IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/PUB/jrv/00007

B E T W E E N

STEPHANO CURRY

Applicant

AND

THE COMMISSIONER OF POLICE

First Respondent

AND

THE ATTORNEY GENERAL

Second Respondent

Before:	**The Honorable Madam Justice Carla Card-Stubbs**
Appearances:	Ms. Maria Daxon of Counsel for the Applicant Ms. Monique Millar of The Attorney General's Chambers, Counsel for the Respondents
Hearing date:	4th April 2024

Civil Procedure and Practice- Application to set aside witness summonses issued in judicial review proceedings- Part 33 and Part 25 The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR')- Rule 54.8 CPR - Practice Direction 11 of 2023
Judicial restraint in making orders for discovery and cross-examination in judicial review proceedings

Pursuant to Part 33 CPR, the Respondents sought to set aside witness summonses issued by the Applicant in these proceedings.
HELD: Allowing the Respondents' application, the court found that no sufficient basis had been shown for issuance of witness summonses or Writs of Subpoena ad testificandum in this case.

"The court's starting point is that judicial review is a supervisory jurisdiction. It is concerned principally with the legality, rationality, and procedural propriety of the impugned decision, and not with a general re-hearing of the underlying merits. For that reason, both disclosure and cross-examination are exceptional. A court hearing a judicial review should resist attempts to obtain broad discovery or compel witnesses to attend for the purpose of exploring whether some further challenge might be constructed from their evidence."

RULING

INTRODUCTION

[1.] Before this court is the Respondents' application to set aside certain writs of subpoenas and witness statements.

[2.] For the reasons that follow, that application is acceded to.

BACKGROUND

[3.] On the 8th day of February 2018, the Applicant sought Leave to Apply for Judicial Review. Leave was granted on September 24, 2019 and the Applicant filed its Originating Notice of Motion on September 25, 2019.

[4.] The Applicant is a former police officer and seeks to review the decision of the First Respondent, to discharge him from the Royal Bahamas Police Force. The Application is said to be grounded in illegality, irrationality, legitimate expectation and procedural impropriety of the decision.

[5.] On March 6, 2023, this Court gave directions in preparation for the substantive hearing. Thereafter the Applicant sought to have access to his personnel file held by the Respondent.

There were several attempts made for the parties to meet so that the Applicant could inspect the file. For various reasons, a meeting did not take place.

[6.] It is against that background that the Applicant sought to issue writs of subpoena duces tecum to a number of persons, and thereafter, witness summonses to a number of persons.

Writs of Subpoena ad Testificandum/Witness summonses

[7.] On August 4, 2023, the Applicant filed Praecipes for Writs of Subpoena Ad Testificandum addressed to the following persons for the purpose of giving evidence in this matter:

i. Ms. Brenda Dorsett, Permanent Secretary, Ministry of National Security
ii. Mr. Emrick Seymour, Former Deputy Commissioner of the Royal Bahamas Police Force
iii. Mr. Anthony Ferguson, Director of National Crime Intelligence Agency
iv. Ms. Lisa Hall, Under Secretary, Ministry of National Security
v. Ms. Cecelia Strachan, Permanent Secretary, Department of Public Service and
vi. Mr. Jack Thompson, Permanent Secretary, Office of the Governor General

[8.] On September 11, 2023, the Respondents filed an application in respect of each Writ of Subpoena (save for that issued to Lisa Hall), styled as "Application to vary or set aside a Witness summons". An application in relation to Lisa Hall was filed on October 19, 2023.

[9.] I note for the record that on September 15, 2023, the Applicant filed a Notice of Application "for several witnesses to be subpoena [sic]" and on December 19, 2023, the Applicant filed a Notice of Application for Witness summonses. The latter application is said to be supported by an affidavit of Christopher Breenen, filed on February 2, 2024. The Applicant's applications are made pursuant to Part 33 The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR') and Part 25 CPR, Rule 25.1. The Applicant's applications did not comply with the timeline set by this court by virtue of its case management directions. No extension of time was sought and the applications were not pursued.

Application to vary or set aside a Witness summons

[10.] The Respondents filed an application to set aside each issued Writ of subpoena ad testificandum/witness summons. The applications are identical save for the name of the person summoned. For this purpose, I will use the application filed September 11, 2023 in relation to Ms. Cecelia Strachan. That application reads:

> On the 4 August A.D. 2023, We were served a Writ of Subpoena ad Testificandum requiring the named witness, Ms. Cecilia Strachan to give evidence on behalf of Stephano Curry. (a copy of which is attached to this notice]
> I now apply for that witness summons to be set aside.
> REASONS:
> The reasons for making this application are:
>
> 1. No application was made to the Court by the Applicant for the Court to issue a Writ of Subpoena duces tecum (Witness Summons) therefore the Witness Summons was not issued by the Court, or a Court officer authorized to do so.
> 2. The Writ of Subpoena duces tecum (Witness Summons) was not properly issued using the relevant practice form.
> 3. The Writ of Subpoena duces tecum (Witness Summons) does not specify the nature and relevance of the evidence the proposed witness is expected to render to the Court or what documents the witness is expected to produce at the hearing.
> 4. The said Writ of Subpoena duces tecum (Witness Summons) failed to indicate the nature and the relevance of the evidence to be produced, it is submitted that the any evidence would be both speculative and irrelevant in this matter.
> 5. The said Writ of Subpoena duces tecum (Witness Summons) is frivolous, vexatious, oppressive and an abuse of the process of the Court, since evidence sought is not relevant to the issues raised in the pleadings.
> 6. Pursuant to PART 33.3 (4) and PART 25.1, we humbly request that the Court set aside this Witness Summons.

[11.] The referenced 'Writ of Subpoena ad Testificandum' is exhibited to the application. It is in similar form and terms to the documents served in relation to the other requested witnesses. The document served by the Applicant in relation to Cecilia Strachan bears the heading, 'PRAECIPE FOR WRIT OF SUBPOENA AD TESTIFICANDUM'. The substantive provisions read:

> SEAL a Subpoena AD Testificandum on behalf of Mr. Stephano Curry, the Applicant herein directed to:
>
> Ms. Cecilia Strachan Permanent Secretary
> Department of Public Service,
> Poinciana Hill Complex
> Meeting Street,
> New Providence, The Bahamas
>
> Returnable before Her Ladyship the Honourable Mrs. Justice Carla Card Stubbs sitting on the Second Floor, Supreme Court, East Street North, Nassau, New Providence, The Bahamas on 24th and 25th of October 2023 at 10:00 a.m. in the afternoon.

ISSUE

[12.] The issue in this case is whether the issued writs of supboenas ad testificandum/witness summonses ought to be set aside.

SUBMISSIONS

Respondents' submissions

[13.] Concerning form and procedure, the Respondents argue that the writs of supboena/witness summonses should be struck out because they fail to comply with Rule 33.2 CPR and Form G21 CPR. The Respondents submit:

> It is submitted that the relevant Subpoenas/Witness Summonses are defective given that they have not been issued in the required form (Form G21) as required by the CPR 2022, Part 33.2(2) nor has the required information been provided.

[14.] As to substance, the Respondents submit that there is no dispute of relevant or critical fact requiring cross-examination, that there is no specificity as to the evidence requested and that the request is imprecise and ambiguous, unsupported by affidavit or documentation, and an abuse of process. The Respondent argues that disclosure in judicial review is exceptional. The Respondents contend that:

> The relevant Subpoenas/Witness Summonses indicate that each witness is to provide testimony on behalf of the Applicant on the specified hearing dates; no information is given regarding the nature of the documents or the evidence each witness is required to produce to the Court. The witness summonses are speculative in nature, and it is our assertion that the Applicant seeks to use the testimony of the witnesses as a means of Discovery. This is clearly a "fishing-expedition" by which the Applicant is intent on obtaining information that is not relevant to the fair disposal of the matter.

[15.] The Respondents rely on several cases, including **Tweed v Parades Commission for Northern Ireland [2006] UKHL 53** for the proposition that courts should guard against "fishing expeditions".

Applicant's submissions

[16.] The Applicant submits that the issue of the writs of supboena/witness summonses is not a fishing expedition. The Applicant submits that there was a previous order of the

Court that allowed the Applicant to review his file held by the Respondent and that that review had not been done. The Applicant argues that the Respondents did not allow the appeal process challenged by the Applicant to be completed and that the file would show this. The Applicant sought to explain that personal circumstances of the Applicant accounted for why no application had been made in accordance with the court's directions and timelines for the issuing of an application for witness summonses. The Applicant contended that the evidence of the witnesses will be relevant because each person "had a part to play" and the Applicant wished to know "why they did or did not… do certain things."

[17.] The Applicant contends:

1. According to the court direction, there were no requirements given by the Court by [sic] the Applicant for the Court to issue a Writ of Subpoena duces tecum (Witness Summons).
2. The Applicant had given the notice to the Respondent [sic] attorney as the specify [sic] the nature and relevance of the evidence the proposed witness is expected to render to the Court.
3. The Applicant had to indicate in writing to the Respondent the nature and relevance of the evidence to be produces [sic], it is submitted that the evidence would be factual and both and relevant in this matter.
4. The said documents is [sic] very relevant to the issues raised in the pleadings.
5. Pursuant to PART 33.3 (4) and PART 25.1, we humbly request that the Court order that the Applicant summons not to [sic] be set aside.

LAW AND ANALYSIS

[18.] The Applicant's applications are made pursuant to Part 33 CPR, Rule 33.3 and Part 25 CPR, Rule 25.1.

[19.] Part 33 deals with Court Attendance by Witnesses and Depositions. Rule 33.2 provides that witness summonses are issued by the court and must be in a certain form. Rule 33.2 provides:

33.2 Witness summonses.
(1) A witness summons is a document issued by the Court requiring a witness to attend Court —
  (a) to give evidence; or
  (b) to produce documents to the Court.
(2) A witness summons must be in Form G21.
(3) There must be a separate witness summons for each witness.

(4) A witness summons may require a witness to produce documents to the Court either on —
  (a) the date fixed for the trial or the hearing of any application in the proceedings; or
  (b) any other date the Court may direct.

[20.] Rule 33.3 makes provisions for issuing witness summonses. It also makes provisions for varying and setting them aside. Rule 33.3 provides:

33.3 Issue of witness summons.
(1) A witness summons is issued on the date entered on the summons by the court office.
(2) A party must obtain permission from the Court when that party wishes to have —
  (a) a witness summons issued less than twenty-one days before the date of the hearing; or
  (b) a summons issued for a witness to attend Court to give evidence or to produce documents on any date except the date fixed for the trial or the hearing of any application.
(3) An application for permission under paragraph (2) may be without notice but must be supported by evidence on affidavit.
(4) The Court may set aside or vary a witness summons.

[21.] Form G21 ('Witness Summons Form') requires that important particulars are set out in the document, including when the witness is to attend court, whether and what documents the witness ought to take to court and the sums to be paid to the witnesses as allowances.

[22.] I note that Practice Direction No. 11 of 2023 serves to "provides guidance in relation to the issue of witness summonses and related matters". In lieu of setting out the entirety of that Practice Direction, I will refer to the guidance as appears in the Supreme Court Civil Procedure Rules, 2022, Practice Guide January 2024. The guidance notes ware helpful in this regard and read:

Notes:

While the provisions concerning court attendance by witnesses and depositions are straightforward and require no explanation, the following observations are worth highlighting:

- The term "witness summons" replaces the formerly used term "subpoena".
- There must be a separate witness summons for each witness.
- Particular attention should be given to the provisions of rules 33.3 and 33.5 regarding the timeframe for issuing and serving witness summonses and the circumstances in which the Court's permission may be required.

The provisions of Practice Direction No. 11 of 2023, which addresses witness summonses, should also be noted. In overview:

- A witness summons may require a witness to attend court to give evidence, produce documents or both on either the date fixed for the trial or the hearing of any application in the proceedings or such other date as the Court may direct.
- A witness summons must be in form G21 and a witness summons which requires a witness to produce documents must identify the documents individually or by reference to a class of documents or things so that it is possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the witness about what they are required to do.
- The Court may issue a witness summons in aid of an inferior court or of a tribunal.
- A mistake in the name of a witness or the address of a witness may be corrected without an application to vary the summons if the summons has not been served by having an amended witness summons re-sealed by the court office.
- A witness summons is issued on the date entered on the summons by the court office. A separate summons is required for each witness.
- A witness summons may be obtained by filing a praecipe in the form annexed to the practice direction in the court office and filing at least two copies of the summons for sealing, one of which will be retained on the court file
- No witness summons may be issued out of the court office without the prior permission of the Court where – (i) the witness summons will be issued less than 21 days before the date of the trial or hearing to which it relates or (ii) the witness summons will require the witness to attend the court or tribunal to give evidence or to produce documents on any date except the date fixed for the trial or the hearing of any application. An application for permission may be made without notice but must be supported by an affidavit.
- As a general rule, a witness summons is binding only if it is served at least 14 days before the date on which the witness is required to attend before the court or tribunal to which it relates but the Court may order that it will be binding notwithstanding it will be served less than 14 days before the date which the witness is required to attend before the court or tribunal. Such a direction should be obtained before the witness summons is served; the application may be made without notice but must be supported by an affidavit.
- Once a witness summons is served an affidavit of service should be filed.
- When a witness summons is served with a witness summons he must be offered a sum to cover his travelling expenses to and from the court or tribunal that he is required to attend and compensation for his loss of time, in accordance with the practice direction. No compensation for loss of time shall be offered or paid to any person in the service of The Government of The Bahamas required to give evidence or to produce documents by virtue of such service

[23.] Part 25 CPR deals with Case Management and the Objective of Case Management. Rule 25.1 provides for the court's duty to actively manage cases. Rule 25.1 sets out a non-exhaustive list of ways by which a court may further the overriding objective by actively managing cases. By Rule 25.1(j) a court is tasked with:

> (j) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application.

[24.] I have given consideration to the cases relied on by the Respondents and certain principles are evident.

[25.] The first and overarching principle concerns the nature of Judicial Review. Judicial Review is concerned with process and lawfulness. It is important at the outset, to recall that Judicial Review invokes the supervisory jurisdiction of the court. Judicial review is not ordinarily concerned with the merits of a decision but, instead, with the legality of the decision-making process. Therefore unlike a private law action, the court in Judicial Review is not to be engaged in a broad forensic re-investigation of the facts. Judicial review is not designed to become an ordinary fact-finding trial. In Judicial Review, where the issue is legality, rationality or procedural fairness, those issues are questions of law and, with few exceptions, are inherently capable of being resolved by reference to the pleadings and affidavit evidence.

[26.] A second principle distilled form the case is that disclosure in judicial review is exceptional. The Respondent relied on **Tweed v Parades Commission for Northern Ireland [2006] UKHL 53**. In that case, the House of Lords determined that disclosure orders are likely to remain exceptional even where proportionality is in issue and warned that the court must guard against mere "fishing expeditions" for new grounds of challenge. That case arose from a judicial review challenge by Mr Tweed to a determination of the Northern Ireland Parades Commission, in which he sought disclosure of five documents said to bear on the legality and proportionality of the Commission's decision. In that case, the Court ordered limited disclosure but reiterated that judicial review proceedings usually concern lawfulness rather than broad fact-finding and therefore ordinary civil disclosure would not apply and disclosure will remain limited and exceptional.

[27.] At paragraph 3 of his judgment, Lord Bingham of Cornhill opined:

> [3] In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered.

> Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. *The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.*

[28.] In **Tweed v Parades Commission for Northern Ireland**, Lord Carswell considered the history of the restrictive approach concerning these matters in judicial review applications. While he considered the desirability for a more flexible approach, he concluded that disclosure is not likely to be necessary in most cases in judicial review. At paragraphs 29 to 32, Lord Carswell stated:

> [29] **The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits:** see *R v Inland* Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 654, per Lord Scarman, and cf Lewis, Judicial Remedies in Public Law, 3rd ed (2004), para 9.086 and a valuable article by Oliver Sanders, Disclosure of Documents in Claims for Judicial Review [2006] JR 194. **In building upon this foundation the courts developed a restrictive rule, whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence**: see the line of authority represented in England by *R v Secretary of State for the Environment, Ex p Islington London Borough Council and the London Lesbian and Gay Centre [See]* [1997] JR 121 and in Northern Ireland by Re McGuigan's Application [1994] NI 143 and Re Rooney's Application [1995] NI 398.
>
> [30] The reasoning of the arguments underpinning the principles laid down by the courts has not escaped criticism and some judicial unease has been expressed on occasion about their application and effect. The "terminus" argument (that in judicial review the court is not required to consider the route by which the impugned decision is reached, but only the terminus), which emerged first in *R v Secretary of State for the Home Department, Ex p Harrison* [1997] JR 113 although adopted in a number of subsequent cases, has not been universally regarded as

valid. A note of caution about accepting it without qualification appears in the judgment of Dillon LJ in *R v Secretary of State for the Environment, Ex p Islington London Borough Council*. When the Law Commission issued its report Administrative Law: Judicial Review and Statutory Appeals (1994, Law Com No 226, HC 669) it recorded (para 7.8) that two thirds of those who responded to the consultation paper favoured the introduction of a more liberal regime of discovery. The Law Commission expressed the opinion in para 7.12 that the requirements of the accepted rule were unduly restrictive and undermined the basic test of relevance and necessity laid down in *O'Reilly v Mackman* [1983] 2 AC 237.

[31] **The reasons which have hitherto been regarded as providing grounds for maintaining these principles are (a) the obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged:** see, eg, Belize Alliance of Conservation Non-Governmental *Organisations v Department of the Environment of Belize (No 2)* [2003] UKPC 6, para 86, per Lord Walker of Gestingthorpe; *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763 at 775, per Lord Woolf MR; (b) **the undesirability of allowing "fishing expeditions", where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge:** cf *R v Secretary of State for Health, Ex p Hackney London Borough Council* (unreported) 29 July 1994; Court of Appeal (Civil Division) Transcript No 1037 of 1994, per Sir Thomas Bingham MR.

[32] Mr Hanna QC for the appellant invited your Lordships to reconsider these principles limiting the extent of disclosure in judicial review applications, as they have not been explored in an appeal before the House. He placed this argument before the House, without developing it very far, as he concentrated on the question of the effect of the proportionality issue. **I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ.** Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to

> follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.
>
> [Emphasis supplied]

[29.] A third discernible principle is that cross-examination in judicial review is exceptional. In **Save Guana Cay Reef Association Ltd v The Queen [2009] UKPC 44**, the Privy Council stated that orders for cross-examination remain exceptional in judicial review because such proceedings are essentially a review of official decision-making and should be resolved without avoidable delay.

[30.] **Save Guana Cay Reef Association Ltd v The Queen [2009] UKPC 44** arose from a challenge to governmental approval of a major development on Great Guana Cay in The Bahamas and an attempt to stop the development. The trial judge refused to order disclosure and cross-examination in the judicial review proceedings. On appeal, the Privy Council held that the refusal of both orders in this case was well within the trial judge's discretion but that court made it clear that the law had moved away from any rigid rule that disclosure is available only where the public authority's affidavit evidence can first be shown to be inaccurate or misleading. The Apex court also reaffirmed that disclosure and cross-examination remain unusual in judicial review because of the nature of the jurisdiction. In addressing the issue of discovery and cross-examination, Lord Walker, LJ declared at paragraph 47:

> [47] It is no longer the rule that disclosure should be ordered only where the affidavit evidence put in on behalf of the decision-maker can be shown to be inaccurate or misleading: *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650. Nevertheless orders for discovery and cross-examination are still exceptional in judicial review proceedings, for good reason. Such proceedings are essentially a review of official decision-making, and need to be determined without any avoidable delay. On a realistic analysis the only arguable ground for judicial review in this case was the alleged inadequacy of the public consultation, a topic on which there was quite a lot of documentary evidence. The judge's refusal of orders for discovery and cross-examination were well within the scope of his discretion.

[31.] A fourth principle that may be gleaned for the cases is that cross-examination should not be allowed unless necessary in order that justice may be done. **George v Secretary of State for the Environment [1979] 1 EGLR 30** is authority for the

proposition that judicial review proceedings are often decided on affidavit evidence and that, while cross-examination is legally available, cross-examination should be permitted only in exceptional and rare cases where necessary to do justice. In that case, the Court of Appeal set aside a judge's order for cross-examination. In the written judgment at page 31, Lord Denning MR stated :

> It seems to me that, in general, cross-examination shall not he allowed in prerogative writ proceedings or in proceedings for judicial review or in applications like this for compulsory purchase orders. There are very good reasons for this rule. First usually the affidavits speak as to what took place before the determining body. It may be before a planning inspector, a magistrate or someone of that kind. He may have to make an affidavit as to what took place before him. It is undesirable that he should be subjected to cross-examination. We said so in a recent case about a certification officer. If he is not to be subject to cross-examination, nor should the applicant. Secondly, experience shows that on these procedural questions there is very little conflict on the affidavits. Thirdly, one party or the other might, by means of cross-examination, try to undermine the actual findings of the inspector or other officer holding the inquiry.
>
> **In general, therefore, cross-examination should not be allowed, but I would stress that there is nothing in law to prohibit it.** It is undoubtedly permissible under the rules. It is covered by order 53, rule 8(1), which brings in order 58, rule 2(3), which in terms provides for cross-examination on affidavits. **It is a matter for the discretion of the court. It seems to me that in these proceedings cross-examination should not be allowed except where the court believes it is necessary in order that justice may be done between the parties.**
>
> [Emphasis supplied]

[32.] In **George v Secretary of State for the Environment**, the Court of Appeal had to decide whether disputed factual matters contained in affidavit evidence justified cross-examination. The Court of Appeal considered that a court had a procedural discretion to allow cross-examination but noted that the ordinary course in prerogative order proceedings was to determine the matter on the written materials. The Court expressed that oral testing of that evidence should be confined to unusual cases where the court could not fairly resolve the matter otherwise and that, in general, cross-examination should not be allowed in judicial review proceedings save where the court considers it necessary so that justice may be done between the parties.

[33.] A fifth principle in this area is that a party seeking disclosure or oral evidence must identify a proper basis for it: **Mitchell et al v Melidor et al SCCivApp. No. 267 of 2015, BS 2017 CA 79** and **Tweed v Parades Commission for Northern Ireland.** Absent some *prima facie* basis for saying that the evidence relied upon by the decision-maker is incorrect or inadequate or incomplete, it is improper to permit disclosure or cross-examination merely to test affidavit evidence.

[34.] Lastly, an apparent principle is that where disputed evidence exists in judicial review, a court should proceed cautiously and only depart from the ordinary paper-based process where it is truly necessary to secure fairness and to ensure that justice may be done between the parties.

[35.] It seems to me that the cases cited are authorities for the proposition that disclosure or cross-examination in judicial review is exceptional and should not become a vehicle for speculative fact-finding. The decided cases confirm that Judicial Review, a public law remedy, is not ordinarily the forum for a full-scale factual inquiry. The use of mechanisms associated with ordinary civil trials such as disclosure and cross-examination aimed at testing merits in dispute, should be restricted to the exceptional case where such mechanisms are strictly necessary to secure fairness and to ensure that justice may be done between the parties. Such an objective is captured in Rule 25.1(j) CPR.

[36.] I note for completeness that Rule 54 CPR deals with applications for disclosure and for cross-examination in Judicial Review proceedings. Rule 54.8 CPR states:

> **54.8 Application for disclosure, further information, cross-examination, etc.**
> (1) Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to a judge in chambers, notwithstanding that the application for judicial review is to be heard by a judge in open court.
> (2) In this paragraph 'interlocutory application' includes an application for an order discontinuing the application or for cross-examination of the maker of an affidavit.
> (3) This rule is without prejudice to any statutory provision or rule of law restricting the making of an order against the Crown.

[37.] The guidance notes for Rule 54.8 as appear in the Supreme Court Civil Procedure Rules, 2022, Practice Guide January 2024, echo the principles cited above. The following synopses of relevant cases are provided in the 2024 Practice Guide:

Cases:

Application for disclosure, further information, cross-examination, etc.

Save Guana Cay Reef Assn Ltd v R [2009] UKPC 44 at 47 ("It is no longer the rule that disclosure should be ordered only where the affidavit evidence put in on behalf of the decision-maker can be shown to be inaccurate or misleading: Tweed v Parades Commission for Northern Ireland [2007] 1 AC 650. Nevertheless orders for discovery and cross-examination are still exceptional in judicial review proceedings, for good reason. Such proceedings are essentially a review of official decision-making, and need to be determined without any avoidable delay.") See also Mitchell and others v Melidor and another (2017) 92 WIR 1.

While declining to exercise the power to order cross examination as requested on the basis of relevance, the jurisdiction may be exercised: Bain J in **R v Christie et al Ex Parte Coalition to Protect Clifton Bay**, 2013/PUB/jrv/00012, Ruling dated 4 October, 2016.

[38.] The Court of Appeal (The Bahamas) in **Mitchell et Al v Melidor et al SCCivApp. No. 267 of 2015, BS 2017 CA 79**, in following **Tweed v Parades Commission for Northern Ireland** (above), accepted that "there is now a more liberal regime for discovery in judicial review proceedings" per Dame Anita Allen. P, at paragraph 35 of that judgment. That case provides helpful guidance on the exercise of the judge's discretion in ordering discovery and/or cross-examination. While that judgment pre-dates the CPR, the principles are consistent with the provisions of the CPR.

[39.] In relation to discovery, a judge must examine the request of what documents are being sought; whether the documents exist; whether they are, or had been in the possession custody or power of the respondent (to the application); whether they are relevant; and, whether they are necessary to assist the Court in fairly disposing of the issues in the proceedings. In considering the request, a judge must consider all the relevant facts and circumstances, including "any 'demonstrable contradiction or inconsistency or incompleteness' in the affidavits filed on behalf of the respondent that might necessitate the discovery of any further documents" and whether there is any apparent "tendency on the part of the appellants to hide any relevant evidence" or , "any other circumstances indicative of any other reason why disclosure should be ordered."

[40.] I would add that the cases cited above support the view that in relation to cross-examination on affidavit evidence, a judge must consider all the relevant facts and circumstances, including "any 'demonstrable contradiction or inconsistency or incompleteness' in the affidavits" that may be appropriately addressed by testing in cross-examination; or whether there is unreconcilable evidence on procedural questions of the decision making process between the affidavits of an applicant and a respondent that may be appropriately addressed by testing in cross-examination and whether cross-examination is necessary to assist the Court in fairly disposing of the issues in the proceedings.

Determination on Procedural objection

[41.] This issue concerns discovery in a judicial review setting. I have taken the time to set out the requirements for the issue of a witness summons under the CPR. It is apparent that the praecipe/writs issued by the Applicant does not adhere to the procedure or practice direction under the CPR. What were issued are styled as Writ of subpoena ad testificandum. Such writs have been replaced by witness summons. A mere perusal of the documents served on the persons sought to be called as witnesses confirms that the documents do not conform to Form G21. The importance of this is not merely procedure. It is my view that there is a matter of substance caught by the forms. Form G21 clearly contemplates that each person summoned knows (1) the purpose for which they are summoned, (2) where and when they are required to attend for the purpose of providing evidence and that (3) they will be furnished with allowances for the time spent.

[42.] In issuing the witness summonses, a party must also comply with the ordinary requirements of service, timing and witness expenses.

[43.] On the question of form and procedure, I accede to the Respondents' submissions.

Determination on Substantive objection

[44.] To the extent that a court order is not always necessary for a witness summons to issue, the Applicant is correct. Under the CPR, the court's permission is required in certain instances only. Otherwise a witness summons may issue without a court order - depending on when the summons is issued in relation to the hearing date of the trial/when the person is to be called. That a witness summons can issue without a court order does not mean that there can be no discernible basis for the issue of the witness summons. The witness summons forms part of the mechanism for obtaining evidence and therefore its use is subject to the rules of evidence, including the rules of discovery. If those are shown to be infringed, those are proper grounds for an application by a recipient to vary or to set aside a witness summons.

[45.] It is therefore necessary, in this instance to determine the discernible basis for the issue of the witness summonses/supboenas in this instance and to consider the matter of discovery in judicial review proceedings. In exercising a discretion to order discovery or examination and cross-examination (oral testimony), a judge must consider whether such a process is necessary to assist the Court in fairly disposing of the issues in the proceedings.

[46.] The Applicant's submission is that there are documents that are "very relevant to the issues in this case". On perusal of the issued praecipes/writs of subpoena, there is a glaring omission of any sort of detail as to the nature of the evidence sought. There is no mention of any document believed to be in the possession of the person being sought to be called as a witness. There is no other evidence before the court as to the nature of the evidence sought. Counsel for the Applicant submits that the "nature and relevance of the evidence the proposed witness is expected to render to the Court" was communicated to the attorney for the Respondents. That evidence is not before the court. It is the court that must exercise its discretion judicially in order to determine whether discovery is necessary to assist the Court in fairly disposing of the issues in the proceedings.

[47.] The court's starting point is that judicial review is a supervisory jurisdiction. It is concerned principally with the legality, rationality, and procedural propriety of the impugned decision, and not with a general re-hearing of the underlying merits. For that reason, both disclosure and cross-examination are exceptional. A court hearing a judicial review should resist attempts to obtain broad discovery or compel witnesses to attend for the purpose of exploring whether some further challenge might be constructed from their evidence.

[48.] Applying those principles, no sufficient basis has been shown for issuance of witness subpoenas or summonses in this case.

[49.] On the Applicant's own Statement of Facts and Issues filed on July 21, 2022, the issues are listed as:

1. Whether the decision of the Respondent to discharge the Applicant from the Royal Bahamas Police Force without following the proper procedures or completion of the outcome of the Applicant's appeal to the Governor General is unlawful, illegal, null and void.
2. Whether the decision of the Respondent to discharge the Applicant from the Royal Bahamas Police Force without following proper procedures or completion of the outcome of the Applicants appeal to the Governor

General AND finally to the Public Service Board of Appeal is unlawful, illegal, null and void?

3. Whether the Respondent had the power to withheld the power to withhold the Applicant benefits before the appeal process was completed?
4. Whether the Respondent had the power to withhold the Applicants benefit before the criminal charges were complete.
5. Whether the Respondent should have stayed the dismissed procedures until the appeal or criminal matter is completed.

[50.] It seems to me that this public law proceeding falls into the usual category where the lawfulness of the decision-making process is what is being challenged and that the issue of lawfulness can be determined on the record. There is no discernible request for discovery or evidence relevant to a specific and material issue which issue cannot be fairly resolved on the papers.

[51.] The Applicant has not identified any *prima facie* reason to conclude that the Respondent's evidence is materially incorrect, incomplete, or inadequate such as to justify the measures sought. Instead, the proposed process appears designed to obtain broad-ranging information and testimony in the hope of uncovering additional support for the Applicant's case. That is not a proper use of the judicial review procedure. I am persuaded that the issue of the witness summonses is nothing more than a fishing expedition that this court ought to guard against.

[52.] For the record, I also note that the documents served are styled "Praecipe for Writ of Subpoena ad Testificandum". It appears that no actual writs were issued although that appeared to be the intention. The Applicant's contention, and submission, has been for the production of documents. Not surprisingly, therefore, the submissions of both the Applicant and the Respondent also referred to "Writs of Subpoena duces tecum". This state of affairs demonstrates the ambiguity and impreciseness of the documents which, *ex facie*, do not indicate the nature or type of evidence being sought.

[53.] It is my determination that the procedure adopted was procedurally incorrect. It is also my determination that, albeit procedurally deficient, any request for the production of documents and any related oral evidence are unsubstantiated, unnecessary and contrary to the settled restraint governing evidential expansion in judicial review.

[54.] It is my determination that the production of documents through witnesses, and/or the attendance of witnesses for examination and cross-examination (oral testimony) should be refused.

CONCLUSION

[55.] The Respondents' Application to set aside the several witness summonses, styled as Writs of Subpoena ad testificandum, is acceded to.

[56.] In the premises, where witness summonses, styled as Writs of Subpoena ad Testificandum, have been issued in this matter, they are hereby set aside.

[57.] The Court will communicate with Counsel for the purpose of setting a date for further directions and to give new dates for the hearing of the substantive matter.

COSTS

[58.] Taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6, I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. Therefore, in this matter, the Applicant shall pay the Respondents' costs, to be summarily assessed and fixed by a Registrar, if not agreed.

ORDER

[59.] The ORDER and directions of this Court are as follows.

(i) The Respondents' Application to set aside the several witness summonses, styled as Writs of Subpoena ad Testificandum, is acceded to.

(ii) In the premises, where witness summonses, styled as Writs of Subpoena ad Testificandum, have been issued in this matter, they are hereby set aside, specifically those issued to:

i. Ms. Brenda Dorsett, Permanent Secretary, Ministry of National Security

ii. Mr. Emrick Seymour, Former Deputy Commissioner of the Royal Bahamas Police Force
iii. Mr. Anthony Ferguson, Director of National Crime Intelligence Agency
iv. Ms. Lisa Hall, Under Secretary, Ministry of National Security
v. Ms. Cecelia Strachan, Permanent Secretary, Department of Public Service and
vi. Mr. Jack Thompson, Permanent Secretary, Office of the Governor General.

(iii) Costs of the Application is awarded to the Respondents to be summarily assessed by a Registrar, if not agreed.

Dated this 22nd day of April, 2026

Carla D. Card-Stubbs, J

Justice