In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: CIVIL APPEAL NO: 17

IN THE MATTER OF THE LAND VALUATION AND TAX ACT 1967
AND IN THE MATTER OF THE PROPERTY KNOWN AS 'GATEWOOD'
ON APPEAL FROM THE LAND VALUATION TRIBUNAL

DIRECTOR OF LAND VALUATION

Appellant

-v-

SAMUEL ANDREW BANKS

Respondent

JUDGMENT
(In Court)

Date of Hearing: July 5-6, 2012
Date of Judgment: July 27, 2012

Mr. Jonathan Small QC of counsel and Mr. Martin Johnson, Attorney-General's Chambers, for the Appellant

Mr. Richard Drabble QC of counsel and Mr. Jeffrey Elkinson, Conyers Dill & Pearman Ltd, for the Respondent

Introductory

1. The Appellant is the Director of Land Valuation and the public officer chiefly responsible for the administration of Bermuda's land valuation regime which forms the basis upon which land tax is calculated. The Respondent owns a property in Paget known as 'Gatewood'("the Property") and challenged the Director's assessment of the land tax payable in respect of the Property. A disagreement as to how much land tax is payable in respect of the Property underlies the present proceedings. However, the Director has also

brought the present appeal, possibly the first under the Land Valuation Act 1967 ("the Act"), to resolve contentious points of statutory interpretation which are of wider general importance to the way the Act is administered.

2. This wider public interest explains why by Summons dated March 9, 2012 the Director sought an extension of time of nearly 14 months in order to appeal the decision of Land Valuation Tribunal chaired by Arthur Jones which was given on October 23, 2010 ("the Jones Tribunal"). On March 28, 2012 I refused this application, but directed that in the public interest the question of when the tax liability arose in respect of new premises should be determined as part of the present appeal.

3. This first question centred on the proper meaning to be assigned to the words "*capable of beneficial occupation*" in section 1(1) of the Act. The Director contended that these words simply meant when a valuation unit was in physical terms capable of occupation; the Jones Tribunal held that the words meant when the unit was legally capable of being occupied as certified by the Planning Department.

4. The appeal proper related to a decision of the Land Valuation Tribunal chaired by Kenneth Robinson and received on October 23, 2011 ("the Robinson Tribunal"). Two points arise in relation to the decision of the Robinson Tribunal, one of which also raisesa point of statutory interpretation of significance to the operation of the statutory scheme beyond the confines of the Respondent's tax liability.

5. The construction point was whether section 5(1) applied to the Property so that the Director was under a mandatory obligation to treat the three parts of the Property (main house, staff cottage and pool house) as a single unit, resulting in a higher tax liability. A further and more practical gloss on this question was whether or not it was open to the Robinson Tribunal to revisit the number of units issue in any event or whether this issue had been finally determined by the Jones Tribunal.

6. The second point (the third global point) was whether it was open to the Robinson Tribunal to receive evidence and determine the valuation of the Property afresh (as the Tribunal decided it could) or whether this issue was not properly before the Tribunal at all (as the Director contended).

7. Before setting out the Court's findings in relation to the above issues, it is necessary to outline the two Tribunal decisions, the scheme of the Act as a whole and the evidence relevant to the present appeal.

The Jones Tribunal Decision

8. The Jones Tribunal's decision was given in summary form. It was common ground that a fuller 'report' could have been requested had either party chosen to appeal within the statutory 21 day period after the October 31, 2010 decision. The Jones Tribunal decided two main issues in relation to the Respondent's January 14, 2009 objection to the

Director's December 31, 2008 proposal for the inclusion of the Property in the 2004 Valuation List, and reached one key conclusion:

(1) "*The valuation unit was not capable of beneficial occupation until the Certificate of Use and Occupancy had been issued...The owner complied with the law and did not take occupancy until the Certificate of Use and Occupancy had been issued and should not be required to pay tax where there was no beneficial occupation. Where an owner does enjoy beneficial occupation prior to the issuing of a Certificate of Use and Occupancy then the valuation unit should be brought into assessment...*";

(2) "*The Tribunal inspected the property and concluded there are three valuation units constructed on it. Were the Director to amalgamate these units it would increase the amount of tax payable by the owner. This would be contrary to Section 5(2) of the Land Valuation and Tax Act 1967 and therefore the Director may not in this case exercise his discretion and must provide an annual rental value for each unit separately as three valuation units...*";

(3) "*The Tribunal concludes that the Director shall issue a new Proposal for this property including three valuation units and the effective date shall be the 27th November, 2009....Should the owner (Mr. Banks) not agree with the new proposal he may refer the matter directly back to the Tribunal for consideration....*"

9. Despite the summary nature of the decision, it is clear that the Jones Tribunal decided both (a) the date of taxation or beneficial occupation point and (b) the number of units point. The number of units point was expressly decided on the premise that section 5(2) of the Act applied to the Property.

The Robinson Tribunal Decision

10. The Robinson Tribunal considered the Respondent's October 27, 2010 objection to the Director's September 29, 2010 proposals for the inclusion of the three units comprising the Property in the 2009 Valuation List. The decision was a reasoned one running to 8 ½ pages.

11. The nature of the proposal and the objection as described in the introductory portions of the decision suggest that the Robinson Tribunal was not revisiting the two key issues determined by the Jones Tribunal, namely the date of taxation issue and number of units issue. Paragraph 1 of the decision opens with the following words: "*The Objection pertains to the annual rental value proposed in respect of...* [the]*units...*"

12. The Tribunal also explained the chronology to the assessment process in relation to the Property. Although the Respondent's original objection was made under the 2004 List, on July 1, 2010 (before the hearing before the Jones Tribunal of the 2009 Objection), the 2009 List replaced the 2004 List. This List was expressed by the Chairman as being final

but, by virtue of section 28 of the Act and its proviso in particular, still subject to amendment "*so far as an objection, proposal or appeal in regard of such valuation unit remains undetermined*" (paragraph 3).

13. This legal analysis resulted in the following "Initial Findings" being reached by the Robinson Tribunal in paragraphs 20-23 of its decision:

> "*20. At the hearing on 29th September 2011 and continuing on 5th October 2011, the Director submitted the argument that after 1st July 2010, the 2009 List was conclusive as to the ARV of any valuation unit listed therein. His submission included the argument that by virtue of the conclusive character of the 2009 List, the scope for objection to assessments included in the 2009 List was limited to a consideration whether, in the case of any particular valuation unit, the relevant valuation was 'fair' having regard to other valuations included in the 2009 List and comparing only one with the other.*
>
> *21. In his submission referred to in paragraph 20 above, the Director took the position in particular that the Tribunal, in considering the objection to the ARVs for the Units, was not entitled to consider evidence of ARVs of other valuation units in Bermuda that were-in terms of the language of Section 20(3)(a) of the LVAT-'...current on the date of the deposit of the draft valuation list concerned...', because the time for objection to the Draft 2009 Valuation List had come and gone as of the 1st July 2010 date on which the 2009 List was confirmed.*
>
> *22. For reasons particularized in paragraph 23 below, the Tribunal rejects the Director's submission outlined in paragraphs 20 and 21 above. The Tribunal finds and concludes as a matter of law that evidence of ARVs of other valuation units in Bermuda current on the date of deposit of the draft 2009 Valuation List is both a proper consideration, and is wholly relevant, to the issue of whether the ARVs listed in the Units in the 2009 List is incorrect or unfair. This is because the 2009 List is as a matter of law to be construed subject to the final decision on objections pending in respect of the Units.*"

14. In paragraph 23, the following further findings were set out:

    (1) the September 29, 2010 Objection was part of a continuing objection to the Director's ARV proposals which began with the January 14, 2009 Objection which led to the Jones Tribunal's directions to the Director. There were for these purposes three valuation units at the Property;

    (2) through no fault of the Respondent and due to delay on the part of the Director and his Department, the 2009 Objection could not be heard by the Tribunal before the chance to hear the Objection was lost;

(3) by letter dated July 21, 2009, the Director in effect represented to the Respondent that consideration of his ARV challenge to the 2004 List was merely being deferred by the deposit of the new 2009 Draft List before the outstanding challenge was adjudicated;

(4) the Respondent was entitled to have his challenge to the ARV assessment heard "*both as a result of the proper interpretation of and application of Section 28 (as read with Section 20(1) and (3)(a) of the LVAT) and application of the rule*[s] *of natural justice*";

(5) the evidence of Ms. Chris Dapena as regards ARVs in the Draft 2009 List was relevant to the question of whether the assessments for the Respondents Units was incorrect or unfair.

15. After a detailed summary of the evidence (the Director adduced no evidence on the grounds that the ARVs in the draft 2009 List had been conclusively determined by the approval of that List on July 1, 2010), the Tribunal accepted (at paragraph 31) that "*Ms. Dapena's evidence that the rental values for the Units would exceed market rents achievable in Bermuda*" and accordingly found (at paragraph 34) that the ARVs proposed were "*incorrect and unfair*". The Tribunal concluded (at paragraph 35) that the cumulative ARV for all three units should be $360,000 ($300,000; $40,000; and $20,000).

The statutory scheme

16. The primary duty of the Director under the Act appears to be to "*prepare a draft valuation list setting out the annual rental value of every valuation unit in Bermuda*" (section 3).The contents and form of the draft List are prescribed by section 6. The Directors powers of information gathering and entry on land are set out in sections 7 and 8. Sections 9 and 10 mandate publication of the draft List while sections 11 to 15 deal with the procedure for objections up to the stage of referral to the Land Valuation Appeal Tribunal constituted by section 19. Sections 15 to 23 prescribe the procedure for referral of objections to the Tribunal and for the adjudication of objections to the draft List. Section 24 creates the jurisdiction for this Court to entertain appeals from the Tribunal. Section 25 enables the Director to make proposals for the amendment of a draft List; sections 26 and 27 mandate the replacement of the valuation list every five years. Section 28 provides that the Valuation List is conclusive whilst section 29 requires publicity to be given to the List.

17. Parts I and II of the Act formed the focal point of the present appeal. Part III of the Act ("TAXATION OF VALUATION UNITS") was not referred to in any detail in the course of argument. However, section 33 does mandate that the owner pays tax. Nor was Part IV ("MISCELLANEOUS") referred to in argument. Nothing appeared to turn on any of these portions of the Act.

18. Section 24 of the Act provides as follows:

> "*(2) No appeal to the Supreme Court under this section shall lie except upon a ground of appeal involving a question of law alone or upon a ground involving a question of mixed law and fact.*"

The evidence

19. Having regard to the fact that an appeal under section 24 is not by way of rehearing, I consider that the only evidence of central relevance to the present appeal is the documentary record of the proceedings before the two Tribunals. The Director's Sixth Affidavit was sworn to explain to the Court how the Act has been implemented in practice and by way of reply to evidence filed by the Respondent and supporting deponents in answer to Fifth Farrow. This evidence was in my judgment largely of peripheral relevance to the primary task of construing the relevant statutory provisions in their context and deciding whether, having regard to the Arthur Jones and Robinson Tribunals' decisions and the material before them, the Tribunals' decisions ought to be disturbed.

Legal findings: the date of taxation point

20. The date of taxation point turns on the proper construction to be given to the following definition in section 1(1) of the Act:

> "*'valuation unit' means any land, building or part of a building occupied or capable of beneficial occupation as a separate unit.*"

21. Section 30 of the Act provides that the specified tax "*shall be charged, levied and collected in respect of every valuation unit which qualifies for inclusion in a valuation list*..." Section 33 obliges the owner of a valuation unit at the commencement of a tax period to pay the assessed tax. There is nothing in the Act which provides that a valuation unit may not be included in a valuation list until it has been certified fit for occupation by the appropriate authorities. In other words, there is no express provision in the Act to the effect that taxes are not due until a valuation unit may lawfully be occupied.

22. The Jones Tribunal nevertheless found that "*capable of beneficial occupation*" meant, in effect, capable of lawful beneficial occupation, because it is a breach of the Building Code to occupy premises which have not been certified as fit for occupation. This conclusion was in part based on the premise that it would be unfair for the Respondent, and other taxpayers in his position, to pay tax in respect of premises prior to taking up occupation.

23. Conflicting evidence was filed on the present appeal about the way unoccupied units had been taxed in the past. As before the Tribunal, the Director asserted that about 40% of valuation units were physically capable of occupation but, because the obligation to seek a Certificate of Use and Occupancy rested on the owner no certificate was issued by the

Planning authorities in such cases. If the issue of the certificate was the date of taxation, this could have significant negative consequences for revenue collection and could give rise to a need to make refunds to taxpayers who had paid land tax in respect of valuation units not certified by the Planning authorities .It was common ground that the Respondent did not occupy any of the units until he obtained the requisite certificate.

24. I make no findings on these contentious evidential matters which in my judgment have no material bearing on the proper construction of the relevant provisions of the Act. Mr. Small QC for the Director argued that there was nothing in the statutory scheme which suggested that where a valuation unit was occupied without the certificate required by the Building Code, no tax was due. If tax was payable from the date of physical occupation, irrespective of irregularities arising under Planning law, it was absurd to construe the Act as exempting the owners of units which were neither occupied nor certified solely on the grounds of the Planning law status of the units. This was a "killer" submission.

25. Mr. Drabble QC for the Respondent sought to pray in aid persuasive authorities from crucially different statutory contexts to prop up a contrary construction. In my judgment the Director's interpretation of when a new valuation unit becomes liable for land tax is clearly the correct one. The English rating scheme provides an express exemption from taxes where "*the owner is prohibited by law from occupying the heriditament or allowing it to be occupied*"[1]. The finding in *Tower Hamlets LBC –v- St Katherine by the Tower Ltd.* (1982) RA 261 that legislation similar to the Bermudian Building Code prohibited the owner from occupying the relevant property would only be pertinent to the present case if the Act contained an exemption from tax liability where the owner is prohibited by law from occupying the relevant valuation unit.

26. No such exemption can be found in the Bermudian Land Valuation and Tax Act. The Act provides as follows: "*valuation unit' means any land, building or part of a building occupied or capable of beneficial occupation as a separate unit.*" There is nothing in this definition or the related provisions of the Act creating a liability for the owner to pay taxes which justifies the conclusion that Parliament intended to import a requirement that a unit be occupied not just physically but also in compliance with planning regulations as a precondition for tax liability.

27. The core concept underlying the Act is that valuation units are assessed for tax based on their "*annual rental value*". This term is defined in section 1(1) to mean "*the rent at which a valuation unit might reasonably be expected to let from year to year...*"Tax liability is assessed based primarily on the market value of the unit, not by reference to the actual rental income generated by the unit as might be the case under an income tax regime. The value of the unit is intended to be assessed on the basis of the rental value which could reasonably be achieved if the unit was rented. This assumes that the relevant unit is in a physical condition which makes it commercially viable to rent it at the assessed value. There may well be certain legal occurrences which might impact on the question of whether a property or part of a property falls within the statutory definition of

[1] Paragraph 2(a) of Schedule 1 to the General Rate Act 1967.

a valuation unit in that it might fairly be contended that no lawful letting could take place[2]. However the fact that an owner has not applied for a Certificate of Use and Occupancy under the Building Code cannot in and of itself constitute grounds for postponing the date when land tax liability commences in respect of all new valuation units.

Legal findings: the number of units point

28. This issue had two aspects to it. The first was the narrow question of whether in all the circumstances of the present case the Appellant had standing to challenge the "finding" of the Robinson Tribunal that the Property comprised three valuation units.

29. The second aspect of this point was the broader and more generally important question of whether the Property fell within section 5(1) of the Act (as the Director contended) or section 5(2) of the Act (as the Jones Tribunal found). If section 5(1) applied, the Director was positively required to treat the units as a single unit; if section 5(2) applied, there was merely the discretion to treat multiple units as a single valuation unit. If the narrow question was resolved against the Appellant, the court was invited to consider the broader question in any event in the public interest.

How many valuation units comprise the Property ?

30. In my judgment it is clear on the face of the two Tribunal decisions and the record of the Robinson Tribunal hearing that the Appellant has no standing to challenge the finding by the Jones Tribunal which was essentially adopted by the Robinson Tribunal that the Property consists of three valuation units. Mr. Drabble rightly submitted that the matter could be analysed in more than one way leading to the same inevitable conclusion.

31. Firstly and quite simply, the Robinson Tribunal was considering an objection to a proposal by the Director which was based on the existence of three valuation units. It was not open to the Director before that Tribunal to unilaterally redefine the matter of which the Tribunal was seized. The number of units issue was not or not validly a matter the Robinson Tribunal was entitled to or purported to determine. The force of this analysis was not greatly enhanced by the embellishment that the Respondent's counsel added to this point with the contention that the Appellant was not in technical legal terms a person aggrieved with standing to appeal his own three-unit proposals.

32. Secondly and no less simply, I find that the Appellant lacks the standing to pursue this point as a ground of appeal against the decision of the Robinson Tribunal because of the doctrine of *res judicata* or issue estoppel. The very issue of how many valuation units the Property consisted of was determined by the Jones Tribunal in a decision which the Director did not appeal. It would be a manifest and gross abuse of the statutory procedure for dealing with objections to permit the Appellant to re-litigate the number of units issue in circumstances where:

[2] Examples might include the absence of any form of planning approval or the existence of an enforcement notice requiring certain works to be carried out before the premises are occupied.

(a) he failed to launch a timely challenge to the decision of the Arthur Jones Tribunal on this issue;

(b) he followed the directions of the Jones Tribunal and made proposals based on the existence of three valuation units;

(c) the Robinson Tribunal has conducted a two day hearing of the objection to the Director's proposals based on the existence of three valuation units.

33. The Appellant advanced no or no viable basis for re-opening the narrower aspect of the number of units point which was decided as between the same parties to the present appeal by the Jones Tribunal and not appealed.

Does section 5(1) or 5(2) of the Act apply to the Property?

34. The question of whether section 5(1) or 5(2) applies to the Property I found to be extremely difficult without the benefit of any judicial authority based on similar legislative provisions. After hearing Mr. Small I felt it was strongly arguable based on a seemingly straightforward reading of the key aspects of section 5(1) that he was right that this subsection applied. After hearing Mr. Drabble I found his technical construction based on the *ejusdem generis* rule impossible to dismiss out of hand.

35. Section 5 provides as follows:

"***Combination of multiple valuation units***

5(1) Where any series or complex of valuation units—

(a) comprise the components of a business or other enterprise; or

(b) are occupied by the same person,

including, but without prejudice to the generality of the foregoing, an hotel, cottage colony, guest house, lodging house, club, suite of offices, commercial or business premises, public utility undertaking, and dwelling house with one or more guest houses or apartments, the Director shall treat them as a single valuation unit and for all the purposes of this Act such series or complex of valuation units shall be deemed to be a single valuation unit:

Provided that the Director may for good cause exclude from any such combination any such valuation unit and treat it as a separate valuation unit.

(2) Where it appears to the Director that a series or complex of valuation units in

the same ownership can with convenience, having regard to the general purposes of this Act, be treated as a single valuation unit, he may so treat them and thereupon for all the purposes of this Act such series or complex of valuation units shall be deemed to be a single valuation unit:

Provided that the Director may not exercise his discretion under this subsection where such combination would result in any increase in liability of any owner for any tax payable under this Act.

(3)For the purposes of this section a valuation unit shall be deemed to be in the occupation of the owner notwithstanding that it is occupied by another person under any agreement or licence as a furnished occupancy."

36. The Jones Tribunal appears to have assumed that section 5(2) applied to the Property and that the Director was seeking to exercise a discretionary power under that subsection to classify the Property as comprising a single valuation unit. It is unclear what submissions were advanced by the parties on this issue. In terms of the evidence, the factual position appears to be as follows:

    (a) in most cases, treating multiple units as one will increase the value except where each unit is a freestanding unit whose value does not enhance a primary residential unit (Fifth Farrow, paragraphs 22 to 27);

    (b) there are over 750 properties consisting of a main house and at least one guest house or pool house, each of which is treated as a single unit (Sixth Farrow, paragraph 10);

    (c) there are also numerous examples properties under common ownership comprising what appears to be a main house and apartments or cottages which are treated as multiple valuation units (Banks affidavit, paragraph 6 and Exhibit 2).

Section 5(1)

37. On a straightforward reading of section 5(1), it initially seems clear that the Property would fall within the subsection on the basis that it is under the same occupation and consists of a "dwelling-house" and one or more "guest houses or apartments". The main house on the Property is clearly a "dwelling house" and the structure currently used as servants' quarters could be considered to be an apartment or guest house in the broadest sense. It initially seemed obvious to me that if the construction contended for by the Director was correct section 5(1) would apply to not just the larger properties such as those owned by the Respondent. It would also apply to any dwelling house with an apartment as well including the average house with an apartment used by the 'ordinary' Bermudian to help finance a mortgage they could not otherwise afford to pay. It would oblige the Director to treat such properties as single valuation units unless, under the proviso to section 5 (1), he finds good cause to treat one or more parts of a property under

the same occupation as a separate valuation unit. This preliminary view was, for reasons elaborated upon below, misconceived.

38. The evidence of the Respondent strongly suggests that the Director has not historically interpreted the Act in this broad-brush manner. There are too many examples on the List of single owned properties which consist of a dwelling house and an apartment or cottage which are treated as separate units. Paragraph 10 of Sixth Farrow clearly asserts that it is only the larger properties such as those owned by the Respondent consisting of "*a main house and at least one guest house or pool house*" which are treated as single valuation units. It is difficult to identify any coherent legal basis in terms of statutory construction for the conclusion that such larger properties fall within section 5(1) but their more humble counterparts do not.

39. The only criteria spelt out by section 5(1)(b) itself is common occupation; and section 5(3) makes it clear that an owner occupier who lets out furnished units will be deemed for section 5 purposes to be in occupation of such units while an owner occupier of one part of a property other parts of which are occupied (by agreement or license) on an unfurnished basis will not be regarded as occupying such other units. So a rational legal basis for distinguishing the large dwelling houses with multiple units from their more modest counterparts would be that only the 'great houses' are under the same occupation because the ancillary units are typically occupied on a furnished basis. This argument was not or not explicitly advanced by the Appellant.

40. Of course how the Act has been interpreted in the past is not dispositive. On the other hand, if the Director's established view of what the Act meant was not itself coherent, this undermined the starting assumption that the interpretation he contended for was itself entirely straightforward and coherent. It was against this background that the Respondent's seemingly technical construction grew in its attraction as the hearing progressed.

41. Mr. Small disputed the application of the *ejusdem generis* rule to shape the construction of the types of properties caught by section 5(2) on the grounds that: (a) the list examples had no identifiable *genus*; and (b) the fact that the list of examples was preceded by the words "*without prejudice to the generality of the foregoing*". But Mr. Drabble's construction only claimed to be "*firmly based on the thinking behind the ejusdem generis canon of construction*" (Skeleton Argument on behalf of the Respondent, paragraph 16). He conceded that the commonest example of this canon of construction did not apply to section 5(1), referring to '*Bennion on Statutory Interpretation: a Code*', 5th edition, section 379 at page 1231.Most significantly, to my mind, Mr. Drabble relied on a judicial pronouncement which illuminates the conceptual underpinnings of a rule which ought not to be applied in a mechanistic manner. In *Brownsea Haven Properties Ltd –v-Poole Corporation* [1958] 1 Ch 574 at 610, Romer LJ stated as follows:

> "*The doctrine of ejusdem generis is only part of a wider principle of construction, namely, that, where reasonably possible some significance and*

meaning should be attributed to each and every word in a written document."

42. It is true that Romer LJ went on to say that it is "*essential...that the examples which have been given are referable to a clearly ascertainable genus*", but the purport of his reasoning is that where there is a string of words, a court construing them must do its best to make sense of any ascertainable legislative meaning underpinning the formulation of the list. Looking at section 5 as a whole, the following conclusions are ultimately clear:

    (a) section 5 (1) (a) applies to "*a complex of valuation units*" which "*comprise the components of a business or other enterprise*" (emphasis added). This suggests a property which forms part of a single business or enterprise with different operating parts or units (for example a large law firm with autonomous but affiliated units e.g. corporate administration services/trust management services/ legal services operating from the same building);

    (b) section 5(1) (b) applies to "*a series or complex of valuation units...occupied by the same person*". Because of the provisions of section 5(3), it is clear that qualifying occupation will include occupation by an owner who permits physical occupation "*under any agreement or license as a furnished occupancy*". A property would not fall within section 5(1)(b) if it was occupied partially by the owner and partially by a tenant of an unfurnished unit (the 'ordinary' Bermudian home with an income generating apartment would in most cases not be caught because such units are ordinarily rented on an unfurnished basis);

    (c) the list of examples following sub-paragraphs (a) and (b) in section 5(1) clearly applies to both sub-paragraphs. The list does have a strong commercial flavour to it: "*an hotel, cottage colony, guest house, lodging house, club, suite of offices, commercial or business premises, public utility undertaking, and dwelling house with one or more guest houses or apartments*".

43. If the last example in the list is construed, for the purposes of section 5(1) (b) but not (a), as including a large private home with units which are not commercially let out, it is clearly the odd man out. This is especially the case because the term "guest house" has a distinct local meaning as a form of tourist accommodation, as the first use of the term in the list makes clear. It therefore becomes very difficult to rationalise assigning a wholly non-commercial meaning to the term "apartment", which again is popularly understood in the Bermudian context to signify a rental unit, as opposed to a pool house or accommodation for personal guests or staff. Because if "guest house" is given its natural (local) meaning in the context of section 5(1), the contrast between a dwelling house linked to a tourist establishment (guest house) and a dwelling house linked to an ordinary (furnished) apartment which is not being commercially let becomes an even more marked one.

44. Bearing in mind that section 5(2) confers a broad discretion to treat multiple units as one, I find that the purpose of subsection (1) of section 5 must be to deal with the specific context of properties divided into multiple units for what may broadly be described as business or commercial purposes. Section 5(1)(a) is concerned with a single enterprise operating through multiple business and property units on what in terms of land title is a single property (i.e. multiple occupants). In addition to the large law firm, this would likely embrace an office building or a shopping mall. Section 5(1)(b) is concerned with a single occupant (as defined by section 5(3)) operating one or more businesses in separate units on the same property. Examples of cases to which section 5(1)(b) potentially applies include:

    (a) a fractional ownership development occupied by a management company with multiple units leased out on a furnished basis;

    (b) a cottage colony, guest house or hotel, comprising several small cabanas;

    (c) a property consisting of a large villa and furnished apartments let out on a short-term basis to tourists or short-term guest workers.

45. It is noteworthy that the section 5(1) list is clearly use-based in contrast to the general statutory scheme which simply looks to the annual rental value of what may be presumed to be largely residential property. The common feature of all such cases appears to me to be that it would be impracticable and burdensome for the Director and his Department (not to mention the Tax Commissioner) to treat multiple units used by a large number of transient occupants. So the statutory presumption is that in these types of cases what would otherwise be classified as multiple units must be classified as one valuation unit. This leaves little "wiggle room" for property owners to whom section 5(1) applies to argue about the number of units which should be created for land tax purposes.

Section 5(2)

46. Section 5(2) is the other side of the coin. For cases not caught by section 5(1), the Director may for good reason treat multiple units as one: "*Provided that the Director may not exercise his discretion under this subsection where such combination would result in any increase in liability of any owner for any tax payable under this Act.*" In my judgment, the Property is the classic type of case to which section 5(2) logically applies. It is, to all intents and purposes, a single valuation unit comprised of a principal home and other units not intended to be used for rental purposes. I accept Mr. Small's submission that the proviso is limited to situations where a property has initially been classified as multiple units and the Director seeks to reclassify it as a single valuation unit with the result that the total tax liability is increased. It does not apply to the initial determination of what the tax liability should be. This would in practice neuter the operation of section 5(1) altogether in the residential property context where, the evidence suggests, the single unit approach will ordinarily increase the total tax liability. More fundamentally still, the proviso is clearly designed to protect the taxpayer from prejudicial assessments. There can be no prejudice to the taxpayer from an initial determination that a property

comprised of multiple units should fairly be determined to be a single rather than multiple units, taking into account objection and appeal rights.

47. Accordingly, had the Director filed a timely appeal against the Jones Tribunal decision and the finding that the proviso to section 5(2) operated to prevent the Director from determining that the Property should be treated as a single valuation unit, this finding would have been reversed.

Summary on section 5

48. In summary, I find that:

(a) section 5(1) of the Act does not apply to high-end residential properties such as the Property but only to properties where the units supporting a main dwelling house used for some business or commercial purpose;

(b) section 5(2) of the Act does apply to high-end residential properties such as those described in Sixth Farrow at paragraph 10. No basis for challenging their assessment as single units arises as the proviso does not apply to an initial assessment at a time when no tax liability capable of being increased exists;

(c) these findings recorded in the public interest have no impact on the status of the Respondent's Property as determined by the Arthur Jones Tribunal and the Robinson Tribunal which it is not open to the Appellant to challenge.

Findings: did the Robinson tribunal err in receiving evidence in relation to the valuation of the three units comprising the Property?

49. This point can be dealt with shortly even though it was the only operative ground of appeal. I reject the proposition that the statutory scheme operates in such a way as to deprive a taxpayer of the right to challenge the annual rental value assessment when an objection has been filed in time but not considered before the confirmation of a valuation list in which it is contained. Section 28 provides as follows:

> "***Valuation list to be conclusive***
> *28.Subject to this Act, the valuation list from time to time in force shall, for the purposes of this Act, be conclusive of the annual rental value of any valuation unit therein notwithstanding that any objection or proposal of the Director or any appeal under this Part remains undetermined:*
>
> *Provided that on the final determination of any such objection, proposal or appeal the valuation list shall be construed subject to the final decision thereon and the Director shall amend the valuation list accordingly.*" [emphasis added]

50. The intent of this provision is in my judgment clear. If the position was ambiguous, I would resolve any ambiguities against the Director as the construction contended for

would be manifestly inconsistent with fundamental fair hearing and property rights which are guaranteed by the Bermuda Constitution (sections 6(8) and 13). The Robinson Tribunal was correct in its conclusion that it could consider the merits of the valuation objection which had been timely filed in relation to the draft List and never determined without fault on the taxpayer's part.

51. The appeal against the valuation decision of the Robinson Tribunal is accordingly dismissed.

Conclusion

52. A valuation unit is "*capable of beneficial occupation*" for the purposes of section 1(1) of the Act and so as to trigger liability to taxation when it is physically ready for occupation, notwithstanding the fact that the owner has yet to apply for and be granted a Certificate of Completion and Use under the Building Code. The Director succeeds on this point which was considered by this Court in the public interest and his existing policy in this regard is affirmed.

53. The number of units point was finally determined by the Jones Tribunal in the Respondent's favour and the Director's attempt to reopen this issue fails. As regards the related question of the interpretation of section 5 of the Act, the Jones Tribunal was right to conclude that high-end residential properties fell to be assessed under section 5(2) rather than section 5(1). Although section 5(2) permits the Director to treat a series of units as one composite unit only on a discretionary basis, the proviso ousting this discretionary power only operates to exclude increasing an existing tax liability. The proviso to section 5(2) does not, as the Director rightly contended, fetter his discretion when making an initial assessment in respect of new valuation units.

54. The Robinson Tribunal correctly determined its own jurisdiction in light of the matters previously determined by the Arthur Jones Tribunal. It was accordingly validly open to the Tribunal to receive evidence upon and assess the annual rental value to be assigned to the Property by way of adjudicating an outstanding objection to the Director's valuation. The appeal by the Director against the decision of the Robinson Tribunal is accordingly dismissed.

55. As the Respondent has succeeded on the merits and merely assisted the Court to clarify the law by contesting the public interest points which have been resolved in the Appellant's favour, there is no obvious reason why costs should not follow the event. However, I will hear counsel as to costs.

Dated this 27th day of July, 2012 _____
IAN RC KAWALEY, CJ