

IN THE GRAND COURT OF THE CAYMAN ISLANDS



CAUSE NO: 45 OF 2019

BETWEEN:



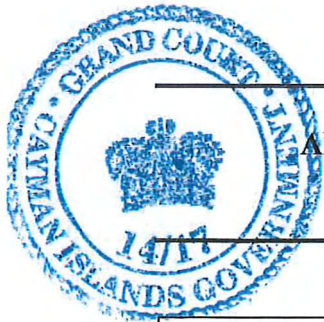
THE PROPRIETORS OF STRATA PLAN NO. 405

Applicant/  
Proposed Plaintiff

and

MINISTRY OF HEALTH, ENVIRONMENT, CULTURE & HOUSING  
OF THE CAYMAN ISLANDS GOVERNMENT

Respondent/  
Proposed Defendant



APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
pursuant to Order 53, rule 9

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of Applicant	The Proprietors of Strata Plan No. 405 PO Box 2503 Grand Cayman KY1-1104 Cayman Islands  A body corporate pursuant to section 5 of the Strata Titles Registration Law (2013 Revision)
Judgment, order, decision or other proceeding in respect of which relief is sought:	The decision of the Cayman Islands Government to grant a coastal works permit to Mr Marcus Cumber for the construction of a private residential dock and cabana on Crown lands adjacent to Block 10A, Parcel 313, Turtle Crawl Drive, Vista Del Mar, Grand Cayman (the "Decision").
Relief sought:	The Applicant seeks: (1) leave to claim judicial review; (2) an extension of time;

	(3) a declaration that the decisions is unlawful; (4) an order quashing the decision and the permit granted pursuant to the decision; (5) further or other relief; and (6) costs.
Name and address of Applicant's attorney	Broadhurst LLC 40 Linwood Street George Town Cayman Islands KY1-1104
Signed:	Dated: 27 March 2019

## GROUND ON WHICH RELIEF IS SOUGHT

### The Decision

1. The material facts are stated in the affidavit of Donald M. Seymour in support of this application, to which the Court is referred by way of background. References in these Grounds to numbered pages are to pages of the exhibit to Mr Seymour's affidavit, "DS1".
2. The Decision is contained in a minute of a meeting of Cabinet on 11 December 2018 (page 389), which was first provided to the Applicant on 20 March 2019 in circumstances explained below. As the Respondent has confirmed at paragraphs 5.1 and 5.6 of its response to the Applicant's letter before action dated (pages 407-412), the Decision was based upon, and followed the recommendations in, a Cabinet Paper by the Hon. Dwayne Seymour, Minister for Health, Environment, Culture & Housing, dated 22 November 2018 (the "Cabinet Paper", pages 390-395), which likewise was first provided to the Applicant on 20 March 2019. The Decision has been given effect by a permit in the form of a deed dated 17 January 2019 (pages 369-376)
3. By the Decision, Cabinet granted approval for the issuance of a Coastal Works Permit to Mr Marcus Cumber for the construction of a private dock (and cabana) extending 128 feet into the Salt Creek canal for the purpose of mooring his boat, notwithstanding objections

made and concerns expressed by the Applicant and other interested parties, by the Planning Department and by Respondent's own Department of Environment.

4. The Applicant seeks leave to claim judicial review of the Decision on the following grounds:

4.1. The Decision is irrational, in that the Cabinet Paper upon which it is based discloses no rational basis for its recommendation to grant a Coastal Work Permit or for rejecting the reasons identified by the Department of Environment, by the Planning Department and by private objectors why a Permit should not be granted, and the Decision departs without reason from the Respondent's published policy that *'Docks constructed along a canal may not extend more than 6 feet into the canal'*.

4.2. The Decision is vitiated by apparent bias. The Minister who presented the Cabinet Paper recommending that a permit be granted is a business associate of Mr Cumber; the Cabinet Paper failed to declare the Minister's relationship with Mr Cumber; and in all the circumstances (including that relationship, the failure to declare it, the absence of reasons for the recommendation in the Cabinet Paper and the absence from the relevant meeting of a key member of Cabinet) an informed and fair-minded observer would conclude that there was a real possibility that the Decision was tainted by bias.

4.3. The Decision is illegal, being contrary to sections 14 and 26(1) of the Public Lands Law 2017, in that it permits the construction of a private dock and cabana over *'public lands'* (in particular the foreshore and territorial waters), obstructing or interfering with the public's right of access to such lands under the Law.

#### **Ground 1: irrationality**

5. The Decision is expressed to be made *'as per the reasons outlined'* (page 389). It is clear from the context, and confirmed in the Respondent's response to the Applicant's letter before action dated 26 March 2019, that this is a reference to the *'reasons outlined'* in the Cabinet Paper.

6. The Court is invited to read the Decision (page 389) and the Cabinet Paper (pages 390-395) in full, but to note in particular the following:
  - 6.1. The Department of Environment's view was that the proposed works would directly and indirectly impact a substantial area of dense, healthy seagrass beds (*Thalassia testudinum*), both in its construction and in its operation. This point was made at paragraph 9 of the Cabinet Paper and more fully set out in the Department's Coastal Works Review dated 10 September 2018 appended to the Cabinet Paper. *Thalassia testudinum* is a protected species under section 15 of the National Conservation Law 2013 and Part 2 of Schedule 1 to that Law.
  - 6.2. The Department of Environment had '*concerns regarding the principle of a dock in this location*', in light of the negative impacts of the proposal on the marine environment. A marina was available for Mr Cumber to moor his boat in Vista Del Mar (where his property is situated). Mr Cumber's agent had indicated that no berths were '*currently... available for purchase*', but the owner of the marina itself had stated that two berths were available which could accommodate Mr Cumber's boat. The Department considered that the least environmentally damage option was for Mr Cumber to utilise one of the available berths at the marina, should one be available. This was recorded at paragraph 10 of the Cabinet Paper, and set out in the Department's Coastal Works Review under the heading '*Principle of a dock*' (page 399).
  - 6.3. The Respondent and the Department of Environment had received '*numerous objections to the proposed dock from neighbouring Vista Del Mar residents and the Strata of the Salt Creek residentia (Strata Plan No. 405)*', i.e. the Applicant, including in relation to navigational impacts, visual impacts, light and noise pollution and impacts to the sea bed (paragraph 11).
  - 6.4. The Planning Department, whose view the Department of Environment had recommended should be sought on the visual impacts of the proposal: paragraph 11(b)), expressed '*concerns with the length of the proposed dock which would extend 128-ft into the canal*': '*a) According to our aerial maps, no other dock exist*

*or extends 128-ft into the canal; b) The proposed [sc. dock] would greatly impact the size of the canal; c) Potential hazard to the boating public; d) There is a potential for proliferation of similar application giving the amount of undeveloped land in the area'. The same proliferation concern was raised by the Department of Environment. See paragraphs 12 and 17.*

- 6.5. The Lands and Survey Department raised no point save to note that it understood that *'the application is for private use only, thus the matter does not need to be considered by the Public Lands Commission'* and that it assumed that responsibility for maintaining the dock would lie with the owner (paragraph 18).
- 6.6. The Port Authority considered that (unlike the proposal in an earlier application by Mr Cumber) the proposed dock did not represent a navigational hazard (paragraph 20).
7. Thus the comments of both the Planning Department and the Respondent's own Department of Environment were, in substance, objections to Mr Cumber's application. Only the Port Authority's observations, which were confined to the narrow issue of navigational hazard, could be considered to be supportive of the application. Yet having identified the Planning Department's and the Department of Environment's objections, the Cabinet Paper simply concluded, under the heading *'Recommendation to Cabinet'*: *'Accordingly, Cabinet is hereby recommended to grant approval'* for the issuance of the Coastal Works Permit.
8. The use of the word "accordingly" suggested that the recommendation followed from the matters which preceded it; but it did not. On the contrary, the Cabinet Paper contained no positive reasons for the recommendation, no reasons why the concerns expressed by the Department of Environment and the Planning Department were outweighed by other reasons, and no reason why Mr Cumber should not be left to moor his boat in one of the berths which was available in the marina at Vista Del Mar (according to the marina's owner), as the Department of Environment suggested. The Cabinet Paper discloses no reasonable basis for its recommendation and the Decision, which accepted the

recommendation 'as per the reasons outlined' in the Cabinet paper is accordingly irrational and liable to be quashed on that ground.

9. Further or alternatively, the Respondent's own policy document, *Design and Construction Guidelines for Docks* (August 2013) states that 'Docks constructed along a canal may not extend more than 6 feet into the canal'. It is clear from the policy document that the word 'canal' is intended to include natural creeks or inlets that are partly canalised: Safe Haven is given as an example of a 'canal'. Salt Creek is a canal for this purpose, and was rightly treated as such by the Planning Department: see paragraph 6.4 above. Contrary to the Respondent's own policy, the Decision would permit the construction of a dock extending 128 feet into Salt Creek, more than 2000% in excess of the six-foot maximum. The Decision and Cabinet Paper contain no reason for the departure from the Respondent's policy, and an unreasoned departure from a policy is irrational and unlawful: see e.g. *Carpets of Worth Ltd v Wyre Forest District Council* (1991) 62 P & C R 334.

## **Ground 2: illegality**

10. Section 14 of the Public Lands Law 2017 creates a right in the public to use public land in the following terms:

'Public areas of public land are open for use by all members of the public without discrimination on the basis of race, gender, age, colour, language, religion, political or other opinion, national or social origin, association with a national minority, sexual orientation or physical or mental impairment, property, birth or other status.'

11. 'Public land' is defined by section 2 of the Law as meaning *inter alia* Crown land and the seabed and territorial waters of the Islands. The foreshore is Crown land.

12. Section 26(1) of the Law provides that:

'No person shall, without lawful authority, obstruct or interfere with the right of a member of the public under this Law to have access to public land, to use public land or to exercise a public right of way over private land.'

13. The dock which Mr Cumber proposes to build would obstruct the public's access along that part of the foreshore, Salt Creek and the seabed over which dock is built: see the affidavit of Donald M. Seymour.
14. The Cabinet Paper and Decision identify no statutory authority for permitting such an obstruction. The instructions accompanying the standard application form for such a Permit explain that in addition to satisfying section 21 of the National Conservation Law 2013, a permit '*grants permission by Cabinet to utilize Crown property and thereby avoids trespass issues*'. Section 21(1) of the National Conservation Law 2013 provides for the granting of a permit to exempt a person from provisions of that Law, but it does not authorise the granting of permission for coastal works more generally. The Coastal Works Permit in this case otherwise appears to have been approved solely on the basis of common law powers.
15. In purporting without statutory authority to approve the grant of permission for such an obstruction to and interference with public access to public land, the Decision is contrary to sections 14 and 26(1) of the 2017 Act.

### **Standing**

16. The Applicant is a statutory corporation with capacity to sue pursuant to section 5(2) of the Strata Titles Registration Law (2013 Revision). Under Article 3.02 of its Bye-Laws the Applicant has the duty of controlling, managing and administering the development's common property for the benefit of all its proprietors and power to do all things necessary for that purpose. That includes power to bring litigation to protect the amenity and value of the common property, such as the present litigation. But in any event the Applicant approved the issue of these proceedings and any necessary amendment of its bye-laws for that purpose by resolutions passed at its reconvened Annual General Meeting on 25 March 2019: see the affidavit of Donald M. Seymour.
17. As set out in the affidavit of Donald M. Seymour, the Applicant is the corporate embodiment of the individual proprietors in the Salt Creek development, which neighbours the Vista Del Mar development in which Mr Cumber's property is situated, and the

Decision will affect the Applicant and the individual proprietors it represents including by diminishing the amenity and value of their land. The Applicant objected to the proposal and its objections were among those before Cabinet when Cabinet made the Decision. In the premises the Applicant has a sufficient interest in the Decision to pursue the proposed claim for judicial review.

### **Promptness and timing**

18. An application for leave to claim judicial review must be made promptly and in any event within three months from when grounds for the application first arose (unless time is extended); Order 53, rule 4.
19. As set out in the affidavit of Donald M. Seymour at paragraphs 21:
  - 19.1. The Applicant became aware of the Decision on 4 January 2019.
  - 19.2. On 21 January 2019, Broadhurst LLC acting on the Applicant's behalf requested a copy of the Decision and the reasons for it and requested confirmation of the date of the decision.
  - 19.3. The Respondent in response advised the Applicant to make a Freedom of Information request '*so that the information eligible for release can be issued promptly*' and stated that '*The date on the Ministry's letter of notification of approval to the applicant is 27 December 2018*'. The Respondent gave no indication that the Decision had in fact been taken any earlier than 27 December 2018.
  - 19.4. Despite having advised the Applicant to pursue a Freedom of Information request as the fastest way of obtaining the Decision and reasons for it, the Respondent on 22 February 2019 refused to supply any Cabinet documents on the ground that they were exempted from disclosure under the Freedom of Information Law. The Decision and the reasons for it were, as set out above, contained in Cabinet documents and nowhere else.



- 19.5. On 12 March 2019, after the Applicant had considered its position, Broadhurst LLC on behalf of the Applicant wrote the Respondent a letter before action. Only in response to the letter before action did the Respondent provide the Decision and the Cabinet Paper, which showed the reasons for the Decision and the fact that it had been taken on 11 December 2018, earlier than the Respondent had indicated.
20. In all the premises, the Applicant has acted promptly. In particular, it sought disclosure of the Decision and the reasons for it within under three weeks of becoming aware of the Decision, took the decision to send pre-action correspondence (which is no trivial matter) within three weeks of the Respondent's Freedom of Information Response, and made this application within five working days of being provided with a copy of the Decision and the reasons for it. The Applicant is not to be criticised for the lapse of time involved in the making of a Freedom of Information request and considering the Respondent's response thereto: the Respondent itself had advised that the Freedom of Information route should be followed in order to obtain the Decision and reasons.
21. Strictly, grounds for the application first arose on 11 December 2018, when Cabinet made the Decision. However, the Applicant did not know, and had no way of knowing, that the grounds upon which it relies had arisen until it had an opportunity to consider the Decision and the Cabinet Paper upon their disclosure on 20 March 2019. The Applicant therefore seeks an extension of the three-month period for applying for leave to claim judicial review of the Decision.
22. The modern approach to the grant of extensions of time for leave to claim judicial review is explained by reference to the leading English cases in *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] 1 WLR 983 (PC). A judge considering whether there is a good reason for extending time must take account of a broad range of factors, including but not limited to, whether there has been undue delay, whether the granting of leave would cause substantial hardship to third parties or prejudice to good administration, the merits of the application, the nature of the flaws in the decision-making process, whether or not fundamental rights are implicated and any public policy considerations.

23. In the present case, there has been no undue delay; there is no hardship to Mr Cumber, because he was informed of the Decision on 27 December 2018 (see above at paragraph 19.3) and must have appreciated that the Decision remained at risk of challenge for at least three months after that date; the merits of the application are strong; and the flaws in the Decision are serious flaws in the determination of a highly controversial application to use public land for a purely private purpose.
24. For all these reasons there are good reasons for extending time and the Court is asked to grant such an extension, together with leave to claim judicial review.

27 March 2019



**Broadhurst LLC**  
Attorneys-at-Law for the Applicant