[2023 Gib LR 382]

IGNACIO v. HOUSING MINISTER and PRINCIPAL HOUSING OFFICER

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): May 5th, 2023

2023/GCA/008

Administrative Law—judicial review—delay—appellant applied out of time for leave to apply for judicial review, and then sought extension of time—applying Denton v. T.H. White Ltd., judge granted extension of time for two grounds of judicial review but refused extension on two other grounds—appellant appealed claiming judge should have considered Supreme Court Act 1960, s.17B(6)—appeal dismissed—s.17B(6) allows defendant to rely on prejudice or detriment as reasons for court to refuse relief—lack of prejudice often material factor in claimant's favour but not factor which s.17B(6) obliges court to consider

The appellant brought a claim for judicial review.

The appellant's grandfather had been the tenant of a flat in Mid Harbour Estate, which was part of the Government housing stock. The appellant had lived in the flat with his grandfather, providing company and some care. When his grandfather moved into residential care, the defendant housing authority ("the Authority") sought possession of the flat. It issued a complaint at the Magistrates' Court pursuant to s.14 of the Housing Act 2007 seeking a possession order. The appellant's grandfather died. The appellant sought assurances that the Magistrates' Court proceedings would be withdrawn and that his occupation of the flat would be regularized. The Authority refused to provide the assurances and the appellant filed a claim for judicial review challenging that decision.

The appellant relied on four grounds in support of his claim:

(1) Part 1 of the Housing Act, which included s.14, did not apply to the flat and therefore the Authority had no standing to bring the complaint before the Magistrates' Court. It was alleged that Mid Harbour Estate and other estates were not owned by the Government, fell outside the definition of "public housing" and were not caught by the provisions of Part 1 of the Act.

(2) The department had either expressly or implied consented to the appellant being a tenant of the flat, alternatively had consented to his occupation of it.

(3) Assuming that the Act was applicable, the Gibraltar Constitution required s.12 of the Act to be interpreted so as to confer succession rights

on the appellant. (Section 12 conferred succession rights on certain family members but not specifically grandchildren.)

(4) In the alternative, the respondents should exercise their discretion to allow the appellant to reside in the flat.

CPR 54.5(1) required an application for leave to apply for judicial review to be made promptly and in any event not later than three months after the grounds to make the claim first arose. Yeats, J. found that the appellant's application was made some six weeks out of time. The appellant applied for an extension of time. Yeats, J. noted that, in cases where the application was lodged after the expiry of the time limit, the court should decide the application in accordance with *Denton* v. *T.H. White Ltd*. ([2014] 1 W.L.R. 3926), the leading authority on how the courts should deal with an application for relief from sanctions. *Denton* laid down a three-stage test: first, to identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order; second, to consider why the default occurred; and third, to evaluate all the circumstances of the case to enable the court to deal justly with the application including factors (a) and (b) in CPR 3.9(1), namely (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and orders.

Yeats, J. found that neither of the first two requirements had been met: it could not be said that the delay was insignificant, on the contrary six weeks delay was significant given the three-month time limit, and there was no good reason for the delay. There was also an unexplained delay in the application for the extension of time. The judge then considered the third stage, having regard to all the circumstances of the case. He held in respect of the first and third grounds that there were points of general public importance which the court should consider. Time was extended to allow these matters to be determined. The judge did not extend time in respect of the second and fourth grounds.

The appellant appealed against the judge's refusal to extend time in respect of the second and fourth grounds. It was submitted that the judge failed to apply or have regard to s.17B(6) of the Supreme Court Act 1960, which provided:

> "(6) Where the court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
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> (a) leave for the making of the application; and
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> (b) any relief sought on the application,
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> 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."

Although the appellant's counsel had referred to s.17B(6) in his skeleton argument, it was in a section of the skeleton which he informed the judge he did not wish to rely upon.

The judge refused leave to appeal on the ground that the appeal had no prospect of success. He stated that s.17B(6) was a second-stage test and

would only come into play if there was a good reason for the delay in bringing the claim for judicial review.

The Chief Justice granted permission to appeal. The appellant submitted that the judge should have considered s.17B(6) and that he erred in treating the question of whether there was good reason for the delay as a threshold question. The question was whether it was reasonable to extend time, and that required consideration of all the circumstances of the case. The judge should have taken into account the fact that there was no evidence of any prejudice or detriment to the respondents or third parties whereas there was substantial prejudice to the appellant if he were forced to leave the home where he had lived for much of his life. These were potentially highly material factors to consider when evaluating whether there was good reason to extend time. The appellant relied heavily on the Privy Council decision in *Maharaj* v. *National Energy Corp. of Trinidad & Tobago* ([2019] UKPC 5).

The respondents submitted that (a) there was no basis for alleging that the judge erred in law in failing to have regard to s.17B(6) which was not relied upon by either party or brought to his attention during the hearing; (b) s.17B(6) was not relevant to this case because there was a threshold test which applied before the section was engaged; there must be a reasonable explanation for the delay and here there was none. In any event, the section only operated in the interests of a defendant; it focused on reasons for refusing an extension of time, not reasons for granting one; and (c) the judge properly applied the *Denton* test, the public interest weighing decisively in favour of allowing an extension of time with respect to two of the grounds which raised issues of wider significance.

Held, dismissing the appeal:

(1) The court made the following observations about the construction of s.17B(6) and its inter-relationship with the *Denton* principles:

(i) The section only came into play where there was "undue delay" in making the application. "Undue delay" was not to be equated with unreasonable conduct by the claimant, however. It simply meant a claim which, viewed objectively, was not made promptly or in any event within three months. The judge's finding that the application for judicial review was outside the three-month limit established that there was undue delay. Any delay, however short, beyond the three months constituted undue delay irrespective of its significance and leave to apply out of time was then required. It did not follow however that the delay was necessarily substantial or serious within the meaning of the *Denton* guidance (although in this case the judge held that it was).

(ii) Section 17B(6) allowed a court to refuse to extend time or, if leave to extend time had already been granted, to refuse to grant relief. The guidance in *Denton* said that where any delay was not serious or significant, it would almost always be appropriate to extend time. But s.17B(6) envisaged that leave might be refused even then, and even if a claimant had a reasonable explanation for such delay as there was. It

followed that prejudice and/or detriment could in an appropriate case be a decisive reason for refusing to extend time even if all other material factors would make it appropriate to grant the extension.

(iii) There was no merit in the respondents' submission that s.17B(6) was only engaged where the applicant could provide a good reason for delay. There was no threshold requirement of that nature underpinning the application of the section. It was not what the section said and there was no justification for reading such a requirement into it. Such a requirement would only make sense if the failure to provide a reasonable explanation for the delay automatically meant that time could not be extended. But that was not the position in law. It would be bizarre if prejudice and detriment could be taken into account when there was a good explanation for delay but had to be ignored when there was no good explanation. It would also be contrary to the guidance in *Denton* and had been rejected in *Maharaj*.

(iv) However, the court accepted the respondents' submission that it was only a defendant who could complain of an alleged failure by the court to have regard to the fact that there was actual prejudice or detriment and he would only do so where leave to extend time had been granted. A claimant refused leave to extend time to make an application for judicial review would have no interest in complaining that the court had failed to have regard to any actual prejudice or detriment to the defendant or a third party; that could only reinforce the reasons for refusal. The defendant could theoretically complain but to do so would serve no purpose where leave had been refused in any event. It was only where an extension of time had been granted, thereby allowing the application to be made, that the issue arose and therefore was only of potential benefit to a defendant.

(v) The concept of prejudice and detriment in the section could not refer to any prejudice or detriment to the applicant himself. Such prejudice or detriment could not be a reason for refusing relief although it might support the grant of relief.

(vi) Accordingly, whilst s.17B(6) allowed a defendant to rely upon the existence of prejudice or detriment to himself or a third party, it did not provide for the converse. It said nothing about the potential significance of the lack of any prejudice or detriment in favour of an applicant seeking the grant of relief.

(vii) That was not to say that the lack of any prejudice or detriment would be irrelevant to any consideration of extending time. That would be the case only if s.17B(6) were to be treated as exhaustive of the circumstances where prejudice and detriment (or the lack of them) could be taken into account. There was no justification for reading the section in that way and neither counsel suggested that it should be so interpreted. The lack of prejudice would often be a material factor in a claimant's favour both when considering whether the delay was significant when applying the first stage of the *Denton* formula and when taking all relevant considerations into account at the third stage. But it was not a factor which the section itself obliged a court to consider (para. 36).

(2) The appellant was correct that there was no threshold requirement in s.17B(6) which limited its application to cases where a reasonable explanation for delay had been provided. However in order to succeed in this appeal he had to go further than that. He had to show that the obligation to have regard to the lack of prejudice or detriment in the applicant's favour arose out of the section. The court did not accept that the section had any relevance to that question. Any failure to have regard to the lack of prejudice or detriment in the appellant's favour constituted no breach of s.17B(6). The lack of any prejudice or detriment were factors which might well be material in the evaluation of all the circumstances at stage three of the *Denton* analysis but this was not because the section required it. It was not part of the s.17B(6) test at all. The appeal therefore failed on the simple ground that the judge did not err in law in failing to have regard, or to give any weight, to s.17B(6). It was either not relevant to his analysis or if it was because there was actual prejudice and detriment, that could only reinforce his decision to refuse to extend time. Moreover, if there were a failure to have regard in the appellant's favour to the lack of any prejudice or detriment, that might in principle justify setting the decision aside but it would not be for a reason relating to the section. It would therefore not fall within the scope of the permitted grounds of appeal (paras. 37–39).

Cases cited:

(1) *Denton* v. *T.H. White Ltd*., [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] C.P. Rep. 40, applied.

(2) *Maharaj* v. *National Energy Corp. of Trinidad & Tobago*, [2019] UKPC 5; [2019] 1 W.L.R. 983, considered.

(3) *Mitchell* v. *News Group Newspapers Ltd*., [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795; [2014] 2 All E.R. 430; [2013] 6 Costs L.R. 1008, referred to.

(4) *Notting Hill Fin. Ltd.* v. *Sheikh*, [2019] EWCA Civ 1337; [2019] 4 W.L.R. 146, referred to.

(5) *R.* v. *Dairy Produce Quota Tribunal*, *ex p. Caswell*, [1990] 2 A.C. 738; [1990] 2 W.L.R. 1320; [1990] 2 All E.R. 434; [1990] C.O.D. 243, referred to.

(6) *R. (Hysaj)* v. *Home Secy.*, [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472; [2015] 2 Costs L.R. 191; [2015] C.P. Rep. 17, referred to.

(7) *R.* (*Robinson)* v. *Home Secy.*, [1998] Q.B. 929; [1997] 3 W.L.R. 1162; [1997] 4 All E.R. 210; [1997] INLR 182; [1997] Imm. A.R. 568, referred to.

Legislation construed:

Housing Act 2007, s.14:

"**Unlawful occupation.**

14.(1) Any person who—

(a) enters into possession of, or remains in occupation of any public housing after the tenancy agreement in respect of those premises has been terminated under section 8 and whether

such person is the tenant on whom notice was served or not; or

(b) occupies any public housing held by the Government without the written authority of the Principal Housing Officer . . .

shall be guilty of an offence . . .

. . .

(5) . . . where a person to whom subsection (1)(a), (b) or (c) applies is in occupation of any public housing, the court shall, at the request of the Principal Housing Officer, order the person to give up possession of the public housing within 14 days of such order."

Civil Procedure Rules (S.I. 1998/3132), r.3.1(2)(a): The relevant terms of this provision are set out at para. 4.
r.3.9(1): the relevant terms of this provision are set out at para. 4.
r.54.5(1): The relevant terms of this provision are set out at para. 3.

Civil Proceedings Rules (Trinidad & Tobago), r.56.5: The relevant terms of this rule are set out at para. 24.

Judicial Review Act 2000, s.11: The relevant parts of this section are set out at para. 22.

Supreme Court Act 1960, s.17B(6): The relevant terms of this subsection are set out at para. 14.

K. Azopardi, *K.C.* assisted by *J. Wahnon* (instructed by TSN) for the appellant;
G. Licudi, *K.C.* assisted by *G. Huart* (instructed by Hassans) for the respondents.

1 **ELIAS, J.A.:**

Introduction

Mr. Monteverde was the tenant of a flat at 14 Wave Crest House, Mid Harbours Estate. The estate is part of the Government housing stock. The appellant is his grandson who had been living with his grandfather since his grandmother, Mr. Monteverde's wife, died in 2017. The appellant says that he was providing company and some care for his grandfather. On the grandfather being moved into residential care in May 2021, the defendant housing authority ("the Authority") sought possession of the flat. It wrote to the appellant on June 29th, 2021 seeking possession by August 12th, 2021, and on August 5th it issued a complaint at the Magistrates' Court pursuant to s.14 of the Housing Act seeking a possession order on the grounds that the appellant was unlawfully occupying the flat. Mr. Monteverde died on September 24th, 2021 but the rent had been paid up until the end of October. The appellant sought assurances that the Magistrates' Court proceedings would be withdrawn and that his occupation of the flat would be regularized. When the Authority refused to

provide these assurances, he filed a claim for judicial review challenging that decision on November 12th, 2021.

2 In his detailed statement of grounds, the appellant relied upon four grounds in support of his claim which can be summarized as follows:

(i) Part 1 of the Housing Act 2007, which includes s.14, does not apply to the flat and therefore the Authority had no standing to bring the complaint before the Magistrates' Court. It is alleged that following a series of transactions entered into by HM Government of Gibraltar, six estates, including the Mid Harbours estate, are owned by certain named entities and not by the Government at all. This means that these estates, including the flat, fall outside the definition of "public housing" and are not caught by the provisions of Part I of the Act.

(ii) The department has either expressly or impliedly consented to the appellant being a tenant of the flat, alternatively had consented to his occupation of it.

(iii) Assuming that the Act is applicable, the Gibraltar Constitution requires s.12 of the Act to be interpreted so as to confer succession rights on the appellant. (Section 12 confers succession rights on certain family members but these do not specifically include grandchildren.)

(iv) In the alternative, the respondents should exercise their discretion to allow the appellant to reside in the flat.

The issues before the judge

3 The judge, Yeats, J. had first to consider whether the application had been made in time and, if not, whether he should extend time. By CPR 54.5(1) the application had to be filed "(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose." The judge concluded that the application was not in time. He held, contrary to the submissions of the appellant, that time ran from June 29th, when the authority had first indicated that they were seeking possession of the flat. The application for judicial review was therefore made some six weeks out of time. His ruling on this point is not the subject of appeal.

4 However, the judge went on to consider whether he should exercise a discretion to extend time. That application was made under CPR 3.1(2)(a) which confers upon the court a general power to "extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)." As the judge noted, in cases where the application is lodged after the time limit has expired, the court should decide the application in accordance with the principles enunciated in *Denton* v. *T.H. White Ltd.* (1). This is the leading authority on how the courts should deal with an

application for relief from sanctions pursuant to CPR 3.9(1) which is in the following terms:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

5 *Denton* was concerned with the application of CPR 3.9(1). It modified and clarified the guidance given in the earlier decision of *Mitchell* v. *News Group Newspapers Ltd.* (3). The aim of these authorities was to bring an end to a perceived tendency by practitioners to adopt a relatively lax approach to compliance with rules, orders and practice directions in favour of a stricter regime in which courts would be more willing to impose the sanctions provided for breaches of the rules.

6 An application to extend time pursuant to CPR 3.1(2) is not strictly an application for relief from sanctions since there is no express sanction for failing to lodge a claim in time—there is, of course, no obligation to lodge a claim at all—but it is now firmly established that the courts will by analogy apply the *Denton* principles in such cases: see *R. (Hysaj)* v. *Home Secy.* (6), where Moore-Bick, L.J. carried out a detailed analysis of the relevant authorities. *Hysaj* also confirms that the stricter principles laid down in *Denton* apply to public law cases as they do to cases in private law.

7 *Denton* itself laid down a three-stage test where the application is for relief from sanctions. Lord Dyson, M.R. and Vos, L.J., in a joint judgment, explained the stages as follows ([2014] 1 W.L.R. 3926, at para. 24):

> "The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].'"

The reference to "factors (a) and (b)" is a reference back to the terms of CPR 3.9(1) set out above. As these factors demonstrate, the material circumstances are not simply the impact which delay may have on the parties themselves; courts must also have regard to the wider public interest

in ensuring that rules are complied with and that litigation is pursued efficiently.

8 The first two factors were described in the *Mitchell* case as being of "paramount consideration." However, the majority in *Denton* (1) (Jackson, L.J. dissenting on this point) resiled from that description whilst still giving these factors particular importance in the overall balancing exercise at stage 3 (*ibid.*, at para. 32):

> "Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."

9 The fact that the first two factors are not a paramount consideration means that there will be cases where justice requires that time should be extended even though there is a significant and unexplained delay. The majority summarized the position thus (*ibid.*, at para. 38):

> "It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*: see in particular para 37. A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight. Anything less will inevitably lead to the court slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate."

10 In the *Hysaj* case (6) ([2015] 1 W.L.R. 2472, at para. 41), Moore-Bick, L.J. (with whose judgment Tomlinson and King, L.JJ. agreed) pointed out that where an issue was important to the public at large, that would be a factor to consider at the third stage and would point in favour of time being extended. Since many judicial review cases raise issues of wider public significance, this will often be a material factor in such cases, and potentially a decisive one.

Applying *Denton* to the facts

11 The judge held that neither of the first two requirements had been met: it could not be said that the delay was insignificant—on the contrary, six weeks was significant given the three-month time limit for judicial review cases—and there was no good reason for the delay. Indeed, there had been no evidence explaining why the delay had occurred, nor did the application notice seek to identify any reason. Moreover, there was an unexplained delay in the application for the extension of time itself.

12 The judge then considered the third stage, having regard to all the circumstances of the case. The only specific additional factor on which he relied was whether there were points of general public importance which the court should consider. He held that both the first and third grounds fell into that category. The first ground, which alleged that the relevant part of the Act did not apply to the premises at all, was a matter with potentially far-reaching consequences because there were six public housing estates which fell under the same ownership structure. The third ground, alleging the existence of a constitutional right to succeed to the tenancy, also raised a general point of wider importance because, if successful, it would widen the scope of those who could claim to succeed to residential tenancies as a matter of right. Notwithstanding the unexplained delay, time was extended to allow these matters to be determined.

13 However, the judge did not think it appropriate to extend time with respect to the other two grounds of appeal. Although not stated in terms, he was satisfied that these raised no general points of public interest. Given the lack of good reasons for what was a significant delay, he refused to extend time with respect to these grounds. He does not appear to have considered that any other factor merited specific consideration.

The grounds of appeal

14 The grounds of appeal are directed solely to the judge's exercise of discretion with respect to the two grounds on which he refused to extend time. It is submitted that the judge failed to apply or have regard to a statutory provision bearing directly on the exercise of discretion in these circumstances, namely s.17B(6) of the Supreme Court Act 1960. It is as follows:

> "(6) Where the court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
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> (a) leave for the making of the application; and
>
> (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."

This is in almost identical terms to s.31(6) of the English Senior Courts Act 1981 and authorities under that Act apply likewise to s.17B(6). (I will hereafter refer to the identified reasons for refusing to grant leave or relief simply as "prejudice or detriment").

15 It is plain from the judgment that the judge did not have regard to this provision, no doubt because neither counsel sought to rely upon it. Indeed,

although Mr. Azopardi, K.C., counsel for the appellant, had referred to the section in his skeleton argument, it was in a section of the skeleton which he informed the judge he did not wish to rely upon.

16 Yeats, J. granted permission to appeal when judgment was handed down, but Mr. Licudi, K.C., counsel for the respondents, was not able to be present at that hearing. Before the relevant order had been perfected, and so whilst the court was still not *functus officio,* the judge agreed to hear further representations from Mr. Licudi and was persuaded that leave should be refused on the grounds that the appeal had no prospect of success. The judge succinctly stated the reason as follows:

> "section 17B(6) would only come into play had I considered that there was a good reason for the delay in bringing the claim for judicial review. It is a second stage test that does not apply here because I found that there was no good reason for delay."

This treats the question of whether there has been a proper or reasonable explanation for the delay as a "threshold question." If there is no proper explanation, the section is not engaged.

17 This decision was appealed to the Chief Justice sitting *ex officio* as a judge of the Court of Appeal. He granted permission but only with respect to those parts of the appeal that could be said to "touch upon s.17B(6) of the Supreme Court Act." The notice of appeal was amended, purporting to reflect that ruling by removing certain grounds of appeal which raised issues concerning the judge's exercise of discretion unrelated to s.17B(6).

18 The grounds falling within the scope of the permission are all in substance identified in the first three paragraphs of the amended memorandum of appeal:

> "1. The learned judge did not properly apply and/or wrongly applied that test at s.17B(6) of the Supreme Court Act ('the s17B(6) test').
>
> 2. The learned judge failed to consider issues of substantial hardship and/or prejudice and/or detriment to good administration inherent in the s17B(6) test and/or failed to have regard to the absence of prejudice and/or hardship and/or detriment in this case.
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> 3. In making such errors of law and/or principle as aforesaid it caused the learned judge to take an unduly restrictive approach to the application for an extension of time and/or he fettered his own discretion when considering the application for an extension of time."

19 There were further grounds specified in the amended memorandum concerning the judge's exercise of discretion but in my view they either add nothing of substance to the paragraphs cited, or they do not touch upon s.17B(6) at all and therefore fall outside the scope of the permissible grounds.

20 The crux of the appeal lies in the application of s.17B(6). Ought the judge to have engaged with it? Mr. Azopardi contends that he should and that he erred in treating the question of whether there was good reason for the delay as a threshold question. The question is whether it is reasonable to extend time, and that requires a consideration of all the circumstances of the case. More specifically, the judge should have taken into account, as the section implicitly requires, the fact that there was no evidence of any prejudice or detriment to the respondent or third parties whereas there was substantial prejudice to the appellant if he were to be forced to leave the home where he had lived for much of his life. These were potentially highly material factors to put in the mix when evaluating whether there was good reason to extend time.

21 Mr. Azopardi relied heavily in support of his submissions upon the decision of the Privy Council in *Maharaj* v. *National Energy Corp. of Trinidad & Tobago* (2). Indeed, he candidly admitted that it was only after reading that case that he became aware that he may have good grounds to appeal the decision of Yeats, J.

22 *Maharaj* concerned the interpretation of a statutory provision in Trinidad, namely s.11 of the Judicial Review Act 2000, the relevant parts of which are as follows:

> "(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.
>
> (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.
>
> (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."

23 Section 11(1) sets the time limit in almost identical terms to CPR 54.5(1) although it includes a provision to extend time where the court considers that there is good reason to do so. The *Denton* principles, read with CPR 3.9(1), require the court to consider whether it is just to extend time, but I see no material difference in the two tests: if it is just to extend time, there will be a good reason to do so, and *vice versa*. Section 11(2) mirrors exactly the language found in s.17B(6). Section 11(3) is not found

in any statutory rule in England or Gibraltar, but it in essence reflects what the courts are required to do at the third stage of the *Denton* guidance.

24 In addition to the statutory provisions, the question of delay was also addressed by the Trinidad Civil Proceedings Rules 1998. CPR 56.5, which has no equivalent in the law of England or Gibraltar, is as follows:

"**Delay**

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.

(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—

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

25 CPR 56.5(1) is a curious provision because it appears on its face to entitle a judge to refuse to extend time simply because of unreasonable delay and without consideration of any other factors. By contrast, CPR 56.5(3) obliges a court, when considering whether to refuse (or to refuse to grant relief), to have regard to issues of prejudice and detriment; and s.11(3) requires all relevant considerations to be considered. These are not easy provisions to reconcile.

26 In *Maharaj* (2), the claimant, a citizen of Trinidad, had been refused a freedom of information request by a state agency. The application was made out of time and the first instance judge held that the claimant had given no proper explanation for the delay and therefore he refused to extend time. The claimant argued on appeal that both s.11(2) and CPR 56.5(3) obliged the judge to have regard to the issues of prejudice and detriment, and he asserted that he had not done so. The Court of Appeal in Trinidad, by a majority, dismissed the appeal. It adopted the threshold construction of s.11(2), concluding that the issues of prejudice and detriment were only engaged if there was a reasonable explanation for the delay. It is important to note, however, that in reaching this decision the court was grappling with the difficult reconciliation of s.11 with CPR 56.5, and in particular the apparent power conferred by CPR 56.5(1) for the court to refuse to extend time solely because of unreasonable delay.

27 The Board of the Privy Council allowed the appeal against the majority decision. Lord Lloyd-Jones, giving the judgment of the Board, held that the question the court had to ask was whether there was good reason to extend time rather than whether there was good reason for the delay, and this had to be determined having regard to all the circumstances of the case, including consideration of prejudice and detriment. Section 11(3) itself envisaged that a court should have regard to such matters as it thought relevant and that must, in an appropriate case, include prejudice and detriment. Moreover, his Lordship stated in terms that this conclusion did not turn on the particular provisions in Trinidad ([2019] 1 W.L.R. 983, at para. 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."

28 Lord Lloyd-Jones observed that when considering whether it is reasonable to extend time, many considerations may fall for consideration (*ibid.*, at para. 38):

> "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."

29 His Lordship also noted (*ibid.*, at para. 39) that fairness to an applicant requires that the lack of any prejudice should be a factor weighing in favour of extending time, just as the existence of prejudice or detriment may tell against extending it.

30 Mr. Azopardi submits that the reasoning of Lord Lloyd-Jones applies here. The judge fettered his discretion and failed to have regard to a relevant consideration. Issues of prejudice and detriment—and more

specifically the lack of any prejudice or detriment—should have been important factors in the judge's determination whether or not to extend time.

31 I would at this stage make two observations about the *Maharaj* judgment. First, nowhere does it say that the obligation to take account of the lack of prejudice or delay arises out of s.11(2) of the Act (the equivalent to s.17B(6) in Gibraltar). Rather Lord Lloyd-Jones held that as a matter of principle it is inherent in the obligation to determine whether there is good reason to extend time, coupled (in Trinidad) with the fact that s.11(3) obliges a court to consider these factors where they are relevant. Second, there was no reference at all in the judgment or, it appears, in any argument before the court, to the *Denton* principles. It may be that they are not incorporated into Trinidad law.

32 The respondents' submissions can be considered under three heads. First, Mr. Licudi submits that, quite independently of the merits of the argument, there is no basis for alleging that the judge erred in law in failing to have regard to a provision which was not relied upon by either party or even brought to his attention during the hearing. Indeed, in so far as it figured in the case at all, it was mentioned in the appellant's skeleton argument but only in a passage which the appellant said he was not seeking to rely upon. Even if the section were otherwise potentially relevant to the issue in dispute, it is impermissible in those circumstances to criticize the judge for failing to have regard to it. If the judge was not in error then there is nothing to appeal.

33 Second, s.17B(6) in fact has no relevance to this case, for two related reasons. The first is that Yeats, J. was right to hold (when refusing permission to appeal) that there is a threshold test which applies before the section is engaged; there must be a reasonable explanation for the delay and here there was none. The section therefore had no bearing on the exercise of discretion. *Maharaj* (2) is distinguishable since the analysis rested upon the particular (and different) statutory provisions in issue in that case. In any event, the section only operates in the interests of a defendant; it focuses upon reasons for *refusing* an extension of time, not reasons for *granting* it. The reference to prejudice and/or detriment in that provision does not include any prejudice or detriment to the applicant; the reference to "third parties" in the section is limited to those adversely affected by any extension of time and that manifestly does not include the applicant. It cannot be a reason for refusing to extend time at the applicant's behest that the applicant is adversely prejudiced by his own delay.

34 Third, Yeats, J. properly applied the *Denton* test as shown by the fact that he allowed the public interest to weigh decisively in favour of allowing an extension of time with respect to two of the grounds which raised issues of wider significance. In any event, in so far as the appeal is directed to

factors or submissions unrelated to s.17B(6), it falls outside the scope of the grounds on which permission to appeal has been granted.

Discussion

35 I turn first to the preliminary objection. This was not pursued strongly, and I will deal with it relatively briefly. There is something unattractive in an allegation that a judge has made an error of law for failing to have regard to a provision which experienced counsel have neither relied upon nor even drawn to his attention in argument. Nevertheless, there is authority to the effect that if the provision is sufficiently obvious and if it has a strong prospect of success, there may be an error of law in failing to deal with it. This is sometimes referred to as a "*Robinson* obvious" point following the adoption of this doctrine by the Court of Appeal in *R*. (*Robinson)* v. *Home Secy.* (7). In any event, an appeal court can in an appropriate case allow an appeal on a point not raised below, particularly a point of law, whether or not the judge was at fault in failing to consider it. The decision below can still be said to be "wrong" in the sense that it was a decision which ought not to have been made, notwithstanding that there was no defect as such in the lower court's reasoning: see the judgment of Snowden, J. (Longmore and Peter Jackson, L.JJ. concurring) in *Notting Hill Fin. Ltd.* v. *Sheikh* (4), a decision of the Court of Appeal in England and Wales. Accordingly, granting permission to argue a new point or points is not necessarily contingent upon establishing an error by the judge below. This was in fact recognized by the Chief Justice during a discussion he had with Mr. Licudi about whether permission to appeal should be granted in this case. The Chief Justice, acting as an *ex officio* member of the Court of Appeal, gave permission for fresh grounds to be argued without forming a view as to whether the judge was in error, as he was entitled to do. The appellant does not, therefore, have to show that the judge was in error before the grounds can be argued. There is no such preliminary hurdle.

Was s.17B(6) engaged?

36 The proper scope of s.17B(6) lies at the heart of this appeal. I would make the following observations about the construction of this section and its inter-relationship with the *Denton* principles:

(i) The section only comes into play where there is "undue delay" in making the application. "Undue delay" is not to be equated with unreasonable conduct by the claimant, however. It simply means a claim which, viewed objectively, is not made promptly or in any event within three months: see *R.* v. *Dairy Produce Quota for England & Wales*, *ex p. Caswell* (5). The finding of Yeats, J. that the application for judicial review was outside the three-month limit of itself established that there was undue delay. Any delay, however short, beyond the three months constitutes undue delay irrespective of its significance and leave to apply out of time

is then required. It does not follow, however, that the delay is necessarily substantial or serious within the meaning of the *Denton* guidance (although in this case Yeats, J. held that it was).

(ii) This section allows a court to refuse to extend time or, if leave to extend time has already been granted, to refuse to grant relief. The guidance in *Denton* says that where any delay is not serious or significant, it will almost always be appropriate to extend time. But s.17B(6) envisages that leave might be refused even then, and even if a claimant has a reasonable explanation for such delay as there is. It follows that prejudice and/or detriment can in an appropriate case be a decisive reason for refusing to extend time even if all other material factors would make it appropriate to grant the extension.

(iii) There is in my view no merit in Mr. Licudi's submission that the section is only engaged where the applicant can provide a good reason for delay. There is no threshold requirement of that nature underpinning the application of the section. It is not what the section says and there is no justification for reading such a requirement into it. Such a requirement would only make sense if the failure to provide a reasonable explanation for the delay automatically meant that time could not be extended. But that is not the position in law. It would be bizarre if prejudice and detriment could be taken into account when there was a good explanation for delay but had to be ignored when there was no good explanation. It would also be contrary to the guidance in *Denton* (1) and has been categorically rejected in the *Maharaj* case (2). It is simply not the case that the court in *Maharaj* only reached that decision because of the particular terms of the legislation in Trinidad; Lord Lloyd-Jones said in terms that his conclusion on this point did not depend on the particular statutory provisions (see para. 27 above). Moreover, it was only because of the apparently contradictory rules in Trinidad that the threshold argument could properly be advanced at all.

(iv) However, I accept Mr. Licudi's submission that it is only a defendant who can complain of an alleged failure by the court to have regard to the fact that there is actual prejudice or detriment and he will only do so where leave to extend time has been granted. A claimant refused leave to extend time to make an application for judicial review would have no interest in complaining that the court had failed to have regard to any actual prejudice or detriment to the defendant or a third party; that could only reinforce the reasons for refusal. The defendant could theoretically complain but to do so would serve no purpose where leave had been refused in any event. It is only where an extension of time has been granted, thereby allowing the application to be made, that the issue arises, and therefore is only of potential benefit to a defendant.

(v) The concept of prejudice and detriment in the section cannot refer to any prejudice or detriment to the applicant himself. Such prejudice or detriment cannot be a reason for refusing relief although it may support the grant of relief.

(vi) Accordingly, whilst s.17B(6) allows a defendant to rely upon the existence of prejudice or detriment to himself or a third party, it does not provide for the converse. It says nothing about the potential significance of the *lack* of any prejudice or detriment in favour of an applicant seeking the *grant* of relief.

(vii) That is not to say that the lack of any prejudice or detriment will be irrelevant to any consideration of extending time. That would be the case only if s.17(B)(6) were to be treated as exhaustive of the circumstances where prejudice and detriment (or the lack of them) could be taken into account. There is no justification for reading the section in that way and neither counsel suggested that it should be so interpreted. As Lord Lloyd-Jones observed in *Maharaj*, the lack of prejudice will often be a material factor in a claimant's favour both when considering whether the delay is significant when applying the first stage in the *Denton* formula, and when taking all relevant considerations into account at the third stage. But it is not a factor which *the section itself* obliges a court to consider.

37 In my judgment, therefore, Mr. Azopardi is correct in saying that there is no threshold requirement in s.17B(6) which limits its application to cases where a reasonable explanation for delay has been provided. But in order to succeed in this appeal he has to go further than that. He has to show that the obligation to have regard to the lack of prejudice or detriment in the applicant's favour arises out of the section. For reasons I have given, I do not accept that the section has any relevance to that question. Any failure to have regard to the lack of prejudice or detriment in the appellant's favour constitutes no breach of s.17B(6). The lack of any prejudice or detriment are factors which may well be material in the evaluation of all the circumstances at stage three of the *Denton* analysis, but this is not because the section requires it. To use Mr. Azopardi's language, it is not part of the s.17(6) test at all (although I would not myself use the term "test" for a section which is simply emphasizing the potential importance of certain factors in an evaluation exercise).

38 The *Maharaj* case does not in my view make good Mr. Azopardi's submissions. It does support them to the extent that it categorically rejects the threshold analysis and it affirms the proposition that lack of prejudice or detriment should in an appropriate case be considered as a factor—and often an important factor—in the evaluation of whether the extension of time is reasonable in all the circumstances. But nothing in that case supports the proposition that this is inherent in the terms of the section

itself. It is true that the grounds of appeal in that case put the argument in that way, but Lord Lloyd-Jones did not uphold the appeal on that basis.

39 In my judgment, therefore, this appeal fails on the simple ground that the judge did not err in law in failing to have regard, or to give any weight, to s.17B(6). It was either not relevant to his analysis or if it was because there was actual prejudice or detriment, that could only reinforce his decision to refuse to extend time. Moreover, if there were a failure to have regard in the appellant's favour to the lack of any prejudice or detriment, that might in principle justify setting the decision aside, but it would not be for a reason relating to the section. It would therefore not fall within the scope of the permitted grounds of appeal.

Additional observations

40 I have so far assumed in the appellant's favour that he can show a lack of prejudice or detriment to the defendant or third parties. However, I very much doubt whether this can be right. It seems to me inevitable that there will be some prejudice to the third party registered on the waiting list for a flat of this nature who would be entitled to become the tenant if the appellant is not lawfully permitted to remain there. Mr. Azopardi submitted that there is no prejudice to such a person because the judge gave permission to appeal out of time in any event with respect to two of the grounds of appeal, and no extra prejudice is conferred by allowing the other two to be advanced. I agree that there would be no (or very little) additional prejudice, but it is in my view artificial to treat any prejudice or detriment resulting from delay as being referable to only some of the grounds for which the extension of time is permitted.

41 No doubt some judges might have been inclined to allow these grounds to be included in the grant of leave on the principle that once one permission is given for one ground, they might as well all be included. But the question is whether the judge was entitled to reach the decision he did. It cannot conceivably be said that the only proper decision was to grant an extension for these two grounds once the extension had been granted for other grounds. In my view the judge had acted lawfully and well within his discretion in refusing the extension of time. The question of prejudice or detriment seems not to have figured at all in the parties' submissions, and a judge can only be expected to focus on the matters advanced in argument. Yeats, J. justifiably put significant weight on what he considered to be serious delay coupled with the lack of any proper explanation for the delay. That is entirely in accord with the *Denton* principles which emphasize the importance of complying with time limits even if delay does not prejudice the parties themselves. The judge considered that notwithstanding the strength of these factors, they were outweighed in relation to two of the grounds of appeal by the wider public interest in having those matters determined. The public interest factor had been specifically relied upon by

Mr. Azopardi in argument whereas the issue of lack of prejudice or detriment had not really figured at all. The judge was not obliged to deal with all matters which might in theory bear upon the exercise of discretion only those relevant to the particular decision he had to make; and counsel were best placed to focus on those matters which they felt would further their cause.

42 For these reasons, I would dismiss the appeal.

43 **DAVIS, J.A.:** I agree.

44 **KAY, P.:** I also agree.

Appeal dismissed.