CAUSE NO: G 0162 OF 2023

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION
BETWEEN

THE KING (on the application of FERNANDO SOTO)

Applicant

-and-

THE POLICE SERVICE COMMISSION

Respondent

-and-

THE COMMISSIONER OF POLICE

Interested Party

Appearances: **Mr Pramod Joshi of McGrath Tonner for the Applicant**

Dr Jevon Alcock, Deputy Solicitor General, with Ms Heather Walker of the Attorney General's Chambers for the Respondent and Interested Party

Before: **The Honourable Justice Jalil Asif KC**

Heard: **21 May 2024**

Judgment **31 May 2024**

Judicial review—whether to grant extension of time for respondent to file evidence—matters relevant to exercise of discretion

Judicial review—discovery—principles to be applied—whether to order further discovery

Judicial review—proper approach to case progression—need for speedy certainty in determination of judicial review proceedings

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JUDGMENT

1. The primary issue before me is whether I should debar the Respondent and Interested Party from adducing any affidavit evidence in opposition in this judicial review application as a result of the Respondent's failure to file and serve that evidence as required by the Grand Court Rules. A subsidiary issue is whether I should order the Respondent to produce certain additional items of discovery that the Applicant complains should have been produced but have not been.

2. The matter came before me on 21 May 2024 as a result of two summonses being issued, one by the Applicant and one by the Respondent. It appears that this is the first hearing in the matter since Justice Carter gave the Applicant permission to pursue the judicial review on 29 September 2023. I discuss later in this judgment the delays that have occurred in the progress towards a determination of the application.

3. The Applicant was ably represented before me by Mr Pramod Joshi of McGrath Tonner. Dr Jevon Alcock, Deputy Solicitor General, appeared for the Respondent and Interested Party, assisted by Ms Heather Walker of the Attorney General's Chambers.

A. <u>The summonses</u>

4. The Applicant's summons is dated 16 April 2024 and seeks an order debarring the Respondent from adducing evidence at the hearing of the judicial review application:

> *"… by reason of the Respondent's failure to file any evidence in response to the notice of motion within the 56 days prescribed by GCR O.53, r.6(4) and there having been no application made to extend time for filing such evidence."*

In addition, the summons seeks certain additional discovery from the Respondent. The summons was sealed by the Court on 3 May 2024. I do not know the reason for the regrettable delay in doing so – it may be that the Registry was identifying a hearing date, but I note that the Applicant sent the Respondent a copy of the unsealed summons on 17 April 2024, and so the Respondent has been well aware of the relief intended to be sought since then.

5. The Respondent's summons is described as a summons for directions. It is dated 8 April 2024, and is therefore the first in time but it was not in fact sealed by the Court until 8 May 2024. Again, I do not know the reason for that unfortunate delay, which should not have happened. The Respondent's summons simply seeks:

> *"(1) ... directions including: the Respondent and the Interested Party shall file and serve any evidence upon affidavit, and*
> *(2) there be such further or other directions as may be deemed necessary by the Honourable Court."*

6. Neither party swore nor filed any affidavits in relation to the summonses. Both parties filed bundles for the hearing. It would have been helpful for them to have coordinated and filed an agreed bundle.

7. Despite the serious nature of the relief being sought by the Applicant, for reasons that I do not follow, the Respondent stated on 16 May 2024 that it did not propose to file a skeleton argument and would present its arguments at the hearing. Mr Joshi filed a helpful skeleton argument on Friday 17 May 2024 and provided the Respondent with a copy, perhaps charitably, given that skeleton arguments are usually exchanged rather than served unilaterally.

8. Having read the Applicant's skeleton argument over the weekend, the Respondent changed its mind, and filed a skeleton argument on Monday 20 May 2024, a public holiday. This resulted in a delay to the commencement of the hearing to allow Mr Joshi to read and consider it.

9. Deciding not to file a skeleton argument in relation to the summonses was not a helpful stance for the Respondent to have taken as:

   9.1 the issues to be determined are serious and hotly contested, and clearly should have been the subject of a skeleton argument, prepared well in advance;

   9.2 the purpose of a skeleton argument is as much to help the judge to prepare for the hearing as it is to give the opponent a chance to marshal their arguments in response; and

   9.3 the result of the Respondent's approach was disruption to the intended hearing of the summonses, with inconvenience to the Applicant, other court users and the Court.

   I therefore take the opportunity to remind attorneys that skeleton arguments should be prepared and provided to the judge in good time whenever there is an issue to be decided that has a potentially serious outcome for one side, where the law or practice is unclear or whenever there is anticipated to be significant argument or citation of authorities.

10. During the course of argument in relation to discovery, I was referred to the judgment of the Divisional Court (Singh LJ and Carr J, as she was then) in *R (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin):

> *"19. One important aspect of the duty of candour and co-operation which should be emphasised and is not always fully appreciated is that it may tend in a different direction from what usually happens when disclosure is required or ordered in the sense of disclosure of documents. Simple disclosure of documents might suggest that all that the public authority has to do is give a lot of documents to the claimant's representatives but this may, in truth, overwhelm them and obfuscate what the true issues are.*
>
> *20. The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack". It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal put it at the hearing before us, to identify "the good, the bad and the ugly". **This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.**"* (emphasis added)

Lord Justice Singh's comment regarding the duty of candour and co-operation to be expected of public authorities in judicial review cases, and of the role that public authorities should play in such cases, is particularly relevant and needs to be reiterated in the Cayman Islands.

B. Should the Respondent be allowed to file affidavit evidence?

11. GCR O.53, r.6(4) provides that:

> *"(4) Any respondent who intends to use an affidavit at the hearing shall file it as soon as practicable and in any event, unless the Court otherwise directs, within 56 days after service upon the respondent of the documents required to be served by paragraph (1)."*

12. In this case, the Applicant served his Notice of Motion and supporting evidence on 9 October 2023. The period of 56 days specified in GCR O.53, r.6(4) therefore expired on 4 December 2023. The result is that *"unless the court otherwise directs"*, the Respondent is not permitted to rely on any affidavit evidence at the hearing of the Notice of Motion.

13. GCR O.53, r.6(4) expressly gives the Court discretion to extend time. The relevant questions are whether that discretion is still available after the 56-days have elapsed, what are the principles to be applied when exercising the discretion and should I exercise that discretion in this case. An

additional question that arose during the course of argument is whether the parties can agree an extension to the 56-day period or whether it is only the Court that can extend time.

The parties' contentions

14. Both parties referred me to the recent decision of Justice Carter in *Anderson v Utility Regulation and Competition Office* (unreported, 20 March 2024) as well as other non-Cayman judgments and materials.

15. Mr Joshi makes the following points in support of his client's application for a debarring order:

15.1 The 56-day period is a long-stop. The primary obligation on a respondent is to file their evidence *"as soon as practicable"*.

15.2 Having regard to the context, GCR O.53, r.6(4) should be read as requiring that an application to extend time should be made before that 56-day period has expired.

15.3 Applicants for judicial review are subject to strict time limits and there is no good reason to allow respondents greater latitude regarding time limits.

15.4 The Court should be guided by the practice in the Crown Office in England & Wales, which is not to allow evidence to be filed out of time unless an extension has been sought and obtained before the expiry of the 56-day period.

15.5 The need for "procedural rigour" in relation to judicial review proceedings is not affected by the differences between the Grand Court Rules in the Cayman Islands and the Civil Procedure Rules in England & Wales.

15.6 By letter dated 6 December 2023 and by email dated 29 January 2024 the Applicant informed the Respondent that time for its evidence had expired. The Applicant also argued in its letter of 6 December 2023 that the ongoing negotiations had not displaced the timetable under the Rules.

15.7 The Respondent did not make any application for an extension before the 56 days expired and is out of time to obtain an extension. When the summonses were argued before me on 21 May 2024, the Respondent was 170 days beyond the 56-day period specified in the Rules, which is itself a long-stop date.

15.8 The Respondent has still not made an application for an extension, nor filed any evidence in support – the Respondent has simply filed a summons for directions.

16. Dr Alcock's response is:

16.1 The Preamble to the Grand Court Rules and the overriding objective require the Court:

> *"… to deal with every cause or matter in a just, expeditious and economical way. … ensuring that the substantive law is rendered effective and that it is carried out; … The Court must seek to give effect to the overriding objective when it (a) applies, or exercises any discretion given to it by these Rules; or (b) interprets the meaning of any Rule. These Rules shall be liberally construed to give effect to the overriding objective, and in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits."*

16.2 The Respondent has been trying exceedingly hard to resolve the Applicant's complaints by alternative means and has made a number of open offers of settlement. The Respondent has been acting within the terms and spirit of the overriding objective at all times.

16.3 Dr Alcock has been involved in a number of other judicial review proceedings, including ones involving Mr Joshi's firm, where no objection has been taken to evidence being filed outside the scope of GCR O.53, r.6(4), so it was not considered to be an issue.

16.4 GCR O.53, r.6(4) confers on the Court a *"wide degree of discretion"* to extend time.

16.5 Even in *R (on the application of Montpeliers and Trevors Association) v City of Westminster* [2005] EWHC 16 (Admin), (a case drawn to the Court's attention by the Applicant, which the Applicant sought to distinguish) the respondent in those proceedings was permitted to participate in the hearing despite failing to file evidence until the day before the hearing of the application. The Respondent's position is less extreme, and the Court should allow the Respondent and Interested Party to file evidence now.

16.6 The Respondent indicated in a letter dated 1 December 2023 that it intends to file evidence. The letter sought a response to the Respondent's open offer of settlement contained in the letter and continued,

> *"… failing which we will furnish you with a Draft Timetable for Directions for the future progression of these proceedings, to include filing affidavit evidence on behalf of our client."*

This signposted to the Applicant the Respondent's intention to rely on such evidence.

16.7 The Respondent reiterated this position in an email sent to the Applicant's attorneys on 20 March 2024:

> *"… our client reserves the right to address any/all matters raised … by way of affidavit in due course."*

I pause here to note that, of course, the Respondent had and has no such "right".

16.8 The Respondent and Interested Party have two affidavits that they wish to rely on, sworn during May 2024.

16.9 The Applicant's evidence in support of the Notice of Motion is inadequate. The Respondent's proposed directions contemplate the Applicant being permitted to file evidence in reply, which will provide the Applicant with an opportunity to address the deficiencies.

17. In correspondence between the parties, the Respondent's position was more robust. In an email dated 29 January 2024, the Respondent asserted:

> *"… We do not accept your assertion that the period for the Respondent's response to your Client's judicial review expired at the beginning of December 2023. As we understand it, you are referring to the filing of an affidavit (within 56 days) which is provided for under Order 53. We accept that the 56 day time period has expired. We did however in open correspondence (before the time line expired) refer to the filing of such evidence. Accordingly, we do not accept that the period for filing any replying affidavit has expired, as such. …."*

And in an email to the court dated 13 May 2024, the Respondent's position was said to be:

> *"… We do not accept that we have failed to comply with the Timetable. We will rely on GCR Order 53 r.6(4) in this regard. The Respondent vehemently opposes the notion that it is disbarred from filing affidavit evidence. …"*

I do not understand how either of these assertions could properly be made, unless based on an assumption that the court would exercise its power in GCR O.53, r.6(4) in the Respondent's favour to extend time. Dr Alcock did not seek to justify the Respondent's statements before me.

Discussion

18. It is useful to start with a reminder of the requirements in judicial review proceedings for expedition and the strict application of time limits, based on the underlying public policy considerations. These were explained by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 284 as being:

> *"… the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law."*

Whilst *O'Reilly v Mackman* has been subject to subsequent criticism, this description of the policy considerations and the need for *"speedy certainty"* remains relevant and helpful.

19. The learned authors of *De Smith's Judicial Review* (9th edition) comment on the competing interests as follows at paragraph 1-004 (citations omitted):

> *"The challenge in designing a judicial review system is to balance competing interests: the rule of law requires that the courts be accessible to people with grievances; there is a legitimate public interest in preventing or minimising disruption to public administration from misguided challenges; and the court itself has an interest in efficiency to prevent delays. Over many years there have been debates as to how to strike a satisfactory balance between these potentially competing interests. The current system includes: (i) limited access to public funds for claimants who otherwise could not afford to make a challenge; (ii) a pre-action protocol designed to encourage resolution of disputes before resort to judicial review; (iii) relatively short time limits for submitting claims; (iv) a permission requirement through which the court, usually in a paper-based procedure, determines which cases should be allowed to proceed to a full hearing in open court; (v) remedies which are discretionary, meaning a court finding that a decision is unlawful may nonetheless withhold a remedial order if it is necessary to do so to protect competing private or public interests or if the flaw in the decision would have made no substantial difference to the outcome."*

20. It is the public policy considerations mandating expedition that drive the following distinctive features of judicial review proceedings:

20.1 the threshold requirement that the applicant must obtain leave to bring the application so that unmeritorious claims, and even meritorious claims that have not been initiated sufficiently promptly, do not go forward;

20.2 the primary requirement in GCR O.53, r.4(1) that the application for leave must be made:

> *"... promptly and in any event within 3 months from the date when grounds for the application first arose ..."*

which is to be contrasted with the 3-year limitation period for personal injury claims and the 6-year period for most other claims;

20.3 the requirement in GCR O.53, r.5(2) that the notice of motion and supporting documents must be filed and served within 7 days of the grant of leave, compared with the four months allowed for service of other forms of originating process within the jurisdiction and the possibility of extending that period;

20.4 the absence of pleadings on either side;

20.5 the requirement in GCR O.53, rr.5(4), 5(5) and 8(1) that the first hearing of the notice of motion should take place from 14 days after service of the application, that it should be treated as a directions hearing and that all interlocutory applications should be made at that hearing;

20.6 the streamlining of the interlocutory steps after the directions hearing so that there is no discovery phase (unless specifically ordered by the Court);

20.7 by virtue of GCR O.53, r.6(4), the respondent's evidence should be filed and served:

> *"…as soon as practicable and in any event, unless the Court otherwise directs, within 56 days after service …"*

20.8 the absence of live evidence and cross-examination at the final hearing (except in unusual cases).

21. It is self-evident that challenges to public law decisions by way of judicial review are likely to have wider effects than on just the applicant and respondent. A challenge to the validity of primary or secondary legislation is an obvious example. But a challenge of the kind in this case, for example, concerning an administrative decision not to promote the Applicant, also has wider effects. If allowed, it has the potential to impact those other officers who were promoted in preference to the Applicant as well as other candidates for promotion who may be deferred if the Applicant's challenge is successful, and he is promoted, or a promotion exercise has to be run again. It also has direct impact on the Respondent's autonomy to make its own decisions as to the allocation of limited resources within its operations.

22. It is therefore essential that judicial review proceedings are started promptly, are prosecuted swiftly and are determined without delay so that the decision can be upheld or quashed as quickly as possible. The overall time from commencement to conclusion should not be more than 6 months in the absence of good reason.

23. Justice Carter reiterated this need for expedition in the conduct of judicial review proceedings and the strict application of the Rules in several different passages in her recent judgment in *Anderson* (op cit), in which she concluded that the 7-day period for service of a notice of motion should be rigorously enforced. For example, she said:

> *"39. … 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 this submission. To do so would mean, in effect, that Order 53 Rule 5 would impose no time limit within which a successful applicant for Leave would be compelled to institute the claim for Judicial Review. This would run counter to the approach regarding timelines and Judicial Review. …"*
>
> *"52. … The Provisions of Order 53 should be strictly construed given the nature of Judicial Review proceedings. …"*
>
> *"53. Strict compliance with the time limits must be adhered to by applicants who seek to make a claim for Judicial Review. …"*

24. In this case, the procedural chronology does not reflect well on the conduct of the case on either side.

24.1 On 1 November 2022, the Respondent made the decision not to promote the Applicant, which is challenged. Based on this date, the application for leave to pursue judicial review ought to have been made promptly, and by 31 January 2023 at the latest.

24.2 On 29 November 2022, the Respondent provided the Applicant with feedback on his application for promotion.

24.3 On 9 February 2023, the Applicant requested that the Respondent reconsider its decision.

24.4 On 24 April 2023, the Respondent declined that request.

24.5 On 28 April 2023, the Applicant questioned whether there was an available route of appeal, as indicated in the Respondent's policy document.

24.6 On 23 June 2023, the Respondent confirmed that there was no available route of appeal for the Applicant.

24.7 On 28 July 2023, the Applicant sent a letter before action.

24.8 On 10 August 2023, the Respondent provided its response to the letter before action.

24.9 On 11 September 2023, the Applicant filed his application for leave to pursue judicial review, some 10 months after the decision to be challenged. I understand from the parties that the Respondent is not challenging that the application was filed in time, due to the uncertainty until 23 June 2023 as to whether there was an available route of appeal rather than the Applicant having to pursue judicial review. However, this does not address the requirement in the Rules that the application must be made "promptly".

24.10 On 29 September 2023, Justice Carter determined the application for leave on the papers.

24.11 On 6 October 2023, 7 days later, the Plaintiff issued his notice of motion. The Applicant served it on the Respondent and Interested Party on 9 October 2023. In light of the recent judgment in *Anderson*, there may be a question whether service was in time, but this was not a point taken before me by the Respondent.

24.12 By virtue of GCR O.53, rr.5(5), the first hearing of the notice of motion should have been fixed promptly for a date after 23 October 2023.

24.13 It was common ground that the 56 days specified in GCR O.53, r.6(4) for the Respondent's evidence expired on 4 December 2023.

24.14 Neither party appears to have done anything about arranging for the first hearing of the notice of motion until their respective summonses were filed at court in early April 2024, some 5 months after Notice of Motion it should have been listed, and 17 months after the decision impugned.

25. As a preliminary point, I reject Dr Alcock's argument that the fact that the parties were engaged in negotiations to resolve their dispute somehow absolves the Respondent from the need to comply with GCR O.53, r.6(4) or the parties more widely from complying with the Rules. Settlement of disputes without resort to the court is a worthy aim and is clearly in the spirit of the overriding objective, as Dr Alcock submits. However, it is not a justification for failure to comply with the time limits in the Rules generally, and more so in respect of judicial review proceedings. This is emphasised by the terms of the Pre-Action Protocol for Judicial Review, Practice Direction No 4 of 2013, which states:

> *"3.1 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. … The Court takes the view that litigation should be a last resort, and that proceedings should not be issued prematurely when a settlement is still actively being explored. …* ***However, parties should also note that an application for judicial review 'shall be made promptly and in any event within 3 months from the date when grounds for the application first arose'.****"* (emphasis added)

26. Logically, the second point to be determined is whether the parties themselves can agree an extension to the period specified in GCR O.53, r.6(4). This is not directly raised on the facts nor was it fully argued before me, but the point was briefly debated in oral argument in light of the ongoing negotiations between the parties and the content of the Respondent's letter dated 1 December 2023

quoted above. Mr Joshi's submission is that the letter does not amount to an agreement between the parties to extend time – it was simply a unilateral statement by the Respondent that it intended to serve evidence at some time in the future – but that in any event the parties do not have power to extend time. Dr Alcock appeared in oral argument to accept this construction of GCR O.53, r.6(4) as being correct.

27. I agree with Mr Joshi. The plain words of GCR O.53, r.6(4) refer to "the Court" directing otherwise. I do not see there is scope to interpret GCR O.53, r.6(4) as giving the parties themselves power to agree extensions of time. Allowing the parties to do so would risk removing control from the Court and enabling the parties to defeat the objective of speedy certainty in judicial review claims. However, there is nothing to stop the parties making a joint application to the Court for time to be extended, if there are good reasons to do so.

28. The third point for decision is whether the application for an extension of time must be made before the 56-day period referred to in GCR O.53, r.6(4) has expired, or whether the Respondent can apply retrospectively for an extension.

29. Neither party showed me any judgment, in the Cayman Islands or elsewhere, where this has been considered, but Mr Joshi relied on the practice of the Crown Office in England & Wales not to accept late evidence unless an extension has been obtained. There is nothing in the wording of GCR O.53, r.6(4) that obviously excludes a respondent from making a retrospective application to extend the 56-day period for evidence in response. I therefore conclude that it is permissible for a respondent to do so. However, applying the overall aim of speedy certainty, such an application should be seen to be exceptional, and will need to be justified by good reason why the application was not made before the expiry of the period permitted by GCR O.53, r.6(4) in addition to the factors relevant to granting an extension of time generally. It is not possible for me to say what might amount to good reason, as that will depend on the facts of the case in question, particularly having regard to the position that the 56-day period is a long-stop, and the primary obligation is to serve the evidence "as soon as practicable".

30. As to the principles on which my discretion to extend time should be exercised, Mr Joshi accepted that for other kinds of civil claims, where an application for an extension of time is made before the expiry of the time limit in question, the court should normally allow an extension in the absence of

prejudice. However, he said that this was not necessarily the case in judicial review proceedings. In particular, he proposed that I should take into account the Respondent's conduct.

31. Neither Mr Joshi nor Dr Alcock articulated to me a comprehensive description or list of the factors that I should consider. I therefore go back to the overriding objective and conclude that in construing GCR O.53, r.6(4) and exercising my discretion bestowed by that rule, I should deal with the case:

31.1 in a manner that is just, expeditious and economical;

31.2 so that the normal advancement of the case is facilitated rather than being delayed, and interpreting that consistently with the particular need for speedy certainty in judicial review claims noted by Lord Diplock in *O'Reilly v Mackman*;

31.3 so that expense is saved;

31.4 so that the case is dealt with proportionately to its importance and complexity (since damages are not a kind of remedy directly available in judicial review claims, the amount of money at stake is not a relevant factor); and

31.5 giving the case a fair share of the Court's finite resources.

32. The learned authors of *De Smith*, in the context of delay in making the application for permission to bring judicial review proceedings, identify the considerations at paragraph 16-059 as follows (citations omitted):

> *"In considering whether to extend time, the Court will consider whether there is an objective justification for the delay, the importance of the issues, the prospects of success, the presence or absence of prejudice to good administration and the public interest more generally."*

This summary is useful on the question of what is just and reflects the kinds of factors that the Court is accustomed to assessing when determining applications to extend time in many other kinds of circumstances. In my judgment, this is a helpful summary which is transferrable to the situation where a respondent seeks an extension of time to file evidence under GCR O.53, r.6(4).

33. Turning to the exercise of my discretion in this case, the first point is that the Respondent has not actually made a formal application to extend time – in his reply submissions, and in response to criticisms from Mr Joshi, Dr Alcock suggested for the first time that he was making an application orally, but there is no properly formulated summons or supporting evidence before me.

Significantly, the Respondent has not put any evidence before me at all. Dr Alcock referred in his skeleton argument to two affidavits that the Respondent wishes to rely upon, apparently sworn during May 2024, but these are not before me. He told me during the course of argument that the Respondent has taken the view it is not appropriate to show them to me. I do not understand that position but in any event, I infer that these affidavits are likely to address the substantive merits of the application for judicial review rather than the considerations outlined below concerning a possible extension of time.

34. As a result of the Respondent's approach, there is no evidence from the Respondent to address the following, which seem to me to be important to the exercise of my discretion:

34.1 why it was not practicable for the Respondent to file its evidence promptly in October or November 2023;

34.2 why it was not practicable for the Respondent to file its evidence by no later than 4 December 2023;

34.3 why the Respondent only apparently finalised its evidence during May 2024;

34.4 why it was not practicable for the Respondent to apply for an extension of time before 4 December 2023;

34.5 why it was not practicable for the Respondent to have completed preparation of its evidence before the middle of May 2024; and

34.6 why it was not practicable for the Respondent to make an application for an extension of time prior to the hearing before me.

35. Further, because of the Respondent's decision not to put the affidavits before me, I have no insight into the nature of the evidence intended to be relied upon by the Respondent, its relevance and importance to the issues to be decided, and hence what effect it might have on the prospects of success on the merits and the resulting prejudice to either side if I allow or refuse the extension of time.

36. Yet further, the Respondent has chosen not to put any material before me that sheds light on the presence or absence of prejudice to good administration and the public interest more generally.

37. Finally, in the absence of an application by the Respondent for an extension of time, understandably there is no evidence from the Applicant either as to any prejudice that he may suffer if I grant an extension of time.

38. In these circumstances, there is literally no material before me on which I can properly base the exercise of my discretion in favour of granting extension. I therefore cannot do so.

39. I do not need to, and do not make, a debarring order. In the absence of an order directing that the Respondent and Interested Party have additional time to file their evidence, the Rules do not permit them to do so. The Respondent's substantive request for an extension of time has been determined. Any further application by the Respondent for an extension of time could only be made if there were to be a change of circumstances.

40. As requested by Dr Alcock, I have specifically considered the outcome in the case of *R (on the application of Montpeliers and Trevors Association) v City of Westminster*, decided by Munby J (as he then was), a highly experienced judge who went on to become President of the Family Division in England & Wales. That case is clearly an extreme one, where the respondent's conduct was egregious. Nevertheless, because the judge was ultimately satisfied that there was no prejudice to the applicant, he permitted the respondent to participate in the hearing despite its prolonged and serious procedural default:

> *"13. … the first question I had to decide was whether the City should be allowed to participate in the hearing at all. Having filed nothing at all until the day before, it required permission under CPR 54.9(1) to take part in the hearing. Mr Thomas Cosgrove on behalf of the City applied for permission to take part; Ms Gillian Carrington on behalf of the claimant opposed that application.*
>
> *…*
>
> *15. The City's conduct is utterly lamentable. Its breaches of the rules are inexcusable. It would be tedious to catalogue each of its defaults. It suffices to emphasis (sic) that, from the beginning until almost the end, the City has wholly failed to comply with the requirements of CPR Part 54. On top of that it simply disobeyed – defied – Goldring J's order. The apology proffered by Mr Large is perfunctory and little more than formulaic. Like too many apologies offered in such circumstances it provides absolutely nothing by way of explanation. Apologies come relatively cheap; proper explanations are far more painful. Moreover, as Ms Carrington pointed out, Mr Large's apology rings rather hollow when read in the light of a letter which he himself had written on 1 September 2004 saying that he was "about to instruct Counsel urgently to draft a formal response to the applications" and indicating that he would be doing so within the week. I specifically asked Mr Cosgrove whether he wished to say anything more in the light of this letter: presumably on instructions he declined the invitation.*

> *16. As I commented during the hearing, the City is not the Warmington-on-Sea UDC making its first ever visit to an unfamiliar court. The City is an experienced litigant – and an experienced litigant, moreover, in the Administrative Court. It has treated the court, but more importantly the claimant – which after all represents some of the City's own citizens and council tax payers – in a cavalier and almost contemptuous fashion. Mr Large's witness statement does little to mitigate matters; if anything the reverse. Almost the only thing to be said in the City's favour is that it does not stand alone in the dock. In the course of two days during the same sittings in the Administrative Court I was faced not only with the City's failures but also with comparably serious failures to comply with CPR Part 54 on the part of two other London boroughs. It is simply not good enough.*
>
> *17.* ***That said, the jurisdiction under CPR 54.9(1) is not to be exercised for the mere sake of inflicting exemplary punishment. Mr Cosgrove made clear that the City was not seeking to rely upon any new evidence other than that relating to the making of the 2004 Order. Ms Carrington for her part accepted that she was able to proceed and did not seek an adjournment. There being, therefore, no prejudice to the claimant that could not be remedied, if need be, by an appropriate order for costs, I accordingly allowed Mr Cosgrove to address me.*** *I formally give the City permission to take part in the hearing notwithstanding its non-compliance with CPR 54.9(1)(b)."* (emphasis added)

41. The difficulty for Dr Alcock is that there is no application by the Respondent for an extension of time before me (other than the oral application he reluctantly put forward in reply submissions); the Applicant in this case is opposing an extension of time; and there is no evidence before me that allows me to form any view on prejudice to either party, as well as the other factors that I should consider and which I have identified earlier. *R (on the application of Montpeliers and Trevors Association) v City of Westminster* therefore does not assist.

42. In this case, despite the Respondent's inability to rely on new evidence as a result of my ruling, the Respondent continues to be able to rely on the discovery already provided in the action and to advance whatever legal arguments it wishes to make. It is also questionable to what extent new evidence now would be relevant and admissible in respect of the decision making in November 2022 that is under challenge. The reality of the outcome of my decision is therefore unlikely to be as detrimental to the Respondent's position within the judicial review as it might appear at first sight.

43. It is difficult to express a view on what I might have done if there had been a proper application before me, supported by evidence at least addressing, if not fully answering, the questions posed above. However, I can indicate that there would have been questions in my mind as to whether allowing the Respondent to adduce evidence at this stage would have facilitated the advancement of the case, rather than further delaying it, would have saved expense, would have been proportionate

to its importance and complexity, and would have been just in light of the apparent strength or otherwise of the claim.

C. Discovery in judicial review

Principles to be applied

44. Dr Alcock helpfully referred me to the decision of Morris J in *R (on the application of Jet2.com) v Civil Aviation Authority* [2018] EWHC 3354 (Admin). The learned judge summarised the principles applicable to discovery in judicial review proceedings as follows:

> *"47. Relevant principles relating to disclosure in judicial review claims are established in a series of well known authorities. I have been referred in particular to* R v Secretary of State for Health ex parte London Borough of Hackney and others *(CA), unreported, 29 July 1994;* Belize Alliance of Conservation Non-Governmental Organisations ("BACONGO") v The Department of the Environment *[2004] UKPC 6;* Tweed v Parades Commission for Northern Ireland *[2007] 1 AC 650;* R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 4) *[2016] UKSC 35 at §§183-184; and* R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs *[2018] EWHC 1508 (Admin) at §§8-24; reiterated in* R (Citizens UK) v Secretary of State for the Home Department *[2018] EWCA Civ 1812 [2018] 4 WLR 123 at §106.*
>
> *48. The established principles can be summarised as follows:*
>
> *(1) In judicial review proceedings, disclosure is not required unless the court orders otherwise: CPR 54, PD54A §12.*
>
> *(2) In judicial review proceedings public authorities have a duty of candour, requiring them to provide a full and accurate explanation of all the facts relevant to the issue which the court must decide, including the full facts and reasoning underlying the decision challenged. It is a "self-policing" duty. The duty requires disclosure which is relevant or assists the claimant. See* Tweed*, §54,* Bancoult *§184, and* Hoareau *§§18, 23.*
>
> *(3) Public authorities must be open and honest in giving disclosure and in their affidavits or witness statements. They must identify "the good, the bad and the ugly". Witness evidence must not obscure areas of central relevance, whether deliberately or unintentionally, nor contain any ambiguity nor be economical with the truth, nor contain spin:* Hoareau *§§20 and 22.*
>
> *(4) The duty of candour is one of the reasons why the ordinary rules of disclosure do not apply to judicial review:* Hoareau *§13 and also* Bancoult *§183.*
>
> *(5) Disclosure orders are likely to remain exceptional in judicial review proceedings. The court should guard against "fishing expeditions" seeking further grounds of challenge.*
>
> *(6) Whilst in the* BACONGO *case, Lord Walker commented that "proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation", that observation was made in the context of describing the public authority's duty of candour and, as such, was directed towards the approach and conduct of the*

> *public authority resisting disclosure, rather than the applicant seeking disclosure. (See also the purpose of citation of* BACONGO *in* Hoareau *§§13-17).*
>
> *(7) Where the court is required to resolve factual disputes, disclosure will be ordered where, in the given case, it appears to be "necessary in order to resolve the matter fairly and justly":* Tweed *§§3, 32, and 52. An example of such an issue of fact is whether a decision has been taken for an improper purpose: see* R (Core Issues Trust) v Transport for London *(CA) [2014] EWCA Civ 34 especially at §§34, 38 and 48.*
>
> *(8) It will be regarded as so necessary, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to resolve the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other: per Bingham LJ in* ex parte London Borough of Hackney *at p19. However disclosure will not be ordered on the basis of unsupported assertions of wrongdoing on the part of public authorities: supra, per Saville LJ at p34."*

45. Whilst there are important procedural differences between the CPR as applicable in England & Wales and the Grand Court Rules, particularly the additional requirement of the overriding objective there that the Court should have regard to enforcing rules, practice directions and orders, these differences do not seem to me to affect the principles underlying the approach to discovery in judicial review claims in both jurisdictions. I am therefore content to adopt Morris J's summary as being a correct statement of the approach in the Cayman Islands as well as in England & Wales. Neither the Applicant nor the Respondent contended that the approach should be different.

The outstanding discovery issues

46. I can deal with the discovery issues much more shortly, as the parties were able to reach sensible agreement during the course of the hearing that a number of the documents requested by the Applicant either do not exist or have already been produced by the Respondent. As a result, the only outstanding request by the Applicant is for a better copy of:

> *"… the scoresheets, interview questions and answers, the respective Panel Reports, and the written recommendations to HE the Governor for each of the successful candidates, and the comparative scores attained by the other candidates (i.e. the successful candidates and any others that scored more highly than the applicant. …"*

47. The Respondent has provided a heavily redacted version of the document containing the scoresheets, interview questions and answers etc, so as to conceal information about the other candidates for promotion. Mr Joshi argues, as a minimum, for a copy that provides the scores and answers of the candidate who scored next above the Applicant for comparison purposes. Dr Alcock resists this, on the ground that it is a fishing expedition.

48. For the reasons that follow, I agree with Dr Alcock.

49. Firstly, the Applicant's primary complaint is that, following his interview, certain information about him was wrongly and unfairly disclosed to the interview panel by the Interested Party. He complains that it was wrong in law (based on the applicable Regulations) to allow the Interested Party to be involved in the decision-making process at all, and that the way in which his input was provided was a breach of natural justice.

50. The Applicant's secondary complaint is that the Respondent then sought to justify its decision on a different basis, namely that there was a limited number of positions to be filled and the Applicant did not score as highly as other applicants, who were promoted in preference to him.

51. Thirdly, the Applicant complains that the Respondent did not follow its own policy in that it failed to have an appeals process in place, and any arrangements for a review or complaint.

52. Whilst I can see that the Applicant's primary and tertiary complaints may be susceptible to judicial review, I cannot see how the mere fact that another candidate has scored more highly and is therefore preferred for promotion gives rise to an arguable claim for judicial review. The Applicant does not advance any case that the Respondent's approach to scoring the candidates itself was illegal or legally flawed in some way, involved a breach of natural justice or was unreasonable, irrational or unfair.

53. It does seem to me that the additional discovery sought is properly categorised as being an attempt at fishing for material that might possibly substantiate an additional complaint. I therefore dismiss the discovery application to that extent.

D. Final comments

54. As will be apparent from what I have already said in this judgment, my view is that it needs to be firmly reiterated in the Cayman Islands that judicial review proceedings must be pursued promptly and brought to a conclusion speedily to provide certainty for those involved in making public law decisions and to avoid the corrosive effect on good administration of long outstanding challenges to previous decisions.

55. There is an alarming tendency in the cases I have seen so far that they are allowed to plod towards a resolution, apparently in the slow lane. This should not happen. It is incumbent both on attorneys acting for applicants, but also on the Crown, to make sure that cases are progressed through the Court as quickly as possible to avoid knock-on effects on good administration and the interests of third parties, as well as in the interests of the applicant and respondent in any given case.

56. Other than in exceptional cases, the final hearing of a judicial review application should be no more than 6 months from the grant of leave and should usually be quicker. If the parties are not going to meet that timescale, they should bring matter back before the judge at the earliest opportunity to explain the reasons why and to obtain directions.

Dated 31 May 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT