

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G10034 OF 2014

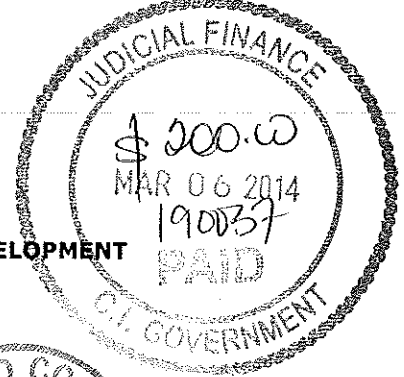
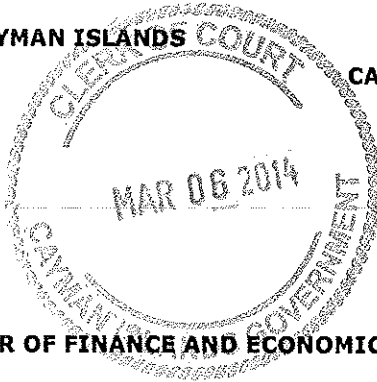
BETWEEN:

THE QUEEN

AND

- (1) THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
- (2) THE FINANCIAL SECRETARY
- (3) THE SENIOR ASSISTANT FINANCIAL SECRETARY

EX PARTE JACKSON



RESPONDENTS

**APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

To the Clerk of the Court, Law Courts, George Town, Grand Cayman, Cayman Islands	
<b>Name, address and description of applicant(s)</b>	Andrew Steven Jackson  Apartment 51, Secret Garden, 307 Fairbanks Road, George Town, Grand Cayman, Cayman Islands  Attorney-at-Law
<b>Judgment, order, decision or other proceeding in respect of which relief is sought</b>	The Respondents failed to render a decision in respect of the Applicant's application as a first-time Caymanian home buyer for a certificate confirming to the Land Registry that the instrument which would effect the transfer to him of land situate at South Sound Block 15C Parcel 33H45 (the <b>Property</b> ) would not be subject to any charge to stamp duty (the <b>Exemption Application</b> ) before the transfer of the Property to him was effected. The Respondents have, following the said transfer, refused to perform an adjudication of the Instrument transferring the Property to the Applicant to determine whether it was or was not chargeable to stamp duty as requested by the Applicant (the <b>Request for an Adjudication</b> ).

**Relief sought**

Judicial review in the form of:

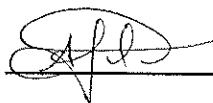
1. A Declaration that the Respondents' policy of denying any application for a first-time Caymanian home buyer stamp duty exemption or concession certificate in respect of a proposed purchase of land if the application is made by a person who has previously acquired title to any land in the Islands, regardless of the purpose or reason for the prior acquisition or acquisitions, is contrary to the Stamp Duty Law (2013 Revision); and
2. Damages in the amount of CI\$19,875.00 in respect of the stamp duty payment made by the Applicant upon registration of the transfer of the Property to him; and
3. Interest pursuant to Section 34 of the Judicature Law (2013 Revision) at such rate and for such period as the Court thinks fit; and
4. Post-judgment interest; or
5. An Order of Mandamus to oblige the Second Respondent on behalf of the First Respondent to render a decision in respect of the question whether the Instrument which transferred the Property to the Applicant was or was not chargeable to stamp duty, and, if so, to what extent, within 15 days of the date of the Order; or
6. An Order of Mandamus to oblige the First Respondent to render a decision in respect of the question whether the Instrument which transferred the Property to the Applicant was or was not chargeable to stamp duty, and, if so, to what extent, within 15 days of the date of the Order; and
7. A Declaration that, in the event that the question set out at paragraphs 5 and 6 above is decided in favour of the Applicant, the Applicant is entitled to the return of CI\$19,875.00 in stamp duty paid to the Cayman Islands Government forthwith.

**Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant**

The Applicant's address for service is:

Apartment 51, Secret Garden, 307 Fairbanks Road, George Town, Grand Cayman, Cayman Islands

**Signed**

  
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**Dated**

06.03.14

## GROUNDS ON WHICH RELIEF IS SOUGHT

The documents and authorities which are relevant to this Application may be found in the paginated bundle which has been lodged with it. Pages in the bundle are referred to in this Application by tab and page number, e.g. [Tab 1/p.1]. The page numbers to be used when locating pages in the Applicant's verifying affidavit and its exhibits are located in the bottom right corner of the page, and the individual documents which compose each exhibit are listed in an index behind the covering sheet of each exhibit.

## THE FACTS AND LAW RELEVANT TO THIS APPLICATION

### The Parties

1. The Applicant is a Caymanian.
2. The First Respondent is the Honourable Minister of Finance and Economic Development, the elected member of the Legislative Assembly (the **Legislature**) of the Cayman Islands Government (the **Government**) with responsibility for the Ministry of Finance and Economic Development (the **Ministry**). The Second Respondent is the Honourable Financial Secretary, and as such is the principal advisor to the First Respondent and an official member of the Government. The Third Respondent is the Senior Assistant Financial Secretary, the senior assistant to the Second Respondent.

### Introduction

3. The Applicant has sought to claim the benefit of a first-time Caymanian home buyer stamp duty exemption under the Stamp Duty Law (2013 Revision) (the **Law**) in connection with the purchase of the Property (defined above) as his first owner-occupied home. The Applicant has made this Application because that benefit has not been extended to him, and because he believes that he will not receive that benefit unless the Court grants the relief which he now seeks by way of judicial review.
4. The first-time Caymanian home buyer scheme under the Law (the **Scheme**) was enacted by the Legislature to assist Caymanians seeking to purchase their first owner-occupied home, or the land on which their first owner-occupied home is to be constructed, by allowing them an exemption from, or concession on, the charge to stamp duty which would otherwise be payable on the instrument transferring the land to them. The Applicant has never benefited under the Scheme. Whilst the Applicant had previously acquired a piece of raw land situate at Registration Section West Bay North East, Block 9A, Parcel 804 (the **West Bay Land**) on 14 October 2011 for CI\$100,000 [See Tab 3/p.49], that acquisition was made because it represented an attractive investment opportunity to the Applicant (discussed further below at paragraph 11) and he paid stamp duty on the transfer in the sum of CI\$4,000. The Applicant acquired the Property as his first owner-occupied home on 8 July 2013 without having been granted the benefit he sought under the Scheme [See Tab 3/p.53].

5. The Respondents have made it their policy to deny the benefit of the Scheme to any Caymanian who applies for a first-time Caymanian home buyer stamp duty exemption or concession certificate in respect of a proposed purchase of land if that person has previously acquired title to any land in the Islands, regardless of the purpose or reason for the prior acquisition or acquisitions (the **Policy**). Thus, by reason of the Applicant's prior acquisition of the West Bay Land, the Respondents proposed to deny him the benefit of an exemption under the Scheme and to reject the Exemption Application (defined above). The Applicant advised the Second and Third Respondents that he considered the Policy to be illegal, in the sense that it is *ultra vires* the Law, and that he should have the benefit of an exemption under the Scheme upon his acquisition of the Property. In light of the Applicant's position regarding the Policy and his entitlement to benefit under the Scheme, the Second and Third Respondents first advised him in May 2013 that they would need to take advice on the matter from the Government's Legal Department (the **Legal Department**) before they could render any decision on the matter. The Second Respondent advised the Applicant that, if he was in a position to do so, he should purchase the Property and pay stamp duty on the transfer of land form, and seek a refund of the stamp duty if they subsequently decided, based on the Legal Department's advice, that he was entitled to benefit under the Scheme. The Applicant acted in reliance on that advice and acquired the Property, and he paid CI\$19,875.00 in stamp duty on the transfer of land form [**See Tab 3/p.53**]. Up to the date of this Application, the Respondents contend that they are still awaiting the advice they sought from the Legal Department and none of the Respondents have communicated any decision to the Applicant on the question of his entitlement to benefit from receiving an exemption under the Scheme.
6. The First Respondent is the Commissioner and adjudicator of stamp duty under the Law (see ss.4 and 8 of the Law [**Tab 6/pp.6-7**]). As such, he owes duties to oversee and decide matters concerning stamp duty in accordance with the Law (see ss.4 and 9 of the Law [**Tab 6/pp.6 and 8**]). By reason of the fact that no decision has been rendered on the question of the Applicant's entitlement to benefit under the Scheme, notwithstanding the Applicant's Request for an Adjudication (defined above), the First Respondent is to be regarded as having failed and refused to perform his duties and functions as Commissioner and adjudicator under the Law. He has also failed to ensure that the persons whom he authorised to perform his functions under the Law (see s.5 of the Law [**Tab 6/p.6**]), namely the Second and Third Respondents, were in fact performing those functions and that they were doing so in a manner which accorded with the Law. This Application is made for leave to apply for judicial review against him by reason of those failures and that refusal. The Second and Third Respondents are joined to this Application as the persons whom the First Respondent has authorised to perform his functions under the Law and who have failed to perform, or failed to perform properly, the functions under the Law which they were expected to perform by reason of that authorisation. Each of the Respondents' failures and their refusals are described more particularly below.

7. The Applicant will accordingly address this Honourable Court, in his submissions below, on the proper construction of the provisions under the Law which relate to the Scheme, the process which the Respondents have established for applying for the benefit of the Scheme, the duty which the First Respondent owes under the Law to decide the applications which are submitted in accordance with that process (or to supervise those to whom he has delegated that function) and the manner in which the Respondents have refused and/or failed in this case to perform those duties and functions. The Applicant will also address the Court on other matters of which it should be aware on this Application and issues concerning delay in the final sections of this Application. In so doing, the Applicant has endeavoured to comply with his duty of full and frank disclosure.

#### **The First-time Caymanian Home Buyer Exemption**

8. The Law provides an exemption from, or concession in respect of, the charge to stamp duty which would otherwise be payable upon a conveyance or transfer of immovable property in the Islands where certain criteria are satisfied. The relevant provision appears in the Schedule to the Law, under the heading "CONVEYANCE OR TRANSFER of any immovable property" at paragraph (10) [see Tab 6/pp.18-21]. Paragraph (10) provides, in particular, that:

*"Notwithstanding paragraph (2), where land (other than land included in the Table to paragraph (1)) is transferred to a Caymanian for the purpose of his first owner-occupied home*

*(a) there is no charge to duty on the instrument effecting such transfer if –*

- (i) in the case of land with a building, the consideration is \$300,000 or less; or*
- (ii) in the case of land without a building, the consideration is \$100,000 or less;*

*[...]*

*An exemption of [sic.] concession afforded by this paragraph in respect of duty shall be subject to such conditions as the Minister of Finance may think fit to impose in order to prevent exploitation of those provisions by persons who are not bona fide first home purchasers, or bona fide purchasers of land for first home building purposes".*

9. The Applicant respectfully submits it is clear from the terms of paragraph (10) that the criteria which must be satisfied if a particular instrument is to be exempt from stamp duty are that: (1) the land which is being transferred must not be included in the Table to paragraph (1) [Tab 6/pp.18-19]; (2) the transferee of the land must be a Caymanian; (3) the land must be transferred to the transferee for the purpose of serving as his first owner-occupied home or the future site thereof; and (4) the consideration given for the transfer must not exceed the prescribed threshold. Provided those criteria are satisfied, no charge to stamp duty arises on the instrument effecting the particular transfer.
10. The Applicant submits it is also clear from the terms of paragraph (10) that the First Respondent has the power to impose such conditions as he thinks fit to prevent exploitation of

the benefits of the Scheme. It appears that the Legislature appreciated that certain transferees might claim the benefit of an exemption on a transfer of land to them, and then subsequently seek to claim the benefit of a further exemption or exemptions on the basis that the land previously acquired did not in fact serve the purpose of a first owner-occupied home; it thus gave the First Respondent the power to deal with such mischief. It is important, however, to recognise that this power to impose conditions is not a power unilaterally to enlarge or amend the criteria prescribed by paragraph (10) in the Schedule to the Law (see paragraph 9 above); it is a power conferred on the First Respondent to enable him to ensure that the criteria which the Legislature did prescribe are satisfied before the particular transfer is treated as being exempt.

11. The Applicant contends that the paragraph (10) criteria were satisfied when the Property (defined above) was transferred to him and that, consequently, no charge to stamp duty arose on the instrument which effected the transfer of the Property to him. The relevant facts are, in particular, that: (1) the Property was not included in the Table to paragraph (1); (2) the Applicant is a Caymanian; (3) the Property was transferred to him on 8 July 2013 for the purpose of serving as his first owner-occupied home; and (4) the consideration given for the transfer of the Property was CI\$265,000 [**See Tab 3/p.53**], and thus well beneath the prescribed threshold of CI\$300,000 for land with a building. One interesting feature of this case is that, having communicated extensively with the Second and Third Respondents on this matter, the Applicant does not understand any of these facts to be in dispute between the parties to the Application (see paragraph 22 below). It may be that, in due course, the Respondents might seek to suggest that the West Bay Land was acquired by the Applicant for the purpose of constructing his first owner-occupied home upon it and that no exemption was sought or granted because it simply did not come within the CI\$100,000 threshold; however, the true position is that the West Bay Land represented an attractive investment for the Applicant at the time of that purchase based on proposed developments in the area (namely an extension of the West Bay Bypass and surrounding residential development) and the Applicant never formed any settled intention as to whether he would later develop the land himself or sell it undeveloped when its market value increased (as the Applicant believes it should). The Applicant accordingly does not apprehend any sound basis for the Respondents to object to the granting of any of the relief for which the Applicant prays.

### **The Application Process**

12. The procedure which has been established for claiming the benefit of an exemption under the Scheme is to submit an application at the offices of the Ministry prior to completion of the proposed purchase. For reasons explained below, the application should be submitted some time before completion of the purchase so that the certificate may be issued before the transfer of land form is filed at the Land Registry. The application is made by way of an affidavit in the form provided by the Ministry which verifies, and provides the facts from which it may be verified, that the paragraph (10) criteria are satisfied and which also exhibits the relevant supporting documents: i.e. proof that the applicant is Caymanian, a valuation of the

property to be purchased, and a copy of the purchase agreement (for an example, see the Exemption Application [Tab 3/p.1-36]). Such applications are decided by the Second Respondent or the Third Respondent as the senior assistant to the Second Respondent, each of whom act under the authority of the First Respondent. The Ministry advises the general public, through the guidance notes to the form of affidavit for the application, that such applications are typically decided within a week of being submitted [Tab 3/p.50]. If the application is granted, the applicant is provided with a certificate which confirms that there should be no charge to stamp duty on the transfer of the land to him, which he may then enclose with his transfer of land form at the time he files it with the Land Registry to enable the Valuations and Estates Office of the Government's Lands & Survey Department to verify that there is no charge to stamp duty on the transfer of land form before passing it to the Registrar of Lands for registration. If the application for the first-time Caymanian home buyer stamp duty exemption certificate is denied, the Applicant assumes that the particular applicant would be informed of the same by one of the Respondents in writing.

13. It is worth noting, at this stage, the apparent reasons that this procedure has been established:

13.1. The first is that the procedure enables a person who claims the benefit of an exemption under the Scheme to know whether or not he will be required to pay stamp duty on his transfer of land form some time before the form is executed and the purchase is completed, and thus before any charge to stamp duty actually arises and becomes payable. This is an important feature of the process because the answer to the question whether there is any stamp duty to be paid on the transfer of land form may determine when, if at all, a person may actually be able to complete a proposed purchase of a particular piece of land.

13.2. The second is that, whilst paragraph (10) renders a transfer of land form exempt from stamp duty where the prescribed criteria are satisfied and, accordingly, whilst a transfer of land form will either be chargeable to or exempt from stamp duty purely by operation of law, it is necessary in each case where the exemption is said to apply for some person to make a factual determination as to whether the paragraph (10) criteria are satisfied; this determination must be made to ensure that each transfer of land form is properly being treated as chargeable or exempt and that stamp duty is paid if required before the particular transfer of land is registered. The duty to make this factual determination is discussed further below at paragraphs 14 to 19.

13.3. The third reason follows from the second, but is less obvious, save perhaps to persons familiar with the procedures of the Government's Lands & Survey Department. Before the Registrar of Lands registers a transfer of land, unless the transfer of land form is accompanied by an exemption certificate or an adjudication is otherwise requested, the Valuation and Estates Office is responsible for assessing the market value of the land being transferred in order to certify the amount of the charge to stamp duty on the

transfer of land form. The Valuation and Estates Office must perform any assessment prior to the registration of the transfer because, as a matter of practice, the Registrar will not register a transfer of land until the appropriate stamp duty payment is made. The performance of such assessments is one of the inherent functions of the First Respondent *qua* Commissioner (see s.4 of the Law [Tab 6/p.6]), which has necessarily been delegated to persons qualified and experienced in valuing land. The exemption certificate enables the Valuation and Estates Office to determine whether or not an assessment is required without having to perform the factual determination mentioned above at paragraph 13.2 (or even having to consider whether it should be performed); though, in any event, the making of that determination is not a function which the First Respondent has delegated to the valuers within that Office.

### **The Duty to Decide**

14. The First Respondent *qua* Commissioner is the adjudicator of stamp duty (see s.8 of the Law [Tab 6/p.7]). Section 9 of the Law provides that the First Respondent's duty as adjudicator is as follows:

*"The adjudicator shall, on payment in the prescribed manner of the prescribed fee adjudicate for stamp duty every instrument presented to him for that purpose within fifteen days of such presentation and, subject to the right of appeal of any person paying the duty as adjudicated, such adjudication shall be final and binding for all purposes of this Law" [Tab 6/p.8].*

What the Law does not expressly provide, but what, in the Applicant's respectful submission, must follow from the First Respondent's power under s.5 of the Law [Tab 6/p.6] to authorise any officer of the Government to perform all or any of his functions, is that the First Respondent *qua* Commissioner also owes a duty to supervise those whom he authorises to perform his functions to ensure that they are performing those functions properly, and, accordingly, that his duties under the Law are being complied with.

15. The Applicant first submits, in relation to the duty imposed on the First Respondent by s.9 of the Law, that, whilst the term "adjudication" is not itself defined under the Law, its plain and ordinary meaning in the context of the Law is "the rendering of a decision as to whether or not and, if so, to what extent an instrument is chargeable to stamp duty": s.3(2) of the Interpretation Law (1995 Revision) provides that every local law "shall be carried out and applied according to the plain reading..." [Tab 5/p.12]. Given that a decision rendered in respect of an exemption application is a decision as to whether or not and, if so, to what extent a transfer of land form executed in connection with the proposed purchase (which is the subject of the exemption application) will be chargeable to stamp duty, it follows in the Applicant's humble submission that an adjudication takes place when the First Respondent, or either of the Second and Third Respondents as his delegates, renders a decision in respect of an exemption application. This is fortified by the proposition that the First Respondent's duty to adjudicate the transfer of land form which would be executed upon the purchase proposed

in the exemption application (if an adjudication were subsequently to be requested) will already have been discharged if he (or his delegate) renders a decision in respect of the exemption application itself. It is similarly fortified by the further proposition that, where an exemption application is actually denied and, by reason of the denial, the applicant subsequently pays stamp duty on his transfer of land form, the applicant will have a right of appeal under s.10 of the Law and may appeal to this Court against the denial. The Applicant submits that, had the Exemption Application actually been denied (or, for completeness, had the Request for an Adjudication resulted in a decision that the instrument which transferred the Property to the Applicant was chargeable to stamp duty), that is the procedure (i.e. the appeals process) that he would have been required to follow. For each of those reasons, it is respectfully submitted that the First Respondent's duties to adjudicate and to supervise any person whom he has authorised to perform the function of adjudicating instruments are engaged when an exemption application is submitted to the Ministry to be decided by one of the Respondents.

16. There is a slight tension between the language of s.9 and the submissions made in the preceding paragraph. Section 9, if construed literally, imposes a duty on the First Respondent to adjudicate for stamp duty an instrument which is presented to him. However, the affidavit on which an exemption application is made is not itself an instrument which may (or may not) be chargeable to stamp duty; the relevant instrument is, instead, the transfer of land form (which would eventually transfer to the applicant the land which was the subject of his exemption application).

16.1. The Applicant respectfully submits that this slight tension was the product of a failure, on the part of those who drafted the amendments to the Law which introduced and subsequently revised the Scheme, to appreciate that the language of s.9 required some minor revision to take account of the procedure which would need to be and which was actually established for ascertaining whether or not the exemption applied to particular transfers of land. The intention behind the section and, indeed behind the enactment of the Scheme, was that the First Respondent should be duty-bound to decide exemption applications within fifteen days of their submission in the same way as any other adjudication under the Law, and the Court will respectfully be asked to construe s.9 in a manner which recognises and gives effect to that intention. Should it assist the Court here, reference is made to s.59 of the Interpretation Law (1995 Revision), which provides that: "*Where one Law amends another Law the amending Law shall, so far as it is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Law*" [Tab 5/p.24].

16.2. In the Applicant's respectful submission, the Law can only be construed as placing the First Respondent under an obligation to decide exemption applications (and, for the avoidance of doubt, to do so fairly and timeously) and to ensure that any delegate properly does so for him, for, to construe it otherwise, would put the First Respondent in a

position where he had the power to deny that benefit to any applicant and even to grant or deny the benefit arbitrarily and based on irrelevant or unreasonable considerations.

17. Having particular regard to the facts (1) that the First Respondent and those acting with his authority have established a particular procedure for dealing with exemption applications which enables an adjudication to be performed prior to the execution of any instrument (i.e. transfer of land form) and which renders any further adjudication of the instrument itself unnecessary, (2) that persons who have submitted exemption applications expect that decisions will be rendered timeously in respect of their applications (3) that the Respondents' practice of deciding exemption applications within a week of their submission is consistent with the timeframe imposed for discharging the duty to adjudicate under s.9, and (4) that an applicant acquires a right of appeal to this Court only once a decision is rendered and a payment of stamp duty is made in accordance with the decision, should the Court disagree with the submissions made at paragraph 12 above, the Court will alternatively be asked to find that the application process explained at paragraph 8 above gave rise to a legitimate expectation that the First Respondent is duty-bound to decide exemption applications within fifteen days of their submission and to ensure that this function was being performed properly by each of the Second and Third Respondents as his delegates.
  
18. There is a further point which the Applicant should mention in relation to the duty to decide exemption applications which is imposed by s.9: It is that s.9 provides for "*payment in the prescribed manner of the prescribed fee*" [Tab 6/p.8] and, if interpreted literally, suggests that the First Respondent's duty to adjudicate is only engaged once the prescribed fee is paid. In the Applicant's humble submission, the First Respondent's duty to adjudicate exists before the payment of any fee, for the Schedule to the Law provides, under the heading "ADJUDICATION of an instrument", that the fee is to be "*1% of the sum adjudicated with a minimum of \$1 and a maximum of \$1,000*" [Tab 6/p.15] and it cannot be possible to pay any fee calculated on that basis until the adjudication has actually been performed. Moreover, the First Respondent and those acting under his authority do not require any fee to be paid in connection with the submission of an exemption application and the Applicant respectfully submits that it cannot follow that the First Respondent is able to avoid his duty to decide exemption applications or to supervise those to whom he has delegated that function simply by failing to charge a fee for the performance of that function.
  
19. There is also a second limb to the analysis of the duty which the First Respondent owes under s.9 of the Law as adjudicator in this context. It is, in the Applicant's respectful submission, that the duty which the First Respondent owes to decide exemption applications is not released by his own failure to render a decision in respect of the exemption application. The process which the Respondents have established for applying for an exemption or concession under the Scheme, explained at paragraphs 12 and 13 above, is simply a mechanism designed to enable the Respondents to perform their adjudicatory function, and thereby to discharge the First Respondent's duty as adjudicator, prior to the execution of an instrument which they would

otherwise be required to adjudicate (assuming a request is made). If, for any reason, no decision is rendered in respect of an exemption application prior to the transfer to the applicant of the property which was the subject of his exemption application (which might happen if the applicant proceeds with the proposed purchase to avoid losing the opportunity or committing a breach of contract), in the Applicant's respectful submission, the First Respondent remains obliged to render a decision as to whether or not the instrument which effected the transfer was subject to any charge to stamp duty; he will have been provided with all of the facts on the exemption application which are necessary to enable him to reach a decision and the only difference in outcome is that, if he decides the instrument was not chargeable, instead of issuing a certificate which confirms the same to the Land Registry, he would be required to arrange a refund of the stamp duty which the applicant was not obliged under the Law to pay. The Applicant respectfully submits that this is consistent with both the language of s.9 and the intention behind the Scheme.

### **The Refusal to Perform the Duty**

20. The Second and Third Respondents failed to render a decision in respect of the Exemption Application before the Property was transferred to the Applicant on the basis that they needed to take legal advice from the Legal Department on matters related to the Exemption Application (see paragraph 22 below). Upon the Property being transferred to the Applicant, the Exemption Application became a request for an adjudication of the instrument which transferred the Property to the Applicant (i.e. the Request for an Adjudication): To be clear, at that point in time, the issuance of a certificate which confirmed to the Land Registry that the instrument which was to transfer the Property to the Applicant was not chargeable to stamp duty would have served no purpose (which was what was sought by the Exemption Application) and the Applicant was, accordingly, asking the Respondents, by his Request for an Adjudication, to render a decision as to whether or not the instrument which did transfer the Property to the Applicant was subject to any charge to stamp duty (and, if it was not, to refund the stamp duty which the Applicant had already paid). The Respondents have also refused to render a decision in respect of the Request for an Adjudication up to the date of this Application, again on the basis that they have not received the advice they requested from the Legal Department (see paragraph 22 below).

21. Those refusals are borne out of a dispute between the Applicant and the Respondents as to the legality of the Policy, which the Respondents have been, according to their own admission, consistently applying for several years when deciding exemption applications (see paragraph 22.2 below). In the Applicant's respectful submission, the Policy is *ultra vires* the Law and thus illegal for the reasons set out at paragraphs 8 to 10 above.

22. The correspondence which has passed between the Applicant and the Second and Third Respondents concerning the Exemption Application and the dispute over the legality of the Policy has been exhibited as Exhibit ASJ-2 [Tab 4] to the Applicant's verifying affidavit filed with this Application [Tab 2] and the Court is invited to read the verifying affidavit together

with that correspondence for a full background to these matters. The material facts for this Application may, however, be summarised as follows:

22.1. On 1 May 2013, the Applicant submitted the Exemption Application to the Ministry for processing. The Applicant made inquiries of the Ministry in the weeks following the submission of the Exemption Application to ascertain its status and discussed the matter by telephone initially with Ms Sasha Brathwaite (**Ms Brathwaite**), who is employed as an assistant at the Ministry. Details of those inquiries and that discussion are summarised in the Applicant's email to the Second Respondent of 21 June 2013 at 7:50 AM [**See Tab 4/pp.5-7**].

22.2. Ms Brathwaite advised the Applicant of the Policy during their telephone conversation on or about 14 May 2013. Ms Brathwaite explained that, because the Applicant owned the West Bay Land, the application of the Policy would result in the Exemption Application being denied. When the Applicant expressed his concerns over the legality of the Policy, he was advised to discuss the matter with the Second and Third Respondents. Upon the Applicant doing so, each of the Second and Third Respondents separately stated that he was unable to render any decision in respect of the Exemption Application until he was in receipt of legal advice from the Legal Department on the questions concerning the legality of the Policy and, ultimately, whether the Applicant is entitled to the benefit of an exemption under the Scheme [**See Tab 4/p.8**]. The Third Respondent confirmed to the Applicant that he would be seeking that advice on 23 May 2013 and each of the Second and Third Respondents implicitly requested the Applicant's forbearance on this matter whilst they awaited that advice. The Second Respondent, however, being cognisant of the likely time-sensitivity of the purchase of the Property and being unwilling to render a decision in respect of the Exemption Application without first taking advice from the Legal Department, stated the following in his email to the Applicant of 26 June 2013 at 10:29 AM:

*"Whereas I understand the legal point you are making, we in the Government have been consistently applying the position outlined to you by Mr Nixon and other staff, that where an applicant has existing property – however it is obtained – that causes a stamp duty waiver to not be available to such an applicant.*

*Pending feedback from our Legal Department as indicated by Mr Nixon, I suggest that if you are in a position to proceed with the purchase of the property, you should do so then seek a refund of stamp duty. I am only making this suggestion because the purchase may be time-sensitive and the opportunity might expire before we receive feedback from the Legal Department" [**See Tab 4/p.8**].*

22.3. The Applicant, accepting the suggestion made by the Second Respondent in good faith and indeed having regard to the time-sensitivity of the purchase, proceeded to purchase the Property on 8 July 2013 for CI\$265,000, excluding the cost of chattels, and

paid stamp duty on the transfer of the Property in the sum of CI\$19,875.00 [**See Tab 3/p.53**]. The Property thereby became the Applicant's first owner-occupied home.

22.4. The Applicant expressly requested, by email on 6 August 2013 at 3:46 p.m., that the Second Respondent perform an adjudication of the Instrument which transferred the Property to him [**See Tab 4/p.31**].

22.5. The most recent correspondence between the Applicant and the Second Respondent on this matter was exchanged between 20 and 24 December 2013, with copies to the First and Third Respondents [**See Tab 4/pp.39-43**]: In summary, the Applicant advised the Second Respondent that he was requesting that a refund be made to him or that a decision be rendered in respect of the Request for an Adjudication within 14 days (i.e. by 3 January 2014) whether or not either of the Second and Third Respondents had received the advice sought from the Legal Department and that, if no refund had been given or, alternatively, no decision had been rendered within that period, the Applicant would consider he had been left with no option but to apply for judicial review. The Applicant's request that a decision be rendered in respect of the Request for an Adjudication was thereby brought to the attention of the First Respondent. In the same chain of correspondence, the Second Respondent advised the Applicant that he had not received the requested advice at the time of writing and that he had again made inquiries of the Legal Department regarding the requested advice, and gave no indication that any decision would be rendered absent receipt of such advice from the Legal Department.

22.6. The Applicant and the Second Respondent discussed the matter further on the evening of 6 February 2014, and the Second Respondent confirmed that he still had not received the requested advice and that the matter was being considered by the First Respondent and other fellow Members of the Legislature. The Applicant advised the Second Respondent that he maintained the view that the Policy is illegal, that he was not prepared to allow further time for a decision to be made in respect of the Request for an Adjudication, having particular regard to the size of the sum in issue, and that he considered it had become necessary to seek a judicial review to obtain a refund of the stamp duty which he had paid on the transfer of the Property.

23. As at the date of filing this Application, none of the Respondents has communicated any decision to the Applicant in respect of the Exemption Application or Request for an Adjudication, nor have they indicated that the advice sought from the Legal Department has been received and/or that a decision will be rendered in respect of the Request for an Adjudication forthwith. In the circumstances, the Applicant respectfully submits that the Respondents are to be treated as having refused to render a decision in respect of the Request for an Adjudication. In particular, irrespective of his failures adequately to supervise the Second and Third Respondents' performance of his functions *qua* Commissioner and adjudicator under the Law and his failure to appreciate that, up to 20 December 2013, neither

the Second nor Third Respondent had rendered any decision in respect of the Exemption Application or Request for an Adjudication, the fact that no decision had been rendered in respect of the Request for an Adjudication was drawn to the First Respondent's attention by the correspondence referred to above at paragraph 22.4 and the First Respondent has since personally failed to render any decision in respect of the Request for an Adjudication. The Applicant respectfully submits that the First Respondent's failure to do so must be treated as a refusal to perform the duty which he owes under s.9 of the Law, and alternatively which he is legitimately expected to perform, which refusal should be remedied by the Court granting such of the relief sought by the Applicant as it thinks just.

### **The Illegality of the Policy**

24. The Applicant has respectfully submitted that the Policy is illegal for the reasons set out at paragraphs 8 to 10 above. The Applicant contends that it is accordingly appropriate and in the public interest that the Court make a declaration to that effect.

### **OTHER MATTERS OF WHICH THE COURT SHOULD BE AWARE**

25. It may be suggested that there is an alternative remedy available to the Applicant in the form of an appeal under s.10 of the Law. Section 10 of the Law provides that: "*Any person who has paid an adjudicated stamp duty upon any instrument may, within thirty days of the adjudication, appeal there against to the Grand Court*" [Tab 6/p.8].

26. Whilst the Applicant has paid stamp duty on the transfer of the Property to him, neither of the Respondents has performed any adjudication in connection with the Exemption Application or the Request for an Adjudication and, accordingly, the stamp duty paid was not an adjudicated sum. This Application was necessitated by the Respondents' failures to perform their duty to adjudicate.

27. The Applicant accordingly contends that he had no right of appeal under s.10 of the Law because there was no adjudication against which he could have appealed. It follows that there was no alternative remedy available to the Applicant under the Law which he might have been required to exhaust before making this Application.

28. The Applicant should, however, draw the Court's attention to the alternative means of obtaining relief in this case, which would take the form of a claim by the Applicant against the Crown to recover the stamp duty that he was not obliged under the Law to pay: in particular, the instrument which transferred the Property to the Applicant was never chargeable to stamp duty under the Law and thus, whilst the Applicant was given no option but to pay the stamp duty which he now seeks to recover by way of this Application if he wished to acquire the Property and obtain registration of the transfer of the Property to him, the Government was never entitled to receive the monies which the Applicant paid to it in respect of that instrument and is under an obligation to return them to the Applicant. The Applicant has made this Application on the basis that the judicial review procedure is the proper course to be adopted

on what is very much a public law matter involving questions of public importance and in order to avoid any suggestion that an action in private law against the Crown, if taken in the first instance, should be seen as an abuse of the Court's process (see *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747, at 754-755 per Lord Woolf MR [Tab 9/pp.754-755]).

## DELAY

29. It may be suggested that the Applicant has delayed in making this Application, given that the Exemption Application was submitted to the Ministry on 1 May 2013 in accordance with the Respondents' established practice and that a decision should have been rendered in respect of the Exemption Application by 16 May 2013. The Applicant respectfully submits that this Application is not made with delay, or, if the Court considers otherwise, that such delay as there has been should not disentitle the Applicant to the relief which he seeks and that it is appropriate to extend the period for making the Application, for the following reasons:

29.1. In the Applicant's respectful submission, the three month period for making this Application began to run on 3 January 2014, and not before (see *Atkin's Court Forms*, (2<sup>nd</sup> ed.) 1998 Issue, Vol. 23(2), Judicial Review, para. 128, [Tab 10/pp.163-164]). That is because the First Respondent was made aware of the fact that no decision had been rendered in respect of the Exemption Application and Request for an Adjudication in December 2013 by the correspondence discussed at paragraph 22.4 above, and he was also made aware by that correspondence of the Applicant's request that a decision be rendered in respect of the Request for an Adjudication by 3 January 2014. Whilst the First Respondent has delegated many, if not all, of his functions under the Law to other officials within the Government, the Law imposes the duty on him to perform those functions and also to supervise those to whom he has delegated those functions in order to ensure that his duties are properly being discharged. The First Respondent has, in the Applicant's respectful submission, failed to perform those duties and the timing of this Application is, at least in part, the product of those failures. Furthermore, the Applicant respectfully submits that, notwithstanding the First Respondent's supervisory failures, it was open to the First Respondent on or before 3 January 2014 (and indeed still is) to perform his duty *qua* adjudicator under the Law and to render a decision in respect of the Request for an Adjudication or to grant the Applicant a refund of the money which he was wrongfully required to pay in respect of stamp duty on the instrument which transferred the Property to him. This Application has thus been rendered necessary by reason of the First Respondent's refusal to perform his duty to adjudicate within the period requested by the Applicant (or any other reasonable period).

29.2. Further and alternatively, the Second and Third Respondents, as delegates of the First Respondent, implicitly requested the Applicant's forbearance in making this Application by requesting that they be allowed time to take advice from the Legal Department on this matter before rendering a decision in respect of the Exemption

Application or Request for an Adjudication and by refusing to render any such decision without first receiving that advice (see Exhibit ASJ-2 [Tab 4/p.8]). The Applicant respectfully submits that he should not be prejudiced by fact that he allowed the Second and Third Respondents time to take legal advice on the matters which are the subject of this Application, particularly where it seems that the Second and Third Respondents may have sought to abdicate their responsibilities to decide the Exemption Application and Request for an Adjudication by failing to obtain the legal advice which they required within any reasonable period. In the Applicant's respectful submission, it would be dangerous if persons holding responsible positions within the Government could ask those who rely on them to perform their responsibilities to bear with them for one reason or another and then subsequently rely on the fact that those persons have borne with them for a generous amount of time as a basis for abdicating their responsibilities.

29.3. Further and in any event, the Second and Third Respondents have, since May 2013, been aware that the Applicant required that a decision be rendered in respect of the Exemption Application and, since July 2013, they have been aware of the Applicant's Request for an Adjudication, or that the money which he paid to the Government in respect of stamp duty be refunded to him. Moreover, in the Applicant's respectful submission, the Government has received money which the Applicant was never obliged to pay to it. The Applicant thus respectfully submits that the Respondents and/or the Government itself cannot claim to have suffered any prejudice by reason of the timing of this Application.

29.4. Further and in any event, the Applicant respectfully submits that the Court should not countenance any arguments based on delay given the public importance of a decision on the question concerning the legality of the Policy. If the Policy is *ultra vires* and illegal, which the Applicant contends it is, then *prima facie* it ought to be discontinued and the Applicant respectfully submits that it is in the public interest that a declaration be made to that effect. In *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518 [Tab 8], the Court considered that, given the public importance of the case before it (which concerned the interception of telephone calls), it would have been a wrong exercise of discretion to reject the application on grounds of delay, thereby leaving the substantive issues unresolved, and extended time to allow the applicant to proceed (see [Tab 8/p.521]). The relevant period of delay in that case was approximately four months.

30. For these reasons, the Applicant respectfully asks this Honourable Court to find that the Application has not been made with delay or, alternatively, if it does consider that there has been delay but is nevertheless of the view that it should decide the substantive issues in the case, that the period for making the Application should be extended pursuant to GCR O.53, r.4(1) [Tab 7/p.337] to allow the Applicant to proceed.

**THIS APPLICATION** was filed by Andrew Steven Jackson, whose address for service is Apartment 51, Secret Garden, 307 Fairbanks Road, George Town, Grand Cayman, Cayman Islands.