



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G167 OF 2023 (IKJ)

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

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

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BETWEEN:

ABC

Applicant

-and-

CAYMAN ISLANDS MONETARY AUTHORITY

Respondent

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr. Peter Hayden and Mr Luke Burgess-Shannon of Mourant Ozannes (Cayman) LLP for the Applicant

Ms Jodie Woodward and Ms Oneka Thompson of the Cayman Islands Monetary Authority for the Respondent

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Heard: 12 January 2023

Date of decision: 12 January 2024

**Draft Reasons
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Application for judicial review-non-compliance by respondent with prescribed time for filing evidence in response-whether strict compliance required-relevance of practice in England and Wales under similar pre-CPR procedural code-whether respondent should be debarred from filing further evidence-duty of applicant to promptly obtain return date for originating notice of motion-need for stricter compliance with time limits in judicial review proceedings contrasted with private litigation-Grand Court Rules Orders 3 rule 5, 53 rule 5 (4), 53 rule 6 (4)

REASONS FOR RULING

Introductory

1. GCR Order 53 rule 6 (4) requires a respondent to file any evidence it wishes to rely upon within 56 days of service of an applicant’s notice of motion. The Applicant contended that the Court should follow persuasive authority on the corresponding pre-CPR English rule upon which our own rule is based. According to that authority, non-compliance with the time limit is strictly enforced and ordinarily results in the defaulting respondent being debarred from filing any evidence at all. No Cayman Islands court appears to have followed the England and Wales practice, and no local authorities on the relevant rule were placed before the Court.
2. On 12 January 2024 (1) I declined to make an Order debarring the Respondent from filing responsive evidence and instead gave directions for it to do so, (2) on terms that there should be a “rolled-up” hearing of the substantive application for judicial review and the Respondent’s application to set aside the ex parte grant of leave.

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3. These are the reasons for that composite decision.

Procedural history

4. The Applicant was served with a direction to produce documents by the Respondent on 2 August 2023, and the Respondent granted an extension of time for compliance to enable the Applicant to consider its position. The legal objections which form the subject of the present proceedings were raised in pre-action correspondence in late August 2023. The Respondent declined to grant the further general extension of time sought by the Applicant for compliance with the Direction.
5. The Applicant applied for leave to seek judicial review on 14 September 2023. On the same date, I granted leave on the papers and gave directions for the file to be sealed and, *inter alia*, any published judgments to be anonymised. The impugned decision is a Direction from the Respondent requiring the Applicant to produce various documents pursuant to an international cooperation request made by the United States Securities and Exchange Commission (the “SEC”). The Applicant contends that the SEC request could not lawfully be enforced by the Respondent in circumstances where the Applicant and its business lacked any connection with the geographical jurisdictional competence of the SEC.
6. A Notice of Originating Motion was promptly filed on 15 September 2023. That same day the Applicant’s attorneys served the leave application papers and the Originating Motion at the Respondent’s offices. That Notice was issued and served without a return date on it. The Applicant took no immediate steps to either list the Originating Motion for hearing or to issue a Summons for Directions. It appears that without prejudice communications took place between the parties which clearly did not resolve the issues in dispute in the present proceedings.
7. By letter dated 22 November 2023, Mourant (attorneys for the Applicant) informed the Respondent that the time for filing responsive evidence had expired and sought confirmation that the Respondent did not propose to oppose the application as a result. The Respondent by letter dated 22 November 2023 complained that the Applicant had failed to apply for directions as contemplated by Order 53 rule 5 (4) and foreshadowed an application to strike-out the proceedings. On 28 November 2023, the Applicant filed a Summons for Directions issued returnable for 12 January 2024. On 9 January 2024 the Respondent filed a Summons applying to, *inter alia*, (1) set aside the *ex parte* Order granting and (2) amend the anonymization Order.

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Findings: the proper interpretation and application of the rule prescribing the time limit for responsive evidence to be filed in relation to judicial review application

Preliminary view as to the interpretation and application of the time limit imposed by GCR Order 53 rule

8. My preliminary view was that the Court had an unfettered discretion to extend the time fixed by the rule for the Respondent to file its evidence. GCR Order 53 rule 6 (4) on its face is a standard provision prescribing the time for doing something:

“Statements and affidavits (O.53, r.6)

6. (1) Copies of the statement in support of an application for leave under rule 3 must be served with the notice of motion and, subject to paragraph (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.

(2) The Court may on the hearing of the motion allow the applicant to amend the applicant’s statement, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.

(3) Where the applicant intends to ask to be allowed to amend the applicant’s statement or to use further affidavits, the applicant shall give notice of the applicant’s intention and of any proposed amendment to every other party and the affidavit shall be before the Court on the hearing of the motion.

*(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).*

(5) Each party to the application must supply to every other party on demand and on payment of the proper charges copies of every affidavit which the party proposes to use at

the hearing, including, in the case of the applicant, the affidavit in support of the application for leave under rule 3.” [Emphasis added]

9. GCR Order 3 rule 5 provides as follows:

“Extension, etc. of time (O.3, r.5)

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

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.”

[Emphasis added]

10. Absent local case law or a Practice Direction mandating a special approach to the time limit under Order 53 rule 6 (4) as read with Order 3 rule 5, this broad flexible extension of time jurisdiction would logically seem to apply. The Supreme Court Practice 1999 paragraph 3/5/2 provides:

“Where the time, sought to be enlarged, is not ‘fixed by these rules’ but by the Masters’ Practice Directions (which have no statutory force) or some other rule of practice, this rule does not apply, and in interlocutory proceedings the court has an inherent jurisdiction to extend the time independently of it...

The object of the rule is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties...”

The strict approach to the Order 53 rule 6 time limit in England and Wales: should this practice be followed in the Cayman Islands?

11. Mr Hayden’s attempt to debar the Respondent from filing evidence based on practice never recorded as having been followed before appeared at first blush to be a swashbuckling, “who dares win” type of submission. This was in part because, in almost 20 (combined) years in two jurisdictions where an English-derived Order 53 was in force¹, I had never before encountered the rule of practice contended for. It was apparent that because of specific concerns encountered by the English courts which prompted the promulgation of a Practice Direction, the time limit prescribed the corresponding rule in that jurisdiction had been strictly construed. It seemed inherently unjust, if this strict rule had not been followed in a jurisdiction where similar abuses by respondents had not occurred, that it should be visited like a bolt of lightning from a clear sky on the unsuspecting Respondent in the present case.
12. Mr Hayden was correct to assert that it was commonplace for local practitioners to have recourse to the Supreme Court Practice 1999 when construing the Grand Court Rules. Any local lawyer considering the *1999 White Book* would have found three paragraphs of commentary bearing on the 56 day time limit for respondents’ evidence:
- (a) **paragraph 53/14/6:** “*If any respondent wishes to rely on any affidavit evidence, he must file his affidavit (s) in the Crown Office within 56 days of service on him of the applicant’s motion (or summons), (O.53, r.6 (4) (as amended); that 56-day time limit is strictly enforced (see further paras 53/14/74 and 53/ 14/75)*”;
 - (b) **paragraph 53/14/74:** “*...The time limit for filing affidavit evidence in reply by respondents was formerly 21 days.. That period was increased to 56 days with effect from March 7, 1989. The new time limit of 56 days is considered to be realistic and adequate and it will be strictly enforced (see the Practice note of March 7, 1989, the text of which is set out below)*...”;
 - (c) **paragraph 53/14/75:** “*Practice Note...Although there is provision for extending this period (see O.3 r.5) it must be clearly understood that extensions of time will be*

¹ Although Order 53 was apparently incorporated into the Grand Court Rules in 1995 locally, it was not incorporated into the Bermudian Rules of the Supreme Court until 2005.

granted only in circumstances which are wholly exceptional and for the most compelling reasons...”

13. The hypothetical diligent lawyer, seeking to ascertain how the GCR Order 53 rule 6 (4) time limit would be enforced in the Cayman Islands, would fairly have concluded that the English practice of strictly enforcing the 56 day time limit was not based on the construction of the rule itself. Rather, the principle of strict enforcement derived from a Practice Note which explicitly circumscribed:
 - (a) the extension of time power contained in Order 53 rule 6 (4) itself; and/or
 - (b) the flexible extension of time jurisdiction conferred by Order 3 rule 5.
14. Practice Notes (or Practice Directions as we know them) are usually (but not invariably) issued with a view to resolving specific problems which have been identified in a particular court. Their aim is to expand upon the bare bones of a particular rule and to afford guidance as to how, going forward, the Court will exercise what is often formulated as an unfettered discretion.
15. In my judgment, the Practice Note relating to the strict enforcement of Order 53 rule 6 (4) in England and Wales reflects the modification of the Rules of Court by way of a special practice rather than persuasive authority as to meaning and effect of a particular rule. For a similarly strict approach to be taken by this Court would require ideally a Practice Direction to be issued by the Chief Justice (at best) or (at a minimum) judicial guidance warning that in future the discretion conferred by GCR Order 3 rule 5 will be narrowly exercised in Order 53 rule 6 (4) cases.
16. Mr Hayden further submitted that the general scheme of Order 53 was designed to promote timeliness in public law matters. The clearest support for this proposition was found in *R-v- Institute of Chartered Accountants in England and Wales ex parte Andreou* (1996) 8 Admin LR 557. Henry LJ (at 562-563), before proceeding to consider the Practice Note, rejected the call for “*greater flexibility*” in relation to the time limit for the following reason of “*general principle*”:

“...Public law deals with the identification and redress of public wrongs generally in disputes between the citizen and the State or its institutions. It provides under Ord.53 a simplified and expeditious procedure which is essential to enable the Crown Office List fulfilling its purpose, while recognizing both the general importance of the issues at stake

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and the large numbers often potentially affected by them, and the necessity for an early resolution of them. If ‘normal’ private law delays and private law relaxed attitudes attitude to rules and time- limits creep into the Crown Office List, then the delays in that list will build to the point that it can no longer properly perform the important public duty entrusted to it. Public litigation cannot be conducted at the leisurely pace too often accepted in private law disputes...”

17. I agreed with the Applicant’s counsel (in the course of argument) that these principles applied to the Cayman Islands Order 53 regime. But could not accept that such high level imperatives were sufficient to justify introducing, without any prior warning, the strict judicial approach which was only introduced in England Wales buttressed by a formal Practice Direction. Not only is there no Cayman Islands Practice Direction articulating a modification of the flexible extension of time powers conferred by GCR Order 3 rule 5. There are no judicial decisions articulating concern about a “*relaxed attitude*” to time limits in public law cases. In my own experience over the last seven so years, more often than not respondents are pressing to expedite the progress of public law proceedings rather than guilty of delay.

18. The Respondent’s Submissions accurately described the formal scope of the jurisdiction to extend time under Order 53 rule 6 (4):

“2. The Rule gives the Court an absolute discretion to extend the period of 56 days if it feels it is appropriate to do so. Although there is no fettering how the Court should exercise its discretion, it goes without saying that the period of 56 days should be extended if it is in the interests of justice to do so.”

19. In my judgment the English approach to the 56 day time limit for respondents’ evidence does not reflect Cayman Islands law or practice.

Time limits and judicial review proceedings under GCR Order 53: the correct approach

20. For the reasons articulated by the English Court of Appeal in *ex parte Andreou*, the public policy function served by judicial review requires a stricter adherence with time limits by both applicants and respondents than in ordinary civil litigation. Indicators within Order 53 itself of the importance of expedition include (1) the presumption in favour of leave applications being dealt with on the papers (Order 53 rule 3 (3)), and (2) the three months' time limit from the date of the impugned decision for commencing proceedings (Order 53 rule 4). Depending on which corner of the public law field a particular application traverses, delay may be more or less prejudicial to applicants or respondents.
21. Subject to any Practice Directions issued by the Chief Justice, the proper approach to judicial review applications will generally require the following procedural steps:
- (a) applicants will not without good cause request an oral leave hearing as the default position is that leave will be considered on the papers unless the applicant requests a hearing (Order 53 rule 3 (3));
 - (b) the Court in its inherent jurisdiction will retain the right to list the leave application for an oral *ex parte* or *inter partes* hearing where the Judge is provisionally inclined to refuse leave on the papers or doubtful about the merits of the application;
 - (c) if leave is refused at the *ex parte* stage, the applicant must renew the application within 10 days (Order 53 rule 3 (5));
 - (d) if leave is granted, the applicant must file and serve a notice of motion together with the leave papers on the respondent within 7 days of obtaining leave (Order 53 rule 5 (2)) and any statement of grounds (Order 53 rule 6 (1));
 - (e) if the respondent wishes to apply to set aside leave, any such application should obviously be filed promptly if an *inter partes* hearing is sought in advance of the substantive hearing of the notice of motion;

- (f) unless the respondent and all parties served agree, the return date of the notice of motion will serve as a directions hearing (Order 53 rule 5 (4));
- (g) there must be at least 14 days between the date of service of the notice of motion and the first hearing date (Order 53 rule 5 (5));
- (h) within 56 days of service, unless the Court otherwise directs, the respondent must file its evidence (Order 53 rule 6 (4));
- (i) implicit in Order 53 rule 5 (4) is the notion that in the normal course of events, the applicant will obtain a return date before serving the notice of motion and no separate summons for directions will ordinarily be required.

Findings: why an extension of time was granted to the Respondent in the present case

- 22. In light of the strong provisional views, I expressed during the Applicant's opening submissions, in oral argument Ms Woodward merely addressed the discretion to extend time. She submitted that an extension of time was appropriate because (1) the Applicant itself had been guilty of delay in failing to issue a Summons for Directions and (2) (more substantively) the Respondent could not have filed its responsive evidence until it had liaised with the SEC because the information relevant to a meaningful response was not within the Respondent's knowledge.
- 23. Having regard to the structure of the relevant rules, I rejected the suggestion that it was incumbent on the Applicant to issue a Summons for Directions to bring the Respondent before the Court to obtain directions in relation to when its evidence should be filed. The default position is that the Respondent's evidence should be filed within 56 days of service of the notice of motion. However, Order 53 rule 5 (4) does contemplate that an applicant will promptly list the notice of motion for hearing; this will enable the parties and the Court to address the need for special directions if required. The Applicant on any view did 'hasten slowly' in failing to initially issue the Notice of Motion with a return date and belatedly issuing a Summons for Directions. But this consideration was of marginal significance in terms of deciding whether the Respondent should be given an extension of time for filing its evidence.

24. The most compelling consideration was that the impugned decision was made by the Respondent, this country's primary financial services regulatory authority, pursuant to a request for international assistance from the SEC, a prominent United States regulatory body. The Applicant's case, while framed as a challenge to the lawfulness of the Respondent's actions, was premised on the core assertion that the SEC had no jurisdiction to make the request. I took into account:
- (a) the fact that the Applicant had been from the outset granted a stay;
 - (b) the fact that the parties had engaged in some without prejudice discussions;
 - (c) the fact that information the Respondent was seeking from the SEC was on its face far from straightforward,
 - (d) the obvious public policy importance of the Respondent's statutory obligations to respond positively, so far as the law permits, with international cooperation requests.
25. I concluded that the factors in favour of granting the Respondent the extension of time it sought clearly outweighed both (1) any countervailing interest of the Applicant in an expeditious hearing and (2) any general policy need to uphold the time limit prescribed for filing responsive evidence under the Rules. The public policy imperative to avoid delay also justified the Court granting an extension of time of its own motion without requiring a formal application to be filed.

Findings: the Respondent's set-aside Summons

26. When a respondent to judicial review proceedings takes nearly four months after being served with the papers relating to the grant of leave to seek judicial review to file an application to set aside leave, the Court is entitled to (1) be concerned to deal with the application in a way which minimizes further delay, and (2) sceptical about the merits of the belated application. These considerations informed my provisional views about the Respondent's Summons. Ms Woodward sensibly did not object to my proposal to adjourn the Summons for a "rolled-up" hearing together with the Applicant's Notice of Motion.

Summary

27. For the above reasons, on 12 January 2024, I declined to debar the Respondent from filing evidence after the 56 day time limit prescribed by GCR Order 53 rule 6 (4) had expired. Instead, I (1) granted an extension of time, (2) gave directions for the hearing of the Respondent's application to set aside the ex parte leave Order at the same time as the Applicant's Notice of Motion is heard and (3) reserved costs.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT