Hilary Term
[2019] UKPC 5
Privy Council Appeal No 0085 of 2017

JUDGMENT

Maharaj (Appellant) *v* National Energy Corporation of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lady Black
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON

30 January 2019

Heard on 29 October 2018

Appellant	*Respondent*
Michael Fordham QC Anand Ramlogan SC Jessica Boyd (Instructed by Alvin Pariagsingh)	Kendell S Alexander (Instructed by Charles Russell Speechlys LLP)

LORD LLOYD-JONES:

1. This appeal concerns delay in the making of an application for leave to apply for judicial review and, in particular, the precise significance of the presence or absence of prejudice to the rights of any person or detriment to good administration resulting from the grant of leave or any relief.

2. On 28 July 2009 the appellant, Mr Devant Maharaj, submitted a request for information to the respondent, the National Energy Corporation of Trinidad and Tobago ("the NEC"), under the Freedom of Information Act 1999 ("FOIA") by which he asked for the curriculum vitae and qualifications of the Chief Executive Officer of the NEC. By letter dated 18 August 2009 the NEC refused the request, pointing out that it had a President and not a Chief Executive Officer and asserting that the information sought was exempt from disclosure under section 30 of FOIA. Between 18 October 2009 and 13 January 2010, representatives for the appellant and the NEC engaged in pre-action correspondence in the course of which the NEC made and the appellant rejected a proposal for alternative dispute resolution. In letters dated 6 and 13 January 2010 the parties confirmed that, were the appellant to issue proceedings, the parties would be bound, in respect of the substantive outcome, by the decision of the court in parallel judicial review proceedings already before the court which raised similar issues (namely Case CV 2009 - 004428, *Devant Maharaj v Education Facilities Co Ltd*) ("the parallel proceedings").

3. On 20 January 2010 the appellant issued an application for leave to apply for judicial review of the NEC's refusal to supply the requested information. With regard to the question of delay, the appellant maintained that there had been no undue delay in circumstances where he had been exploring alternative remedies, that any delay was justified and that, if the court were to find that there had been undue delay, time should be extended. By order dated 21 January 2011, following an ex parte application, Boodoosingh J granted the appellant leave to apply for judicial review. On 22 February 2011 the NEC applied for an order setting aside the grant of leave on the grounds that the appellant's application had not been made promptly and there had been unreasonable delay. By letter dated 29 April 2011 the parties informed the court that on 7 April 2011, in the parallel proceedings, Rajnauth-Lee J had held that the documents requested were not exempt documents and had ordered that they be disclosed. They confirmed to the court that the NEC would not pursue its submissions of 24 March 2011, that the appellant would make no submissions on the substantive merits of his application and that the only issues for the court's determination were the issues of delay and costs. It was, as a result, common ground that the appellant would succeed on his claim for judicial review if it were permitted to proceed. Following a hearing on 3 June 2011, Boodoosingh J granted the NEC's application and set aside

the grant of leave. In a written judgment dated 3 October 2011 he stated that there was no proper explanation for the delay in filing the application beyond 7 December 2009 and concluded that there had been unreasonable delay in filing the application for judicial review. He made no order for costs in light of the fact that the substance of the matter had been determined in the appellant's favour.

4. The appellant appealed to the Court of Appeal (Jamadar, Bereaux and Smith JJA). The issues on the appeal were, having regard to section 11 of the Judicial Review Act, 2000 and rule 56.5 of the Civil Proceedings Rules 1998, as follows:

> (1) Whether the judge erred in concluding that there had been unreasonable delay in the filing of the appellant's application for leave to apply for judicial review;
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> (2) If not, whether he erred in declining to exercise his discretion to extend time for judicial review and in refusing leave on this basis alone without consideration of other factors including whether the delay was such as to "substantially prejudice the rights of any person" or to be "detrimental to good administration"; and
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> (3) If not, whether he had in any event erred in setting aside his prior grant of leave on this basis.

5. The appeal was heard on 29 July 2016. On 26 April 2017 the Court of Appeal (Jamadar JA dissenting) dismissed the appeal on the grounds that:

> (1) There had been unreasonable delay in bringing the application for leave to apply for judicial review;
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> (2) The judge had not erred in declining to extend time on the sole ground of unreasonable delay;
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> (3) Since the objection was to delay, that did not require consideration of prejudice or detriment to good administration;
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> (4) The judge's exercise of his discretion to set aside a prior grant of leave on the basis of the perceived unreasonable delay had not been plainly wrong.

6. Final leave to appeal to the Judicial Committee of the Privy Council was granted by order dated 24 July 2017. At the hearing of the appeal we were informed by counsel that, following the grant of leave by the Board, the information sought by the FOIA request has now been provided by the NEC to the appellant, but that the appeal and the judicial review proceedings have not been conceded by the NEC.

Relevant provisions

7. Section 11 of the Judicial Review Act provides in the relevant part:

> "(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
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> (2) The court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.
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> (3) In forming an opinion for the purpose of this section, the court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.
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> …"

8. The Civil Proceedings Rules 1998 ("CPR") provide:

> "Delay
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> 56.5(1) The judge may refuse leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application.

> (2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which it relates.
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> (3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -
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> > (a) cause substantial hardship to or substantially prejudice the rights of any person; or
> >
> > (b) be detrimental to good administration."

9. In this judgment the term "prejudice" is used to refer to substantial hardship or prejudice to the rights of any person and "detriment" to refer to detriment to good administration.

Authority in Trinidad and Tobago

10. In the recent decision of the Judicial Committee in *Fishermen and Friends of the Sea v Environmental Management Authority* [2018] UKPC 24, [2018] PTSR 1979 ("*Fishermen 2"*) Lord Carnwath (paras 23-25) drew attention to the conflicting lines of authority in this jurisdiction, including the decision of the Court of Appeal in these proceedings, in relation to the treatment of prejudice and detriment resulting from delay in applying for judicial review. It is convenient to start by examining the leading decisions.

11. In *Fishermen and Friends of the Sea v Environmental Management Authority* (unreported) 30 August 2002 (HCA No 1715 of 2002) ("*Fishermen 1*"), the applicant sought leave to bring judicial review of a decision to grant a certificate of environmental clearance to BP Trinidad and Tobago ("BPTT"). Objection was made on grounds of delay, the application having been filed more than three months after the decision was made.[1] Bereaux J, sitting at first instance, drew attention to the

[1] At the date of this decision there was in force in Trinidad and Tobago a rule of court similar to Part 56.5. Order 53(4)(1) of the Rules of the Supreme Court 1975 (as substituted by The Supreme Court (Amendment) (No 3) Rules 1982) provided:

> "4(1) Subject to the provisions of this rule, where in any case the court considers that there has been undue delay in making an application for judicial review or, in a case to which para (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the court may refuse to grant -
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> (a) leave for the making of the application, or
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> (b) any relief sought on the application,

judgment of Ackner LJ in *R v Stratford-on-Avon District Council, Ex p Jackson* [1985] 1 WLR 1319, which was approved in the House of Lords in *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell* [1990] 2 AC 738, decisions which, although not binding, he considered highly persuasive. His summary of the law as stated in those cases included the following:

> "(4) If there is good reason shown for extending time, the court may grant an extension. But even if the court considers that there is good reason, it may still refuse leave if the granting of the relief sought would be likely to cause hardship or prejudice or be detrimental to good administration."

The judge then followed a structured approach. First, he considered whether good reason had been shown for extending the time for issuing proceedings. There was no contest that the application was outside the three-month period and that therefore there had been undue delay. Having considered the submissions of the parties, he concluded that no good reason had been put forward for the grant of an extension of time. Prejudice and detriment were not considered at this stage. Secondly, he considered whether the extension of time or the grant of relief would be prejudicial to the BPTT or detrimental to good administration. The judge declined to adjourn this issue to the substantive hearing. There had been full argument on the issue and the BPTT had provided evidence of the prejudice it would suffer if the judicial review were to proceed and relief were to be granted. The judge concluded that during the hiatus of five and a half months BPTT had proceeded substantially to implement the project. He considered that this weighed heavily against the grant of leave, in particular when considered in light of the applicant's failure to give any notice of its intention to bring legal proceedings. In his view there would be significant prejudice to BPTT. In addition, it was important to good administration that the decision should be treated with decisiveness and finality. The judge then, thirdly, went on to consider whether the public interest required that the application should be permitted to proceed. Having referred to the decision of Laws J in *R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd* [1998] Env LR 415 ("*Greenpeace 1*") and that of Maurice Kay J in *R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd* [2000] Env LR 221 ("*Greenpeace 2*"), he concluded that the balance came down against the grant of leave.

12. On appeal, the Court of Appeal (Jones CJ (Ag) and Nelson JA, Lucky JA dissenting) (unreported) 14 August 2003 dismissed the appeal. Nelson JA, with whom the Chief Justice agreed, considered that the sole issue was whether Bereaux J had

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> if, in the opinion of the court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

properly exercised his discretion in refusing to extend time. There was, in his view, no ground for interfering with that exercise of discretion. Lucky JA dissented on the ground that the judge had, by refusing an extension of time, pre-empted important issues in the case.

13. The applicant appealed to the Judicial Committee of the Privy Council: [2005] UKPC 32. Delivering the judgment of the Board, Lord Walker of Gestingthorpe observed that the judge had correctly analysed the effect of the relevant authorities in England and Wales, including *Caswell*. He drew attention to the structured approach followed by the judge. The question whether the applicant had shown a good reason for the extension of time arose under section 11(1). The judge had then gone on to consider two topics specifically mentioned under section 11(2), whether there would be substantial prejudice to the rights of BPTT or detriment to good administration, before considering the public interest. It is of some significance to the present appeal that, as the Board read the judgment of Bereaux J, he had expressed a preliminary view against granting an extension of time because of the unjustifiable delay, but then went on to test that conclusion against other issues, including the public interest and the strengths and weaknesses of the applicant's case. Those other matters confirmed his preliminary view. The Board concluded, dismissing the appeal, that there was no reason to interfere with the decision not to grant an extension of time.

14. In *Police Service Commission v Graham* (unreported) 26 March 2010 (Civil Appeal Nos 143 of 2006 and 8 of 2008) Mendonça JA, with whom Jamadar and Bereaux JJA agreed, followed a staged approach very similar to that indicated by Bereaux J in *Fishermen 1*. However, as the Court of Appeal considered that there was a good reason to extend time to apply for judicial review and no question that the relief granted would cause prejudice or detriment, the decision does not add anything of great significance to the current debate.

15. A very different approach to prejudice and detriment in the context of delay was adopted by the Court of Appeal (Kangaloo, Weekes and Jamadar JJA) in *Abzal Mohammed v Police Service Commission*, (unreported) 31 March 2010 (Civil Appeal No 53 of 2009) where *Fishermen 1* and *Police Service Commission v Graham* are not referred to. The applicant applied out of time for judicial review of a decision of the Commission. The judge held that there was no justification for the delay, nor was there any good reason to support an application for an extension of time. Kangaloo JA, with whom the other members of the court agreed, noted that the applicant had not attempted to explain the delay but had applied for an extension of time, maintaining that "there is no conceivable prejudice to the defendant or any third party" (at para 7). Kangaloo JA identified the central issue as follows:

> "The question, however, is whether the learned judge erred by adopting too technical an approach to the application for the

> extension of time by using the explanation for the delay as a threshold condition to the exercise of his discretion. I am of the view that he did. I should say that my view is premised on the assumptions that (a) the argument of the appellant about the effect of the Constitution is not without merit and (b) no prejudice to third parties or the Commission nor detriment to good administration has been shown nor is self evident." (para 15)

Referring to a dictum of Lord Woolf in *R v Comr for Local Administration, Ex p Croydon London Borough Council* [1989] 1 All ER 1033, 1046G, considered below, Kangaloo JA observed that where there is no prejudice as a result of the delay, the statute and the rules ought not to be applied in a technical manner so as to deprive an otherwise worthy applicant of relief. He accepted that good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary, but considered that a compelling reason may very well be the lack of prejudice to third party rights. He continued:

> "It is my view therefore that at the permission stage, depending on the length of the delay, where it is neither self evident nor can it be shown that as a result of the delay there is likely to be prejudice to third parties and/or detriment to good administration, the applicant should not be deprived of permission. To my mind, this case is an a fortiori one, in that the delay is short." (para 20)

16. Kangaloo JA then turned to consideration of section 11 of the Judicial Review Act and CPR rule 56.5. In his view, section 11(1) showed that the court has the jurisdiction to extend the time for the making of the application.

> "Section 11(2) shows when the court may refuse to grant leave to apply for judicial review. It is when the court considers that there has been undue delay in making the application *and* the grant of any relief would result in prejudice to other persons or there would be detriment to good administration.
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> From the legislative scheme, therefore, it is clear that it is only if there is both undue delay and prejudice or detriment that the court may refuse to grant leave.
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> I am therefore fortified in my opinion, that delay alone without prejudice or detriment is not sufficient to preclude an otherwise worthy applicant of permission." (Original emphasis) (para 21)

Similarly, he considered that rule 56.5(3) showed that when a court is considering whether to refuse leave on the ground of delay, it must consider whether the grant of leave would be likely to cause substantial hardship to or prejudice to the rights of any person or be detrimental to good administration. In his view, the rule demonstrates that delay alone is not the deciding factor on whether to refuse leave.

17. Kangaloo JA considered that, as prejudice or detriment had not been demonstrated, the only other hurdle the applicant had to clear was to show good reason for the court to extend time. He noted that what amounts to good reason was the subject of debate in the case law.

> "It is sufficient to say that among the factors to be taken into account are (a) length of delay (b) reason for delay (c) prospect of success (d) degree of prejudice (e) overriding principle that justice is to be done and (f) importance of the issues involved in the challenge. This is not an exhaustive list of factors." (para 25)

In the court's view time should have been extended and leave to apply for judicial review granted.

18. Mr Fordham QC, on behalf of the appellant, has referred us to two first instance decisions in which the judge has, in the same way, had regard to prejudice when determining whether to extend time. Thus, in *B v The Children's Authority of Trinidad and Tobago* (unreported) 26 July 2017 (Claim No CV2016-04370) Kokaram J said (para 175):

> "The question of prejudice and detriment to good administration must be taken into account in the exercise of the discretion to extend time to apply for leave."

Similarly, in *Charles v Her Worship Maria Busby Earle-Caddle (Acting Chief Magistrate)* (unreported) 6 December 2017 (Claim No CV2017-03707) Rampersad J held that "[t]aking all the circumstances into account, and the lack of an objection or evidence of prejudice" there was a "fit and proper case to extend the time for filing the application for leave" (at para 31).

The judgments in the present proceedings

19. The judgments in the present proceedings seem to show that the differences revealed by these varying approaches have hardened.

20. At first instance, Boodoosingh J noted that the decision had been made on 18 August 2009 and the application was filed on 20 January 2010. The applicant had sent a pre-action protocol letter two months after the decision (on 18 October 2009) but a further three months had passed before the application was filed. The judge considered that no proper explanation had been provided for the delay in filing the application beyond the three-month period stipulated in the legislation. He therefore found that there was unreasonable delay in filing the application and he set aside the order giving leave to bring proceedings for judicial review.

21. On one reading of his judgment, Smith JA in the Court of Appeal approved of this approach. He noted that the judge had set aside leave on the sole ground of unreasonable delay (paras 5, 22):

> "It is important to remember that in this case, the parties had agreed that the only factors for the judge to consider were delay and costs. Having found that this was a clear case where there was unreasonable delay in bringing the application for leave (a decision I agree with), the trial judge could rightfully have exercised his discretion to set aside his earlier grant of leave. Further, in arriving at that conclusion, the trial judge did not accept that there was a good explanation or reason for the delay. Having thus decided the matters that the parties had agreed to submit to him, for consideration, he was not bound to go on to consider detriment and prejudice as further grounds for refusing leave." (para 29)

This should be contrasted with the view of Bereaux JA who noted that the judge did not give any express consideration to section 11(1) in that he did not say whether there was good reason to extend time. He thought that the judge may have confused section 11(1) considerations with those of section 11(2) and Part 56.5(1) and (3). However, he also observed that the objection taken by NEC was the lack of promptitude in filing the application under section 11(1) which "did not require the consideration of prejudice to a third party or detriment to good administration". While the judge would then have to consider whether there was good reason to extend time, "he obviously found that there was no good reason" (para 12).

22. However, Smith JA also considered the conflict of authority. He rejected a submission on the basis of *Abzal Mohammed* that since the respondent could not demonstrate any real prejudice or detriment the appellant was bound to get leave to apply for judicial review. First, this interpretation nullified the mandatory provisions of section 11(1) and Part 56.5(2). Secondly, it nullified the discretion of the judge under section 11(1) to refuse to extend time unless there was a good reason to do so and the discretion under Part 56.5(1) to refuse leave, because on the application of the

reasoning in the *Abzal Mohammed* case even if the applicant fails to provide a good reason for the delay a judge will be unable to refuse leave if there is no prejudice or detriment. Thirdly, the interpretation proffered in *Fishermen 1* was consonant with the parent Act and the CPR since it preserved both the time filter prescribed and the discretion of the judge to balance the needs of good administration and the need to avoid creating a stymie on deserving applications.

> "Part 56.5(3) which mandates the considerations of prejudice and detriment must be read in conjunction with section 11(2) of the Act. This means that the 56.5(3) considerations (prejudice and detriment) only apply when considering the residual discretion to refuse leave pursuant to section 11(2) even where there may be reason to extend the time for leave." (Original emphasis) (para 26)

Fourthly, the *Fishermen 1* interpretation was more compatible with the statutory scheme for judicial review than the *Abzal Mohammed* interpretation. At the leave stage, which is usually *ex parte*, it would be very difficult in most cases properly to know, assess or weigh competing factors of prejudice and detriment. To mandate proof of prejudice and detriment at the leave stage would, in practice, negate the requirements of timeliness. Fifthly, *Abzal Mohammed* could be considered per incuriam as the court did not cite the earlier decision of the Court of Appeal or the Privy Council in *Fishermen 1* or that of the Court of Appeal in *Police Service Commission v Graham*.

23. Bereaux JA, concurring, adopted an approach very similar to that in his judgment at first instance in *Fishermen 1*. He observed at the outset of his judgment:

> "The objection of the respondent was to the fact that the appellant had not acted promptly. Lack of promptness raises a different consideration under section 11(1) of the Act. It is not linked to questions of substantial prejudice or hardship to third parties or detriment to good administration." (para 3)

He considered that speed and expedition are at the heart of judicial review. In his judgement there was no significant distinction between unreasonable delay and undue delay. The decided cases point to delay which is unjustifiable in the circumstances, whether described as undue or unreasonable. (para 10) Once there is lack of promptitude there must be a good reason shown for extending the period within which the application shall be made. "If there is no good reason leave will more than likely be refused." (para 5) In his view, there was no conflict between section 11(1) and (2) and Part 56.5(1) and (3).

> "Rather, the combined effect of section 11(1) and CPR 56.5(1) and (3) may be summarised as raising three issues for the judge:
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> (1) Whether the application was filed promptly.
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> (2) If the application was not prompt whether there is good reason to extend the time. If there is no good reason to extend the time, leave to apply for judicial review will be refused for lack of promptitude.
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> (3) If, however, there is still good reason to extend the time, whether permission should still be refused on the ground that the grant of the remedy would likely cause substantial hardship or substantial prejudice to a third party, or would be detrimental to good administration." (para 7)

He noted that generally refusal of leave, even after time is extended, will be at an *inter partes* hearing where evidence of substantial hardship, substantial prejudice or administrative detriment may be put in by the opposing party (para 8).

24. Jamadar JA, dissenting, emphasised that delay as a bar to judicial review must be considered against the background of the constitutional importance of judicial review as a means of vindicating the rule of law. In his view subsection 11(3) provides further guidance in relation to both subsections 11(1) and 11(2) and is therefore relevant to both the time standards in relation to the granting of leave and to the finding of undue delay in relation to the refusal of leave. As a result, when considering promptitude, good reason and undue delay the court may have regard to such other matters as it considers relevant. (paras 39-42). Furthermore, the court has a duty under section 11(1) to consider whether there is good reason to extend time (not simply to consider whether there is a good explanation for the delay which has occurred). Reading section 11 as a whole, it must be that the duty to consider whether to extend time includes a due consideration of the subsection 11(2) as well as the subsection 11(3) factors to the extent that they may be relevant. In considering whether there are good reasons for extending time, a court must at least consider whether the delay has been undue and, depending on the circumstances of the case, whether the grant of leave or the grant of relief would cause prejudice or be detrimental. (paras 43-46)

> "Of significance in this analysis, is that this wholistic interpretation reveals that it is erroneous to treat the 'good reason' explanation in subsection 11(1) as restricted to whether or not there is good reason for not meeting the statutory time

> standards or for any delay. A more purposive and expansive reading, driven by the constitutional values identified and the primary purpose and intention of judicial review in public law, permits an interpretation of 'good reason for extending the period' to include a broader range of considerations. Including but not limited to the subsections 11(2) and 11(3) factors, as well as matters such as the merits of the application, the egregiousness of any alleged flaws in the decision-making process, whether or not breaches of fundamental rights are implicated, and whether there are any compelling public interest and/or public policy considerations. Thus, while it is material to inquire whether there is good reason for the failure to file an application for leave within the prescribed time or for any delay, it would be wrong in principle to consider this, or even the issue of an extension of time per se, as a necessary threshold condition." (para 48)

Fishermen 2

25. Since the judgment of the Court of Appeal in the present case, the Judicial Committee has heard an appeal from the Court of Appeal of Trinidad and Tobago in *Fishermen 2* (see para 10, above) where objection was made to leave to apply for judicial review on the ground of delay. In delivering the judgment of the Board, Lord Carnwath observed that the Board found it unnecessary to resolve the conflict between these different approaches.

> "It is satisfied that where, as here, the proceedings would result in delay to a project of public importance, the courts were right to adopt a strict approach to any application to extend time. It was unnecessary to show specific prejudice or hardship to particular parties. There was no such competing public interest in the *Abzal Mohammed* case, which concerned a challenge by a police officer to an individual decision of the Police Service Commission. However, in considering whether there is good reason to extend time, there may, …, be some overlap between sections 11(1) and (2), so that the issues including the relative merits of the applicant's case, and any prejudice, public or private, may be taken into account in the overall balance." (para 25)

Authority in England and Wales

26. The classic exposition of the approach to delay in applications for judicial review in England and Wales is to be found in the speech of Lord Goff of Chieveley

in *Caswell*. It was from this speech that Bereaux J in *Fishermen 1* extracted his proposition (4), quoted above, to the effect that even if there is good reason for extending time, the court may still refuse leave on grounds of prejudice or detriment. *Caswell* concerned the inter-relationship of section 31 of the Supreme Court Act 1981 and RSC Order 53, rule 4.[2] Lord Goff agreed with the reasoning and conclusion of Ackner LJ in *Jackson* that even though a court may be satisfied that there was good reason for the failure to apply promptly or within three months, the delay, viewed objectively, remains "undue delay" and the court therefore retains a discretion to refuse to grant leave or the relief sought on the substantive application on the grounds of delay if it considers that it would be likely to cause substantial hardship or prejudice or would be detrimental to good administration. Rule 4(1) limited the time within which an application may be made for leave to apply for judicial review. The court, however, had the power to grant leave despite the fact that the application was late if it considered that there was good reason to exercise that power. Lord Goff continued:

> "It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration. I imagine that, on an *ex parte* application for leave to apply before a single judge, the question most likely to be considered by him, if there has been such delay, is whether there is good reason for extending the period under rule 4(1). Questions of hardship or prejudice, or detriment, under

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[2] Order 53, rule 4, provided as follows:
"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made. (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

Section 31 of the Act of 1981 provides (so far as relevant) as follows:
"(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant -
(a) leave for the making of the application, or
(b) any relief sought on the application,
if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

> section 31(6) are, I imagine, unlikely to arise on an *ex parte* application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply, as indeed they did in *R v Stratford-on-Avon District Council, Ex p Jackson*; but even then, as in that case, it may be thought better to grant leave where there is considered to be good reason to extend the period under rule 4(1), leaving questions arising under section 31(6) to be explored in depth on the hearing of the substantive application.
>
> In this way, I believe, sensible effect can be given to these two provisions, without doing violence to the language of either." (p 747B-F)

27. *Caswell* is undoubtedly authority for Bereaux J's fourth proposition ie that notwithstanding the existence of good reason to exercise the power to grant an extension of time, leave or substantive relief may nevertheless be refused on the ground that it would be likely to cause prejudice or detriment. This is uncontroversial in the present proceedings. However, there is no support in *Caswell* for the further proposition, advanced by Smith JA in the Court of Appeal in the present case (para 26), that "the 56.5(3) considerations (prejudice and detriment) only apply when considering the residual discretion to refuse leave pursuant to section 11(2) even where there may be reason to extend the time for leave". (original emphasis) Nor does it provide any support for the view expressed by Bereaux JA in the Court of Appeal in the present case that the issue of lack of promptness under section 11(1) is a distinct consideration not linked to questions of substantial prejudice or hardship to third parties or detriment to good administration. On the contrary, Lord Goff is saying that even where there would otherwise be good reason to extend time, the existence of prejudice or detriment may result in the refusal of an extension of time. He is not saying that prejudice and detriment are irrelevant to the grant of an extension of time.

28. In *Caswell* the applicants sought to challenge a decision of the Dairy Produce Quota Tribunal made in February 1985. The applicants did not apply for leave to bring judicial review until 1987 when they obtained leave *ex parte*. On the hearing of the substantive application they conceded that there had been undue delay but resisted the submission on behalf of the Tribunal that since there had been a large number of other unsuccessful applications to which the same provisions applied the grant of relief would be detrimental to good administration. The judge held that the Tribunal had erred in its interpretation of the relevant legislation but refused to grant relief on the ground that it would be detrimental to good administration to do so. The Court of Appeal and the House of Lords refused to interfere with that conclusion or the judge's exercise of his discretion. Notwithstanding the resemblance of RSC Order 53, rule 4(1) to section 11(1) of the Trinidad and Tobago Judicial Review Act and the resemblance of section 31(6) of the Supreme Court Act 1981 to section 11(2) of the

Trinidad and Tobago statute, there is nothing in the reasoning of Lord Goff's speech to support the view that a court must first address the issue of pure delay as a threshold question, excluding considerations of the presence or absence of prejudice or of detriment. In particular, *Caswell* was not a case in which a court refused to take account of a lack of prejudice or detriment when considering whether there had been undue delay or whether there were good grounds for extending time.

29. On the contrary, there is authority in England and Wales indicating that these provisions should not be applied in a technical manner. Thus, in *R v Comr for Local Administration, Ex p Croydon* [1989] 1 All ER 1033, 1046 Woolf LJ observed:

> "While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r 4 and section 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

30. Similarly, the decision of Maurice Kay J in *Greenpeace II*, although a first instance decision, has been influential with regard to the correct approach to delay. In that case Greenpeace sought to challenge by judicial review what it maintained was the defective implementation into domestic law of Council Directive 92/43/EEC of 21 May 1992 ("the Habitats Directive") and the resulting failure of the Secretary of State to have regard to the Directive or the implementing legislation when proposing the grant of exploration licences in relation to the United Kingdom's continental shelf. The question of leave was adjourned to the substantive hearing. At that hearing the judge addressed the following questions in turn:

(1) Is there a reasonable objective excuse for applying late?

(2) What, if any, is the damage, in terms of hardship or prejudice to third-party rights and detriment to good administration, which would be occasioned if permission were now granted?

(3) In any event, does the public interest require that the application should be permitted to proceed?

Under the first head, the judge concluded that Greenpeace had not satisfied the requirement of promptness. It should have applied sooner and there was no reasonable objective excuse for their failure to do so. Under the second head, he concluded that because the application had been made at an earlier stage in the sequence of events than in the challenge brought by Greenpeace in *Greenpeace I* in respect of an earlier licensing round, where leave had been refused on grounds of delay, the prejudice to oil companies and others was significantly less and the implications for good administration were less damaging than in *Greenpeace I*. Under the third head, he noted that he had heard full submissions on the merits and it was plain that Greenpeace was right about the central substantive issue in the case, the geographical extent of the Habitats Directive. This and the resulting erroneous approach of the Secretary of State were matters of substantial public importance. Accordingly, notwithstanding the lack of promptness, this was a case in which the public interest balance came down in favour of extending time and permitting the application to be made.

31. It is apparent, therefore, that notwithstanding his conclusion that there was a lack of promptness and no objective excuse for applying late, the judge did not end his consideration at that point but went on to consider the extent of likely prejudice or detriment and gave weight to the fact that they were likely to be significantly less than in *Greenpeace I* when concluding that the public interest balance came down in favour of extending time and permitting the application to be made.

Discussion

32. The substantial disagreement in the case law in Trinidad and Tobago as to the correct approach to the issue of prejudice and detriment in the context of delay in applying for judicial review may be summarised as follows. One school of thought would exclude the presence or absence of prejudice or detriment from an assessment of whether delay has been unreasonable and whether an extension of time should be granted. On this approach it is only if there are good grounds to extend time that the court will go on to consider whether an extension of time would result in prejudice or detriment. If prejudice or detriment is shown, leave to apply for judicial review may still be refused. If, however, there are no good grounds for extending time, leave to apply for judicial review will be refused notwithstanding the fact that no likely prejudice or detriment has been established. In this way an applicant is deprived of the opportunity to rely on an absence of prejudice or detriment. Another school of thought considers the presence or absence of prejudice or detriment to be at least a relevant consideration when determining whether there is a good reason to extend time and in *Abzal Mohammed* the Court of Appeal went so far as to hold that the court may not refuse leave if there is no prejudice or detriment.

33. The provisions of the Judicial Review Act and the CPR with which we are concerned in this case are not entirely happily drafted. In this they resemble the provisions in England and Wales considered above. Various provisions overlap and there is a degree of repetition. In interpreting them it is desirable, if possible, to arrive at a reading which gives compatible effect to all of the provisions. In the event of an irreconcilable conflict between the Judicial Review Act and the provision of the CPR, the primary legislation must, of course, prevail.

34. Delay or lack of promptitude is addressed in both subsections 11(1) and 11(2) and in CPR rule 56.5(1). In this regard, it seems clear that the requirement that an application shall be made promptly and in any event within three months from the date when the grounds first arose (section 11(1)), "undue delay" (section 11(2)) and "unreasonable delay" (rule 56.5(1)) all refer to a single concept. Extension of time is addressed expressly only in section 11(1). Prejudice and detriment are addressed in section 11(2) and in rule 56.5(3).

35. The scheme of the legislation does not provide any support for the view that subsection 11(1) should be applied in isolation from other provisions, in particular subsection 11(2). Subsections 11(1) and (2) address overlapping concepts. When they are addressed at the same hearing, if the judge concludes that leave should be refused because of the existence of prejudice or detriment arising from delay, the result will not be the withdrawal of leave otherwise granted under subsection 11(1) but a refusal of leave on the basis of a refusal to extend time under that subsection. Thus, issues of delay and extension of time are not insulated from considerations of prejudice and detriment. Furthermore, rule 56.5(3), which does not have a counterpart in the relevant legislation in England and Wales, expressly provides that when considering whether to refuse leave or relief because of delay the judge must consider the issues of prejudice and detriment. Once again, this refers to a refusal of leave on grounds of delay and is inextricably linked with the issue of extension of time. This provision is totally inconsistent with the notion of an insulated threshold condition in subsection 11(1). Moreover - and this is critical - subsection 11(3) provides that "in forming an opinion for the purpose of this section" the court may have regard to such other matters as it considers relevant. Thus, the court is permitted to have regard to considerations of prejudice and detriment when assessing delay under both subsections 11(1) and (2), and when considering extension of time under subsection 11(1). Where such factors are in play, they must surely be relevant to the application of both subsections 11(1) and (2). The open-ended provision of subsection 11(3) is totally inconsistent with the suggested insulation of subsections 11(1) and (2) from each other. These provisions must be read as a whole and the relevance of prejudice or detriment is not limited to a residual discretion under section 11(2).

36. More generally, and quite independently of the particular provisions and scheme of the legislation in Trinidad and Tobago, as a matter of principle, considerations of prejudice to others and detriment to good administration may,

depending on the circumstances, be relevant to the determination of both whether there has been a lack of promptitude and, if so, whether there is good reason to extend time.

37. The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether an application has been made promptly or with undue or unreasonable delay. Thus, for example, in 1991 in *R v Independent Television Commission, Ex p TV Northern Ireland Ltd* reported [1996] JR 60 Lord Donaldson MR warned against the misapprehension that a judicial review is brought promptly if it is commenced within three months.

> "In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged." (p 61)

Similarly, in *R v Chief Constable of Devon and Cornwall, Ex p Hay* [1996] 2 All ER 711, Sedley J observed (at p 732A):

> "While I do not lose sight of the requirement of RSC Order 53 rule 4 for promptness, irrespective of the formal time limit, the practice of this court is to work on the basis of the three-month limit and to scale it down wherever the features of the particular case make that limit unfair to the respondent or to third parties."

Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.

38. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest. (See for example, *Greenpeace II* at pp 262-264; *Manning v Sharma* [2009] UKPC 37, para 21.) Here the Board finds itself in agreement with the

observations of Kangaloo JA in *Abzal Mohammed* (para 25) cited above para 17. In Trinidad and Tobago these are all matters to which the court is entitled to have regard by virtue of subsection 11(3). More fundamentally, where relevant, they are matters to which the court is required to have regard.

39. If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way. It is not controversial in these proceedings that, even where there is considered to be a good reason to extend time, leave may nevertheless be refused on grounds of prejudice or detriment. By contrast, if, without taking account of the absence of prejudice or detriment, it is concluded that there is no good reason for extending time, leave will be refused and their absence can never operate to the benefit of a claimant.

40. The approach described by Lord Goff in *Caswell* may well reflect a concern arising from the procedure for applying for leave to apply for judicial review. Lord Goff noted (at p. 747 D-E) that questions of hardship or prejudice, or detriment, under section 31(6) would be unlikely to arise on an *ex parte* application, when the necessary material would in all probability not be available to the judge. A similar concern can be detected in the judgments of the majority in the Court of Appeal in the present case. Smith JA noted (para 27) that at the leave stage, which is usually *ex parte*, and where the public authority would not in all likelihood have filed an affidavit, it would be very difficult in most cases properly to know, assess or weigh competing factors of prejudice and detriment to good administration. Therefore, he suggests, to mandate proof of prejudice and detriment to good administration at the leave stage would, in practice, negate the requirements of timeliness in relation to applications for judicial review. Bereaux JA made a similar point (para 8):

> "Generally, refusal of leave, even after time is extended, will be at an *inter partes* hearing where evidence of substantial hardship, substantial prejudice or administrative detriment may be put in by the opposing party. This is unlike the *ex parte* hearing where the promptitude question is considered usually without an opposing party and generally without evidence from the opposing party of such prejudice, hardship or detriment."

41. The allocation of issues of delay and extension of time, on the one hand, and prejudice and detriment to good administration on the other, to discrete hearings may have lent some support to the notion that extension of time is a threshold issue and that issues of prejudice or detriment do not arise at that stage. However, for the reasons given at paras 27 and 28, above, *Caswell* provides no justification for the claimed insulation of these issues from each other. Furthermore, civil procedure has developed considerably in England and Wales since 1990. Nowadays the pre-action

letter of response allows a respondent or interested party to draw attention to the possibility of any prejudice or detriment. Compliance with pre-action protocols and the Civil Procedure Rules should ensure that in most cases issues of prejudice or detriment to good administration are identified at the outset. Where such issues are raised by a defendant in the context of delay, it will be open to the judge to adjourn the question of leave to an *inter partes* hearing or to order "a rolled-up hearing", at which leave will be considered, followed immediately by the substantive application, if leave is granted. (*Greenpeace II*, for example, was a rolled-up hearing.) In either case, full consideration can be given to issues of extension of time, prejudice and detriment, on the basis of evidence filed by the parties. In any event, even if leave is granted without full consideration of issues of prejudice and detriment resulting from delay, these may still be a bar to relief at the substantive hearing. The Board has not been advised of the extent to which similar procedures are available in Trinidad and Tobago. Nevertheless, it is worthy of note that the issue arose in the present case on an *inter partes* application to set aside leave. Moreover, section 11(2) makes clear that the presence or absence of prejudice or detriment is a matter appropriate for consideration at the leave stage.

42. Similarly, the Board does not consider that there is any inconsistency between its considered view as to the relevance of prejudice and detriment and the approach adopted by the Board in *Fishermen 1* [2005] UKPC 32. Bereaux J's proposition (4), quoted above (para 11), which was approved by the Board (para 22), is derived from the speech of Lord Goff in *Caswell* at p 747B-C. It does not say that prejudice and detriment are irrelevant to issues of promptitude or the existence of a good reason to extend time. Furthermore, in that case the Board viewed Bereaux J as having confirmed his preliminary conclusion against granting an extension of time because of unjustifiable delay by testing it against other relevant considerations including prejudice and detriment. *Fishermen 1* is not authority for an insulated threshold condition as a result of which leave can be refused on grounds of delay, without giving due consideration to the presence or absence of prejudice or detriment.

43. For these reasons the Board accepts the submission of Mr Fordham on behalf of the appellant that, far from constituting an insulated residual discretion, considerations of prejudice and detriment are capable of being of key relevance to the issues of promptitude and extension of time.

Application to this case

44. Both Smith JA and Bereaux JA in their judgments in the Court of Appeal refer to an agreement between the parties limiting the issues for consideration before Boodoosingh J. Smith JA (para 29) stated that it was important to remember that in this case the parties had agreed that the only factors for the judge to consider were delay and costs. Smith JA referred to the judge's finding of unreasonable delay and

observed that "[h]aving thus decided the matters that the parties had agreed to submit to him, for consideration, he was not bound to go on to consider detriment and prejudice as further grounds for refusing leave". Bereaux JA observed (para 12) that although the judge had given no express consideration to whether there was a good reason to extend time, he obviously had found that there was no good reason and that, in any event, as agreed between the parties, the sole question which arose for him to consider on the promptitude question was pure delay. It may be that these comments are based on a misunderstanding. Reference has been made above (para 2) to the agreement between the parties, so far as the substance of the application is concerned, to abide by the outcome in the parallel proceedings. The parties confirmed this by sending a jointly signed letter to Boodoosingh J in which they stated that there would be no submissions on the merits and "[t]he only issue for the determination of this Honourable Court is the issue of delay and costs". (Judgment of Smith JA, paras 2 and 3.) The Board is not, however, aware of any agreement limiting the scope of the hearing on the issue of delay. Mr Fordham, on behalf of the appellant, has told us that there was no such agreement. Equally, Mr Alexander, on behalf of the respondent, has not sought to justify the decisions below on this basis.

45. The Board considers that the approach of the judge, Boodoosingh J, in setting aside leave was erroneous. He founded his decision entirely on the ground that there was no satisfactory explanation for the delay which had occurred. Contrary to the observation of Bereaux JA in the Court of Appeal (para 12) that the judge "obviously found that there was no good reason" to extend time, in the Board's view he failed to give any consideration to whether there was a good reason for extending time. He failed to address the likelihood of prejudice or detriment resulting from the grant of leave. He also failed to have regard to other relevant considerations including the merits of the claim and the overall public interest in the proceedings. As a result, he exercised his discretion in setting aside leave on an erroneous basis.

46. In the Board's view, the approach of the majority in the Court of Appeal was also flawed. For the reasons set out above, the Board considers that issues of prejudice and detriment are not limited to a residual discretion but are capable of having an important bearing on an assessment of promptitude and whether there exists a good reason to extend time. In particular, an approach which seeks to insulate prejudice and detriment in the manner favoured by the majority in the Court of Appeal is likely to result in a failure to give due weight to an absence of such prejudice or detriment. In the circumstances of the present case the judge at first instance was required to have regard to prejudice and detriment before reaching a conclusion on whether to set aside leave. The Board finds itself in agreement with Jamadar JA's view (para 48) that, reading section 11 as a whole, a judge considering whether there is a good reason for extending time must take account of a broad range of factors, including but not limited to, considerations under subsections 11(2) and 11(3), the merits of the application, the nature of the flaws in the decision-making process, whether or not fundamental rights are implicated and any public policy considerations, to the extent that they may be relevant.

47. The Board is, however, unable to endorse without reservation the approach followed by Kangaloo JA in *Abzal Mohammed*. It is not the case that "it is only if there is both undue delay and prejudice or detriment that the Court may refuse to grant leave" (per Kangaloo JA, para 21). Here the Board agrees with the observation of Jamadar JA in the Court of Appeal in the present case (para 51) that Kangaloo JA in *Abzal Mohammed* overstated the position somewhat. While prejudice or detriment will normally be important considerations in deciding whether to extend time, there will undoubtedly be circumstances in which leave may properly be refused despite their absence. One example might be where a long delay was wholly lacking in excuse and the claim was a very poor and inconsequential one on the merits, such that there was no good reason to grant an extension.

48. In other circumstances the Board would consider it appropriate to remit this matter for consideration on the correct legal basis of the question whether leave to apply for judicial review out of time should be set aside. It notes that Jamadar JA in his dissenting judgment in the Court of Appeal indicated (para 68) that, the judge having found delay, the appropriate course would have been to remit the matter to the judge for a re-evaluation taking account of all relevant considerations. The following unusual features, however, make this course inappropriate in the Board's view.

(1) First, on 29 April 2011, prior to the hearing of the application to set aside leave to apply for judicial review, the parties wrote a joint letter informing the court that the similar application in parallel proceedings had been decided by Rajnauth-Lee J in favour of the applicant and that, as a result, the defendant did not propose to resist the application on the substantive merits.

(2) Secondly, the respondent conceded by letter dated 30 September 2016 (between the hearing of the appeal on 29 July 2016 and the handing down of judgment by the Court of Appeal on 26 April 2017) that there is no evidence of likely prejudice or hardship. (See judgment of Jamadar JA para 68.)

(3) Thirdly, following the grant of leave to appeal by the Board, the information sought by the FOIA request was provided by the NEC to the appellant on 28 October 2018, albeit without conceding the appeal or the judicial review proceedings.

49. By the time the judge considered the application to set aside the grant of leave to apply for judicial review, the substance of the application had already been conceded by the respondent. The respondent was resisting disclosure of the information sought simply on the basis that there had been delay and therefore the appellant could not obtain an order in the judicial review proceedings for their disclosure. The Board is compelled to observe that the failure of NEC to disclose,

quite independently of these proceedings, the information sought once it had accepted a legal obligation to do so, was irresponsible on the part of a public body. Nevertheless, the proceedings were not moot as they raised an important point of principle.

50. In the light of these matters and having regard to all the circumstances of the case, the Board proposes simply to allow the appeal with costs.