



## PRACTICE DIRECTION No 4 OF 2013

(GCR O. 1, r. 12)

### JUDICIAL REVIEW

(GCR O. 53)

#### PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW

##### Introduction

This protocol applies to all proceedings for judicial review in the Cayman Islands. It does not affect the time limit specified by GCR O. 53, r. 4 which requires that any application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose.<sup>1</sup>

- 1 Judicial review allows people with a sufficient interest in a decision or action by a public body to ask a judge to review the lawfulness of:
  - 1.1 rules, and regulations, or other subordinate legislation; or
  - 1.2 a decision, action or failure to act in relation to the exercise of a public function.
- 2 Judicial review may be used where there is no right of appeal or where all avenues of appeal have been exhausted.
- 3 Alternative Dispute Resolution ("ADR")
  - 3.1 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the applicant and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Court takes the view that litigation should be a last resort, and that proceedings should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court may have regard to such conduct when determining costs. However, parties should also note that an application for judicial review *"shall be made promptly and in any event within 3 months from the date when grounds for the application first arose"*.

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<sup>1</sup> Save where any statutory provision has the effect of limiting the time within which an application for judicial review may be made; see GCR O. 53, r. 4(3). Although the Court does have the discretion under GCR O. 53, r. 4 to allow a late application, the Court will only permit this in exceptional circumstances. Compliance with this Protocol alone is unlikely to be sufficient to persuade the Court to allow a late application.

3.2 It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without recourse to litigation:

- (a) discussion and negotiation;
- (b) early neutral evaluation by an independent third party (for example, an attorney experienced in the field of administrative law or an individual experienced in the subject matter of the claim);
- (c) mediation – a form of facilitated negotiation assisted by an independent neutral party.

3.3 It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.

4 **Judicial review may not be appropriate in every instance. Applicants are strongly advised to seek appropriate legal advice when considering such proceedings and, in particular, before adopting this Protocol or issuing an application.**

5 This Protocol sets out a code of good practice and contains the steps which parties should generally follow before making an application for judicial review.

6 This Protocol does not impose a greater obligation on a public body to disclose documents or give reasons for its decision than that already provided for in statute or common law. However, where the Court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose sanctions. This Protocol will not be appropriate where the defendant does not have the legal power to change the decision being challenged. This Protocol will not be appropriate in urgent cases; for example, when directions have been set, or are in force, for the applicant's removal from the Cayman Islands, or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so; in such cases an application for judicial review should be made immediately. An applicant's letter before action will not stop the implementation of a disputed decision in all instances.

7 All applicants will need to satisfy themselves whether they should follow this Protocol, depending upon the circumstances of his or her case. Where the use of this Protocol is appropriate, the Court will normally expect all parties to have complied with it and will take into account compliance or non-compliance with the Protocol when giving directions for case management of proceedings or when making orders for costs. However, even in emergency cases, it is good practice to send a fax to the defendant a draft of the application for judicial review which the applicant intends to issue. An applicant is also normally required to notify a defendant when an interim mandatory order is being sought.

#### **The applicant's letter before action**

8 Before making a claim, the applicant should send a letter to the defendant. The purpose of this letter is to identify the issues in dispute and to establish whether litigation can be avoided.

- 9 Applicants should normally use the suggested standard format for the letter outlined at Annex A.
- 10 The letter should contain the date and details of the decision, act or omission being challenged and a clear summary of the facts on which the application is based. It should also contain the details of any relevant information that the applicant is seeking and an explanation of why this is considered relevant.
- 11 The letter should normally contain the details of any interested parties known to the applicant. Those interested parties should be sent a copy of the letter before action for their information. Applicants are strongly advised to seek appropriate legal advice when considering such proceedings and, in particular, before sending the letter before action to other interested parties or issuing an application.
- 12 An application should not normally be issued until the proposed date for reply given in the letter before action has expired, unless the circumstances of the case require more immediate action to be taken.

### **The defendant's letter of response**

- 13 Defendants should normally respond within 14 days of the letter before action using the standard format at Annex B. Failure to do so will be taken into account by the Court and sanctions may be imposed on the defendant unless there are good reasons not to do so.
- 14 Where it is not possible within the proposed time limit to reply substantively to the letter before action the defendant should send an interim reply and propose a reasonable extension within which to reply substantively to the letter before action. Where a defendant seeks an extension, it should give reasons and, where required, the additional information requested by the applicant in the letter before action. Proposing such an extension will not affect the time limit for the applicant to issue an application for judicial review nor will it bind the applicant where (s)he considers the proposal to be unreasonable. However, where the Court considers that a subsequent application for judicial review has been made prematurely it may impose sanctions.
- 15 If the defendant concedes the claim in full, its reply should say so in clear and unambiguous terms.
- 16 If the defendant concedes the claim in part or does not concede the claim at all, its reply should say so in clear and unambiguous terms, and:
- 16.1 where appropriate, contain a new decision, clearly identifying what aspects of the claim are being conceded and what are not, or, give a clear timescale within which the new decision will be issued;
  - 16.2 provide a fuller explanation for the decision, if it considers it appropriate to do so;
  - 16.3 address any points of dispute, or explain why they cannot be addressed;
  - 16.4 enclose any relevant documentation requested by the applicant, or explain why the documents are not being enclosed; and
  - 16.5 where appropriate, confirm whether or not it will oppose any application for an interim remedy.

- 17 The response should be sent to all interested parties identified by the applicant and contain details of any other parties whom the defendant considers also have an interest.

## ANNEX A

### LETTER BEFORE ACTION

#### SECTION 1 - INFORMATION REQUIRED IN A LETTER BEFORE ACTION

Proposed claim for judicial review

1. To  
*(Insert the name and address (including post-office box number) of the proposed defendant – see details in section 2.)*
2. The applicant  
*(Insert the title, first and last name and the address (including post-office box number) of you, the applicant.)*
3. Reference details  
*(When dealing with large organisations it is important to understand that the information relating to any particular individual's previous dealings with it may not be immediately available. Therefore it is important to set out any relevant reference numbers for the matter in dispute and/or the identity of those within the public body who have been handling the particular matter in dispute.)*
4. The details of the matter being challenged  
*(Set out clearly the matter being challenged, particularly if there has been more than one decision.)*
5. The issue  
*(Set out the date and details of the decision, or act or omission being challenged, a brief summary of the facts and why it is contented to be wrong. Consider attaching a draft of the Originating Summons.)*
6. The details of the action that the defendant is expected to take  
*(Set out the details of the remedy you seek, including whether you are requesting a review or any interim remedy.)*
7. The details of your attorneys, if any, dealing with this application  
*(Set out the name, address (including post-office box number), fax number and, if known, email address, and reference details of any attorneys dealing with the application on your behalf.)*
8. The details of any interested parties  
*(Set out the details of any interested parties and confirm that they have been sent a copy of this letter.)*
9. The details of any information sought  
*(Set out the details of any information that you seek. This may include a request for a fuller explanation of the reasons for the decision that is being challenged.)*

10. The details of any documents that are considered relevant and necessary  
*(Set out the details of any documentation or policy in respect of which you seek disclosure and explain why these are relevant. If you rely on a statutory duty to disclose, you should specify that duty.)*
11. The address for reply and service of court documents  
*(Insert the address (including post-office box number) to which the defendant should reply, including, where relevant, a fax number and/or email address.)*
12. Proposed reply date  
*(The precise time will depend upon the circumstances of each individual case. Although a shorter or longer time may be appropriate in a particular case, in most circumstances it is reasonable to allow 14 days.)*

## **SECTION 2 - ADDRESS FOR SENDING THE LETTER BEFORE ACTION**

Letters before action sent to statutory authorities should be addressed to the relevant Chief Executive Officer, Managing Director, or Director as the case may be. Letters before action to statutory tribunals should be addressed to the Chairman of the Tribunal.

All letters before action should be copied to the Hon. Attorney General, Government Administration Building, 133 Elgin Avenue, George Town, P.O. Box 907, Grand Cayman KY1-1103, Cayman Islands.



## RESPONSE TO A LETTER BEFORE ACTION

### INFORMATION REQUIRED IN A RESPONSE TO A LETTER BEFORE ACTION

Proposed claim for Judicial Review

1. Applicant  
*(Insert the title, first and last names and the address (including post-office box number) to which any reply should be sent. If responding to an attorney, the letter should also be sent by fax and/or email if the attorney's details are available.)*
2. From  
*(Insert the name and address of the defendant.)*
3. Reference details  
*(Set out the relevant reference numbers for the matter in dispute and the identity of those within the public body who have been handling the issue.)*
4. The details of the matter being challenged  
*(Set out details of the matter being challenged, providing a fuller explanation of the decision, where this is considered appropriate.)*
5. Response to the proposed application  
*(Set out whether the defendant concedes the issue in question in part, or in full, or will contest it. Where the defendant does not propose to disclose any information that the applicant has requested, the defendant should explain the reason for this. Where the defendant is sending an interim reply and there is a realistic prospect of settlement, it should include details.)*
6. Details of any other interested parties  
*(Identify any other parties whom the defendant considers to have an interest in the issue to the extent that the applicant has not already confirmed that (s)he has sent to them a copy of the letter before action, and confirm that they have been sent a copy of this response letter and of the letter before action.)*
7. Address for further correspondence and service of court documents  
*(Set out the address (including post-office box number and fax number and/or email address) for any future correspondence on this matter, and an address (including post-office box number) for service of any court documents.)*

Dated this 12 day of December 2013

  
The Hon. Anthony Smellie Q.C.  
Chief Justice