

[1988–90 Gib LR 246]**VICTORY v. CAPTAIN OF PORT OF GIBRALTAR**

SUPREME COURT (Kneller, C.J.): June 6th, 1990

Administrative Law—judicial review—discovery—no discovery where no indication as to which documents relevant to issues raised by affidavit or evidence for breach of public duty by authority

Administrative Law—judicial review—Governor—court has jurisdiction to review Governor's exercise of discretion if outside limits imposed by ordinance conferring it—not altered by Governor's acting in gubernatorial capacity—service of application on Governor required by R.S.C., O.53, r.5(3) as affected by any order—Governor (or individual nominated by him) has right to file affidavit in reply

Evidence—witnesses—cross-examination—judicial review—although cross-examination generally permitted when required for justice of case, rarely allowed in judicial review applications—exception made in cases of alleged procedural unfairness or breaches of natural justice

The applicant sought judicial review of the Captain of the Port's refusal to grant him licences to operate fast launches.

The applicant, who had been operating boats for 30 years, owned 3 fast launches. In January 1987, he applied for, and was granted, licences for the launches, in accordance with the requirements imposed by the Port (Amendment) Rules, r.117B. Shortly before the expiry of these licences, in January 1988, his then solicitor wrote to the Captain of the Port asking for the licences to be renewed, sending the necessary fee and documents; the applications were rejected, without any reasons being given, either at the time or upon a subsequent request. In October 1988, the applicant applied again, and his applications were refused by the Governor (to whom they had been referred by the Captain of the Port), who declined to give his reasons either to the Captain of the Port or to the applicant. The applicant sought an order of certiorari quashing the decision; a prohibitory injunction preventing the Captain of the Port from taking irrelevant considerations into account when processing the applicant's application for fast launch licences, and/or from taking directions in relation to the applications from people not authorized by the fast launches legislation to give them; an order of mandamus compelling the Captain of the Port to grant the applications for renewal of the licences; an order joining the Governor as a respondent to the proceedings; an order for discovery

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against the Crown in respect of any documentation relating to executive policy relating to the fast launches legislation in general, and the instant application in particular; and directions as to the mode of trial, including an order that the applicant's counsel could cross-examine the maker of any affidavit relating to the proceedings.

The applicant submitted that (a) there was no valid reason in law justifying the refusal of the Captain of the Port and the Governor to renew his licences; (b) he had a legitimate expectation that his applications for renewal would be approved; (c) the Captain of the Port and/or the Governor had acted in bad faith, which was indicated by the refusal to give reasons; (d) the Captain of the Port and the Governor were unduly influenced by irrelevant considerations, and that the Governor's refusal was due to British policy considerations, which ought not to have been taken into account given that the Ordinance was Gibraltar legislation; (e) the Governor should be joined as a party to the proceedings, as the refusal of the licences had been his decision; (f) the Governor was not immune from judicial review, and that in order to make a full examination of the merits of the matter, discovery of all the relevant documents, including those subject to a claim of privilege by the Crown, would be necessary; (g) the onus was on the Governor to disprove the allegation of bad faith by showing reasonable cause for his refusal to assent to the renewal of the licences; (h) as there was an allegation of bad faith, the deponent of any affidavit put in by or for the Governor should be subject to cross-examination; and that (i) this was merely an interlocutory application for directions, and that the substantive merits of the case were not relevant at this stage.

The respondent submitted in reply that (a) the Captain of the Port had a discretion as to whether or not to grant a licence, albeit one that was fettered by the requirement in s.4(1) of the Ordinance to seek the Governor's approval before granting a licence; (b) the applications were applications for new licences under the Ordinance, rather than applications for renewal of the existing licences, and there was no expectation that the licences would be granted; (c) neither the Governor nor the Captain of the Port was required to give reasons for refusing to grant a licence; (d) the applicant did not have an arguable case; (e) the court had no power to compel the Governor to file an affidavit; (f) the applicant was only seeking discovery speculatively, and that there was no cause for such an order, which would be inappropriate in the present circumstances, to be made; (g) if an order for discovery were made, the court had a discretion as to whether the relevant documents would be covered by a claim of privilege by the Crown; and that (h) the application for joining the Governor as a party to the proceedings was out of time.

Held, making the following orders:

(1) The Governor was to be joined as a party to the action. He had exercised the discretion vested in him by s.4 of the Ordinance in refusing to assent to the Captain of the Port's decision to grant the applicant the

licences, and the court therefore had jurisdiction to determine whether he did so within the limit of the powers vested in him by the Ordinance. The fact that the Governor was acting as Governor when he exercised his discretion did not remove the court's jurisdiction to review his exercise of it; he had to act in pursuance of the powers given him by law. As he would be affected by any order made, service of the application on him was required by the Rules of the Supreme Court, O.53, r.5(3). He would have the right to file an affidavit in reply—or to order an official who recalled the previous Governor's reasons for exercising his discretion as he did to do so on his behalf—when served with the application. The application for joining him was not out of time (paras. 45–46).

(2) The cross-examination of the deponent of any affidavit would not be permitted at the present stage. While cross-examination was generally permitted when the justice of the case required it, the courts had been slow to permit it on applications for judicial review, as the issues arising rarely gave rise to it, although exceptions were often made in cases of alleged procedural unfairness or breaches of natural justice. Here, the justice of the case did not require cross-examination of the Captain of the Port, as he had indicated that he did not know why the Governor did not support his willingness to grant the applications; it was not yet known whether the Governor would file and serve an affidavit, or, if so, what issues—if any—it would raise that might require cross-examination (para. 47; para. 50).

(3) The application for discovery would be refused. The evidence adduced had not revealed reasonable grounds for believing that there had been a breach of public duty by either the Captain of the Port or the Governor, and there was no indication as to which documents would be relevant to the issues (if any) raised by the affidavit or affidavits, if they were served (para. 48; para. 51).

Cases cited:

- (1) *Air Canada v. Trade Secy. (No. 2)*, [1983] 2 A.C. 394; [1983] 2 W.L.R. 494; [1983] 1 All E.R. 910, observations of Lord Denning, M.R. applied.
- (2) *Att.-Gen. v. Marrache*, C.A., Civil App. No. 2 of 1981, January 28th, 1982, unreported, applied.
- (3) *De Verteuil v. Knaggs*, [1918] A.C. 557; (1918), 87 L.J.P.C. 128; 118 L.T. 738; 34 T.L.R. 325, applied.
- (4) *Eleko v. Officer Administering Govt. of Nigeria*, [1931] A.C. 662, *dicta* of Lord Atkin applied.
- (5) *George v. Environment Secy.* (1979), 38 P. & C.R. 609; 77 L.G.R. 689; [1978] R.V.R. 215, applied.
- (6) *Khawaja v. Home Secy.*, [1984] A.C. 74; [1983] 2 W.L.R. 321; [1983] 1 All E.R. 765, referred to.
- (7) *O'Reilly v. Mackman*, [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, observations of Lord Diplock applied.

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- (8) *R. v. Captain of Port, ex p. Schiller*, Supreme Ct., Misc. Civ. App. No. 113 of 1988, October 19th, 1988, unreported, applied.
- (9) *R. v. Inland Rev. Commrs., ex p. National Fedn. of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617; [1981] 2 All E.R. 93, observations of Lord Scarman referred to.
- (10) *R. v. Inland Rev. Commrs., ex p. Rossminster Ltd.*, [1980] A.C. 952; [1980] 2 W.L.R. 1; [1980] 1 All E.R. 80; (1979), 70 Cr. App. R. 157; [1979] T.R. 309, observations of Lord Scarman referred to.
- (11) *Vinet v. Cortes*, 1988–90 Gib LR 26, applied.

Legislation construed:

Fast Launches Ordinance (1984 Edition), s.4(1):

“The Captain of the Port may, with the approval of the Government, grant to the owner of a fast launch, or to a person intending to purchase a fast launch, a licence to use it in the controlled area.”

Port (Amendment) Rules, r.117B: The relevant terms of this rule are set out at para. 22.

C. Finch for the applicant;

K.W. Harris, Attorney-General, for the respondent.

1 **KNELLER, C.J.:** Obdulio Victory, by summons in chambers of November 1st, 1989, asks this court to give directions concerning the future conduct of his application. More particularly, he applies to join His Excellency the Governor as a respondent to the proceedings; for an order for discovery against the Crown in respect of any documentation in its possession, power or control regarding the executive policy towards the Fast Launches legislation generally, and matters affecting the Governor’s involvement and/or the involvement of other Crown officials (whether authorized by the legislation or not) in respect of the instant application in particular; and directions as to the mode of trial, including the right to cross-examine the makers of any affidavit or the persons on behalf of whom an affidavit has been made.

2 His counsel asked for leave to amend the originating motion on notice of May 17th, 1989 which begins the proceedings. The Attorney-General, on behalf of the respondent, opposes all these orders.

3 The story of these proceedings to date is as follows. Obdulio Victory, on May 10th, 1989, sought leave to apply for judicial review under O.53, r.3 of the Rules of the Supreme Court. The judicial review that he sought was that of a decision of the Captain of the Port dated February 15th, 1989, which Mr. Victory received on February 20th, 1989. The Captain of the Port is said to have refused to renew the fast launch licences for Mr. Victory’s three fast launches.

4 What the applicant wants is an order of certiorari quashing that decision; an order of prohibition against the Captain of the Port preventing him from taking irrelevant considerations into account in processing Obdulio Victory's application for fast launch licences and/or for complying with directions affecting his discretion and/or decision as to whether or not to grant fast launch licences from persons not authorized under the Fast Launches Ordinance; an order of mandamus commanding the Captain of the Port to grant the applications for renewal of these licences; or, in the alternative, declaratory orders in respect of the matters set out under the paragraphs relating to the orders of certiorari, prohibition and mandamus.

5 The grounds on which this relief is sought are: failure to comply with the rules of natural justice, in that the Captain of the Port failed to give the applicant any or any further hearing on these applications, including any ground of objection to each of them; breach of statutory duty; taking into account irrelevant considerations and/or failing to take into account relevant considerations; abuse of discretion; and, finally, bad faith.

6 There is an affidavit in support sworn by Mr. Victory on May 11th, 1989. A summary of its contents is that he is a married man with two children, and has lived in Gibraltar all his life. He is a Gibraltarian. He and his family have been in what he calls "the boat business" for as long as he can remember, and certainly for what he terms his working life, which is for more than 30 years. He trades in tobacco, coffee, electrical goods and other commodities. He has never been convicted of any national or international offence against trade or customs laws and regulations. The Gibraltar Police on September 25th, 1986 certified that he was a British subject and that nothing was known which was prejudicial to his character. They gave him a Good Conduct Certificate, No. 08640.

7 He claims that he is the legal and beneficial owner of three motor vessels which are the subject of this application for judicial review. They are called *Willing and Waiting*, *El Bonito*, and *See You Later*. The three of them are classed as fast launches, under the provisions of the Fast Launches (Control) Ordinance. He has owned these boats for a considerable period of time, since before the Ordinance commenced. He was lawfully using these three launches until the new legislation came into being. He is also a registered taxi driver, but his livelihood, and that of his family, was mainly generated from the commercial use of these boats.

8 Then came this new legislation designed to control the operation of fast launches within the Port of Gibraltar. Mr. Victory applied for, and was granted, on January 20th, 1987, a licence to operate these fast launches. He produces those licences as photostat exhibits. I will turn to those.

9 The Captain of the Port granted him a licence to operate the fast launches on January 20th, 1987; the only special conditions attached to

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the grant of the licences were that life-saving appliances should be carried on the launches and that they should be sufficient and in good condition; that the general equipment should be in good condition and properly adjusted; that the launches should be seaworthy and not unsafe; and that the vessels must be surveyed before June 1st, 1987. The licences were in the same form for each of the three boats.

10 On January 8th, 1988, his solicitor, Mr. Azopardi, wrote to the Captain of the Port asking for those licences to be renewed in accordance with the Ordinance and regulations, and sent along the necessary fee and all the documents. The applications were rejected by the Captain of the Port on January 13th, 1988, without any reasons being given. Mr. Victory complains that he was not asked to appear before the Captain of the Port, he was not questioned by any official, and he was not told by any official (including the Captain of the Port, or any person acting for him or on his behalf) or other person in authority what there was about him or his conduct or his fast launches that prejudiced his expectation of having the licences renewed.

11 The Captain of the Port was asked to give his reasons for refusing to grant a renewal of these licences but he did not do so. Then there came something that Mr. Victory calls “unfortunate personal circumstances and subsequent problems with the vessels concerned,” so he was not in a position to renew his application or take further action about his refusal to renew. He changed his solicitor and instructed Mr. Finch to submit a new application, which was delivered by hand to the Captain of the Port on October 13th, 1988, and was in accordance with the Ordinance and the regulations in force at that time.

12 Each application is set out in Form FL/1, and gives the applicant’s full name as Obdulio Victor Victory; his date of birth, November 1st, 1951; his nationality as British; his residential address as Flat 508, Ocean Heights, Montagu Place, Gibraltar; his telephone number; his business address; and his business telephone number.

13 He answers para. 8 of the form by indicating that he has never been convicted of an offence against the Imports and Exports Ordinance, the Merchant Shipping Ordinance, the Port Ordinance or the Drugs (Misuse) Ordinance. He then gives the particulars of each launch: where it was registered; its manufacturer; its type; its length; the make and maximum brake horsepower of the engine it houses; and the purpose for which the launch will be used if a licence is granted.

14 So far as *El Bonito* is concerned, it is declared to be a glass-reinforced plastic “pleasure yacht.” Its maximum brake horsepower is 990, and the purpose for which the launch will be used if a licence is granted is said to be “pleasure yacht”: attached is a Certificate of Survey for it. Amongst other things, it says that the yacht is “soundly constructed and in

a good state of repair with the name and the port of registry inscribed as required.”

15 *See You Later* was of the same type, namely a glass-reinforced plastic pleasure yacht, and had a higher maximum brake horsepower of 1320. This was also to be used as a “pleasure yacht” if a licence were granted. It had the same Certificate of Survey.

16 The last launch, *Willing and Waiting*, was the same sort of yacht and had the same maximum brake horsepower as “*El Bonito*”; if a licence were granted, it was also to be used as a “pleasure yacht.” It was soundly constructed and in a good state of repair.

17 The Captain of the Port returned the cheque on October 24th, 1988. He was asked on October 26th of the same year what had happened to the three applications. There was no reply. Mr. Victory’s solicitor telephoned the Captain of the Port and was told that the applications had been sent for comments to the Collector of Customs and the Commissioner of Police. The Captain of the Port gave the applicant’s solicitor the impression that the Deputy Governor had probably been consulted or involved in some fashion. No information was given as to what was being sought from these persons, although it seemed that these three officials had become part of the decision-making process. None of them contacted Obdulio Victory or the solicitor about anything to do with these applications or told them of any objections to their renewal. A letter then went to the Attorney-General from Mr. Victory’s solicitor asking for an answer.

18 The Attorney-General at the time made inquiries about these applications and discovered that a memorandum addressed to him from the Commissioner of Police dated December 1st, 1988 had been misfiled and had not been brought to his attention. He admitted that he was responsible for a large part of the delay in dealing with the applications. He apologized to Mr. Victory for the inconvenience caused to him, and forecast that the Captain of the Port would be replying very soon. On February 15th, 1989 the Captain of the Port wrote to the solicitors and said he was sorry that he had to tell them that the applications had been refused.

19 Going back to Mr. Victory’s affidavit, he goes on to say once again that he has not been convicted of any offences under these Ordinances or the Fast Launches (Control) Ordinance, and that he has really not been given any hearing on this matter or told whether there is anything about him or his behaviour, or about the fast launches themselves, which was prejudicial to his expectation of having them all renewed.

20 So, he concludes, he feels deeply aggrieved by the decision of the Captain of the Port. He believes that the decision was not that of the Captain of the Port. He believes that if the documents which affect or

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relate to those applications were to be looked at, it would be found that the Captain of the Port was unduly influenced, or that he was directed to refuse the applications. He thinks that the reason for refusing them had nothing whatever to do with the merits of his application, and that there is no valid reason in law—especially under the Fast Launches (Control) Ordinance—justifying such refusals. The delay and the refusal to give either a hearing or notice of any objection or a valid reason for refusing his application, in his view, indicates that the Captain of the Port acted in bad faith, and that he has not duly discharged his statutory duty and discretion as he is obliged to do under that Ordinance. And if the Captain of the Port had taken into account all the matters that he should have, and eschewed irrelevant ones, he would have been obliged to grant these applications for renewal in accordance with the legislation, its spirit and intent, and with principles of equity and justice. Mr. Victory says that he has lost £500 per week because he has not been able to use these three fast launches for his business.

21 The Captain of the Port, Frederick James Hayward, has replied with an affidavit dated July 10th, 1989, in these terms. He has been employed by the Government of Gibraltar in this position for 11 years and he says that before January 1st, 1987, there were no statutory provisions in force in Gibraltar regulating the licensing and use of vessels now known as fast launches in the Port Waters or territorial waters of Gibraltar. It was on that date that the provisions of the Port (Amendment) Rules 1986 (“the Rules”) became law by virtue of Legal Notice No. 114 of 1986, which was published on November 27th, 1986.

22 Rule 117B(1) empowered the Captain of the Port in his discretion to “grant to the owner of a fast launch, or to a person intending to purchase a fast launch, a licence” to operate it out of the Port of Gibraltar and in the territorial waters off it. Rule 117B(2) of the Rules also empowered him to attach to the grant of any such licence “such conditions as [he thought] desirable or necessary.” None of the Rules imposed any obligation upon him to seek the approval of any other person, either in the grant of a licence or the attachment of any conditions.

23 He accepts that Obdulio Victor Victory is the owner of these fast launches and admits that licences were granted by him for all three vessels on January 20th, 1987, in accordance with the discretionary powers in r.117B. The applications had come in to him in late 1986, probably in anticipation of the Rules becoming effective on January 1st, 1987. The Captain of the Port made some enquiries about Mr. Victory, and nothing that he heard suggested that the licences should not be granted. These licences expired on January 19th, 1988.

24 The Rules, however, together with an amendment effected by Legal Notice No. 97 of 1987, remained in force only until July 16th, 1987, when

the present statutory provisions regulating the licensing and use of fast launches contained in the Fast Launches (Control) Ordinance 1987 (“the Ordinance”) came into operation.

25 This marked a sea change (if I may use that term) in the legislature’s approach to the licensing of fast launches because, under s.4(1) of the Ordinance, the Captain of the Port was given a discretion to grant to the owner of a fast launch (or to a person intending to purchase one) a licence to use it if it met with the approval of the Governor. The Captain of the Port no longer had sole discretion in the matter, and was no longer empowered to attach to any licence granted under the Ordinance such conditions as he considered necessary or desirable.

26 From the middle of July 1987, therefore, the Captain of the Port had first of all to decide whether he in his discretion should grant the applicant the licence that he sought, and if he decided that he should, then, before doing so, to get the approval of the Governor.

27 No complaint about the applicant’s suitability to be the holder of a fast launch licence for any of these fast launches had been made to the Captain of the Port during the currency of the licences which were granted on January 20th, 1987. When he received further applications for the same vessels in January 1988, he saw no reason why they should not be granted; he told the Governor this, and asked for his approval.

28 At the same time, acting on advice that he had received and administrative directions that had been given to him, he sent copies of these applications to the Collector of Customs and the Commissioner of Police, from whom the Governor had said that he wanted reports on all applicants for fast launch licences to assist him in determining whether or not his approval of the grant of a licence or licences should be given.

29 The Governor declined to give his approval to the grant of a further licence for any of these launches. The Captain of the Port was given no reasons or explanation for the Governor’s decision in this matter. The Captain of the Port then had to tell Mr. Victory’s solicitor that the applications had been refused despite his own willingness to grant them. He could not give any reasons for the refusal of the Governor to approve each one, because none had been passed on to him.

30 When the next applications came in on October 24th, 1988, once again the Captain of the Port was ready to give the applicant a licence for each launch because he had nothing against him, the launches, or their use which would prohibit this. Once again, the Governor declined to give his approval, and he did so without giving any reasons. The Captain of the Port is considering still further applications for the issue of licences for these three fast launches. He admits nothing else that has been put forward by Obdulio Victory in his affidavit in support of his summons.

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31 Now, for the moment, I cannot squeeze out of the material before the court any further allegations of fact. So I now turn to the submissions of Mr. Finch and Mr. Harris, which I will summarize. Mr. Finch begins by saying that leave to apply for judicial review was granted by Alcantara, A.J. on May 11th, 1989. The affidavit of the Captain of the Port in reply was filed on July 10th, 1989, and now the applicant knows that the Captain of the Port would have given him licences for another year for each of these fast launches but that the Governor refused to approve of his doing so. He therefore needs to join the Governor and amend the pleadings and serve them. He also wants a direction from the court that the Governor should file an affidavit setting out his position.

32 Mr. Finch submits that for centuries the people of Gibraltar have had the right to navigate from these shores in their boats, and, until recently, to do so in fast launches. The amendment to the Port Rules and, later, the passing of this Ordinance interfere with this right, and, more particularly, with the livelihood made out of these launches by Mr. Victory. He goes so far as to say that the Governor acted in this matter in bad faith. There is nothing in the Ordinance which sets out any criterion for the grant of a licence or a refusal of it, so none can be imposed by an outside agent. Here there would be no margin in favour of the Crown.

33 When it comes to discovery, Mr. Finch underlines the fact that because there is an allegation of bad faith and a refusal to renew or to continue the licences, the Governor must now explain why the renewal was not granted. The onus is on the Governor. Reasonable cause for this must be shown to a very high standard. So that is why he wants to have a look at the documents relating to the Government's policy on this and see if they are affected by local or foreign concerns; or, in other words, is it Gibraltar policy, or is it one imposed by the United Kingdom? Should it be a policy that the United Kingdom has brought to bear, Mr. Finch would like to submit that that is something that ought not to be taken into account so far as the workings of a local Ordinance are concerned. Over and above that, he would like to find out how it is that the Governor came to a decision which was contrary to that of the Captain of the Port, especially as he has done so without giving any reasons.

34 Then, so far as the directions as to the mode of trial are concerned, Mr. Finch accepts that it will have to be heard by one judge, but he would like an order that he be allowed to cross-examine the deponent of an affidavit put in by or for the Governor because there is an allegation of bad faith. The Captain of the Port has already put in an affidavit, and he has to be before the court. He has explained that he would have granted the licences but that the Governor refused to approve of his doing so, so now Mr. Finch submits that the Governor should be called upon to explain why he said no.

35 Generally, Mr. Finch added, the Governor was not protected from judicial review by the court. He reminded the court that there was no power of appeal under the Ordinance. The court still had its supervisory powers. He suggested that when judicial review is concerned with allegations of bad faith, a court still has to consider the merits of the matter, and that it would need to look at all the documents, including the privileged ones. Mr. Finch said that the proper order for the costs of this application should be that they be reserved, and that each side should have liberty to apply before the hearing began.

36 Mr. Harris, in reply, said that the court should not make these orders. All that Alcantara, A.J. did when he gave leave under the Rules of the Supreme Court, O.53, r.3 was to indicate that Mr. Victory had what is known as *locus standi* and an arguable case. This has not been conceded by either the Captain of the Port or the Crown. There have been two cases which concern these Rules and the Ordinance, in which I delivered lengthy judgments which Mr. Harris prayed in aid. The first was *Vinet v. Cortes* (11), and the second *R. v. Captain of Port, ex p. Schiller* (8).

37 Mr. Harris submitted that the Ordinance gave the Governor the power to nullify the Captain of the Port's discretion to grant or to refuse a licence by not approving its exercise. These were not applications for renewal, and Mr. Victory had no expectation that the licences would be renewed. Each was a separate new application under the Ordinance. The Governor was not required to give any reasons, just as the Captain of the Port was not obliged to do so; the judgment in *Schiller* had become the authority for that. The only reason why there was an application to join the Governor was that the applicant now realized that it was the Governor who had refused to approve the decision of the Captain of the Port. The applicant had no more statutory right to a licence than had the applicant in *Schiller*, nor a right to a renewal of it even if it had been an application for renewal.

38 The refusal of the decision-maker to give reasons is not a breach of natural justice in an application case. The fact that there is an allegation of bad faith or fraud does not make it one, especially when there is no indication of what the claim of bad faith and fraud is based on. No particulars have been given of these allegations. There is no fetter on the discretion of the Governor in this Ordinance, and there is nothing overwhelmingly in favour of a different decision. This court is not to indicate in detail the conditions or manner in which the Captain of the Port or the Governor ought to exercise his discretion.

39 Mr. Harris also submitted that this court has no power to order the Governor to file an affidavit, or to order anyone to do so on his behalf. He reminded Mr. Victory and his counsel that he had no power to file another affidavit without leave if it included new facts. He strongly objected to an

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order for discovery which he described as “a fishing expedition” and most likely to lead to material for libel or defamation actions. There was no cause for such an order to be made. There was a discretion vested in the court as to whether documents would be covered by a claim of privilege by the Crown. It was rarely appropriate for an application for discovery to be allowed, and it was certainly not appropriate here.

40 Mr. Harris pointed out that judicial review really springs from the residual jurisdiction of the court to control the process of making a decision by those who are entrusted with this task. Interlocutory matters or relief are difficult to obtain in such proceedings. The application for joining the Governor and for judicial review against him was very much out of time, and no more time should be given to the applicant. In all, the summons should be dismissed.

41 Mr. Finch pointed out that the underlying merits seemed to have been argued by the Attorney-General when all that was happening here was that the applicant was making an interlocutory application for directions. All that Mr. Finch was asking for was that the proper parties and issues should be brought before the court. The applicant had asked for licences, they had been refused, and the Captain of the Port then told him that the Governor made the decision. So the applicant had been misled, and the public should be protected from this sort of behaviour. He was not on “a fishing expedition.” He was alleging that there was a blanket policy of refusing a licence to anybody who asked for one for his fast launch, or before he bought one. He wanted to know what allegations had been made against Mr. Victory which prevented the Governor from approving of the Captain of the Port’s exercise of his discretion in the applicant’s favour.

42 It was quite right that the Ordinance did not stipulate what reasons would be sufficient for refusing the licence, and that it did not stipulate that reasons should be given, but the Ordinance should not be used by anybody as an engine of fraud. Maybe the Governor has directed the Captain of the Port to refuse these applications; Mr. Finch asked how the Governor could do such a thing, especially if he had done so by some secret process. The Governor was not above the law here, or anywhere else.

43 So far as the mechanics of such an order went, it would not be necessary to call the previous Governor (who left during the morning of the hearing of this summons); the order would apply to whoever occupied that position when this order was made. He would then select someone to make an affidavit relating to these matters. The Captain of the Port remains a live party because he refuses to give a licence, and the orders (if made) will still affect him. This was merely an application for directions, and an interlocutory application at that.

44 Now I must turn to the law which was cited and which I have discovered for myself. The English authorities are persuasive because they

deal with judicial review which is provided for under the Rules of the Supreme Court, O.53, which, in turn, are applied in Gibraltar by virtue of the provisions of the Supreme Court Ordinance, s.12.

45 The Governor, in my judgment, may and should be joined as a party to this action. He exercised a discretion vested in him by the Ordinance when he refused to support the Captain of the Port's decision to give the applicant licences for his three launches, so it is within the power and jurisdiction of this court to entertain and determine whether or not he did so within the limits of the powers vested in him by the Ordinance: *De Verteuil v. Knaggs* (3). If he acted solely under his executive powers, he can only act in pursuance of the powers given to him by law. The opinion of the Judicial Committee of the Privy Council in *Eleko v. Officer Administering Govt. of Nigeria* (4) ([1931] A.C. at 670, *per* Lord Atkin) was that—

“in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.”

46 The fact that the Governor was acting as Governor is not enough to take the exercise of his discretion outside the scrutiny of the courts: *Att.-Gen. v. Marrache* (2). Moreover, since he will be a person directly affected by the orders or declarations if they are made, O.53, r.5(3) requires service of the application on him. When he is joined, he has the right to file an affidavit in reply or to authorize some official who recalls why the previous Governor did not support the Captain of the Port's decision to grant these licences to do so for him. It may be prudent for him to have the facts on which he wishes to rely before the court dealing fully with the issues raised by the applicant in his statement and supporting affidavit.

47 Generally, cross-examination of affidavit evidence is permitted whenever the justice of the case requires it: O.38, r.2(3) and O.53, r.8(1). The courts are slow to permit it on an application for judicial review: *George v. Environment Secy.* (5); *R. v. Inland Rev. Commrs., ex p. Rosminster Ltd.* (10). The issues that arise rarely require it. The exceptions are alleged procedural unfairness or a breach of natural justice: *O'Reilly v. Mackman* (7) ([1983] 2 A.C. at 282, *per* Lord Diplock). The interests of justice rarely require the attendance of an overseas deponent for cross-examination: *Khawaja v. Home Secy.* (6).

48 There is no inherent right to orders for discovery in applications for judicial review, and it is only in exceptional cases that discovery will be permitted: see *Air Canada v. Trade Secy. (No. 2)* (1) ([1983] 2 A.C. at 410,

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per Lord Denning, M.R.). It will not be ordered “unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty: and it should be limited strictly to documents relevant to the issue which emerges from the affidavits”: *R. v. Inland Rev. Comms., ex p. National Fedn. of Self-Employed & Small Businesses Ltd.* (9) ([1982] A.C. at 654, *per* Lord Scarman).

49 Applying the law to the facts here, and in the exercise of the discretion vested in the court, I give the following directions:

(a) the applicant is to have leave to join His Excellency the Governor as a respondent;

(b) the applicant is to have leave to amend and serve the pleadings within 30 days;

(c) the Governor, or some official directed by him, may file and serve an affidavit in reply within 21 days thereafter;

(d) the trial is to take place before a judge, for 3 consecutive days;

(e) each party is to have liberty to each party to apply; and

(f) the costs of the application are to be costs in the cause.

50 There will be no order that the Governor (or anyone authorized by him) is to file and serve a replying affidavit, and no order at this stage permitting the cross-examination of the maker of any affidavit, because the issues that arise in the affidavit of the Captain of the Port do not indicate that the justice of the case requires it. He was ready to give the applicant his licences, and he does not know why the Governor did not support him, as he is not privy to any principle of high policy in the matter. It is not yet known whether the Governor will file and serve an affidavit or direct someone to do so on his behalf, so it is not known what issues; if any, it will raise.

51 Likewise, the application for discovery is refused. The court is not satisfied at this juncture that the evidence reveals reasonable grounds for believing that there have been breaches of a public duty, and there is no indication yet of what documents are relevant to the issues which emerge from the affidavit or affidavits.

52 The Governor (or his nominee) will have 21 days from today in which to file his affidavit if he elects to provide one. The costs of the application will be, as Mr. Finch submitted that they should, costs in the cause.

Order accordingly.