

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO. ANUHCV 2008/0704

BETWEEN:

ASIAN VILLAGE LIMITED

Claimant

-And-

- (1) The Minister of Finance and the Economy and Minister responsible for Economic Development**
- (2) The Commissioner of Inland Revenue**
- (3) The Attorney General of Antigua and Barbuda**

Defendants

Appearances:

Mr. David Joseph Q.C. and with him

Mr. Trevor Kendall,, for the Claimant

The Attorney General Mr. Justin Simon Q.C. for the 1st and 3rd Defendant

Mr. J. Fuller and Ms. Spencer for the 2nd Defendant

.....
2008: May 26; 27

2009: April 24
.....

JUDGMENT

[1] **Harris J:** The Claimant is a company incorporated in the British Virgin Islands and was a wholly-owned subsidiary of the Johon Group, a Malaysian group of Companies whose activities involved property development. It is common ground that the Claimant is a non-citizen as defined in the Non-Citizen Land Holding Regulations Act Cap. 293 of Antigua and Barbuda (see para. 1 of the "Submissions on Behalf of the Defendants" filed May 19, 2008).

[2] The First Defendant is the Minister of Finance and Economy and Minister responsible for Economic Development and is the agent of the Government of

Antigua and Barbuda charged with power and responsibility under Section 4 of the Non-Citizens Undeveloped Land Tax Act ("**the Act**") Cap. 294 of the revised edition of the Laws of Antigua and Barbuda 1992 (see "Statement in Support of Application for leave to Apply for Judicial Review" filed November 23, 2007 pp 1 Trial Bundle Volume 1).

- [3] The Claimant is the registered proprietor of six (6) parcels of land which it, subject to mutually agreed conditions, purchased and acquired from the Crown and a local private entity in or around May of 1998. The purchase which was pursuant to an agreement between the Government of Antigua and Barbuda(**GAB**) and Asian Village Antigua Limited ("**AVA**") for the construction of a tourist development project.
- [4] The AVA agreement was incorporated into Law as Schedule II of the Asian Village Resort (Incentives) Act, 1997 No. 14 of 1997 (now repealed by Act No.15 of 2004).
- [5] To date the development has not materialized. This case revolves around the making of an Order under the Act by the relevant minister for the retroactive application of an 'Undeveloped' Land Tax (see statute) to the Land held by the Claimant.
- [6] The Government, by Claim 2004/0035 initiated proceeding in the High Court of Justice Antigua and Barbuda for a declaration of forfeiture against the Claimant for breach of the Asian Land Holding Regulations Act Cap. 293; more specifically for AVA's "failure to apply for and obtain the required license" to hold land in Antigua and Barbuda. These forfeiture procedures were stayed when in or around September of 2006 the Claimant, pursuant to the AVA agreement, filed arbitration proceedings for various forms of relief including damages and declaratory relief. The Defendants counterclaimed in the Arbitration proceedings. (see pp 418 of the Trial Bundle Volume I Tab 5i – AI/155-187 filed May 21, 2008 for "Amended Statement of Defense and Counterclaim")
- [7] In so far as is relevant for our purposes here the Government/Defendant Counterclaimant, ("**GAB**") pleaded in paragraph 115 to 118 of its Defense &

Counterclaim in the Arbitration proceedings, in relation to the Undeveloped Land Tax, that AVA's breach of the AVA agreement rendered the said Claimant liable to undeveloped Land Tax Act Cap. 294 of the Laws of Antigua and Barbuda.

[8] This pleading in the previous Arbitration is important and I set it out below for convenience.

"Y. Undeveloped Land Tax

115. **Under Article 8.2 GAB agreed to grant to AVA a concession that the Demised project should be exempt from the requirements of undeveloped Land Tax Taxes, provided that AVA had substantially completed a minimum of a 250 room hotel, a casino and had started development of its golf course within 36 months.**
116. **A concession to that effect was enacted in section 19 of the AVA Act, although therein the 36 months period was expressed to commence from 18 September 1997.**
117. **A.V.A failed to complete, whether substantially or at all, either a 250 room hotel or a casino to the development of a golf course within 36 months of 18 February 1997 of 18 September 1997 or any later completion date or at all.**
118. **In the premises, on the time construction of the Agreement when it was extant AVA was not and remains not exempted from liability to undeveloped Land Tax in respect of the Demised Property and all other undeveloped property owned by it in Antigua and Barbuda".**

[9] The Defendant goes on at para. 2 of its Counterclaim (pp 31 of the Defense and Counterclaim) to Claim:

"A declaration under CC115-CC118 that, on the true construction of the Agreement (when extant) and in the events which occurred AVA was not and remains not exempted from liability to Undeveloped Land Tax in respect of the Demised Property owned by it in Antigua and Barbuda as from the date or dates AVA acquired such land" (emphasis added).

[10] The Arbitral Award (Arbitration Case No VMC 74/CCO) dated the 28th September, 2007 deals with "AVA's liability for Undeveloped Land Tax" at paragraph 521-528. Para. 521 of the award provided:

"Finally there is an issue between the parties as to AVA's immunity from Undeveloped Land Tax. AVA claims that this falls within the broad scope of accrued rights under Article 19.4 of the Agreement or at common law; GAB disputes and claims declaratory relief accordingly (381)".

[11] The footnote "381" reads:

"ibid paras 115-118, and for the declarations sought, ibid, pp30-1"

[12] The footnote directs the reader to footnote '380' which reads as follows "see *GAB, Amended Statement of Defense and Counterclaim, paras. 103-114 and for the terms of the declaration sought see ibid p. 30.*" The paras. 115-118 are set out above along with the relevant declaration referred to in footnote '380'.

[13] The Arbitral Award with respect to "AVA's" liability for Undeveloped Land Tax concludes at para. 528 that:

"Sections 14 and 19 have been repealed. It follows that A.V.A. no longer has a statutory exemption from non-citizen Undeveloped Land Tax. Further, given the proviso in Article 8.2.19 and in any case, given termination of the Agreement, it has no contractual entitlement to any exception. But the issue is currently hypothetical, and the Tribunal sees no need for any declaration to this effect. The matter is one for the authorities responsible for the administration of the Non-Citizen Undeveloped Land Tax Act."

[14] The award, among other findings, determined that the Claimant were in breach of their obligation to construct the resort under the agreement.

[15] The Arbitral Award is dated the 28th day of September, 2007. By Order published in the official Gazette dated the 4th of October, 2007 the Government, pursuant to S.4 of the Non-Citizens Undeveloped Land Tax Act Cap. 294 declared the several parcels of land owned by the Claimant as undeveloped land owned for the purposes of the Non-Citizens Undeveloped Land Tax Act as of the 1st day of June, 2001. This order triggers the imposition of a progressive scale land tax on the subject property. Its alleged unlawfulness is at the heart of the matter before the court.

[16] The Order of 4th October, 2007 purports to apply the land tax retroactively to the year 2001, when the Defendants argue that the Claimant was contractually required to have completed the resort development-the date of breach.

[17] The four identifiable issues to be determined can conveniently be put as:

- (i) Whether in the construction of the Non-Citizen Land Tax Act the retrospective order of 4th October, 2007 is unlawful and in excess of powers.
- (ii) Whether the agreement on the Asian Village Incentives Act No. 14 of 1997 modifies or creates the retrospective liability to tax under the said Act.
- (iii) Whether the issue of "retrospectively" has been decided by Mr. Crawford, the Arbitrator in the Arbitrations proceedings and awards thereto – The *res Judicator* argument.
- (iv) If the Order is unlawful, what are the consequences – what order from this court should flow?

[18] Mr. David Joseph Q.C., counsel for the Claimant, has noted that this last issue on the consequences of an unlawful order has not been addressed by the Defendants in their statements or written skeleton submissions, but he does not anticipate that there will be any contention on this point.

Res Judicator

[19] The Claimants contend that arbitral awards give rise to *res judicator* in the same way as judgments do. In support of this proposition the Claimant relies on the case of **Fedilifas Shipping v V/O Exportschleb [1966] 1 QB 630 at 642E-643C**. Diplock L.J., more specifically, Diplock L.J. quoting from the judgment of the Judicial Committee of the Privy Council in the case of **Hoystead v Commissioner of Taxation [1926] A.C. 155 (170)** said:

"... The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

[20] Further at pp 643 C-D, Diplock L.J. states that "*Issue estoppel applies to arbitration as it does to litigation. The parties have chosen the tribunal to determine the disputes between them as their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal*" That case dealt with the U.K. 1934 Arbitration Act and the significance there under of interim awards as opposed to final awards with respect to the creation of an issue estoppel. That act appears from the

judgment to provide for the determination of all disputed questions of fact. The tribunal's determination of legal consequences of facts is subject to correction by the High Court (see pp 643 F-G) once the statutory machine is invoked.

[21] The relevant part of the Arbitration Clause in the AVA Act of 1997 is at Article XV Clause 15.1 of the Schedule II and reads:

“All disputes, controversies, claims or differences arising out of or related to this Agreement shall be settled by Arbitration ... The decision of the arbitrator shall be final and binding on both parties.”

[22] Does this claim oust the court's jurisdiction to determine the legal consequences of the facts that it has determined? Does this court have the jurisdiction to determine the legal issues before it which arise out of and relate to this A.V.A. agreement?

[23] The Claimant suggests that the Defendant is prevented from re-litigating what is in fact the same issue, before the High Court.

[24] Counsel for the Claimant submits that the effect of the Arbitral award is enshrined in the Arbitration Act Cap. 50 S. 34 (2) and is binding for all purposes and may be relied on by the Claimant in these proceedings.

[25] In examining the issue before the tribunal contends the Claimant, GAB sought a declaration that the Claimant was not exempt from having to pay Undeveloped Land Tax from the date of acquisition in 1997. This, the Claimant submits, is found in para. 115-118 of the Defense and Counterclaim (set above at para 8).

[26] The Claimant submits that the fact that this issue was expressly raised by the Government of Antigua and Barbuda (GAB) is admitted by the Defendants, more particularly in the Affidavit/evidence-in-chief of Mr. Lebrecht Hesse (para. 20), and in answer to questions put to him in cross-examination at trial.

[27] Further, the Claimant submits that in para. 521 to 528 of the Arbitral Award the Arbitrator dealt with the issue of AVA's liability for undeveloped Land Tax (see para.10, 13 and 29 herein) where the arbitrator at para. 521 commences his

analysis by *"Finally there is an issue between the parties as to AVA's immunity from Undeveloped Land Tax"* and concludes in para. 523 that *"...Undeveloped Land Act is only payable where the Minister has taken the necessary steps and it is prospective only."*

[28] In dealing with the issue as to whether AVA was liable for Undeveloped Land Tax it appears the arbitrator determined that it was not retrospective but only prospective.

[29] In paragraph 528 of the said award the arbitrator said *"... It follows that AVA no longer has a statutory exemption from Non-Citizen Undeveloped Land Tax. Further, given the proviso in Article 8.2.19 and in any case given termination of the Agreement, it has no contractual entitlement to any exemption. But the issue is currently hypothetical, and the tribunal sees no need for any declaration to this effect. The matter is one for the authority responsible for the administration of Non-Citizens Undeveloped Land Tax Act."*

[30] The Claimant contends that the hypothetical issue referred to in para. 528 of the award do not include the retrospective application of the land tax.

[31] Finally, submits the Claimant, paragraph 536 (9) of the arbitral award provides that *"All other claims for declarations damages or other relief are rejected"*.

[32] When read against the Defendant's pleadings, para. 521- 528 of the Arbitral Award and the other sub-paragraphs of para. 536 and Article 8.2.19 of the Agreement, establishes that the Arbitrator had disposed of the exact same issues previously before the said Arbitration tribunal.

[33] The Defendant's contend that the decision of the Arbitrator was not final i.e. the issue was not raised, contested by the parties and clearly and finally decided by the Court or Tribunal.

[34] The Defendant's submit that the arbitrator merely commented on the issue and additionally, the determination, if that is what it is, was not necessary or fundamental to the decision. Further, argue the Defendants, a statement or

determination which is collateral or incidental to the main issue before the Arbitrator or which does not finally dispose of an issue by an Arbitrator is not conclusive of any matter or issue and cannot give rise to an issue of *res judicata*.

- [35] What did the Arbitrator mean in para. 528 when he said that the “issue is currently hypothetical, and the Tribunal sees no need for any declaration to this effect.”? What ‘issue’ was he referring to? In para. 521 the arbitrator says; “Finally there is an issue between the parties as to AVA's immunity from Undeveloped Land Tax (emphasis mine) and that this Land Tax exemption falls within the scope of accrued right under Article 19.4 of the agreement and at common law.
- [36] This issue as put by the Arbitrator in para. 521 do not identify the retrospective application of the Act as being under consideration. This admittedly does not accord with the plain reading of the Defendants pleadings in that Arbitration, at para. 2 of the Counterclaim, that AVA is not exempt from liability for the said Tax from the date AVA acquired such land.
- [37] The fact that the Defendants pleadings were of the widest scope does not necessarily mean that the Arbitrator dealt with it fully. **The plain reading of the Arbitrators award and more particularly para. 523 suggest that the arbitrator did not finally dispose of the whole issue.** Further, the Defendant in the case at bar has abandoned the full scope of its argument at the Arbitration on this point and does not deal with it at all as an “Accrued right”. The Defendant's rights (if that is what it is) under the Act are applicable from the year 2001 rather than the date of ownership, 1987.
- [38] I do not note any discussion and analysis of submissions on the issue of retrospectivity/prospectivity of the Act of the nature and extent of that which was made before this court, in the five hundred and thirty six (536) paragraphs and one hundred and thirty six pages Arbitral award. The legal conclusion at the end of para. 523 of the award that the Undeveloped Land Tax Act *is prospective only* appear to be more in the nature of a comment and in any event do not entirely

dispose of nor are conclusive of the issue put before the Arbitrator by the Defendants pleadings.¹

[39] *Res judicator* therefore does not apply and the issues before this court are properly before the court.

Retrospectively/Prospectively

[40] The Non-Citizens Undeveloped Land Tax Cap. 294 provides for the application of a land tax on land, declared by the relevant minister to be undeveloped land. 'Undeveloped Land' is a term of art and is defined in S.2 of the act to mean "... any land in respect of which an order under section 4 is in force".

[41] It is common ground that in the month after the Arbitral award referred to above, October of 2007, the relevant minister made such a declaration pursuant to S.4 of the Act declaring the Claimants lands to be undeveloped lands for the purpose of this act from July 2001.

[42] The Claimant's submissions are that the retrospective effect of the order is unlawful and that the act does not give to the relevant minister the power to make a retrospective Order. The effect of such an order would be to render the Claimant's land subject to the imposition of an annual tax pursuant to S.6 and S.7 of the Act, to a time predating the order; some 6 years.

[43] In argument, the Claimant contends that not only does the Order offend against the express language of the Act and its overall scheme, but further, against what is known as a salutary and fundamental rule of statutory construction; namely the presumption against retrospective effect or operation² (see para. 8 of the Claimant's Skeleton Arguments for Trial of Judicial Review filed May 19, 2008).

[44] It is not in dispute that the Order seeks to declare certain parcels of land liable to Undeveloped Land Tax as of 1st June 2001 (see para. 4 of Mr. Hesse affidavit).

¹ See para 36 above.

² Bennion on Statutory Interpretation (5th edit 2008); Maxwell on the Interpretation of Statutes (12th edit) pp 215; Carson v Carson [1964] 1 WLR 511 at 516 per Mr. Justice Scarman.

- [45] **The Claimant submits that the Order is unlawful for two reasons other than res judicator.**
- [46] *"First and foremost, the plain words of the act when construed either on their own or together with well known rule of construction; namely the presumption against retrospective operation, does not permit the Defendants retrospectively to declare land as undeveloped land and then levy a retrospective tax. Instead, the act clearly requires the gazetting of land to trigger the start point of the timetable leading to a prospective liability to tax. Mere ownership of land by a non citizen which is in fact not developed does not attract liability to tax. The Act only permits the levying of tax on a land owner prospectively for the period of ownership in respect of which a valid undeveloped land order is in force. Further any such declaration is then always subject to the protection provided by the scheme of the Act. Specifically, the Act allows a year's grace after any gazetting and before any liability to taxes accrues, during which time the owner can either cure the issue or sell. This protection would be removed at a stroke by the imposition of retrospective taxes."*
- [47] The second argument is that; *"In any event, one consequence of the defendant's conduct is to try to invoke the provisions of the Act for a period when the claimant was statutorily exempt from its provisions by virtue of s14 of the Asian Village (Incentives) Act."*
- [48] The order purports to be made in exercise of the power contained in S. 4 of the Non-Citizens Undeveloped Land Tax Act.
- [49] The Scheme of the Act is as set out in para. 31-41 of the Claimant's Skeleton Filed on the 19th of May 2008.
- [50] Pursuant to S.3 of the Act a Non-Citizen has a responsibility to develop land as may be practicable having regard to the relevant circumstances.
- [51] Pursuant to S.4, where it appears that a non citizen is not fulfilling this duty to develop such land the Minister *"may by order published in the Gazette declare*

such land or any area therein to be undeveloped land for the purposes of this Act."

- [52] In section 2 of the Act, the expression "*Undeveloped Land*" is defined to be land "in respect of which an order under S. 4 is in force".
- [53] Section 6 of the act provides that an annual tax is to be raised, levied, collected and paid on every piece of "*undeveloped land*" that is owned by a non-citizen.
- [54] The Claimant submits that the methodology is simple in that the tax payable is an amount equivalent to a percentage of the value of the land. The schedule to the Act provides a table of values and time of application.
- [55] The Claimant submits (see para. 43-44 of the Claimants Skeleton) that section 4 of the Act is central to the scheme of the Act and that for liability to tax to accrue there must be a gazetting of the land. The Act provides for an order for the declaration of the land "to be undeveloped for purposes of the Act" (**emphasis added**).
- [56] This wording, submits the Claimants, uses the present tense "to be" and does not permit the declaration, "*has been*", undeveloped.
- [57] The only power in the Act to levy a tax says the Claimant, is found in section 6 which provides that undeveloped land is "*land in respect of which an order under Section 4 is in force*" (**emphasis mine**). The use of the present tense "... is in force" militates against retrospectively.
- [58] By levying the tax going back to 2001 the Defendant seeks to affect the land at a time when the section 4 Order was not in force.
- [59] The Claimant refers to Schedule 1 of the Act and submits that in S.1 and 2 of the schedule reference to 'undeveloped land' is land in respect of which an order in force under S.4. Further, reference to 'such ownership' in S.2 (a) (b) (c) of the schedule refers to ownership of 'undeveloped land'. "Undeveloped Land" contends the Claimant, can only be land the subject of a S.4 Order and it is not

undeveloped land merely because for a period of time an owner does not meet its responsibility under S.3 of the Act.

- [60] The scheme of the Act submits the Claimant, provided for a non-citizen challenging the classification of his lands upon the S.4 Order being made. The non-citizen is permitted 3 months from the date of the order to do so. The retrospective order however, would side step the scheme of the Act which would have allowed three (3) months to cure the Defect and lodge an objection. For each back-year for which the Claimant has been assessed he has been deprived of the opportunity at that time from lodging his objections and taking steps to remedy his default.
- [61] The Claimant contends and there is no disagreement by the Defendants that, save for the year 1980, there is no annual tax applicable on the 1st year of "such ownership". The scale provided in Section 2 of the schedule imposes a tax from the 2nd year of "such ownership" by the non-citizen.
- [62] Further, the Claimant contends that the tax is subject to the important protection; that a recipient of any such Order can (1) cure the defect; or (2) sell the land. The retrospective order would prevent the Claimant from taking either of the two steps above (see para. 44 of the Claimants Skeleton).
- [63] **The Defendant's submissions on retrospectively/prospectively** are that the Non-Citizens Undeveloped Land Tax Act Cap. 294 is one of several pieces of public interest legislation intended to protect the Crown. The legislative intent of Cap. 294 submits the Defendants, is to protect the public interest and ensure crown lands which are granted subject to conditions, are developed by the non-citizens (see para. 21 of the submissions on behalf of the Defendants filed May 19, 2008).
- [64] The rationale, submits the Defendants, *"is that the crown may grant land to a non-citizen under license on the condition that the non-citizen develop the land then the Crown may exercise the option of imposing undeveloped land tax Sections 3 and 6 of Cap. 294 therefore impose two statutory obligations on a non-citizen. The first is the obligation to develop. The second is the additional*

obligation to pay taxes in the event of a failure to perform" (para. 21 of the Defendant Submissions filed May 19, 2008).

- [65] The final analysis is that there is no dispute by the Defendant that Section 4 of the Act is that which empowers the Minister to make a 'declaration' in relation to the non-citizen lands and that the statutory basis for the imposition of the Undeveloped Land Tax is S.6 of the said Cap. 294.
- [66] The high water mark as it were, of the Defendants case on 'retrospectively' relies on the schedule to the Act. The Defendant in Clause 24 of the Submissions filed on May 19, 2008 put it thus: *"significantly Clause 2 of the First Schedule requires that after the year 1980 the annual land tax to be imposed and paid must be assessed not prospectively, but retrospectively from the date of ownership. The inevitable legislative inference must therefore be that Parliament intended the non-citizen to pay taxes retrospectively as assessed under Cap. 294 no provision is made for the prospective assessment of values or taxes payable under Cap. 294"*.
- [67] The Defendant's submit further, that the payment of the tax is not in the Act referred to as payable from the date of the Minister's order.
- [68] Further, the 1st and 3rd Defendants points out that since the Act provides for the assessment of the tax to be assessed retrospectively, that is, from the date of ownership, it would make no sense to then have it paid prospectively.
- [69] The Cap. 294 only provides for retrospective and not prospective assessment and quantification of the taxes payable by a non-citizen.
- [70] The Defendants contend that the non-citizen could frustrate the underlying considerations under Cap. 294 by failing to develop land for many years¹ and claim that it is not obliged to pay taxes for the year it failed to develop if the Act and order thereto are prospective only.

¹ If they are allowed to do so.

The Agreement, The Asian Village Resort (Incentives) Act 1997 "Incentive Act"

[71] The Defendant in further support of their arguments for the retrospective effect of the Undeveloped Land Tax Act Cap. 294, relies on the Incentive Act and more particularly s.19 of the said Act, together with two (2) provisions are set out below:

"The demised property shall be exempt from the requirement of undeveloped land taxes whatsoever, provided that the Company has substantially completed a minimum of a two hundred and fifty (250) room hotel, a casino and has started development of its golf course within thirty – six (36) months."

[72] S.19 of Act 14 of 1997 – The Incentives Act – states *"Notwithstanding the provisions of any law for the time being in force the demised property shall be exempt from the requirements of undeveloped land taxes of any kind provided the enterprise shall have substantially completed a minimum of five hundred (500) room hotel, a casino with a floor space of 2000 square feet and has started development of its golf course within thirty-six months from 18th September, 1997."*

[73] The Defendants argue that these claims recognize that the Claimant has an obligation to pay taxes under Cap. 294 if they did not satisfy the conditions placed on them. The Defendants contend further, that until such time - by Arbitration - it was confirmed that the Claimants were in breach of the obligation to develop (see article 8.2.19 and s.19 of 14/97 set out above), the Minister was precluded from making an Undeveloped Land Order under S.4 of Cap.294.

[74] The Defendants are suggesting by that argument that the Minister has no power to make a s.4 determination, that is, to determine whether the non-citizen is fulfilling his responsibility under the Act to develop such lands. The Arbitrator, now having determined that the Claimant failed to perform and is in *"...breach of all its core obligations under the Agreement ..."* (see para. 336 of Arbitral Award Tab Bundle) the Minister can only now make an order under the Undeveloped Land Taxes under Cap. 294 (see para. 30 of Defendants Submissions filed 19 May, 08).

[75] The Claimant's short answer to this point is that the said Article 8.2.19 of the Agreement and s.19 of the Incentive Act (Act 14 of 1997) simply do not create a new obligation or liability but merely grants exemption.

- [76] The Claimant contends the proviso to both clauses seeks to place a qualification upon the exemption to tax which would otherwise be extended to the Demised property. The Claimant says that the general rule for the construction of provisos are that they are limited in operation to the ambit of the section which it qualifies in support of this proposition relies on the authority of **Lloyds & Scottish Finance Ltd v Modern Cars & Caravans [1966] 1 QB 765, (780)** per Edmund Davies J (as he then was).
- [77] According to counsel for the Claimant, Mr. David Joseph Q.C.; *"It is turning the proviso completely on its head to argue that this somehow creates a new and retrospective liability to Tax"*. Section 19, he continues, creates an exemption from the requirements of Cap. 294 subject to its proviso and the Claimant cannot be required under Cap. 294 to pay the retroactive taxes.
- [78] Mr. Joseph Q.C. notes that the Minister's order of 4th October, 2007 did not purport to rely on S.19 of the Incentives Act by stating clearly that it was made pursuant to S.4 of the Non-Citizens Undeveloped Land Tax Act Cap. 294.
- [79] Further, it is argued that the GAB has now repealed section 19 along with the Incentives Act and the defendants cannot now rely upon a repealed Act. (See S.14 of the Interpretation Act Cap. 224).
- [80] The Claimant notes also that the Incentive Act is later in time than the Non-Citizens Undeveloped Land Tax Act Cap. 294.
- [81] This argument by the Defendant with respect to the effect of the Agreement and the Incentives Act on Cap. 294 has already been advanced by the Defendants and rejected by the arbitrator contends the Claimant. Counsel for the Claimant points to paragraphs 521-528 of the Arbitral Award in support of this contention.
- [82] S.14 of the Incentives Act says the Claimant provides for an unqualified and unlimited exemption and it makes no reference to S.19 of the same Act. The s.14 reads as follows:
- "The enterprise is hereby exempted from the payment of development charges or tax of any kind as prescribed under the provisions of the Non-Citizens Undeveloped Land Tax."**

[83] The Incentive Act at S.7 defines "Enterprise" to mean Asian Village Antigua Limited, the Claimant in this matter.

[84] With respect to the argument that the Claimant is estopped from asserting that it is not obliged to pay retrospective taxes; the Claimant submits that there is no legal basis for this and relies on the learning of the editors of Wade & Forsyth Administrative Law 9th Ed p. 237 that; "*In Public Law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority power which it does not in law possess*" (see also Maritime Electricity Company v General Dairies Ltd [1937] AC 610 and Swallow and Pearson v Middlesex County Counsel [1900] 1 Ch. 695 and Islington Vestry v Hornsey Urban Council [1900] 1 CH 695).

Findings

[85] Let me say at the onset that I am inclined to the views expressed by counsel for the Claimant in support of the Claimant case on each of the issues put before the court for determination.

[86] Whereas I accept the Defendant's position that a legislative framework exists in Antigua and Barbuda to safeguard its limited land resources for the benefit of the citizens of Antigua and Barbuda, I do not ascribe an interpretation to the relevant statutory provisions consistent with that which the Defendants urge. I do not believe that for our purposes here, the Incentives Act passed by the Government of Antigua and Barbuda adds anything to the proper construction of the Land Tax Act Cap. 294. Further, I accept the argument from counsel for the claimant that in the peculiar circumstances of this matter, having regard to the then ongoing arbitration and its possible if not probable effect on the further development of the subject lands that a retrospective order covering that period, is improper.

[87] The legislative framework for our purposes here consists of the (i) Non-Citizens Undeveloped Land Tax Act, Cap. 294 of the Laws of Antigua and Barbuda; (ii) The Asian Village Resort (Incentives) Act No. 14 of 1997 and (iii) Non-Citizens Land

- [88] I refer to the land holding regulations here, although it has not been substantively raised by either party to the proceedings, for this reason; that the Defendant raised in argument that a retrospective application of the Land Tax Act and the Section 4 Order thereto is required to be able to allow the Government to penalize an errant non-citizen for failing to comply with the conditions of his license or agreement between the time of its breach and the making of Section 4 Order.
- [89] However, the non-citizen under the land holding regulation (S.4 (2) is subject to forfeiture proceedings for breach of any condition in a license to hold land. This, as any and all remedies deployed by the Government is subject to legal objection. In the present case the Government was held to have impliedly amended the Land Holding Regulations in relation to the Claimant thereby exempting it from requiring holding the land under license. By its own act the government of Antigua and Barbuda removed one of its immediate and arguably strongest protections against errant non-citizen land developers by rendering the Claimant not subject to the Regulations and consequently not subject to it's forfeiture provisions. A decision to exempt a party from the Act is properly a matter for the Government of Antigua and Barbuda.
- [90] Another form of protection available to the Government to ensure that development take place as prescribed and agreed between the parties is the imposition of the disputed land tax under the Non-Citizens Undeveloped Land Tax Act Cap. 294. This clearly is not intended to be as severe and absolute as the forfeiture provisions of the Regulations. This Act provides the Minister with the authority, where it appears that a non-citizen is not fulfilling his responsibility under the Act to develop the lands, to declare it "undeveloped" land and thereafter subjecting the lands to the imposition of a tax from the coming into force of the S.4 Order.
- [91] Contrary to the submissions of the Defendants, I do not agree that the Minister is constrained under Cap. 294 to making the S.4 declaration and Order only after an Arbitration Tribunal (the incentive Act provides for disputes arising out of the Agreement to be determined by Arbitration) has found the existence of facts that support the determination that a non-citizen is not fulfilling its responsibility to

develop the subject lands. The more detailed and phased the development requirements are, the simpler it is for the minister to ascertain the developers breach and to invoke the land tax in a timely manner¹. I observe that the ease of operation of the land tax act is dependant on the manner in which the GAB operates it.

[92] Section 4 of the Land Tax Act should read; "where it appears to the Minister that a non-citizen ..." Any objection to the Minister classifying the land as "Undeveloped Land" is lodged with the said Minister (see S.5).

[93] Clearly, if a legal dispute arises over the development such as ultimately did in this matter and the Minister's hand is 'stayed', the imposition of the tax may or may not be deferred as the case may be until the final resolution of the matter But the date of the Order if made remains the same.

[94] The 1st and 3rd Defendants have argued that the said Act and S.4 Order is retrospective and applies from the date of breach of the agreement in 2001 to the date of the order October 4, 2007 and that the tax is not applicable thereafter. Counsel for the 2nd Defendant, Mr. J Fuller, contends that the S. 4 orders is both retrospective and prospective.

[95] The drafting of the Land Tax Act is somewhat loose in that it allows for several interpretations, largely with respect to the application of the tax in the first year of the operation of the Act; the year 1980. Notwithstanding that, I do not find that that the statutory construction leading to retrospectively is the dominant construction. I do not find either, that the tax is not at all applicable after the date of the Order as contended by counsel for the 1st and 3rd Defendants.

THE FIRST SCHEDULE

[96] The 1st and 3rd Defendants have placed much emphasis on the First Schedule of the Land Tax Act Cap. 294 and more particularly on Section 1. The said

¹ A later determination by way of Arbitration in favor of the 'Order', arguably will take effect from the date of the said earlier Order

Defendant's argument goes like this; That of necessity for the first year of assessment in 1980, the tax imposed is clearly retrospective, and that an Order made, say, in December of 1980, would be payable pursuant to S.9 of the Act, in the following year July 1981 and would date back to 1980. If the Act clearly imposes a retroactive tax in 1980 then it is to be taken to intend the same effect thereafter.

[97] That argument however cannot in my view be sustained. Section 8 of the Act relates to the date of assessment of value of the land upon which the tax will be based. The relevant date for that value assessment is 1st January, 1980 as provided in the Act and every 5 years thereafter. A section 4 order made at anytime after the commencing of the Act in 1980 will naturally relate to a past failed development and to the latest land value assessed prior to the Ministers Order and impose the 5% tax for the 1st year commencing, in this hypothetical example, from the date of the order in 1980 on the non-citizen owned land over which the S.4 order stood. So it is the previous value assessed in Jan. 1980 that will be applied but applied prospectively.

[98] Arguably, the 5% per annum tax or the first year of 'breach' , referred to in S.1 of the First Schedule, upon proper construction of both S.1 and 2, apply to every first year-after 1980- of "such ownership" after a Section 4 notice is declared. But that issue is not before me now. To the extent that the Act provides at all for a retrospective imposition of tax for the first year of the act, 1980(and I do not accept that it does), It, in my view, is limited to that year only.

[99] Upon closer scrutiny it becomes clearer that Section 1 of the schedule, in relation to 1980 at least, is substantially inoperable in the way suggested by the defendants and it bears speculating that the Act as originally drafted was probably intended to come into force just prior to or upon 1st January, 1980. However, the issue as to whether section 1 in relation to the year 1980 is inoperable or not is also not before me and I do not believe that it alters the ultimate findings in this matter.

- [100] One does not glean from the schedule of Cap. 294 any section or part thereof that expressly rebuts the presumption against the retrospective application of the terms of the said Act and Schedule or Order made thereto.
- [101] The Act and schedule is comfortably workable, prospectively. Upon the Minister's determination under S.3 and S.4 of the Act, the order is made and the tax is imposed. That tax is based on the value of the land which was assessed in accordance with the act (every five years) and so could be as much as 5 years prior to the Order. Thereafter the non-citizen developer either lodges an objection to the classification of his land as undeveloped land; gets going with the development program so as to bring his development into compliance; pay the taxes as they become due or perhaps sell the lands.
- [102] The fact that under this Act the Government of Antigua and Barbuda in the peculiar circumstances of this case, cannot now impose taxes for the year 2001–2007 is not a sufficiently strong displacing circumstances to rebut the presumption against retrospective application of the Act and Notice by necessary implication (see Customs and Excise Commissioners v Shingleton Tax Cases (1988) S.T.C 190) or otherwise. It is also not necessarily evidence of the weakness of the Act but perhaps a shortcoming in the **AVA Act** and agreement.⁵
- [103] I accept the logic of the Claimant's submissions that the language used in the Act point to a prospective application of the Act; in the application of S.4 and 5 of the Act; in the application of S.6 and 7 of the Act imposing the tax in the context of the definition of the "undeveloped land", in the reading of the First Schedule in the context of the meaning of the phrase "such ownership".
- [104] I accept the Claimants contention that one is assisted in the interpretation of the Act by its usage and operation. The only two (2) other instances of the Land Tax being invoked are two Acts that are dated prior to and after the subject Order of November 4, 2007 respectively. They cover some 80 properties owned by non-nationals and in both cases the Act and Land Tax thereto are applied prospectively.

⁵ And management of same.

[105] The argument for the 1st and 3rd Defendants is not that the Act and imposition of land tax thereto commences retroactively and can accumulate and extend beyond the date of the order. The 1st and 2nd Defendant is not contending that the Minister has no discretion under the Act to determine when the imposition of the Land Tax commences. The 1st and 2nd Defendant's position is that the Land Tax can only be imposed retroactively.⁶ This contention is diametrically opposed to the two instances of the operation of this Act prior to and since October 4, 2007 Order. To this end the defendant's have not submitted on whether, in the event of the success of the claimant, the subject Order as worded, can stand for the period after the date of the Order – prospectively, and whether the court can make an order with such an effect.

ORDER

[106] For the reasons provided above⁷ the following Orders of relief are hereby granted:

- (i) An Order of Certiorari quashing the First Defendant's Order of October 2007 as published in the Gazette as being unlawful and in excess of powers under section 4 of the Non-Citizens Undeveloped Land Tax Act Cap 294 (the Act);
- (ii) A declaration that pursuant to the Act the First Defendant may not seek to impose or levy undeveloped land tax on the claimant or the land identified in schedule 2 to the retrospective order retrospectively;
- (iii) An Order prohibiting the First and/or Second and/or Third defendant from taking any steps further to or consequent upon the said Order dated 4th October 2007 in relation to the retrospective period;

⁶ The 2nd defendant's position is that the Order is both retrospective and prospective.

⁷ And for the reasons provided by the claimants in their written submissions on the issue of unjust enrichment and generally.

- (v) An Order that the defendants pay the claimants costs pursuant to the CPR2000 unless otherwise agreed;
- (vi) The claimant is at liberty to apply in relation to damages arising from the placement of the caution.



David C. Harris
High Court Judge
Antigua and Barbuda