

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

Cause No: [     ]

**BETWEEN**

**THE QUEEN**

**ON THE APPLICATION of**

**(1) Davenport Development Ltd.**

**(2) NCB Investments Ltd.**

**(3) NCB Homes Ltd.**

**(4) Aura Ltd.**

**(5) Cayman Shores Sales I Ltd.**

**(6) Olea Ltd.**

**(7) Paul R. Pearson**

**(8) Mark A. Jordan**

**(9) Kenneth J. Thompson**

**(10) Periwinkle Ltd.**

**(11) Heber Arch**

**(12) Last Chance LTD**



**Applicants**

**And**

**MINISTER FOR FINANCE AND ECONOMIC DEVELOPMENT**

**Defendant**

---

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

---

**To:** the Clerk of the Court, Law Courts, George Town, Grand Cayman

<b>Name, address and description of applicant(s):</b>	
	1.1 NCB Investments Ltd. Ground Floor, Shedden Rd, One Capital Place PO Box 10251 APO Grand Cayman KY1-1003 Cayman Islands
	1.2 NCB Homes Ltd. c/o International Corporation Services Ltd. 2nd Floor, North Wing, Harbour Place 103 South Church Street P.O. Box 472

	Grand Cayman KY1-1106 Cayman Islands
1.3	Aura Ltd. c/o Centralis Cayman Ltd. 3rd Floor, Shedden Rd One Capital Place PO Box 1564 Grand Cayman KY1-1110 Cayman Islands
1.4	Cayman Shores Sales I Ltd. c/o Bedell Cristin Cayman Partnership PO Box 1990 Grand Cayman KY1-1104 Cayman Islands
1.5	Olea Ltd. c/o Bedell Cristin Cayman Partnership PO Box 1990 Grand Cayman KY1-1104 Cayman Islands
1.6	Davenport Development Ltd. 5 Caymanian Village Plaza North Sound Way PO Box 65 Grand Cayman KY1-1102 Cayman Islands
1.7	Paul R. Pearson P.O. Box 2708 Grand Cayman KY1-1111 Cayman Islands
1.8	Mark A. Jordan P.O. Box 65 Grand Cayman KY1-1102 Cayman Islands
1.9	Kenneth J. Thompson P.O. Box 7 Grand Cayman KY1-1101 Cayman Islands
1.10	Periwinkle Ltd. PO Box 233 Grand Cayman KY1-1104 Cayman Islands
1.11	Heber Arch PO Box 233 Grand Cayman KY1-1104 Cayman Islands

	<p>1.12 Last Chance LTD  PO Box 233  Grand Cayman KY1-1104  Cayman Islands</p>
<p><b>Judgment, order, decision or other proceeding in respect of which relief is sought:</b></p>	<p>1. The Applicants are property development companies incorporated and operating in the Cayman Islands. The Defendant is the Commissioner for stamp duty collection.</p> <p>2. The Applicants apply for leave to apply for judicial review of the decision of the Lands and Survey Department ("L&amp;S"), for which the Defendant is responsible, to change its practice/policy on waiving stamp duty liability.</p> <p>3. This claim principally arises because the change of practice/policy was introduced with retrospective effect, in that it affects transactions entered into in reliance on the previous practice/policy for waiving stamp duty liability which prevailed at the time the transactions were entered into.</p> <p>4. The Court is respectfully asked to read the affidavits of the following witnesses alongside this application for leave: (i) Adam Johnson; (ii) Paul Pearson; (iii) Ian Jamieson; (iv) Benjamin Eagleson; (v) Sophie Miles; and (vi) Kris Bergstrom.</p>
<p><b>Relief sought:</b></p> <p>The Applicants seek leave to apply for judicial review.</p> <p>Please refer to Section K of <u>Annexure I Grounds On Which Relief Is Sought</u> for a description of the relief sought by the Applicants at the substantive hearing should leave be granted.</p>	
<p><b>Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant</b></p>	<p>Appleby (Cayman) Ltd.  71 Fort Street, PO Box 190  Grand Cayman KY1-1104  Cayman Islands</p>

19 November 2020

---

Dated this 19<sup>th</sup> day of November 2020



---

**Peter McMaster QC**

## **ANNEXURE I - GROUNDS ON WHICH RELIEF IS SOUGHT**

### **A. INTRODUCTION**

1. The Applicants are property development companies incorporated and operating in the Cayman Islands. The Defendant is the Commissioner for stamp duty collection.
2. The Applicants apply for leave to apply for judicial review of the decision of the Lands and Survey Department ("**L&S**"), for which the Defendant is responsible, to change its practice/policy on waiving stamp duty liability.
3. This claim principally arises because the change of practice/policy was introduced with retrospective effect, in that it affects transactions entered into in reliance on the previous practice/policy for waiving stamp duty liability which prevailed at the time the transactions were entered into.
4. The Court is respectfully asked to read the affidavits of the following witnesses alongside this application for leave: Adam Johnson; Paul Pearson; Ian Jamieson; Benjamin Eagleson; Sophie Miles; and Kris Bergstrom.
5. This document is structured as follows:
  - 5.1. Section B - The Stamp Duty Law.
  - 5.2. Section C – L&S's practice of waiving stamp duty liability.
  - 5.3. Section D – L&S's change in practice.
  - 5.4. Section E – Pre-action correspondence.
  - 5.5. Section F – Ground 1: breach of legitimate expectation.
  - 5.6. Section G – Ground 2: breach of the proportionality principle.
  - 5.7. Section H – Ground 3: misapprehension of the Stamp Duty Law.

5.8. Section I – Ground 4: irrationality.

5.9. Section J – Ground 5: failure to give reasons.

5.10. Section K - Relief.

## **B. THE STAMP DUTY LAW**

### **B.1 The discretion to waive stamp duty liability**

6. Section 4 of the Stamp Duty Law ("**the Law**") provides that the Defendant "*shall be ex officio Commissioner for the collection of stamp duty and his care and management of the collection of all stamp duty imposed by this law or any other law.*"
7. Section 5 of the Law provides that the Defendant may delegate any of his functions to any officer of the Government. The Defendant has delegated his functions under the Law to the staff of L&S.
8. Section 3(1) of the Law provides that stamp duty shall be charged on certain instruments at the rates prescribed by the schedule to the Law. However, s.20(6) of the Law provides that "*The Commissioner may, at any time ...waive, refund or abate the whole or part of the duty payable*". Both the previous practice (described at section C below) and the new practice (described at section D below) depart from the strict provisions of the schedule to the Law and, accordingly, constitute the waiver or abatement of stamp duty liability pursuant to s.20(6) of the Law.

### **B.2 The pre-payment of stamp duty on purchase agreements**

9. The schedule to the Law provides, under the heading "*CONVEYANCE OR TRANSFER of any immovable property*", that the charge on any conveyance or transfer of immovable property is 7.5%.
10. Under the heading "*AGREEMENT OR MEMORANDUM OF AGREEMENT*", the schedule provides that:

- 10.1. In relation to an agreement for the purchase of any land under which no right to possession is conferred, the purchaser has the option of paying either (i) CI\$100 or (ii) the same duty as on a conveyance or transfer of the land executed in conformity with the agreement.
- 10.2. If option (ii) is chosen and a conveyance or transfer is subsequently executed in conformity with the agreement, the duty which would be charged on transfer *"shall be reduced or extinguished by the deduction therefrom of the duty paid on the agreement"* (emphasis added). This means that – under the strict provisions of the schedule - if the value of the conveyance or transfer ultimately exceeds the value of the agreement, a balance of stamp duty is payable.
11. Thus, option (ii) confers the option of making a pre-payment of stamp duty to L&S. The only advantage to a purchaser of tying up money in this way would be to save the CI\$100 payable under option (i). Thus, if the schedule to the Law were applied strictly, it would rarely make financial sense for a purchaser to exercise option (ii).

### **B.3 Illustration of the pre-payment of stamp duty on purchase agreements**

12. The application of the pre-payment option may be illustrated by the following transaction.
- 12.1. The purchaser ("**Purchaser**") enters into the following with a seller/developer ("**Developer**"): (a) an agreement for the sale and purchase of land, in respect of a development scheme ("**Purchase Agreement**"); and (b) an agreement to develop the Land ("**Development Agreement**").
- 12.2. The purchase price payable pursuant to the Purchase Agreement is CI\$95,000 and the price payable pursuant to the Development Agreement is CI\$600,000, *i.e.* a total price payable of CI\$695,000 ("**Completion Price**").
- 12.3. The Purchaser pays to the Developer a deposit on account of the Completion Price of CI\$69,500 with the balance payable upon legal completion of the transaction and transfer of the land (which will take place when the development works are substantially complete).

12.4. The Purchaser elects to pay *ad valorem* stamp duty on the Purchase Agreement at the rate of 7.5%, *i.e.* CI\$7,125 (that is, option ii). The Purchaser pays that duty to L&S and the Purchase Agreement is duly stamped.

12.5. The land subsequently increases in value as a result of general market value increases and/or construction works being completed (in part or in full) as contemplated by the Development Agreement. By the time of completion, the land is worth CI\$720,000.

12.6. If the Schedule to the Law were applied strictly, then on completion the Purchaser would have to pay *ad valorem* stamp duty at the rate of 7.5% on the value of the land. If that value is CI\$720,000, then the stamp duty due to be paid to L&S is CI\$46,875 (CI\$54,000 less the CI\$7,125 duty paid on the Purchase Agreement).

#### **B.4 Pre-payment of stamp duty on assignments**

13. Under the heading "ASSIGNMENT", the schedule to the Law provides that:

13.1. In relation to the assignment of any rights under an agreement for the purchase of any land where no right to possession is conferred, the assignee has the option of paying either (i) CI\$200 or (ii) the same duty as on a conveyance or transfer of the land executed in conformity with the assignment.

13.2. Again, if option (ii) is chosen, the payment will be set off against the duty liable to be paid on the conveyance or transfer.

13.3. The approach is the same whether or not there is a premium on the assignment.

14. Thus, again, option (ii) confers the option of making a pre-payment of stamp duty to L&S. Again, if the schedule to the Law were applied strictly, it would rarely make financial sense for an assignee to exercise that option.

#### **B.5 Illustration of the pre-payment of Stamp Duty on assignments**

15. The application of the pre-payment option on assignments may be illustrated by the following transaction.

- 15.1. The purchaser ("**Purchaser**") enters into the following with a seller/developer ("**Developer**"): (a) an agreement for the sale and purchase of land, in respect of a development scheme ("**Purchase Agreement**"); and (b) an agreement to develop the Land ("**Development Agreement**").
- 15.2. The purchase price payable pursuant to the Purchase Agreement is CI\$95,000 and the price payable pursuant to the Development Agreement is CI\$600,000, *i.e.* a total price payable of CI\$695,000 ("**Completion Price**").
- 15.3. The Purchaser pays to the Developer a deposit on account of the Completion Price of CI\$69,500 with the balance payable upon legal completion of the transaction and transfer of the land (which will take place when the development works are substantially complete).
- 15.4. The Purchaser elects to pay *ad valorem* stamp duty on the Purchase Agreement at the rate of 7.5%, *i.e.* CI\$7,125 (that is, option (ii)). The Purchaser pays that duty to L&S and the Purchase Agreement is duly stamped.
- 15.5. The land subsequently increases in value as a result of general market value increases and/or construction works being completed (in part or in full) as contemplated by the Development Agreement.
- 15.6. Prior to completion, the Purchaser assigns the Purchase Agreement and Development Agreement to a third party ("**Assignee**"). The assignment is valued as the value of the Purchase Agreement (CI\$95,000) plus a premium of CI\$25,000 (to reflect an increase in transaction value since the date of the Purchase Agreement) as consideration for the assignment. The Assignee also refunds to the Purchaser the CI\$7,125 in *ad valorem* stamp duty which the Purchaser paid on the Purchase Agreement.
- 15.7. The Assignee elects to pay *ad valorem* stamp duty on the assignment (that is, option (ii)). The Assignee therefore pays the sum of CI\$9,000 (7.5% of \$120,000) to L&S.

15.8. If the Schedule to the Law were applied strictly, then on completion the Assignee must pay *ad valorem* stamp duty at the rate of 7.5% on the value of the land. If that value is CI\$720,000, then the stamp duty due to be paid to L&S is CI\$37,875 (CI\$54,000 less the CI\$9,000 duty paid on the assignment and the CI\$7,125 duty paid on the Purchase Agreement).

16. Accordingly, the total stamp duty paid in a transaction chain involving an assignment (CI\$54,000) is the same as the total stamp duty paid in a transaction chain not involving an assignment (CI\$54,000 – see section B.3 above).

## **B.6 Linked property transactions**

17. The *Stamp Duty (Amendment) Law 2018* introduced new provisions on “*linked property transactions*” within a development scheme whereby different stamp duty arrangements apply in relation to developments of the kind described at sections B.3 and B.5 above. However, the transitional provisions at s.34 of the Stamp Duty Law provide that these new provisions do not apply to “*a linked property transaction where the development scheme has obtained planning permission not later than the 30<sup>th</sup> day of June, 2019 and the relevant agreement for sale or the conveyance are executed not later than the 31<sup>st</sup> day of December, 2019*”. This claim only relates to the impact of the Defendant’s decision insofar as it concerns transactions to which the new provisions do not apply (“**Qualifying Purchase Agreements**”).

## **C. L&S’S PRACTICE/POLICY OF WAIVING STAMP DUTY LIABILITY**

18. Up until around May 2020, L&S’s practice/policy was to waive or abate stamp duty liability in two respects, first in relation to Qualifying Purchase Agreements and second in relation to assignments of Qualifying Purchase Agreements.

### **C.1 Practice/policy on the pre-payment of stamp duty on Qualifying Purchase Agreements**

19. As set out at section B.2 above, the schedule to the Law only confers on a purchaser the right to deduct *ad valorem* duty paid on a Qualifying Purchase Agreement from the duty payable on the transfer of the land. On a strict application of the schedule to the Law, if the value of the land increases between the time of the agreement and the time of

transfer, L&S may insist on the purchaser paying *ad valorem* duty on the balance. However, L&S had a practice/policy not to do so. Under the practice/policy, it abated or waived all further liability for stamp duty at the transfer stage if *ad valorem* duty had been paid on the Qualifying Purchase Agreement.

20. Thus, in the illustration at section B.3 above, L&S would have waived the CI\$46,875 that would otherwise have been payable on completion.

## **C.2 Practice/policy on the pre-payment of stamp duty on assignments**

21. As set out at section B.4 above, the schedule to the Law confers on an assignee the right to deduct *ad valorem* duty paid on an assignment of rights under a Qualifying Purchase Agreement from the duty payable on the transfer of the land. Again, on a strict application of the schedule to the Law, if the value of the land increases between the time of the assignment and the time of transfer, L&S may insist on the assignee paying *ad valorem* duty on the balance. However, again, L&S's practice/policy was not to do so. Instead, it abated or waived all further liability for stamp duty at the transfer stage if (a) *ad valorem* duty was paid on the Qualifying Purchase Agreement and (b) no premium was paid on the assignment or - if a premium was paid - *ad valorem* duty was paid on the premium.

22. Thus, in the illustration at section B.5 above, L&S would have waived the CI\$45,000 that would otherwise have been payable (CI\$54,000 less the CI\$7,125 paid on the Qualifying Purchase Agreement and CI\$1,875 paid on the premium payable for the assignment)..

23. As set out in the affidavits of Adam Johnson, Paul Pearson, Ian Jamieson, Benjamin Eagleson, Sophie Miles, and Kris Bergstrom, L&S's practice was clear and consistent, and was relied on by the property sector.

24. The practice had two obvious advantages for the Defendant: first, it stimulated investment and property development, thereby contributing to economic growth and, ultimately, potentially higher net tax receipts; second, it encouraged the early payment of *ad valorem* stamp duty.

## **D. L&S'S CHANGE OF PRACTICE**

25. In or around May 2020, L&S amended part of its practice.

### **D.1 Continuing practice/policy on the pre-payment of stamp duty on Qualifying Purchase Agreements**

26. Significantly, this part of the practice/policy remains as set out at section B.3 above. Indeed, the policy is recorded on L&S's website<sup>1</sup>.

27. Thus, in the illustration at section B.3 above, the position remains that L&S would waive stamp duty in the sum of CI\$46,875. The total stamp duty payable on the transaction will remain CI\$7,125.

### **D.2 New practice/policy on the pre-payment of stamp duty on assignments**

28. By contrast, L&S has abrogated its practice/policy on the waiver of stamp duty at the completion stage if the Qualifying Purchase Agreement has been assigned.

29. Indeed, the Defendant has stated that *ad valorem* duty paid on the assignment cannot even be *set off* at the completion stage. In a letter dated 31 July 2020, the Defendant stated: "*We have reviewed the applicable law and remain fervent in the view that any prepayment of stamp duty at the ad valorem rate at the time of an assignment whether or not there was a premium paid cannot be set off against ad valorem stamp duty payable at the time of the conveyance*" (emphasis added).

30. As set out at section B.4 above, the schedule to the Stamp Duty Law – even if strictly applied – provides that *ad valorem* stamp duty paid on assignment does fall to be set off at the time of conveyance. Thus, the Defendant's approach is founded on a misapprehension of the Stamp Duty Law – that error founds ground 3 of the claim (section H below).

---

<sup>1</sup> "*If the option to pay Ad-Valorem Duty is exercised, then providing the subsequent Transfer of Land is in conformity with the Purchase Agreement (eg. names of parties) and relates to the same property (eg. size of property), then no additional Duty will be payable on the Transfer of Land.*" (<https://www.caymanlandinfo.ky/Services/VEO/Stamp-Duty/Stamp-Duty-Contracts-for-Sale-or-Purchase-Agreements>)

31. On the approach set out in the Defendant's letter, the assignee in the illustration at section B.5 would pay a total of CI\$63,000 in *ad valorem* duty (CI\$9,000 at the assignment stage plus CI\$54,000 on the completion).
32. Even if the Defendant had simply abrogated the previous practice/policy, the assignee in the illustration at section B.5 would pay a total of CI\$54,000 in *ad valorem* duty.
33. It is wholly unclear why the Defendant would seek stamp duty in the sum of (to take the illustration above) CI\$7,125 for transactions leading to the transfer of land where there has been no assignment and yet require the payment of CI\$63,000 for transactions leading to the transfer of precisely the same land where the purchase agreement happens to have been assigned, in circumstances where the Stamp Duty Law draws no such distinction in Stamp Duty liability between the two classes of case (as set out in section B, on a strict application of the schedule, the total stamp duty recovered by the Defendant would be CI\$54,000 in both cases).
34. Notwithstanding the Applicants' request for reasons for the change of policy/practice on 19 October 2020, the Defendant has not provided any reasons, contrary to s.19(2) of the Constitution. That breach founds ground 5 of the claim (section J below).
35. On the face of it, there is no rational basis for an administrative practice/policy which treats the two sets of transactions (assignment vs. no assignment) so differently (stamp duty liability of CI\$63,000 vs. CI\$7,125) in circumstances where the legislature decided to treat them both the same. That disparity in treatment founds ground 4 of the claim (section I below).

### **D.3 The retrospective application of the new practice/policy**

36. As shown by the illustration at section B.3 above, a property transaction comprises a series of steps, running from the point at which a purchase agreement is entered into to the point of completion and transfer. For so long as the practice/policy described at section C.2 was in force, purchasers, developers and assignees relied on that prevailing practice/policy to determine whether a transaction (as a whole) would be financially viable and for the purpose of financing the project. Further, the decisions of purchasers to elect to pre-pay *ad valorem* duty at the purchase agreement stage and the decisions of assignees to elect to pre-pay *ad valorem* duty at the assignment stage were

contingent on the prevailing practice/policy; had the practice/policy not been in force, it would not have made commercial sense to make such pre-payments.

37. However, when L&S introduced the new practice/policy in or around May 2020, it did not merely apply it to transactions commencing after that date. It applied the new practice/policy to transactions which had commenced before that date. Thus, the financial viability of purchase agreements and assignment agreements - founded on the prevailing practice/policy - was retrospectively undermined. As set out in the affidavits, a significant number of property transactions have, retrospectively, been rendered commercially unviable.

38. Take the illustration at section B.5 above. Assume that the purchase agreement took place before January 2020 and the assignment took place before May 2020. Those steps were taken - and financing obtained, attorneys' fees paid, and prepayments of *ad valorem* duty made - in reliance on the practice/policy that no further stamp duty would be payable. But for the existence of the practice/policy, those financial commitments may well not have been entered into. Then, in May 2020, out of the blue, the Defendant determined that an additional CI\$54,000 would be payable on completion, thereby upsetting the commercial balance on which the pre-existing financial commitments were founded. The unfairness is stark.

39. The application of a new practice/policy to transactions that had already commenced not only upsets the commercial balance of those transactions, but also - as set out in the affidavits - erodes investor confidence and suppresses the market for property development.

## **E. PRE-ACTION CORRESPONDENCE**

40. A number of developers wrote to the Defendant on 26 May 2020 to protest the abrogation of the practice/policy. The Defendant replied on 2 August 2020 (by a letter dated 31 July 2020), in the terms set out at para.29 above. The Applicants sent further correspondence dated 5 August, 19 August, 25 August and 3 September 2020, without substantive response. On 19 October 2020, the Applicants wrote to the Defendant under the pre-action protocol for judicial review. To date, the Defendant has not replied to that letter.

41. On 22 October 2020, the Defendant (through the Attorney General's Chambers) proposed a compromise, which he clarified on 30 October 2020. The proposal was to extend the previous practice/policy to transactions completed by 31 December 2020. The Applicants rejected that offer, on the basis that 2 months was manifestly insufficient time to complete the affected transactions.

## **F. GROUND 1 – BREACH OF LEGITIMATE EXPECTATION**

42. De Smith's Principles of Judicial review (8<sup>th</sup> Ed, 2019, para.12-001) provides that: "*Since the early 1970s one of the principles justifying the imposition of both procedural and substantive protection has been the legitimate expectation. Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage... It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public*".

43. A legitimate expectation may arise through a public body's practice or policy. For example, the UK tax statutes provided that companies had to submit records of trading losses within two years if they were to offset those losses for the purposes of calculating tax liability. However, the Inland Revenue Commissioners had departed from the statutory scheme by permitting a practice whereby Unilever plc submitted an estimation which did not expressly identify trading losses and then submitted its claims outside the two-year period. The tax authorities later sought to disallow a claim to set off trading losses relating to a period during which Unilever's accounts had been submitted in this way. The Court of Appeal of England and Wales held that the Commissioners' conduct was conspicuously unfair and unlawful (*R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 681).

44. In this case, unlike the *Unilever* case, the Defendant has an express statutory discretion to waive or abate stamp duty. Through L&S, he operated a consistent practice/policy on how he would exercise that power over a course of many years. As set out in the affidavits, L&S staff confirmed the practice/policy when asked.

45. The whole of the property development sector in the Cayman Islands (and not just one company, as in the *Unilever* case) relied on the practice/policy. Persons entered into

binding transactions and incurred substantial costs in reliance on it, which would not have been entered into or incurred if the Defendant had notified them that he was withdrawing the practice/policy.

46. The premise of this ground of challenge is that the Defendant was entitled to withdraw the practice/policy prospectively. But what is conspicuously unfair was for him to dis-apply the practice/policy in relation to transactions which had already been commenced and in relation to which persons had entered into binding contractual commitments and incurred substantial costs in reliance on the practice/policy.

47. In those circumstances, in dis-applying the practice/policy in relation to transactions which had already been commenced, the Defendant unlawfully breached the Applicants' legitimate expectations and/or acted with conspicuous unfairness.

#### **G. GROUND 2 - PROPORTIONALITY**

48. Section 19(1) of the Constitution provides that: "*All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair*" (emphasis added).

49. Further or alternatively, section 15 of the Constitution requires "*reasonable justification*" to be shown for interference by the state in the peaceful enjoyment of any person's property in satisfaction of a tax. The Bill of Rights is modelled on the European Convention on Human Rights and, in the jurisprudence of the Convention, "*reasonable justification*" is synonymous with "*proportionality*".

50. Proportionality is classically assessed by asking the following questions:

50.1. Is the objective behind the act sufficiently important to justify the limitation of a protected right?

50.2. Is the act rationally connected to the objective?

50.3. Could no less intrusive action have been taken without unacceptably compromising the achievement of the objective?

50.4. And, balancing the severity of the act's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the act will contribute to its achievement, does the latter outweigh the former? (*Bank Mellat v HM Treasury (No 2)* [2014] AC 700, para 20, *per* Lord Sumption).

51. As set out under grounds 4 and 5 (below) it is not clear what, if any, objective the Defendant was attempting to pursue in abrogating the practice/policy in relation to transactions involving assignments (but not other transactions), such that the Defendant has not shown that he satisfies the first and/or second stages of the proportionality test.

52. The fact that the Defendant has now offered to extend the practice/policy in relation to transactions involving assignments until 31 December 2020 strongly indicates that it would not have unacceptably compromised his objective (whatever that was) to defer the abrogation of the practice/policy. Indeed, there is nothing to indicate that limiting the new practice/policy to transactions commenced following its introduction would unacceptably compromise the objective. In those circumstances, the Defendant has not shown that he satisfies the third stage of the proportionality test.

53. In any event, for the reasons set out in relation to ground 1, the abrogation of a practice/policy in relation to transactions that were commenced in reliance on it is conspicuously unfair and clearly fails to strike a fair balance between the Defendant's objective (whatever that was) and the interests of the property sector (and, indeed, the wider public interest, in circumstances where the damage caused by the abrogation of the practice/policy will damage investor confidence and suppress the market for property development).

## **H. GROUND 3 – MISAPPREHENSION OF THE STAMP DUTY LAW**

54. The Defendant's understanding of the rules that would apply to stamp duty collection on transactions involving assignments if he abrogated his policy/practice on waiver or abatement was plainly relevant to his decision to do so.

55. As set out in the Defendant's letter dated 31 July 2020, he abrogated the practice/policy on the understanding that the schedule to the Stamp Duty Law provides that stamp duty on assignments "*cannot be set off against ad valorem stamp duty payable at the time of the conveyance*".

56. That is plainly wrong in law. The Stamp Duty Law provides that "*the duty which would otherwise be charged on the subsequent conveyance or transfer shall be reduced or extinguished by the deduction therefrom of the duty paid on the assignment*" (para.(2) under the heading "ASSIGNMENT" in the schedule to the Law).

57. That error was plainly material to, and therefore vitiated, the decision to abrogate the practice/policy.

#### **I. GROUND 4 - RATIONALITY**

58. The Applicants rely on two propositions:

58.1. First, in *Matadeen v Pointu* [1999] 1 AC 98, 109, the Privy Council held that "*treating like cases alike and unlike cases differently is a general axiom of rational behaviour*".

58.2. Second, the exercise of discretion in a manner that is "*antithetical to one of the underlying principles of the overall scheme, is an important factor when considering the rationality*" of a ministerial decision (*Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778, para.106, *per* Rose LJ).

59. The policy underpinning the schedule to the Stamp Duty Law is that real property transactions involving assignments should be treated in the same way as transactions not involving assignments. Thus, in the illustrations at sections B.3 and B.5 above, the total *ad valorem* duty payable is identical in each case (CI\$54,000 where there is an assignment and CI\$54,000 where there is no assignment).

60. L&S's previous practice/policy treated transactions involving assignments in the same way as transactions not involving assignments if there was no premium. In the case of a premium, the treatment was *broadly* similar. Thus, in the illustrations at sections C.1 and C.2 above, the total *ad valorem* duty payable in the transaction involving an assignment with a premium was CI\$9,000 compared to CI\$7,125 in the transaction not involving an assignment.

61. By contrast, the abrogation of the practice/policy in relation to transactions involving assignments but not in relation to transactions not involving an assignment has created a stark disparity in treatment. To take the illustrations at D.1 and D.2 above, the total *ad valorem* duty payable will now be CI\$63,000 in a transaction involving an assignment with a premium compared to CI\$7,125 in a transaction not involving an assignment.

62. By promulgating a practice/policy to treat cases involving assignments in a starkly different way from cases not involving assignments, in circumstances where the legislative policy is to treat those cases the same, the Defendant has acted irrationally.

#### **J. GROUND 5 – FAILURE TO GIVE REASONS**

63. Section 19(2) of the Constitution provides: "*Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act*". It is implicit that the reasons must be provided within a reasonable period. What constitutes a reasonable period will depend on the circumstances, including the purpose for which the reasons are sought.

64. The Applicants' interests have been adversely affected by the decision to abrogate the practice/policy. At paragraph 27 of their pre-action protocol letter dated 19 October 2020, the Applicants stated: "*The Applicants hereby request written reasons for the change of approach pursuant to s.19(2) of the Constitution*". They stated that a response was required by 4pm on 3 November 2020, thereby affording the Defendant a full 14 days to respond. The purpose for which the reasons were sought was to help inform the Applicants' assessment of the lawfulness of the decision. It was therefore important for the Defendant to provide those reasons promptly. More than 28 days after that letter was sent, the Defendant has still not provided his reasons, thereby breaching his duty to give written reasons within a reasonable period.

#### **K. RELIEF**

65. The Applicants seek leave to apply for judicial review.

66. At a substantive hearing of the claim, the Applicants will seek:

- 66.1. A declaration that the abrogation of the practice/policy described at section C.2 above was unlawful for the reasons set out at sections F, G, H and I above.
- 66.2. A declaration that the Defendant breached his duty to provide reasons as set out at section J above.
- 66.3. An order quashing the decision to abrogate the practice/policy described at section C.2 above.
- 66.4. An order that the Defendant shall pay damages in respect of the Applicants' losses resulting from the abrogation of the practice/policy described at section C.2 above, pursuant to s.27 of the Constitution, to be assessed at a further hearing if not agreed, with directions to be given for the filing of any further evidence on the question of loss.
- 66.5. Such further or other relief as is needed to give effect to the judgment of the Court.
- 66.6. Costs.

## **L. CONCLUSION**

67. The Applicants have (at least) an arguable claim for judicial review. They respectfully ask that leave be granted.