BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0185

BETWEEN:

VIRGIN ISLANDS ENVIRONMENTAL COUNCIL

Claimant

AND

THE ATTORNEY GENERAL

Defendant

QUORUM ISLAND (BVI) LIMITED

Interested Party/Applicant

Appearances:

Mr. Stephen Hockman Q.C. for the Claimant
Ms. Kathleen Quartey, the Attorney General and Ms. Joann Williams-Roberts, Solicitor General for the Defendant
Mr. Gerard Farara Q.C. for the Interested Party

2008: February 20th and March 7th

JUDGMENT IN CHAMBERS

(Administrative Law – claim for judicial review – environmental matter –whether action statute barred under section 2(a) of the Public Authorities Protection Act Cap. 62 – whether application for leave for judicial review pursuant to CPR 2000 Part 57 is the commencement of an "action, claim or proceeding" under section 2 (a) of the Act

[1] **JOSEPH-OLIVETTI, J.:** As we become more aware of the overwhelming imperative to live in harmony with nature, more scrutiny is being given by ordinary people to governmental decisions to allow development in areas with perceived fragile ecosystems; the cry for governmental accountability and sustainable development resounds in the lands and the aid of the courts is increasingly being sought throughout the world, so too in the British Virgin Islands. The primary issue before me is ostensibly a simple one, namely whether the Claimant's action is statute barred by virtue of section 2(a) of the Public Authorities Protection Act Cap. 62. However, what lies beneath is the Claimant's concerns with the impact on the environment of a proposed multi-million dollar development at Beef Island, in the naturally spectacular British Virgin Islands billed by the BVI Tourist Board as "Nature's Little Secrets".

Background

[2] A short summary of relevant matters is helpful. The interested party, Quorum Island BVI Limited ("Quorum"), is the prospective developer of what has been termed "an integrated resort" on 432 acres of land at Beef Island which would include a slip marina and breakwater and an 18-hole golf course. Quorum has been trying to develop this resort since 1994. On 31st January 2007 the then Chief Minister of the Territory, Dr. D. Orlando Smith (now historically the very last person to hold that office so titled) in his capacity as Minister of Planning granted planning approval for the project to Quorum.

[3] On 31st July 2007, the Virgin Islands Environmental Council ("VIEC"), a BVI non-profit organization in person, filed an application for leave to apply for judicial review to challenge the Minister's decision to grant planning permission and the entry by the Government into the development agreement with Quorum on 2nd December 2005. This application was made without notice as permitted by the CPR 2000 Part 56.3. On 14th August they filed an affidavit as to the need to hear the matter urgently as it was the Long Vacation. I considered the application on paper and granted leave on 20th August. Pursuant to that leave, VIEC issued a Fixed Date Claim Form on 4th September, 2007.

[4] VIEC, the Government and Quorum appeared in court on the return date and Quorum was granted leave unopposed to participate in the proceedings, being clearly an interested party. Subsequently, further hearings in the form of case management conferences were held. The issue that the claim was statute barred by virtue of section 2 (a) of the Public Authorities Protection Act, Cap. 62 ("the Act") was first raised by the Government in the Second Affidavit of Louis Potter filed 19th November 2007 and then Quorum raised it in the First Affidavit of Federico Sanchez filed on 28th November 2007. On 15th January 2008 the court ordered that that issue be tried as a preliminary issue.

[5] The relevant evidence to be considered by the Court on this hearing is contained in the said Affidavit of Mr. Sanchez, the said Affidavit of Mr. Potter and the Sixth Affidavit of Dr. Quincy Lettsome filed on 8th January 2008 on behalf of VIEC.

[6] As already noted the acts complained of were the entry into the Development Agreement on 2nd December 2005 and the Minister's decision to grant planning approval to Quorum. However, Mr. Hockman, Learned Queen's counsel for VIEC conceded that the Act applied

and that the only live issue before this court at this hearing related to the Minister's said decision.

Quorum's Submissions

[7] Mr. Farara, learned Queen's Counsel for Quorum contended in a nutshell that the claim is statute barred by section 2(a) of the Act as it was commenced on 4th September, 2007 when the Fixed Date Claim Form was filed, not on 31st July 2007 when the application for leave for judicial review was made, and that this was patently outside the six-month period prescribed by the Act for commencing an action to challenge the act, neglect or default of a public authority. The Act requires that the "action" must be "commenced" within six (6) months from the act, neglect or default complained of. Here the decision of the Minister dated 31st January 2007 is the act complained of. That the term "action" in the Act has the meaning given to the word "action" by section 42 of the Interpretation Act Cap. 136 (as amended) and means – "a civil proceeding commenced in such a manner as may be prescribed by the rules of the court and includes a claim under the Eastern Caribbean Civil Procedure Rules, 2000 but does not include a criminal proceeding by the Crown."

[8] Mr. Farara conducted an overview of CPR 2000 Part 56. Part 56 prescribes the manner in which a claim for judicial review must be brought. Part 56 makes a clear distinction between an application for leave for judicial review and the application itself. The application for leave is a condition precedent to the claim being brought and is not the claim itself. See CPR 56.3(1). Therefore, the claim for the purposes of the Act did not commence with the ex-parte application for leave filed 31st July 2007 as VIEC asserts. Mr. Farara urged that an application for leave is merely indicative of an intention to apply for judicial review and is not the commencement of judicial review proceedings or an application for judicial review. An application for leave is made by a prospective claimant against a prospective defendant in respect of a proposed claim. Until leave is obtained and the claim commenced by filing of the originating proceedings the defendant is not faced with any proceedings. A claimant who has obtained leave of the court may elect not to commence or may, as a result of non-compliance with the order granting leave, fail to commence proceedings for judicial review. In such circumstances, there can be no

commencement of proceedings such as would interrupt the running of the limitation period in section 2(a) of the Act.

[9] Counsel submitted further that CPR 56.7 expressly recognizes that an application for leave for judicial review is not the commencement of proceedings as that rule stipulates that an application for an administrative order which includes an application for judicial review must be made by Fixed Date Claim Form supported by affidavit evidence identifying the nature of the relief sought and the facts and grounds on which the claim is based. He also referred to the provisions of CPR 56.7(8) which speak to the first hearing and to CPR 8.1 which speaks to how proceedings are started, namely by filing in the court office the original and a copy of the claim form.

[10] Mr. Farara relied on **Seal v. Chief Constable of South Wales Police [2007] UKHL 31** and in particular the dicta of Lord Brown at paras. 73 and 747 as to what amounts to a condition precedent and the effect of a failure to comply.

[11] Counsel also relied on **Regina v. Secretary of State for the Environment, Ex Parte Ostler**[1] in anticipation of any argument that the Act should not be upheld on the ground that it amounts to an ouster of the court's supervisory jurisdiction. He contended that section 2(a) does not constitute a complete ouster of the jurisdiction of the court but only prescribes a limitation period within which the action must be commenced and so does not offend as did the relevant statutory provision in **Anisminic v. Foreign Compensation Commission**[2].

[12] Mr. Farara also cited certain dicta of Lord Denning in **Ex Parte Ostler** in which Lord Denning explained the rationale for the limitation period in that case. Counsel submitted that the same rationale is applicable to decisions made under the Physical Planning Act 2004 including the grant of planning approval for developments. He pointed out that Quorum has expended large sums of money in reliance on the approvals and the development agreement. Therefore, it cannot be in the public interest for persons to delay in questioning such decisions and that the limitation period imposed by the Act was in the public interest and should be honoured. Mr. Farara urged further that VIEC themselves have acknowledged that the Act is applicable and that it is clear that VIEC have brought

[1] [1976] 3 WLR 288
[2] [1969] 2 A.C. 147

their claim outside the stipulated period and that the claim is barred. Counsel asked that the claim be dismissed with costs to the Government and to Quorum.

The Government's Submissions

[13] The learned Attorney General, Ms. Quartey, adopted the submissions of Mr. Farara and in particular those relating to the provisions of CPR. In addition, Counsel made further submissions on the Act.

[14] Ms. Quartey contended that it is a fact that VIEC's Fixed Date Claim commencing the present application for judicial review was filed on 4th September 2007 and that this is outside the scope of the six months period mandated by the Act and obviously, VIEC has failed to bring themselves within the prescribed statutory period. VIEC's application for leave under CPR 56.3(1) was simply to indicate their intention to bring an action and that was all that VIEC accomplished on 31st July 2007. At that point in time, therefore, no action had been commenced against the Government.

[15] Furthermore, the procedure for commencing an action for judicial review of an administrative order must be made by Fixed Date Claim Form, with the supporting evidence by way of affidavit setting out the nature of the relief sought and the components of the facts that would support such a claim. It is the filing of such a Fixed Date Claim that in effect begins or commences the proceedings.

[16] Counsel urged that based on the plain meaning of the Act and CPR, being the primary and subsidiary matters for sources of interpretation, VIEC has failed to comply with the legal requirements for timely judicial intervention and is thus out of time in these proceedings. Counsel therefore asked that the claim be dismissed with costs to the Government and Quorum.

VIEC's Submissions

[17] Mr. Hockman Q.C. for VIEC sought to rebut the contention of the Government and Quorum that the claim is statute barred. He confirmed his concession that the Act applied to this claim and that the only issue related to the challenge to the planning approval dated 31st January 2007 which was the act complained of for the purposes of section 2(a) of the

Act. This is a plain concession that the claim in respect of the Development Agreement is statute barred. Counsel was at pains to stress that the court was called upon to interpret section 2(a) of the Act and that this therefore was primarily a case of statutory interpretation.

[18] Counsel reiterated the positions of both the Government and Quorum that no other factual matters or evidence were relevant to the determination of this preliminary issue.

[19] Counsel submitted that the key issue is whether an application for leave pursuant to rule 56.3(1) can be treated as the commencement of proceedings for the purposes of section 2(a) of the Act. He noted that this preliminary issue raises a novel point of law, that is the interaction between section 2(a) of the Act and Part 56 of the CPR as this has never been judicially considered in the BVI. This issue, he says, should be determined having regard to the proper construction of the relevant legislative provisions and by reference to the common law.

[20] Mr. Hockman, like Mr. Farara urged that "action" in the Act had the same meaning as the word "action" in section 42 of the Interpretation Act. That section 2(a) of the Act is almost identical to section 1 of the now repealed Public Authorities Protection Act 1893 in the United Kingdom ("the 1893 Act"), That Section 2(a) of the Act amounts to a substantive right to bring proceedings within the statutory six months period and as a matter of principle, procedural rules which regulate the procedure by which civil claims and applications for judicial review are made and managed by the Court should not be construed as effecting any substantive rights that existed in respect of access to the prerogative writs, or orders. That there is nothing to indicate that the adoption of the CPR was intended in any way further to restrict the right of the citizen to seek judicial review, and very clear words would have been required had there been any intention to do so. Therefore, in short, the only sensible construction of the provisions of CPR Part 56 is that it lays down a two-stage procedure for making a claim for judicial review and that an action within the meaning of the Act is commenced by the filing of the ex parte application for leave for judicial review as mandated by CPR 56.3(1).

[21] Counsel also prayed in aid the interpretation of similar English statutory provisions in **R. v. Stratford-on-Avon District Council ex parte Jackson [1985] 1 WLR 1319** which was

approved by the House of Lords in **Caswell v. Dairy Produce Quota Tribunal for England and Wales [1990] 2 A.C. 738 p. 741 D-H**.

[22] Mr. Hockman asked that the court dismiss the application and make an order for the immediate payment of costs against both Respondents in such proportions as the court deems fit.

Discussion

[23] We are called upon to determine whether leave to file an application for judicial review can be regarded as the commencement of an action, prosecution or other proceedings for the purposes of section 2(a) of the Public Authorities Protection Act. This entails us construing not only section 2(a) but the relevant provisions of CPR Part 56.

[24] The Act is modeled on the former English Public Authorities Protection Act 1893 and most of the English speaking commonwealth countries have inherited that legislation for better or for worse. In **Felix Augustus Durity v. The Attorney General of Trinidad and Tobago – Privy Council Appeal No. 52 of 2000** Lord Nicholls of Birkenhead had this to say at para. 20 of the statute:-

> "This statutory provision, it may be noted in passing, or its equivalent in the United Kingdom legislation, had a somewhat **inglorious life**. The (United Kingdom) Public Authorities Protection Act1893, until its eventual repeal by the Law Reform (Limitation of Actions) Act 1954, attracted judicial criticism, in respect of both content and drafting. Most actions against public authorities were actions for personal injuries arising out of accidents. It was seen as unfair that plaintiffs injured by a public authority should have a far shorter time in which to commence a claim than if they had been injured by someone in the private sector: See *Stubbings v. Webb* [1993] AC 498, 502, per Lord Griffiths. The difficulties arising in the interpretation of the Act, and deciding which types of case fell within its scope and which did not, were repeatedly the subject of critical observations by the House of Lords: see *Bradford Corporation v Myers* [1916] 1 AC and *Firestone Tire and Rubber Co (SS) Ltd v. Singapore Harbour Board* [1952] AC 452, 463-464. **In the result the Act was always construed restrictively, lest "what was**

intended as a reasonable protection for a public authority would become an engine of oppression": see *Burmah Oil Co *Burma Trading) Ltd v Lord Advocate* 1963 SC 410, 448, per Lord President Clyde." Emphasis added.

[25] Criticisms in the same vein to which I add my voice have been leveled against similar provisions in other jurisdictions for example Jamaica,[3] St. Vincent and Antigua[4].

[26] Now to Section 2(a) which reads:-

> "2**.** Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect –
>
> > (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof;"

[27] It is conceded by VIEC that the Act applies and that the "act" complained of for the purposes of this trial is the decision of the Minister of Planning of 31st January 2007. Thus, an "action, prosecution or proceeding" challenging this act must be filed on or before the 31st July 2007. In passing I note that Mr. Farara had initially, in his written submissions, taken issue with that computation of time as in his view the period ended on 30th July 2007. However, he did not argue this point at the trial and must be taken to have conceded it. This in my view was a proper concession having regard to VIEC's written submissions on the point which drew the court's attention to the provisions of the

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[3] **Millen v. University Hospital of the West Indies Board of management [1986] 44 WIR 274 –** Court of Appeal of Jamaica – Carberry, JA at p. 293 para. e.

[4] **Genevieve Joyce (Suing in her capacity as Personal Representative of Jermaine Joyce, deceased) v. Antigua Public Utilities Authority – Civil Suit No. ANUHCV1998/0112 -** Mitchell, J at para. 14:-

> "The meaning of the words of the statute in such an event are clearly draconian and out of date with modern thinking as to the responsibility of public authorities to members of the public as the section is, the legislature has not seen fit to remove it from our law as has been done in some other parts of the Commonwealth. The result is that the filing of the writ seven months after the death in this case was fatal. The claim will accordingly be dismissed."

Interpretation Act on computing time and to section 39(3) in particular which provides that in computing time the first day of a prescribed period is not to be taken into account and to the position at common law which accords with this. See **Dodds v. Walker**[5].

[28] The terms 'action', 'prosecution', 'other proceeding' are not defined in the Act. However, the definition of 'action' contained in s. 42 of the Interpretation Act Cap. 136 (as added by the Interpretation (Amendment) Act 2000 section 2) is applicable by virtue of sections 2 and 3 of the Interpretation Act. Section 3 provides that every provision of the Interpretation Act applies to every enactment whether passed or made prior to or after the Interpretation Act comes into effect unless a contrary intention appears in the Interpretation Act or the enactment to be construed. Section 2 states that an 'enactment' is an Act or a statutory instrument or any provisions thereof. And an "Act" means any Act or Ordinance of the Legislature of the Virgin Islands passed on or before the commencement of the Interpretation Act. The conjoint effect of these provisions is that the Act is an enactment and that the definition applies.

[29] Section 42 reads: - "action means a civil proceeding commenced in such manner as may be prescribed by rules of court and includes a claim under the Eastern Caribbean Civil Procedure Rules 2000 but does not include a criminal proceeding by the Crown."[6]

[30] Applying this definition to the word 'action' in section 2(a) and giving the words used their plain and ordinary meaning 'action' in section 2(a) means a civil claim or civil proceeding commenced as prescribed by CPR or by rules of court. Thus, only an action so commenced and filed within the six-month period can be effective to stop time running against a public authority.

[31] No submissions were made in respect of the meaning of the terms 'prosecution' or 'proceedings' and they are not defined in the Act or in the Interpretation Act. However, although mindful of Mitchell J's tart caveat in **Genevieve Joyce v. Antigua Public Utilities Authority – Civil Suit No. ANUHCV1998/0112** at para. 13[7] about the wisdom of

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[5] [11981] 1WLR 1027

[6] It is also of interest to note that s. 2 of the Interpretation (amendment) Act 2000 also inserted definitions for 'Master', 'Originating Motion', 'originating summons', 'plaintiff', 'writ of summons', 'writ of summons endorsed with statement of claim' and 'specially endorsed writ' to take account of the definitions in CPR 2000.

[7] "No legal authorities have been called by either party for the use of the court. It is usually a bad practice for a court to do its own research after case has ended into legal authorities on which it has not had the benefit of comment and advice of counsel in the case, so I shall follow counsels' lead and refrain from

the court embarking on its own research I will venture that it is useful to consider those terms as well as they occur in section 2(a) and may be of assistance as the court is called upon to construe the entire section.

[32] According to **Words and Phrases Legally Defined 3rd Edition Vol. 3 K-Q p. 450**, the term 'prosecution' has been judicially determined in the context of a criminal charge. There, it was held that a prosecution exists where a criminal charge is made before a judicial officer or tribunal and any person who makes or is actively instrumental in the making or prosecuting of the charge is deemed to prosecute it, and is called the prosecution. See also **45 Halsburys Laws of England 4th edn.** para. 1342. Obviously, we are not concerned with a criminal charge as a claim for judicial review is a civil matter.

[33] The term 'proceedings' has been considered in different contexts. In **Quazi v. Quazi [1979] 3 All E.R. 424 at 429 f** in the context of matrimonial matter. Ormrod LJ held: - "The ordinary or natural meaning or meanings of the word "proceedings" standing by itself, without any adjectival description, are so general and imprecise that the dictionary definition does not carry the matter any further. The phrase "judicial proceedings" **implies some form of adjudication and some kind of order of a court or of some other person or body acting in a judicial capacity**." (emphasis added)

[34] The ordinary dictionary meaning of "proceedings" according to the **Concise Oxford Dictionary of Current English 9th Edn** is "proceeding (in full legal proceeding) – "an action in law, a lawsuit."

[35] These definitions of proceeding or judicial proceedings tie in with the meaning of action and seems to add very little more to section 2(a).

[36] Section 2 (a) then in plain language purports to limit the time within which an action can be brought against a public authority. It is to the effect that legal proceedings, whether civil (an action begun in the manner prescribed by rules of court or by CPR) or criminal (a prosecution) must be commenced within six months of the act of the public authority complained of.

[37] Therefore, to stave off this challenge, VIEC must show that its application for leave which was filed within the six-month period (indeed on the last day of that period) constituted the

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referring to ay. The matter falls therefore to be determined mainly on general principles of statutory interpretation."

commencement of an action or claim for judicial review in accordance with CPR. In other words that it was a claim initiated in the manner prescribed by CPR.

[38] CPR Part 56 and in particular r. 56.3(i) and (ii) and r. 56.7 has been relied on heavily by the learned Attorney General and Mr. Farara in support of their arguments that an action for judicial review is not commenced by an application for leave for judicial review as leave is a condition precedent to commencing action which must be initiated by Fixed Date Claim Form. By this analysis, VIEC would only have commenced their action when they filed their Fixed Date Claim Form on 4th September 2007, after leave was obtained which was by any reckoning outside the six-month statutory period.

[39] CPR Part 56 deals specifically with applications for administrative orders which encompasses claims for judicial review. However, it lays down a special procedure for applying for judicial review. First, r. 56.3 (1) stipulates: "a person wishing to apply for judicial review must first obtain leave." Then r. 56 3(2) provides that the application may be made without notice and r. 56.3(3) makes provisions for the contents of the application. And r. 56.4(1) provides:- "an application for leave to make a claim for judicial review must be considered forthwith by a judge of the High Court."

[40] En passant, I remark that 'forthwith' means no more than it must be dealt with within a reasonable time. It does not mean that the judge is required to deal with the matter immediately. See **Words and Phrases Legally Defined 3rd Edition** Vol. 3 D-J p. 272:-

> "Where the word "forthwith" occurs in a statute it has usually been construed as meaning "within a reasonable time in view of the circumstances of the case and of the subject matter."

[41] Now, Mr. Farara says that leave is a condition precedent to filing an action for judicial review and that an application for leave cannot be considered as the beginning of an action for judicial review. However, Mr. Hockman says that the procedure for making a claim for judicial review is a two-stage process and the leave stage must be considered as the start of the claim.

[42] Much reliance was placed on **Seal** by Mr. Farara**.** In that case Mr. Seal was arrested by police officers for breach of the peace and removed to a place of safety under section 130 of the Mental Health Act 1983 U.K. where he was detained for over a week. Just before

the expiration of the six-year limitation period under section 2 of the Limitation Act 1980 he brought proceedings against the police authority for, inter alia, misuse of section 136. The district judge found that he had failed to obtain the necessary leave of the High Court under s. 139(2) of the 1983 Act to commence civil proceedings in respect of acts purporting to be done in pursuance of the 1983 Act and struck out the whole claim as a nullity. Mr. Seal, who was now outside the limitation period, appealed and the judge restored the part of the claim not relating to the exercise of the police power under the 1983 Act. Mr. Seal appealed on the ground that the requirement for leave was directory rather than mandatory and the situation could be remedied by a subsequent grant of leave with a stay of proceedings in the meantime.

[43] The English court of appeal upheld the judge's ruling by a majority there being powerful dissenting judgments by Lord Woolf and Baroness Hale of Richmond. The basis of the decision was that ever since a requirement for leave in such circumstances had first been introduced in 1930 there had been a clear consensus of judicial, professional and academic opinion that lack of the required leave rendered proceedings a nullity; that, consequently, Parliament had to be taken to have passed the 1983 Act on that basis and with that intention; that although an inflexible rule might be hard on some litigants, Parliament must have recognised that possibility and considered it a price worth paying for the reassurance and protection it gave to those dealing with the mentally ill.

[44] To my mind this case has no application here as the relevant statute itself laid down the leave requirement and made it clear that without leave the court would have no jurisdiction[8]. Therefore this was not just a question of procedure but went to the court's jurisdiction to entertain the claim. The court agreed with that analysis and found that the requirement for leave was a precondition to filing the claim.

[45] In contrast, the requirement for leave here is a procedural one. Rule 56.3(1) does not speak to the court's jurisdiction in the sense that it confers jurisdiction as the court's

[8] Section 139 (2) reads:-

"(2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions."

jurisdiction to grant judicial review arises from the court's inherent jurisdiction[9]. The framers of CPR, by regulating the procedure for making application for judicial review meant to sift out unmeritorious claims at an early stage, hence the leave stage, but cannot be taken to have intended that the failure to obtain leave would render a claim a complete nullity. Furthermore, that the requirement for leave is a procedural requirement is emphasised by the provisions in r. 56.6 which allow the court to treat a proceeding which is in reality one for judicial review but which was commenced without leave not as a nullity but as an irregularity. Clearly then, the reasoning in **Seal** cannot be applied to CPR r. 56.

[46] I also found it helpful to look at the position for initiating claims for judicial review in England which is akin to ours. **De Smith Judicial Review of Administrative Action 5th Edn** describes the procedure for obtaining judicial review in England under the then RSC Order 53 (this has now been superseded by UK CPR rule 54.) At para. 15-011 the learned authors state:-

> **"the procedure usually consists of two, but there can be three or four stages:**
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> (1) the application for leave of the court to commence proceedings,
> (2) an interlocutory stage
> (3) the hearing of the substantive application and finally
> (4) an appeal." (Emphasis added.)

[47] They go on to describe the 'purpose of the leave stage' as –

> "The leave stage in Order 53 proceedings serves a number of purposes. First, it may safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for them to become a party to litigation. The requirement may also prevent administrative action being paralysed by a pending, but possibly spurious, legal challenge. Secondly, for the High Court, the leave procedure provides a mechanism for the efficient management of the growing judicial review caseload. A large portion of applications can be disposed of at the leave stage

[9] See Gordon JA para. 17 in Civil Appeal 23 of 2006 – St. Lucia – **C.J. Touring Service et al and St. Lucia Air and Seaports Authority** –

"Judicial review derives form the inherent jurisdiction of the court."

with the minimum use of the court's limited resources. Thirdly, for the applicant the leave stage far from being an impediment to access to justice, may actually be advantageous since it enables the litigant expeditiously and cheaply to obtain the views of a High Court judge on the merits of his application."[10]

[48] The learned authors also explain the procedure in the English courts for challenging the grant or refusal of leave. An applicant who has been refused leave may apply **de novo** to another judge or to the court of appeal and a respondent by applying to set aside the grant of leave. The same applies here. See also **HMB Holdings v. Attorney General of Antigua and Barbuda**[11]

[49] This analysis of the English procedure is equally applicable to our situation. No doubt the leave requirement was introduced for the very reasons alluded to by **de Smith**. It is noted that in England leave in judicial review proceedings is not regarded as a condition precedent to filing a claim but rather as the first stage of the claim. I have no doubt that the same applies here and that leave to apply for judicial review is the first stage of an application for judicial review and that an application for leave is to be regarded as the commencement of the action for the purposes of section 2(a) of the Act. That this is the correct view is bolstered by reference to the panoply of powers vested in a judge at the leave stage. See Part 56.4 and 56.5. Under these provisions the judge seised of the matter may give leave without a hearing or he or she can direct a hearing in open court and may grant interim relief. And notably where the application is for a order of prohibition or certiorari, the judge **must** direct whether the leave operates as a stay of the proceedings. A judge may also refuse leave on grounds of delay. Are these not matters which call for some form of judicial intervention and involves the making of some kind of court order?

[50] It is inconceivable that the application for leave can be regarded as one other than the commencement an action or of legal proceedings for the purposes of section 2(a) of the Act.

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[10] It has been suggested that it is wrong for such a broad discretion to be exercised **at this preliminary stage** of the litigation process, if only because important issues of principle may often emerge only late in the litigation process.

[11] Privy Council Appeal No. 18 of 2006

[51] I note that neither of the Respondents has offered any analysis as to how the procedure for leave should be regarded other than to say that it is a condition precedent to the bringing of an application for judicial review. However, in my judgment, that analysis is flawed as it fails to take account of the powers that a judge can exercise on the consideration of an application for leave and also to consider that there is no other **proper** way for an applicant to commence proceedings for judicial review although as already noted the court can grant leave. See rule 56.6(3).

[52] I agree with Mr. Hockman that to hold otherwise will unduly fetter a litigant's access to the court and unduly subject him to the exigencies of the system as once he or she files an application for leave he or she has no control as to how long it will take before it is considered by a judge. According to the analysis of the Respondents the litigant will have to wait for leave to be granted and then commence the action by Fixed Date Claim Form subsequently. Thus, an applicant will in effect have much les than six months within which to commence legal action and will be unable to assess with any certainty the period within which an application for leave will be considered. Thus he or she will be entirely at the mercy of the court office and the judge in meeting the six-month time limit. Is this what the framers of CPR had in mind when they imposed the requirement for leave?

[53] In this very case VIEC, although they filed their application for leave on the very last day of the six-month period, had to wait for a judge to hear the application. I did not consider the application until almost 20 days after its filing. So, even if the application were filed not on the last day of the period, but twenty days before, the claim would still have been out of time. If the application for leave does not constitute an action or proceedings for the purposes of the Act then a litigant will be severely disadvantaged and in fact discriminated against as if one has an ordinary claim one can file suit on the very last day of the limitation period and this will be sufficient to stop time running. This could not be the intention of CPR to so discriminate when it comes to questions of limitation of actions in matters of judicial review. Clearly, in my judgment when one considers Part 56 in its entirety it contemplates a two-stage procedure for claims for judicial review and the application for leave must be considered as the commencement of the claim for the purposes of the Public Authorities Protection Act. This interpretation will visit no injustice

on anyone and it accords with the overriding objective which we are required to take into account when interpreting any provisions of CPR. See rule 1.2(b).

Conclusion

[54] For the foregoing reasons in my judgment a claim for judicial review under Part 56 is a two-stage process and the action or legal proceeding is commenced when an application for leave is filed. Thus, for the purposes of section 2(a) of the Act the filing of an application for leave for judicial review is the commencement of the action. Here, VIEC filed its application for leave on the 31st July, 2007 and this was within the six-month period stipulated for by the Act. It follows then that the claim for judicial review is not statute barred under the Act and the Respondents' challenge is without merit.

[55] VIEC is to have its costs to be assessed upon application within 21 days if not agreed such costs to be borne equally by the Government and Quorum. I have considered VIEC's request for immediate payment. The court has a discretion as to time of payment and ordinarily an order of the court is to be complied with as soon as practicable unless otherwise ordered. I take into account that VIEC is a non-profit organization and is pursuing litigation in the public interest and has had to retain counsel from abroad because of certain difficulties faced here which difficulties were alluded to by Dr. Lettsome in his affidavit testifying to the urgency of the matter. In my view it is just that the costs be paid within 10 days of agreement or assessment.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands