at all. Instead, it is to make clear that that power will be exercised in accordance with the particular features of judicial review proceedings, namely the overarching requirement for expedition and speedy certainty in such proceedings, as recently discussed in *The King (On the Application of Soto) v Royal Cayman Islands Police Service* (unreported 31/05/24) at [18]-[19] and see: Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 284.

73. Mr Wheeler points out that, in *Intertrust Corporate Services (Cayman) Ltd v Cayman Islands Monetary Authority* [2021 (2) CILR 422) at [66], Segal J cited *Finnegan v Parkside Health Authority* [1998] 1 W.L.R. 411, where it was said that RSC O.3, r.5:

> *"... explicitly confers the widest measure of discretion in applications for extension of time, and* ***draws no distinction whatsoever between various classes of cases****."* (emphasis added)

Intertrust concerned the time for filing a statutory notice of appeal in a public law matter, so it is not the same context as a judicial review case but does have a similar public law element and points away from the disapplication of GCR O.3, r.5 in public law cases.

I. What impact does *Anderson* and the jurisprudence in other countries have upon the construction of GCR O.53, r.5(2)?

74. The question now arises whether *Anderson*, as well as the law and procedure of Jamaica and the ECSC circuit, on which *Anderson* is founded, requires that I should take a different approach to the meaning of GCR O.53, r.5(2) from my provisional view expressed above, and should conclude that the rule has the effect contended for by the Respondents.

75. The Respondents' position is that *Anderson* is the law and that I should follow it, and moreover that it is good law. Mr Gayle notes that *Anderson* addresses exactly the same points as arise in this case, namely is the grant of leave conditional upon a claim for judicial review being commenced and served within 7 days, and do GCR O.2, r.1 and GCR O.3, r.5 apply to GCR O.53, r.5(2) to give the court any discretion to extend time to commence or serve the claim.

76. Based on *Anderson* and a range of cases from Jamaica, Ireland and Northern Ireland, Mr Gayle draws from the mandatory nature of *"shall"* in GCR O.53, r.5(2) that a grant of leave pursuant to GCR O.53, r.3 is provisional until proceedings are validly commenced, and that a failure to comply with the 7-day time limit has the result that the leave lapses and cannot be renewed. Once the leave has lapsed, proceedings for judicial review cannot properly be commenced, and any proceedings purported to be commenced without proper compliance with GCR .53, r.5(2) are a nullity.

77. Mr Gayle asserts that the court does not have power retrospectively to extend time for serving a notice of motion, i.e. if the 7-day period for service has passed, because the proceedings are by then a nullity and there is no *lis* before the court in respect of which an extension of time can be granted. The court only has jurisdiction to extend time prospectively within the window between filing the notice of motion and expiry of the 7-day period for service laid down by GCR O.53, r.5(2), i.e. a matter of days, or possibly even hours. This strikes me as being a surprising and strange result of the construction contended for.

78. Starting with the argument on conditionality, the first case from Jamaica on which Mr Gayle relies is *Golding v Simpson Miller* (unreported 11/04/08, CA). He cites the following extracts from the judgment of Panton P, at pages 8-10:

> *"11. … 'leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave' …*
>
> *13. In the instant case, the respondent had the benefit of fourteen days … to file the claim. This was not done. The effort by Miss Anderson, through her affidavit, to have time extended for the purpose of filing the claim was wasted effort. The Rules forbid an extension of time in the instant circumstances. …*
>
> *16. It is for the above stated reasons that I agreed with my very learned colleagues that there was merit in the appeal which should be allowed …"*

79. Mr Gayle submits that Smith JA in the same case explained that the leave to pursue judicial review proceedings only becomes unconditional, or absolute, when the claim is made, i.e. by issuing the proceedings.

80. However, Mr Wheeler urges me to conclude that the Jamaican Court of Appeal, was dealing with a specific question of the construction of the Civil Procedure Rules in Jamaica and was not expressing a wider rule of law. He says that the reasoning in *Golding* and the other cases from Jamaica following it cannot apply to the Grand Court Rules or be transferred to the Cayman Islands because the Civil Procedure Rules in Jamaica are drafted in a different way and take a different approach.

81. I agree with him. That *Golding* concerned the construction of the specific procedural rules applicable in Jamaica, rather than purporting to establish some wider principle of law, appears from the following passages in the judgments of the Court of Appeal:

81.1 The judgment of Panton P, at page 2:

> *"4. ... Rule 56.4(12) is of great importance for the purposes of this appeal, and so must be quoted:*
>
> *'Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.'"*

81.2 The judgment of Smith JA, at page 15:

> *"This appeal turns on the interpretation of rule 56.4(1) which provides:*
>
> *'Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.'*
>
> *Leave is not absolute. It is conditional. The condition is precedent, that is to say the vesting of the right is delayed until the claim form for judicial review is filed. Only when the claim for judicial review is made does the leave become absolute."*

81.3 The judgment of Harris JA, at page 31:

> *"Under rule 56.4(12) of the CPR leave is conditional upon the applicant making a claim within 14 days from the date of the obtaining of leave. ... The critical issue in this case is centered on the true interpretation of this rule."*

82. In addition, it appears from another passage of the judgment of Panton P, at page 9, that the approach in Jamaica of conditionality pre-dates the introduction of the current Jamaican Civil Procedure Rules:

> *"12. Prior to the introduction of the Civil Procedure Rules, there was a similar provision in the law that governed these applications. … Section 564(c) of the Judicature Civil Procedure Code provided thus:*
>
> > *'Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than one month after the date of the proceeding …'*
>
> *Section 564D(2) provided:*
>
> > *'Unless the notice or summons is filed within fourteen days after leave has been granted the leave shall lapse.'"*

83. The second case from Jamaica on which Mr Gayle relies is *Minister of Finance and Planning & Public Service v Bailey-Latibeaudiere* [2014] JMCA Civ 22. Having discussed *Golding*, *Willis v Commissioner of Taxpayer Audit and Assessment Department* (unreported, 12 and 19/01/10), which followed *Golding*, and a third case applying both of those judgments, Morrison JA, with whom the other members of the Court of Appeal agreed, said at [100]:

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

84. I do not need to repeat Panton P's quotation of the terms of the Jamaican CPR 56.4(12), which is set out in paragraph 81.1 above. It is apparent that Jamaica has specific language in its procedural rules that expressly states that any grant of leave is conditional. There is no analogue in GCR O.53. I conclude that *Golding* is not a helpful guide to the proper construction of GCR O.53, r.5(2).

85. I remind myself that McMillan J in *Urgent Care* similarly rejected the respondents' reliance on *Golding* on the basis that CPR 56.4(12) is a specific provision in the Jamaican Civil Procedure Rules that does not appear in the Grand Court Rules.

86. Before moving on from Jamaica, it is important to note the decision in *Hamilton v Commissioner of Police* [2013] JMCA Civ 35. In that case, Mr Hamilton had failed to file his affidavit in support of his judicial review claim when he issued the fixed date claim form, although he had served both on the respondent. The judge concluded that he was bound to follow *Golding* and dismissed the claim as being a nullity because of a failure to comply with CPR 56.4(12). The Jamaican Court of Appeal

allowed Mr Hamilton's appeal. Phillips JA, giving the judgment of the court, distinguished *Golding* on the basis that CPR 56.4(12) does not include any requirement regarding the affidavit in support, only the claim itself. This illustrates that the court in Jamaica is keen to keep the ambit of CPR 56.4(12) within closely confined bounds and militates against an expansive application of the practice in Jamaica beyond the four corners of CPR 56.4(12).

87. Before me, Mr Gayle also relies upon *KSK Enterprises Ltd v An Bord Pleanála* [1994] 2 IR 128 to support his argument that compliance with the strict requirements of GCR O.53, r.5(2) is a pre-condition to commencement of judicial review proceedings. Mr Gayle relies on the following passage in the judgment at 137:

> *"I therefore conclude that the true interpretation of the section is that it may be complied with by an application which has been made within the time limited in the sense that a notice of motion grounded as is provided in O.84 has been filed in the High Court and it has been served on all the mandatory parties provided for in the sub-section. If however it is not served on all the parties provided for mandatorily within the sub-section, as distinct from the power of the court at a later stage to order the service of additional parties, then it has not been completed within the time limited by the section."*

88. However, the court in *KSK Enterprises Ltd* was construing the meaning of an Irish statute, worded in completely different terms to GCR O.53, r.5(2). At page 134, Finlay CJ said:

> *"The issue before this Court is strictly confined by virtue of the provisions of the sub-sections as inserted by the Act of 1992 and by virtue of the form of certificate granted by the learned judge of the High Court to the question of the interpretation of the section …"*

It is therefore a case that should be confined to the issues that it decided, and it does not assist with the interpretation of GCR O.53, r.5(2) in the Cayman Islands.

89. In addition to the cases from Jamaica, Carter J in *Anderson* was taken to the ECSC case of *Antigua and Barbuda Fisherman Co-Operative Society v Financial Services Regulatory Commission* (unreported 04/01/18), a first instance judgment of Henry J. The equivalent to the Jamaican CPR 56.4(12) is ECSC CPR 56.4(11), and is as follows:

> *"Leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave"*

Apart from the substitution of *"must be"* for *"is"*, the wording is identical to Rule 56.4(12) in Jamaica.

90. Henry J in *Antigua and Barbuda Fisherman Co-Operative Society* followed *Golding* and concluded that ECSC CPR 56.4(11) does not allow the ECSC to extend time to commence judicial review proceedings. In my judgment, *Antigua and Barbuda Fisherman Co-Operative Society* does not add anything useful to the mix.

91. In relation to the argument that leave that is not taken up lapses, Mr Gayle relies on the first instance judgment in Northern Ireland in *In the Matter of an Application by Tami Lee Diver for leave to apply for judicial review (Lapse of Time)* [2021] NIQB 83. In that case, the applicant sought judicial review but failed to issue her notice of motion within the time limited in the Rules of the Court of Judicature in Northern Ireland. The judge recorded at [4]:

> *"4. ... The present issue arises because the applicant's notice of motion was not issued within 14 days of the grant of leave. Pursuant to RCJ Order 53, rule 5(5), 'A notice of motion must be issued within 14 days after the grant of leave or else leave shall lapse.' In light of this, the applicant seeks an extension of time for issue and service of the notice of motion. The first respondent contends that it is not open to the court to extend time once leave has lapsed and that (a) a further application for leave to apply for judicial review requires to be made; and (b) in that event, leave should be refused."*

92. This case therefore concerned the effect of the lapse of leave under the particular wording of RCJ O.53, r.5(5) that applied, and whether the court had power to extend time. The judge concluded that the court could only do so prospectively and not retrospectively, because of the wording of the applicable rule, which expressly states that leave *"lapses"* when the 14 days expires. Because of the inclusion of that wording in RCJ O.53, r.5(5), he also held that the general powers to cure irregularities and to grant extensions of time in RCJ O.2, r.1 and O.3, r.5(2) – equivalent to the similar provisions in the Grand Court Rules – are unavailable because they are implicitly excluded. The judge made the point, at [22] that:

> *"22. ... The Rules specifically provide for a consequence of failure to issue the notice of motion within time. That consequence was provided for a reason; and the obvious and natural interpretation of rule 5(5) is that it was designed to send the applicant back to square one where there is a non-compliance with the time-limit."*

93. Mr Gayle noted that the wording *"or else leave shall lapse"* does not appear in GCR O.53, r.5(2) nor in the Civil Procedure Rules in Jamaica and the ECSC but argued that it was nonetheless implied in case law as the sanction for non-compliance, given the wording of the mandatory requirements under GCR O. 53, r. 5(2).

94. I do not agree. In my view, *Tami Lee Diver* does not support Mr Gayle's argument. In fact, if anything, it reinforces Mr Wheeler's submission described at paragraph 57 above, which I accept, that the absence of a stated consequence in the rule implies that none is intended (other than the need to obtain an extension of time to rectify the breach).

95. However, the judge in *Tami Lee Diver* did go on to express his views, strictly *obiter*, regarding the response of the court if a fresh application for leave were to be made. Having set out the considerations that the court should take into account, the judge said this:

> *"[29] In summary, provided the applicant seeks to rectify the situation expeditiously after the error has been identified and there is a reasonable explanation for the default, the court is likely to be sympathetic to a re-grant of leave made on foot of a further application."*

In my judgment, these comments point away from the strict application of rigid time limits for which the Respondents contend in this case.

96. In addition, the judge's view that it is open to an applicant to make a fresh application for leave, and his indication of the likely view that a court would take to such a second application, is inconsistent with Mr Gayle's submission that once leave has lapsed it cannot be renewed.

97. In *Anderson*, Carter J considered that the differences between the wording of the Civil Procedure Rules in Jamaica and the Grand Court Rules in the Cayman Islands, so far as they concern judicial review, are not material to the proper approach to the interpretation of GCR O.53, r.5(2). The learned judge dealt with this at [39] and [42] in her judgment as follows:

> *"39. This Court is mindful that, in the authorities cited, the particular Rules that were being considered contained provisions which stated clearly that the grant of Leave was conditional upon the actual claim being filed within a particular time for its validity, unlike GCR Order 53 Rule 5(2). Of relevance to this application is the underlying approach in each of the cases to the nature of the Judicial Review application and the need for strictness in the interpretation of the Rule under consideration. …*
>
> *42. … I cannot agree with [the applicant's] submission. To do so would mean, in effect, that Order 53 Rule 5 would impose no time limit within which a successful applicant for Leave would be compelled to institute the claim for Judicial Review. This would run counter to the approach regarding timelines and Judicial Review. Rule (5(2) clearly mandates service of the Notice of Motion within a set time frame. The validity of this Notice is dependent upon it having been filed within seven (7) days of the grant of Leave. The grant of Leave is therefore conditional upon the filing and service of the Notice of Motion within the time limited for so doing by Order 53 Rule 5(2). The effect of the Notice of Motion being filed outside the time limit required by the Rule is that the Notice so filed is invalid since the Leave to apply for Judicial Review had, in essence, lapsed. …"*

98. Mr Wheeler argues that the general principle of expedition underpinning Carter J's comments is transferrable between jurisdictions, but the conditionality explicit in the Jamaican and ECSC Civil Procedure Rules is not. He suggests that Carter J fell into error because she imported the approach in Jamaica to the Cayman Islands, ignoring that the case law in Jamaica and the ECSC depends on the wording of their Civil Procedure Rules, and that she gave insufficient weight to the plain reading of O.53, r.5(2) and O.2, r.1.

99. I do not understand the basis for Carter J's statement in the fifth line in [42], as quoted above, that the *validity* of the notice of motion is dependent on it being filed in time. Whilst late service is undoubtedly a breach of GCR O.53, r.5(2), there is nothing in the rules that indicates that the result of that breach should be that the proceedings are *invalid*, i.e. that they are a nullity.

100. With respect to Carter J, I agree with Mr Wheeler that it seems that she elided the public policy applicable across most common-law based jurisdictions of requiring judicial review claims to be determined speedily, and significantly more speedily than other kinds of civil claim, with the particular considerations in Jamaica and the ECSC circuit which are founded on the specific wording of their respective Civil Procedure Rules. In my view, these should not be considered to be generally applicable public law principles and do not have general application across or transferability between common-law based jurisdictions where the applicable procedural rules are differently framed. If they were generally applicable public law principles, then there would be no need for the Jamaica and the ECSC Civil Procedure Rules expressly to provide for the grant of leave to be conditional, nor for the Rules of the Court of Judicature in Northern Ireland to state that a grant of leave lapses if proceedings are not commenced in time.

101. In my judgment, the terms of GCR O.53 are significantly different from the equivalent provisions in Jamaica and the ECSC. In both of those jurisdictions, the procedural rules expressly state that the grant of leave is conditional. There is no equivalent language in GCR O.53, and I do not consider it is legitimate to imply that conditionality requirement into GCR O.53, r.5(2) simply because the rule says that the documents commencing the claim *"shall"* be served within 7 days. That is a *non sequitur*.

102. It is apposite to mention the warning of Lord Cooper (President) in the Scottish case of *Howitt v Alexander & Sons Ltd* 1948 SC 154 at 158, with the substitution of *"judicial review"* for *"admiralty"* and *"Jamaica"* for *"England"*:

> *"... Some reference was made to the alleged Admiralty practice in England, and all I wish to say with regard to that branch of the argument is that, whatever the present or past Admiralty practice in England may be, that practice has nothing to do with this case, and that, if we attempted to follow English decisions,* ***we should be very likely to spoil our own law and practice by misunderstanding theirs.****"* (emphasis added)

103. Finally, of relevance, Mr Wheeler draws my attention to the English case of *R v Institute of Chartered Accountants, ex parte Andreou* (unreported 19/03/96). The case digest from Westlaw records that:

> *"... Having been granted leave, A failed to institute a substantive application for judicial review within the 14 day time limit as required by RSC Ord.53 r.5(3) and r.5(5). A's application for an extension of time was refused and the matter was struck out. A appealed, claiming the delay was due to 'lawyer error' and that the more flexible private law principles should apply to the issue of time limits.*
>
> *Held, dismissing the appeal, that (1) the argument that the more flexible private law rules as to time limits, as stated in* Costellow v Somerset CC *[1993] 1 W.L.R. 256 should apply, was rejected. On a matter of principle, public law litigation could not be undertaken at the slow pace adopted too often in private law disputes. ..."*

104. RSC O.53, r.5(5) was the precursor to GCR O.53, r.5(2) and was in the following terms:

> *"(5) The application must be entered for hearing within 14 days after the grant of permission."*

"Entering" the application was the equivalent process to filing the notice of motion in the Cayman Islands.

105. As Mr Wheeler pointed out to me, the digest of the Court of Appeal's decision in *ex parte Andreou* does not explain whether Mr Andreou's appeal was rejected because the judge and Court of Appeal considered there was no jurisdiction to grant an extension of time (i.e. the Respondents' position in this case) or that it was refused on the merits. However, this is clarified in the subsequent judgment of Lord Woolf in *Andreou v Institute of Chartered Accountants in England & Wales* [1998] 1 All E.R. 14 at page 17, at letter "a", as follows:

> *"On 26 April 1995 on a renewed application for leave Mr Andreou was granted leave by the Court of Appeal. He was also allowed to amend his application to include a claim for damages. However, he failed to enter a notice of motion within the 14 days required by RSC Ord 53, r.5(5). He then applied for an extension of time in which to enter his notice of motion. By the time the application for an extension was heard by Popplewell J on 4 October 1995, the application was in practice an application for an extension of some six months and* ***was refused on the grounds of unjustified delay****.*

> *On 19 March 1996 the Court of Appeal refused Mr Andreou's application for leave to appeal against that decision. The court did, however, order that the claim be continued as if begun by writ …"* (emphasis added)

106. Thus, under the equivalent English rule in the Rules of the Supreme Court 1965 on which GCR O.53, r.5(2) is based, there was jurisdiction to grant an extension of time. This provides some additional support for Mr Wheeler's argument.

J. Are proceedings commenced in breach of GCR O.53, r.5(2) a nullity?

107. Mr Gayle's argument is that proceedings are a nullity, rather than merely being irregular, where (a) the proceedings never properly started at all owing to some fundamental defect in issuing them; and/or (b) the proceedings appear to be duly issued but fail to comply with a statutory requirement, which he says is the case where there is a failure to comply with the Grand Court Rules, which are statutory in nature.

108. In support of this proposition, he relies first upon *Official Receiver v McDaid* [2016] NICA 62, where Gillen LJ, giving the judgment of the Court of Appeal, said this:

> *"8. A number of authorities have been helpfully put before us all of which we have had a chance to look at. In essence they are repetitive in many ways of the important principles and we find that in the case of* Pritchard *(1963) Chancery 205 the decision of Upjohn LJ affords us the best guideline available in this vexed area of deciding when an irregularity occurs as opposed to when a nullity occurs. At p 523 he says as follows:*
>
> *'The authorities do establish one or two classes of nullity such as the following. There may be others though for my part I would be reluctant to see much extension of the classes.*
>
> *1. Proceedings which ought to have been served but have never come to the notice of the Defendant at all. This of course does not include cases of substituted service or service by filing in default or cases where service has properly been dispensed with.'*
>
> *That is far removed from the present case where it is not a question of service because these proceedings had cleared been served and indeed affidavits had been filed by all the parties including the Appellants, but simply a matter of the Appellant not being informed of the date of the hearing.*
>
> *Secondly, Upjohn LJ went on to say:*
>
> *'Proceedings which had never started at all owing to some fundamental defect is issuing the proceedings.'*
>
> *Again one could not conceive of proceedings more far removed from the instant case where of course they had been properly started and served etc.*
>
> *Thirdly, Lord Upjohn said 'proceedings which appear to be duly issued but fail to comply with a statutory requirement' and once again that falls outwith the instant case."*

109. Secondly, Mr Gayle relies on the judgment in *Tami Lee Diver*, discussed at paragraphs [91]-[95] above, to argue that leave lapses if there is non-compliance with the time limit in the rules.

110. Based on these cases, Mr Gayle posits that failure to issue a notice of motion for judicial review before the leave lapses is not a mere irregularity. If the leave has lapsed because of the failure to comply with the mandatory requirement in GCR O.53, r.5(2) that they must be served within 7 days, then the proceedings are a nullity and cannot be cured by recourse to GCR O.2, r.1.

111. Mr Wheeler submits that a failure to comply with GCR O.53, r.5(2) has the result that the proceedings are irregular, not a nullity. He says that the Respondents ignore GCR O.2, r.1, which 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."* (emphasis added by Mr Wheeler)

112. He relies on McMillan J's consideration of the availability of GCR O.2 r.1 to cure defects in compliance with GCR O.53, r.5(2) in *Urgent Care*, set out above. He also relies on the decision of the Court of Appeal in *International Credit and Investment Company (Overseas) Limited & Ors v Adham & Ors* [1999] CILR 501. Albeit in a different context, Rowe J.A. noted at page 523 that:

> *"Non-compliance with the rules of civil procedure does not automatically lead to the invalidity of the process. Non-compliance is to be treated as an irregularity."*

113. In relation to *Tami Lee Diver*, as I have indicated at paragraph 93 above, Mr Gayle overlooks that the applicable rules in Northern Ireland specifically state that leave lapses if the proceedings are not served within 14 days, which GCR O.53, r.5(2) does not.

114. As regards Mr Gayle's reliance on *McDaid*, Mr Wheeler points out, and I agree with him, that the distinction between irregularities and nullities in *Re Pritchard (decd.)* [1963] Ch. 502, to which the court in *McDaid* referred, was negated by the introduction of RSC O.2, r.1 in 1964 explicitly addressing the nullity / irregularity dichotomy. The editorial notes in the *Supreme Court Practice* explain this at paragraph 2/1/2:

> *"This rule came into its present form following the decision of the Court of Appeal in* Re Pritchard (decd.) *[1963] Ch. 502, and under it the above mentioned distinction between nullity and mere*

> *irregularity disappears (see* Harkness v. Bell's Asbestos & Engineering Ltd *[1967] 2 Q.B. 729, p.735, CA) at any rate in regard to 'a failure to comply with the requirements of these rules,' though it may still be that there are other failures to comply with statutory requirements or other improprieties so serious as to render the proceedings in which they occur, and any order made therein, a nullity. 'Proceedings' for the purposes of this rule, includes any application to the court, however informal (ibid.). …"*

The arguments in this case regarding GCR O.53, r.5(2) concern a failure to comply with a requirement of the rules, and are therefore plainly within GCR O.2, r.1, which is the equivalent of RSC O.2, r.1.

115. Relevantly, the editorial notes in the *Supreme Court Practice* continue at paragraph 2/1/3 as follows:

> *"The authorities, taken as a whole, show that O.2, r.1 should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules of procedure …"*

116. It does not seem to me that a breach of the 7-day period specified in GCR O.53, r.5(2) has the effect that the proceedings are irregular in any other than a purely technical sense. As with any other failure to comply with a time limit imposed by a rule or court order, the cure is simply to apply for an extension of time. Taking the approach contended for by the Respondents would be to cause injustice by mindless adherence to technicalities in the Grand Court Rules.

117. I therefore conclude that an applicant's failure to serve the notice of motion, and any of the other documents listed in GCR O.53, r.5(2), within 7 days of receipt of a sealed copy of the order granting leave is a breach of GCR O.53, r.5(2). However, that breach does not make the proceedings a nullity. Instead, at most, it is an irregularity in respect of which the appropriate course of action is for an applicant to apply for an extension of time.

K. Should I waive the irregularity or extend time for compliance with GCR O.53, r.5(2)?

118. I do not consider that I can simply waive the irregularity resulting from the Applicants' failure to serve the notice of motion in time. The editorial notes to RSC O.2, r.1 in the *Supreme Court Practice* provide a useful indication why not at paragraph 2/1/3:

> *"Where a plaintiff, just before the expiry of validity of a writ, purported to serve the writ out of the jurisdiction without leave of the court, renewal of the writ under O.6, r.8 was refused. The failure to obtain leave to serve out of the jurisdiction was an irregularity which could be cured by the exercise of the court's discretion under O.2, r.1. The court, however, would not exercise its discretion under O.2, r.1 more favourably to the plaintiff than under O.6, r.8. The plaintiff should not be allowed to enter through the "back door" of O.2, r.1 where he could not properly enter*

through the "front door" of O.6, r.8 (Leal v. Dunlop Bio-Processes International Ltd *[1984] 1 W.L.R. 874; [1984] 2 All E.R. 207, CA)."*

119. Simply waiving the irregularity would be giving the Applicants relief by the back door that they ought more properly to obtain by making a suitably formulated application for an extension of time pursuant to GCR O.3, r.5.

120. In this case, the Applicants have made a formal application for an extension of time by their summons filed on 29 February 2024, i.e. 6 days after time for their notice of motion expired.

121. Mr Wheeler relies on the adoption by Segal J in *Intertrust Corporate Services (Cayman) Ltd v Cayman Islands Monetary Authority* [2021 (2) CILR 422) at [57] of the following passage from Sir Thomas Bingham MR's judgment in *Costellow v Somerset County Council* [1993] 1 W.L.R. 256 as providing guidance on the task for the court when considering whether to grant an extension of time:

> *"Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord. 3, r.5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."*

122. Mr Wheeler suggests that I adopt the following well-known guidance from *Mortgage Corporation v Sandoes* (*The Times* 27/12/96) quoted in the editorial notes in the *Supreme Court Practice* at 3/5/4:

> *"The Master of the Rolls and the Vice Chancellor, as Head of Civil Justice, have approved the following guidance as to the future approach which litigants can expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court:*
>
> 1. *Time requirements laid down by the rules and directions given by the Court are not merely targets to be attempted; they are rules to be observed.*
> 2. *At the same time the overriding principle is that justice must be done.*
> 3. *Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties to the litigation.*
> 4. *In addition the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.*
> 5. *Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted as a last resort.*
> 6. *Where time limits have not been complied with the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.*
> 7. *If they reach such an agreement they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.*

> 8. *The court will not look with favour on a party who seeks to take tactical advantage from the failure of another party to comply with time limits.*
> 9. *In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.*
> 10. *In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances including the considerations identified above."*

123. He also commends to me Mangatal J's approval in *Bush v Baines* [2016] (2) CILR 274 of the following approach when considering an application to extend time:

123.1 identify and assess the seriousness and significance of the default;

123.2 identify the cause of the default; and

123.3 evaluate all the circumstances of the case.

124. Mr Wheeler concedes that the approach in public law proceedings is generally more restrictive regarding the grant of extensions of time, as a result of the policy in favour of expedition and speedy certainty in such cases. However, he relies on the following statement by Segal J in *Intertrust* at [92]:

> *"... even in a case involving a public law challenge, the Court is not required to and should not adopt a mechanistic approach involving, as the Authority contended, rigid preconditions that had to be satisfied before the Court is able to grant the extension of time sought. ... The approach adopted in the authorities dealing with extensions of time for compliance with procedural requirements in inter partes litigation needs to be adapted and modified in the case of public law appeals by giving additional weight to the public law context and the factors which have peculiar significance by reason of that context and the legislative regime within which the appeal is being brought. But it is, in my view, only an adaptation of the underlying approach to the exercise of a broad discretion to extend time rather than the substitution of an entirely different approach."*

125. Mr Gayle argues that *Sandoes*, *Bush Baines* and *Intertrust* are not judicial review cases, and that the approach in general civil cases is different and more forgiving.

126. I agree with Mr Gayle on this, but I also agree with Segal J's statement in *Intertrust* that the approach of the court to granting an extension of time in a judicial review case involves an adaptation of the underlying approach to granting such extensions more widely, rather than the adoption of an entirely different approach.

127. Ultimately, as the overriding objective in the Preamble to the Grand Court Rules states, the court's task is to deal with the cases before it in a way which is just, expeditious and economical. Dealing

with cases justly usually requires that they are decided on their merits rather than on the basis of procedural arguments.

128. In my judgment, the guidance in *Mortgage Corporation v Sandoes* provides a useful checklist of the considerations to bear in mind when considering an extension of time to file a notice of motion for judicial review, just as they are also applicable in the private civil law context. However, the public policy requirement in judicial review cases of expedition and speedy certainty has the result that the court will take a less forgiving approach to delays in progressing the proceedings, by either side. In particular, the court will look for a good reason for the failure to comply along with a more focused consideration of the prejudice to the parties and to third parties.

129. Turning to the application of those principles to this case, Mr Wheeler submits that an extension of time should be granted for the following reasons:

129.1 The Applicants' delay in filing and serving the notice of originating motion is only six days. It has not put the trial date in jeopardy or otherwise had any meaningful impact on the proceedings, save for the fact that it has generated the Respondents' summons and consequent delay to the progress of the substantive claim. Once the Respondents' summons has been determined, the matter could be listed in short order for final disposal.

129.2 The delay in service was not deliberate nor was it designed or intended to undermine the proper administration of justice.

129.3 The delay in listing the summonses is not anyone's fault in particular, it is still possible for the hearing to take place within the target period of 6 months noted in *The King (on the application of Soto) v Royal Cayman Islands Police Service*.

129.4 Although the Applicants accept that each case turns on its own facts, in *Bush v Baines*, Mangatal J held that a 14-day delay in filing a summons seeking to set aside an *ex parte* order granting leave to serve by substituted service *"could not properly be regarded as serious or significant"*. In *Gabato v Immigration Appeals Tribunal* [2011] (1) CILR Note 6, Quin J held that a 21-day delay in filing an appeal from the decision of the IAT was *"not substantial"*.

129.5 There is an acceptable reason for the short delay, namely: (a) this is not a normal case in that it involves 9 separate groups of applicants, this is a lot of people to co-ordinate, some of whom have difficulties with literacy, access to IT systems affecting ease of communication, etc;

(b) most of the documents required by O.53, r.5(2) to be served were served in time, the notice of motion is the outlier.

129.6 There is no prejudice to the Respondents from the delay. They were promptly put on notice of the proceedings. Apart from the notice of motion and the supplemental affidavits, the Applicants served or provided the other documents listed in O.53, r.5(2) within the 7-day period. The Respondents only objected to service by link to electronic copies of certain of the documents after the time for service had already expired.

129.7 It would be contrary to the interests of justice to allow the Respondents' decision not to grant the licences to the Applicants to stand without being reviewed by the court, where the court has granted leave. A comparison can be drawn with the position in ***Intertrust***, where Segal J held at [87] that:

> *"... the clear purpose of the right to appeal to the Court is to ensure that there is proper judicial oversight of the exercise by the Authority of those regulatory powers which have the most significant impact on licensees."*

In a similar way, judicial review exists to ensure that the court maintains oversight of potentially unlawful or unreasonable actions of public bodies.

129.8 The court should also bear in mind McMillan J's statement of the purpose of O.53, r.5(2) in *Urgent Care*, namely that it *"exists to discourage dilatory and potentially improper judicial review proceedings"*. The Applicants' judicial review application is neither dilatory nor improper.

130. Mr Gayle sensibly concedes that if I conclude that the Applicants' failure to comply with GCR O.53, r.5(2) amounts only to an irregularity, rather than rendering the proceedings a nullity, then the Applicants are not guilty of a long delay and their reasons for that delay provide some excuse for it. However, he makes the following points:

130.1 The negligence of or difficulties faced by counsel are not a good reason to exercise the discretion to extend time. It is counsel's duty to have enough staff, or not to take clients on if they cannot devote proper attention to the conduct of the matters they are handling.

130.2 There is prejudice due to the time that has elapsed – third parties have been granted temporary licences and have incurred expenditure on the basis that they will be given full licences in due course, for example they have obtained trade and business licences. Although there is no

specific evidence before me to support that submission, he says that I can infer prejudice from the terms of the decision letters, read in conjunction with the promulgated Seven Mile Public Beach Vending Policy, which indicate that permits will be granted to the other applicants for vendor slots.

131. I agree with Mr Gayle's first submission, but I consider it is difficult to draw any useful inferences as to prejudice to third parties in the absence of specific evidence filed on behalf of the Respondent or such third parties.

132. Mr Gayle contends in addition that the court should have regard to the merits when deciding whether or not to grant the extension of time. He relied on the elapsed time between filing of the applications and the hearing before me and changes in the status quo, specifically, his assertion that the Seven Mile Public Beach Vending Policy has been amended to include a review process and may therefore have rendered the substantive judicial review otiose. Whilst it was common ground that the policy had been amended, there was nothing before me to indicate the nature of the amendments. When the omission of this from the evidence was raised, Mr Gayle indicated that it was the Applicants' duty to put such material before the court.

133. In my judgment, there are two reasons why I should not embark on a consideration of the merits:

133.1 by granting leave, the court has already concluded that there is a claim that is worth pursuing; and

133.2 further analysis of the merits of the claim risks descending into a mini trial which, it is well established in multiple situations where the court is invited at an interlocutory stage to have regard to merits, should be avoided.

134. Having regard to the submissions on this point made by Mr Wheeler and by Mr Gayle, I conclude that I should grant the Applicants the extension of time that they need in order to complete the filing of their notice of motion and to serve it. My brief reasons are that the delay is short, there is a reasonable explanation for it, there is no prejudice to the Respondents and there is no evidence before me of prejudice to any third parties.

L. Conclusion on interpretation and application of GCR O.53, r.5(2)

135. For the reasons set out in detail in this judgment, I conclude that:

135.1 I am not bound to follow Carter J's decision in *Anderson* as a result of the respondent's failure in that case to bring *Urgent Care* to her attention.

135.2 I decline to follow *Anderson* in light of *Urgent Care*, which I consider was correctly decided.

135.3 Further, following my review of the arguments and various authorities relied upon by the Respondents, I conclude that Carter J was wrong to reach the conclusion that she did in *Anderson*, with the result that even in the absence of *Urgent Care* I would still not agree with *Anderson*.

135.4 GCR O.53 is not a self-contained procedural code and the other rules within the Grand Court Rules apply to proceedings within GCR O.53 so far as they are relevant except where clearly excluded.

135.5 In particular, GCR O.2, r.1 and O.3, r.5 apply to judicial review proceedings.

135.6 GCR O.53. r.5(2) does impose a time limit for serving the prescribed documents that applicants should comply with. However, a failure to comply does not have the consequence that the leave lapses and does not render the judicial review proceedings a nullity or otherwise invalid.

135.7 Where there is a breach of GCR O.53. r.5(2), that is an irregularity. The applicant must apply under GCR O.3, r.5 for an extension of time. The applicant must put forward a cogent explanation for the breach, and the court will bear in mind the requirement in judicial review cases of expedition and speedy certainty as part of its determination of what is just in all the circumstances.

135.8 Similarly, where the applicant can see prospectively that it will not be possible to comply with GCR O.53. r.5(2), they should attempt to agree an extension of time with the intended respondents and should make a prompt application for an extension of time if agreement is not forthcoming.

135.9 On the facts of this case, I grant the extension of time required by the Applicants.

136. Within 7 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on consequential matters including costs, providing their agreed available dates for a hearing; or (b) whether they will submit written submissions on these points within 14 days.

Dated 19 July 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT