In The Supreme Court of Bermuda

CIVIL JURISDICTION
2022: No. 178

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER ORDER 53 OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

ROBERT G. G. MOULDER

Applicant

-and-

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondent

Before: Assistant Justice David Hugh Southey KC

Appearances: The Applicant did not appear following an order of the Court
Mr. Delroy Duncan KC and Mr. Ryan Hawthorne of Trott & Duncan Limited for the Respondent

Dates of Hearings: 28 & 29 March 2023

Date of Judgment: 31 May 2023

JUDGMENT

SOUTHEY, AJ

Introduction

1. This application for judicial review arises from the work of the Commission of Inquiry into Historic Land Losses in Bermuda ('the Commission of Inquiry'). The Commission of Inquiry was appointed under the Commissions of Inquiry Act 1935 ('the 1935 Act'). I have already delivered a judgment on 5 August 2022 in the matter of *Davis and Piper v The Premier and the Commission of Inquiry* 2021 No. 29. I will cite some of that judgment when setting out the factual background to the work of the COI.

2. I appreciated the assistance that I have been given by Mr Duncan KC and Mr Hawthorne. As I will set out, the conduct of the Applicants has posed challenges. I appreciate the efforts of Mr Duncan KC and Mr Hawthorne to ensure this matter has been fully considered despite the conduct of the Applicants.

Factual Background

3. In my judgment in *Davis and Piper* I noted that:

> *7. The Commission of Inquiry was appointed on 31 October 2019.*
>
> *8. According to the Commission of Inquiry's report as well as its terms of reference, the impetus for its appointment was a motion of the Honourable House of Assembly ('the HOA') on 4 July 2014 regarding land expropriation and the need to investigate it. On that date the late C. Walton D. Brown, JP, MP, a member of the Progressive Labour Party which was then the Official Opposition, introduced the motion. The ensuing parliamentary debate revealed that there were particular concerns regarding 2 well-known expropriations in Bermuda, Tucker's Town and St. David's Island. However, there were also concerns regarding widespread injustices in dealing with losses of land in other areas across the island. For example, Mr Brown MP stated that:*

We have an opportunity ... to help correct some of the wrongs of the bad old days when justice was a fleeting illusion for many, and where the rich, the powerful and the connected acted with impunity. The theft of land, the dispossession of property, took place in this country on a wide scale and over a long period of time. The villains in these actions, Mr. Speaker, were oftentimes lawyers, real estate agents and politicians, but not exclusively so. The victims were at times the poor and the marginalised, but not always. What the victims shared though, Mr. Speaker, was an inability to secure a just outcome. ... (Hansard 2014 p. 2603).

9. Mr Brown MP clearly was of the opinion that one group that was connected was those with a political connection. He stated that:

The "politically connected," Mr. Speaker, refers to individuals with close ties to politicians but, perhaps more importantly, to people who have actually sat, served in this Honourable Chamber. A significant number of land grabs have their fingerprints and their signatures on paperwork marked for posterity. (Hansard 2014 p. 2603). ...

11. The motion approved by the HOA following the debate was as follows:

...to take note of historic losses in Bermuda of citizens' property through theft of property, dispossession of property and adverse possession claims; AND BE IT RESOLVED that this Honourable House calls on His Excellency the Governor to establish a Commission of Inquiry into <u>all</u> such known claims and to determine, where possible, the viability of any such claims and make recommendations for any victims of wrongful action to receive compensation and justice. [Emphasis added]

12. The use of the word 'all' is significant as it suggests an intention that the Commission of Inquiry should be comprehensive. ...

14. Following a failure to act on the 1st motion, in 2017 the motion was again passed. This time it was acted upon by the Premier. A Commission was issued under the 1935 Act. This named the Honourable (Retired) Justice Norma Wade-Miller as the Chairman. The terms of reference set by the

Premier ('the terms of reference') were said to be derived from the HOA motion and were as follows:

> *1. Inquire into historic losses of citizens' property in Bermuda through theft of property, dispossession of property, adverse possession claims and/or such other unlawful or irregular means by which land was lost in Bermuda;*
>
> *2. Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens' property;*
>
> *3. Prepare a list of all land to which such historic losses relate;*
>
> *4. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property; and*
>
> *5. To refer, as appropriate, matters to the Director of Public Prosecutions for such further action as may be determined necessary by that Office.*

15. The Premier's commission also made it clear that findings should be submitted within 40 weeks or such longer period as the Premier might direct.

16. Mr Marc Telemaque, Secretary to the Cabinet, says in an affidavit that:

> *The Cabinet took the view that the establishment of a Commission was a matter of importance to the people of Bermuda, particularly those who considered themselves and their families to have suffered losses of land through theft of property, dispossession of property and adverse possession claims and through diverse other unlawful and irregular means over the past decades. The depth of feeling attached to these historic issues was evident in the protest of the then Governor's decision not to issue a commission of inquiry. The Cabinet determined that it was important to give a voice to as many of these people as possible. The breadth of cases suggested the need for an investigation that would be wide enough to allow such cases to be reported and heard. [Emphasis added]*

4. The Applicant complained to the Commission of Inquiry in a letter dated 8 June 2020.

5. On 19 June 2020 the Commission of Inquiry wrote to the Applicant. This letter stated that:

> *As a general proposition ... the Commission cannot make its decision based on broad allegations without supporting evidence; ultimately its conclusions must be supported by the evidence you can marshal.*
>
> *Having said that, the Commission is willing to hear your evidence limited to the facts that led to what you refer to in your application [as] a "deliberate land grab". We are aware from your application that the circumstances of the so-called land grab have been canvassed before the Supreme Court and as such, the Commission has no wish to traverse over grounds that are well tilled. However, you say that "your evidence will also be useful to the Commission in general as it illustrates how land theft could have occurred in other cases historically ... " It is that aspect of your evidence that the Commission wishes to hear.* [Emphasis added]

The Applicant's 1st affidavit states that he understood this letter to mean that he had been granted standing and that his evidence would be considered. The Commission of Inquiry argue that this letter is important when considering delay. That is because it was made clear the basis upon which the Applicant's evidence would be heard. In particular, it is said that this letter demonstrated that there would be no specific recommendation in the Applicant's case.

6. Mr Moulder subsequently wrote an undated letter (which from its contents appears to have been written in October 2020). This stated that evidence had been served. It also stated that:

> *As I have repeatedly stressed, the circumstances leading to the grab of my land have never been properly before the courts; in other words, there has never been a trial where the evidence supporting dishonesty was looked at and the merits of such evidence weighed. ...*
>
> *I ... hope that there has been some misunderstanding and that the Commission still intends to properly hear and fully ventilate my claim including what Mr. Smith referred to as "the criminality".*

7. On 12 October 2020 the Commission of Inquiry responded to the undated letter and stated that:

> *To be clear, the Commission is not a court of law. Rather, it investigates historical systemic issues relating to land grabs in Bermuda. It does not and cannot grant remedies to any claimant. If it decides that systemic issues need to be addressed, it may make a recommendation to the Government of Bermuda as may be required to resolve such systemic problems. In your letter, you suggest that your evidence will demonstrate a systemic problem relating to unlawful or irregular adverse possession. On that basis, the Commission is prepared to hear your evidence.*

8. The Commission of Inquiry's report stated that, in relation to Mr Moulder's case:

> *The COI decided to hold the Hearings in camera after 26th January, 2021 sitting. This arrangement was made to preserve the integrity of the process and afford a fair Hearing to all parties, including the Claimant and the parties to whom adverse statements had been directed by the Claimant on 26th January, 2021. Guided by section 8 of the Commission of Inquiry Act 1935 and the Rules of Procedure and Practice, the COI decided not to televise or broadcast the Hearings with a view in mind that, after hearing the evidence from the Claimant, it would make a determination thereafter regarding the issues of relevance and, more importantly, whether the probative value outweighed the prejudicial effect of any of the evidence to be given.*

9. The affidavit evidence filed on behalf of the Commission of Inquiry

> *We were concerned about how the issues raised by Mr. Moulder's evidence may impact any recommendation the COI may have made to the Director of Public Prosecutions (the "DPP") and any subsequent investigation by the DPP, particularly as that was specifically what was sought by the Moulder Complaint. ...*
>
> *The Former Commissioners were concerned that allegations of criminal conduct, such as theft, dishonesty, fraud, deception and deliberate land grab, were being made against individuals publicly in circumstances where those individuals had no notice of the allegations. The Former Commissioners*

were further concerned about issues of the COI procedure and whether issues such as the giving of evidence and self-incrimination could impact any recommendation to the DPP and any subsequent investigation. ([27] – [28])

10. There were in camera hearings on 26 January, 4 February and 23 March 2021. I have been provided with the transcript of these hearings. I have not heard submissions as to whether the disclosure of the transcripts in these proceedings mean that they are now public. As a consequence, I will merely note that the transcripts record the Applicant making allegations against individuals. As someone who is not a member of the Commission of Inquiry, I am not well equipped to determine the significance of those allegations.

11. On 23 March 2021 the Applicant withdrew from the Commission of Inquiry. He claimed he had a right to have evidence broadcast. He stated that he intended to bring judicial review proceedings.

12. On 13 July 2021 the Commission of Inquiry wrote to the Applicant (and others with an interest in the Applicant's case) stating that it had decided to reopen consideration of Mr Moulder's case. The reason for this is not entirely clear but appears to have been linked to the fact that documents submitted by Mr Moulder had been received as evidence.

13. The final report of the Commission of Inquiry stated that issues for it to consider included whether:

> *3. Whether Commissioners may review decision(s) of the Supreme Court of Bermuda.*
>
> *4. Whether Commissioners can inquire into and consider the merits of allegations and or hear new evidence 'supporting dishonesty', being relied on by the Claimant regarding his being dispossessed of land, in respect of a matter previously determined by the Supreme Court of Bermuda.*

Having directed itself that it needed to consider whether it could review decisions of this Court, the Commission of Inquiry concluded that:

> *The COI cannot review the decision of a Court of Bermuda and a fortiori is not empowered to consider the matters the Claimant sought to invite it to hear and decide, namely legal or other issues post the land being returned to*

him. As unfortunate as the present state of affairs of the Claimant may be, those are his legal challenges and finances. The COI has no jurisdiction to hear, much less determine, these matters.

14. The Commission of Inquiry submitted its report to the Premier on 31 July 2021. That covering letter was signed by the Commissioners including, Norma Wade-Miller J, as Chairman. That report was presented to the House of Assembly on 10 December 2021.

15. The 1st affidavit of Mr Moulder states that the Commission of Inquiry's website was updated in March 2022. This now stated that:

> *This matter was held in-camera in accord with item 7 of the COI Rules of Procedure and Practice thusly, all evidence, audio & video recordings, transcripts and documentation have been deemed confidential. Information on how to access these files can be found with the Archivists at the Bermuda Archives.*

It should be noted that this web posting can be read as suggesting that the records might be obtained from the Bermuda Archives. That is because it refers to information about access to the records being available from the Bermuda Archives.

16. The 2nd affidavit of Mr Moulder exhibits a series of e-mails between Ms Chambers and the Bermuda Archives regarding Mr Moulder's case. Importantly:
    a. Ms Chambers e-mailed seeking the records on 7 March 2022.
    b. Initially Ms Chambers was told that the records had not been received from the Commission of Inquiry.
    c. However, on 9 June 2022 Ms Chambers was told that the records would remain closed for 50 years. It was said that that decision had been made by the Commission of Inquiry.

Grounds

17. In my judgment ordering a rolled up hearing in this matter, I concluded that the following grounds were arguable:

1. *The Commission of Inquiry erred by failing to hold the Applicant's case in public and failing to disclose the Commission's records regarding the case.*
2. *The Commission of Inquiry's reasons for making no recommendation in the Applicant's case were flawed. In particular, there was no basis for refusing to consider matters that followed the order of the Court of Appeal returning Mr Moulder's land. The Commission also erred by refusing to consider criminality.*

I refused leave in relation to other grounds.

18. The grounds that I identified were not particularised in the form 86A in the manner that they were in the judgment ordering a rolled up hearing. However, I was satisfied that the form 86A (read as a whole) identified these 2 grounds (as well as others that I found were not arguable). I emphasise that I read the form 86A as a whole. It appeared to me that both the description of the decisions challenged and the relief sought shed light on the issues being raised on the grounds.

19. As I ordered a rolled up hearing rather than granting leave, I considered during the course of the rolled up hearing whether I had correctly identified matters raised in the form 86A. The Commission of Inquiry suggested that the language I had used when identifying the grounds that were arguable meant that the grounds were broader than those raised in the form 86A. One reason for that was said to be that the grounds specified in the form 86A were narrow. It appears to me that it would not be right for me to proceed on a basis narrower than I had suggested was arguable in my previous judgment. Mr Moulder was not heard at the substantive hearing. In any event, I have heard nothing that persuades me that the grounds are narrower than I concluded they were. The grounds I identified reflected the form 86A read as a whole. The complete form 86A includes both the decision challenged and the relief sought. In light of my approach below, I highlight the fact that the decision challenged in the form 86A was expressly said to include a challenge to all public records of the Applicant's case for 50 years.

Procedural History

20. These judicial review proceedings were issued on 13 June 2022.

21. The matter was listed for a leave hearing on 15 July 2022. Having heard argument I reserved my judgment.

22. On 5 August 2022 I delivered a judgment ordering a rolled up hearing of this matter. Although I found that there were arguable grounds, I wanted to consider whether leave should be refused on the grounds of delay and/or the existence of an alternative remedy. I concluded that those issues had not been addressed adequately in light of the position taken by the Commission of Inquiry.

23. The rolled up hearing scheduled for 17 October 2022 did not take place. This was because I was not in a position to determine whether the Applicant was correct to argue that there was good reason to stay the rolled up hearing. I subsequently concluded in a judgment delivered on 22 October 2022 that there was no good reason for a stay.

24. In the judgment delivered on 22 October 2022, I also concluded that indemnity costs should be ordered against the Applicant. This was on the basis that there had been a number of failures to comply with court orders. My judgment dated 22 October 2022 stated, among other matters, that:

> *37. Mr Moulder appears to have failed to grasp that he was obliged to conduct himself in a manner intended to ensure that the matter progressed towards trial. I highlight the following matters:*
>
> *a. Mr Moulder's failure to make a prompt and formal application for an adjournment after he had decided by at least 21 September 2022 (the date when the Constitutional Motion was withdrawn) that he wished to seek an adjournment.*
>
> *b. Mr Moulder's failure to address the direction requiring the service of evidence by 3 October 2022 until after that deadline passed. As noted above, there was no attempt to serve as much evidence as possible and/or apply for an extension of time for the service until after the deadline had passed.*
>
> *c. Mr Moulder's failure to make it clear in his e-mail dated 4 October 2022 that perceived failures of the Commission to disclose material justified him seeking an adjournment. Had that been made clear, the Commission might well have sought to provide full disclosure.*

d. Mr Moulder's service of evidence seeking a stay and/or additional material so shortly before the case management hearing that the Commission of Inquiry had no opportunity to respond on that date.

e. Mr Moulder's failure to anticipate that his application for a stay might fail so that he needed to ensure that continue to prepare for the hearing on 18/19 October 2022 so that it could effective if the application for a stay failed.

25. On 22 October 2022 I issued directions intended to facilitate the hearing of this matter on 28 and 29 March 2023. In a judgment delivered in writing on 8 March 2023 I concluded that the Applicant had again failed to comply with directions. I ordered that he could make no further submissions in writing or orally in support of his application. I expressed some concern about the Court determining this application without the Applicant. However, I noted that:

> *I have no faith in the Applicant's willingness to comply with orders. It is striking that he took no steps to comply when faced with the summons. There must come a point where the Court says enough is enough.* [21]

26. I have kept under review the order that the Applicant may file no further submissions in writing or make oral submissions. I am conscious of the overriding objective that requires the Court 'to deal with cases justly' (order 1A(1) of the Rules of the Supreme Court 1985). I have concluded that it remains just to prevent the Applicant making further written or oral submissions in light of the following matters:

    a. The fact that the Applicant has brought this situation on himself by repeated failures to comply with directions. I remain satisfied that there was a real risk of further adjournment if the Applicant was permitted to participate because he was unwilling to comply with directions.
    b. There would have been unfairness to the Commission of Inquiry had the Applicant been permitted to file late written submissions or make oral submissions without a skeleton argument. The Commission of Inquiry would have been denied a proper opportunity to respond to the Applicant's submissions.
    c. I am not aware of any case where an applicant for judicial review has been unable to participate because of a failure to comply with directions. That may

because the degree of non-compliance with directions in this case is exceptionally rare. It is hopefully extraordinary for a party to be ordered to pay costs of an adjourned hearing on an indemnity basis as a consequence of non-compliance with directions and then fail to comply with further directions putting the hearing of the matter at risk for a second time. In any event, I am aware of at least one case where a defendant in judicial review proceedings was prevented from participating because of non-compliance (*R (AT) v Secretary of State for the Home Department* [2017] EWHC 2714 (Admin)). I can see no reason why applicants should be treated differently. Ultimately the Court must be able to proceed in the absence of the applicant otherwise orders of the Court could be ignored.

d. In my judgment dated 8 March 2023 I noted that the Commission of Inquiry was represented by lawyers who owed duties to the Court. That was consistent with the approach in *AT* where the judge noted that the claimant's lawyers owed duties to the Court [16]. I have no reason to believe that Mr Duncan KC and Mr Hawthorne did not comply with their duties. I was also conscious that I needed to consider points that might have been taken by the Applicant.

Legal Framework

27. Section 1 of the 1935 Act provides that:

> *1. The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.*
>
> *2. Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public.* **[Emphasis added]**

28. Section 1A of the 1935 Act provides that:

> 1. *The Premier shall, in addition to the Governor, have the authority to issue commissions of inquiry under this Act.*
> 2. *When the Premier acts under subsection (1), sections 1 to 6 and 11, and the First and Second Schedules, shall be read with "Premier" in place of "Governor", and the rest of those provisions shall be construed accordingly.*

This makes it clear that the Premier can exercise the powers of the Governor identified in section 1 (as well as other powers set out in the 1935 Act). Obviously, in this case it was the Premier who established the Commission of Inquiry.

29. Section 6 of the 1935 Act provides that:

> *The commissioners shall, after taking the oath, make a full faithful and impartial inquiry into the matter specified in their commission, and shall conduct such inquiry in accordance with the direction (if any) in the commission, and shall, in due course, report to the Governor, in writing, the result of such inquiry; and the commissioners shall also, when required, furnish to the Governor a full statement of the proceedings of the commission, and of the reasons leading to the conclusions arrived at or reported.*

30. The terms of reference establishing the Commission of Inquiry state that:

> *I FURTHER DIRECT that, without prejudice to the powers granted to the Commission under the Commissions of Inquiry Act 1935, the Commission shall conduct such parts of the inquiry that it may deem appropriate in camera.*

31. Section 8 of the 1935 Act provides that:

> *The commissioners acting under this Act may make such rules for their own guidance and the conduct and management of proceedings before them, and the hours and times and places for their sittings, not inconsistent with their commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their commission.*

32. Rule 7 of the Commission of Inquiry's Rules provide among other things that:

> *Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications on some aspects of its mandate may be made to proceed in camera.*

33. The Commission of Inquiry's Rules further provide that:

> *28. All evidence shall be categorized and marked P for public sittings and, if necessary, C for sittings in camera.*
>
> *29. Electronic copies of the P transcript of evidence will be provided to parties by the Secretary or her delegate and will be published as soon as is possible on the Commission website. Hard copies of the transcript may be ordered by anyone prepared to pay the cost. One copy of the P transcript and the P exhibits of the public hearings will be made available for public review.*
>
> *30. Another copy of the P transcript of the public hearings and a copy of P exhibits will be available to be shared by the media.*
>
> *31. Only those persons authorized by the Commission, in writing, shall have access to C transcripts and exhibits.* [Emphasis added]

Arguments of the Parties

34. I have read the skeleton argument filed on behalf of the Commission of Inquiry. In light of the order that I made regarding the participation of the Applicant, I have not had the benefit of a skeleton argument from the Applicant. I have, however, taken account of the arguments presented at the leave hearing. I have also taken account of arguments that it appears to me would have been open to the Applicant.

Delay

Legal principles

35. Section 68 of the Supreme Court Act 1905 provides that:

> *(1) The Court may refuse to grant leave for the making of an application for judicial review, or to grant any relief sought on the application, if it considers that -*

(a) there has been undue delay in making the application; and

(b) 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.

Subsection (1) is without prejudice to any enactment or Rule of Court which has the effect of limiting the time within which an application for judicial review can be made.

36. Order 53, rule 4 of the Rules of the Supreme Court 1985 provides that:

(1) An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

37. It is clear from the language of order 53, rule 4(1) that an application must be made promptly even if it is made within 6 months (*Perinchief v Public Service Commission et al* (Civ All No 6 of 2009). The primary requirement is promptness.

38. The reason for the relatively tight time limit in judicial review is clear. In *O'Reilly v Mackman* [1983] 2 AC 237 Lord Diplock held that:

The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision (p280H-281A)

39. As order 53, rule 4(1) makes clear, it is open to the Court to extend time where there is good reason. In *Maharaj v National Energy Corporation of Trinidad and Tobago [*2019] 1 WLR 983 it was held that whether there is a good reason to extend time:

> *... 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 prospects of success, the presence or absence of prejudice or detriment to good administration, and the public interest.* [38]

Ground 1

40. The Commission of Inquiry argues that the decision challenged in ground 1 in this case was taken on 26 January 2021. As noted above, that was the date when the decision was taken to hear the Applicant's evidence in camera. It is argued, in essence, that there was no separate decision to deny public access to the transcript of the evidence or other materials. The denial of transcripts was the consequence of rules 28-31 of the Commission of Inquiry's Rules.

41. It appears to me that the Applicant does not accept that analysis. For example, the form 86A filed in support of the application for judicial review states that one of the decisions challenged is:

> *The decision of the COI to suppress from public view details of the Applicant's claim which suppression included:*
>
> *(a) not releasing any of the Applicant's evidence or transcripts of the Applicant's hearings on its website which website was updated subsequent to 11th December and*
>
> *(b) closing to the public all records of the Applicant's claim for the period of 5O years, a decision made known through email from the Bermuda Archives on 9th June 2022.*

42. It appears to me that there can be no doubt that any challenge to the decision taken on 26 January 2021 to hold a hearing in camera is far out of time. It is also difficult to see how there is good reason to extend time. The Applicant was threatening to bring judicial review proceedings in 2021. However, the Applicant did nothing until these proceedings were commenced. The Applicant caused further delay after the grant of leave.

43. However, it is clear that the Applicant is arguing that there were later decisions to decline to permit public access to his evidence and the transcripts of his hearing. It appears to me that argument requires me to consider whether there really was or should have been a separate decision to decline to disclose the evidence and transcripts. A mere repeat of a historic decision is not a fresh decision.

44. It appears to me that rules 28-30 of the Commission of Inquiry's Rules make it clear that the starting point when a decision is taken to hold an in camera hearing is that evidence considered during the in camera hearing as well as the transcript of evidence given during the in camera hearing is confidential. However, rule 31 of the Commission of Inquiry's Rules provides that the Commission of Inquiry has a discretion to authorise the disclosure of the material. In this case it appears to me that the Commission of Inquiry is essentially saying that it did not consider authorising disclosure. As a consequence a key issue is whether the Commission was entitled to give no consideration to authorising disclosure after the initial decision that the hearing should take place in camera. At this stage it appears to me that it is arguable that there was a duty to give separate consideration to whether transcripts and evidence should be withheld. It appears to me that conclusion is consistent with my indication in the judgment of 5 August 2022

45. If there was a duty to consider disclosure, as already noted. My understanding of the evidence of the Commission of Inquiry is that there was no decision to decline to order publication of the transcripts and evidence. That means that there is no clear date when time starts to run from. It appears to me that either a challenge to the failure to consider disclosure is in time or time should be extended for the following reasons:

    a. Although there is some suggestion that time cannot start to run until a person is properly notified of a decision (*R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 at [26]), the prevailing view appears to be that lack of knowledge does not prevent a decision being out of time (*R (Crompton) v South Yorkshire Police and Crime Commissioner* [2018] 1 WLR 131 at [103]) but does provide a good reason to extend time (*R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at [74]). It appears to me that it was unclear whether material was being withheld until at least March 2022.
    b. If there is a duty to review the publication of documents, that would imply that there is an ongoing failure to conduct that review meaning that the application

for judicial review is not out of time (*R (Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin) at [197]).

c. The public interest in a matter proceeding can be relevant as to whether it should be held to be out of time (*Riverside Truck Rental Ltd v Lancashire County Council* [2020] EWHC 1018 (TCC) at [100]). Public access to the records of the Commission of Inquiry is in the public interest if there is no good reason for maintaining the confidentiality of those documents. That suggests that the Court should determine whether there is good reason for withholding those documents.

d. It is difficult to see what prejudice is caused to the Commission of Inquiry if time is extended.

Ground 2

46. The second ground challenges the decision to make no recommendation. The first issue that needs to be determined in relation to that ground is the date of decision. The form 86A filed by the Applicant suggests that the date of decision is 11 December 2021 as that is when the Commission of Inquiry published its report.

47. It is not agreed that the Applicant has correctly identified the date of decision. As noted above, it is argued by the Commission of Inquiry that the letter dated 19 June 2020 made clear the basis upon which the Applicant's evidence would be heard. It is said that the letter made it clear that there would be no specific recommendation in the Applicant's case. I am not sure that is a fair reading of the letter. It appears to me that the letter is not entirely clear. When reaching that conclusion I take account of the fact that the letter was directed at the Applicant, who was not a lawyer and so can be expected to have been less aware of the way in which the Commission of Inquiry might be expected to operate. So for example, the reference to not wanting to consider matters that had been 'well-tilled' might have been understood as permitting the Applicant to argue about what was 'well-tilled'. There is some reason to believe that the Applicant understood the letter dated 19 June 2020 as permitting him to argue about what had been determined by the courts. That appears to be what he is attempting to do in his subsequent letter. The position is further complicated by the letter from the Commission of Inquiry dated 12 October 2020. That clearly stated that what was in issue was systemic failings. However, it did not suggest

that there could be no recommendation in the Applicant's case if it was demonstrated that there were systemic failings.

48. In light of the matters above, I conclude that either there was no clear decision set out in the letter dated 19 June 2020 or if there was a decision, the lack of clarity would potentially a good reason to extend time. That conclusion is supported by the fact that judicial review is a remedy of last resort. That suggests that the Applicant could not have been expected to have commenced judicial review proceedings when there was a possibility that the Commission of Inquiry could have been persuaded to change its position. However, that is not an end of the matter.

49. The Commission of Inquiry report was published on 10 December 2021. These proceedings were issued on 13 June 2022. Prima facie that is outside the 6 month time limit for applying for judicial review. As I found in *Junos v Premier* 2022 No 179, because the 6 month time limit expired on a Saturday, time was extended until 13 June 2022. That finding has not been challenged by the Commission of Inquiry. However, as both *Junos* and *Perinchief* make clear, it is still necessary to consider whether the challenge to failure to make a recommendation was brought promptly.

50. The written submissions of the Applicant that were submitted in advance of the leave hearing on 15 July 2022 highlight 3 matters to argue that the application for judicial review is not out of time. In addition to arguing that the application was brought within 6 months, it is argued that it was only in March 2022 that the Commission of Inquiry's website made it clear that evidence and transcripts would not be uploaded. It was then only on 9 June 2022 that the Archives indicated that public access to the records was closed for 50 years.

51. It appears to me that none of the matters identified in the Applicant's written submissions (and the associated evidence in response) explain why it took 6 months to commence a challenge to the Commission of Inquiry's decision not to make a recommendation. That decision was known about on 10 December 2021. It appears to me to be clear that the application was not brought promptly.

52. Although I have found that the application is out of time, I still have to consider whether to extend time. I do not accept that a formal application is required. The language of order 53, rule 4(1) makes it clear that the Court has a power to extend time for good reason. Applying the approach in *Maharaj* it appears to me that the following matters are relevant to whether to extend time:

a. The issues raised by ground 2 are not particularly important. I already concluded in *Davis and Piper* that the Commission of Inquiry misdirected itself as to the scope of its duties. That was significant as it raises questions about the scope of the work of the Commission of Inquiry. Once it has been established that the Commission misunderstood the scope of its terms of reference, the precise detail of the extent of the misunderstanding is less significant. Ultimately, as indicated in my judgment dated 21 October 2022 on relief and costs in the matter of *Davis and Piper*:

> *... at present I have no reason to believe that my declaration will not be respected. To the contrary, as Craig demonstrates, I can expect compliance with the law.* [9]

As a consequence, the judgment in *Davis and Piper* should cause consideration to be given as to what steps need to be taken in relation to the misdirection.

b. In this case, the delay is not merely before the application was lodged. As noted above, the failure to comply with directions caused one substantive hearing date to be lost and risked another. These matters mean, for example, that the Court should be cautious about granting relief (section 68(1)(b) of the Supreme Court Act 1905). That is a matter that weighs against extending time.

c. The matters in the sub-paragraph above are the context in which the public interest should be considered. As noted above, it is in the public interest for any uncertainty about the legality of decisions of public authorities to be resolved promptly (*O'Reilly v Mackman*). That suggests that the Court should be reluctant to deliver a judgment on delay that suggests time should be readily extended.

d. The strongest factor weighing against the matters above is the strength of ground 2. In the judgment ordering a rolled up hearing I found ground 2 to be arguable. It would not be surprising if the Commission of Inquiry had misdirected itself in the Applicant's case given that found it had in *Davis and Piper*.

53. Having considered all of the matters above, it appears that I should not extend time. Although there is a clear argument that the Commission of Inquiry misdirected itself, there is also a need to finality in this context. The Applicant has repeatedly failed to act with the degree of expedition required of a person applying for judicial review. There is a public interest in determining whether the Commission of Inquiry has correctly understood scope of its duties. However, that public interest has been addressed by my judgment in *Davis and Piper*. My conclusion that there was a misdirection by the Commission of Inquiry is a matter that the Premier can be expected to address (*Craig v Her Majesty's Advocate* [2022] 1 WLR 1270 at [46]).

Conclusions regarding delay

54. In light of the arguments of the parties and my analysis of the arguments, it appears to me that there is a single issue that I need to determine substantively. That is whether the Commission was entitled to give no consideration to authorising disclosure after the initial decision that the hearing should take place in camera.

Disclosure of the Records of the Commission

Legal framework

55. I have set out above the Commission of Inquiry's Rules. The Rules provide that 'only those persons authorized by the Commission, in writing' may access the records of a confidential hearing. I can see nothing in the Rules that would prevent authorisation being given in writing permitting general access being granted to the records of a confidential hearing. Even if that is wrong, access could have been granted to the Applicant.

56. In *Scott v Scott* [1913] AC 417 Lord Atkinson held that:

> *The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.* (p463)

57. The principle of open justice has, however, never been absolute (e.g. *Khuja v Times Newspapers Ltd* [2019] AC 161 at [14]).

58. Written submissions on behalf of the Commission of Inquiry state:

> *There is doubt on whether there is a legal presumption that any public inquiry is required to sit openly: see Persey v Secretary of State for the Environment Food and Rural Affairs [2002] EWHC 371 (Admin) [37]-[59].* [4(a)]

59. In *Persey v Secretary of State for the Environment Food and Rural Affairs* [2002] EWHC 371 (Admin) it was noted that there are public inquiries where what is in issue 'misconduct'. It was said that in those cases:

> *Of course it is imperative when questions of that sort are raised that inquiries are held in public. Their objective is above all to establish the truth and the principle of open justice applies.* [39]

Conclusions regarding open justice

60. I accept that commissions of inquiry are conducted in a wide range of circumstances. As a consequence, there is no presumption that the open justice principle will necessarily apply to all commissions. Matters such as the nature of the issue and the importance of those issues to the public determine whether open justice applies.

61. I have set out above the background to this Commission of Inquiry. It is clear that the Commission of Inquiry was intended to bring a measure of justice to the victims of very substantial historic injustice. There was a concern that the powerful had abused their powers. That meant that it was important that the work of the Commission of Inquiry was not seen to be protecting the powerful. Openness was potentially an important aspect of that. That suggests the principle of open justice applied. I can see no reason why it would not. As was said in *Scott v Scott*, 'the best means for winning for it public confidence and respect' is a public hearing.

62. My finding that the open justice principle applies does not mean that the Commission of Inquiry is unable to hold a hearing in private if there is good reason for holding it in private. However, there needs to be a justification for holding a hearing in private. There

also needs to be justification for withholding the records of a hearing. The existence of a justification for holding a hearing in private does not necessarily mean that there is a justification for withholding a record of the hearing. It may be that the evidence given during the hearing was not as sensitive as anticipated. It may be, that having heard the evidence, it is clear that the risk of prejudice to a criminal prosecution is not as great as appeared.

63. The fact that there may be no justification for withholding the records of a private hearing appears to me to mean that consideration must be given to disclosing those records. Otherwise records may be withheld for no good reason. Even if that is wrong, the e-mail from Ms Chambers dated 7 March 2022 sought disclosure of the records. The terms of rule 31 of the Commission of Inquiry's Rules plainly permitted it to authorise the disclosure of the records as requested by Ms Chambers.

64. I have already indicated that my understanding of the evidence of the Commission of Inquiry in this case is that there was no decision to decline to order publication of the transcripts and evidence. That appears to me to mean that the Commission of Inquiry has not established that there is a good reason for withholding the records of the hearings at which Mr Moulder gave evidence.

65. I have considered whether there is clearly a good reason for withholding records of the hearings at which Mr Moulder gave evidence. I have found it impossible to reach a conclusion regarding that. I simply do not have the necessary knowledge. I am concerned that the Commission of Inquiry may have been over influenced by the desire to avoid embarrassment of people who were the subject of the Applicant's allegations. While I accept that there are circumstances where a person's right to privacy may require evidence to be heard in private, it is significant that court proceedings are often embarrassing and that is generally not a reason for the proceedings to be private (*Scott*). Applying the approach in *Sadovska v Secretary of State* [2017] 1 WLR 2926, I cannot conclude that had the Commission of Inquiry properly directed itself, it would 'inevitably' have withheld the records [33].

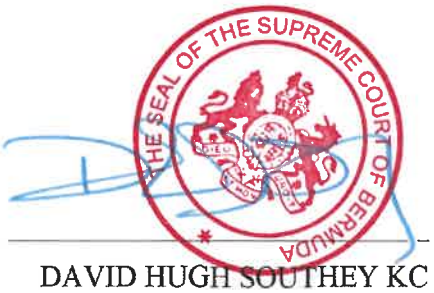
66. I have considered whether there is any reason to refuse to make a declaration. Obviously relief in judicial review is discretionary. However, I cannot see any reason to decline to

make a declaration. The reality is that a declaration merely records the legal position as found by me in this judgment. That implies that there is no reason to refuse to make a declaration.

Conclusion

67. In light of the matters above, I am willing to make an order declaring that the Commission of Inquiry erred in its approach to the continuing confidentiality of the records of the hearings at which the Applicant gave evidence. The Commission of Inquiry can be expected to take appropriate action (*Craig v Her Majesty's Advocate* [2022] 1 WLR 1270 at [46]).

Dated this 31st day of May 2023



DAVID HUGH SOUTHEY KC

ASSISTANT JUSTICE