JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO: 5/87

APPLICATION NO: 927/1/82

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

IN THE MATTER of the Review of an Assessment Officer's grant of a Certificate of Exemption in respect of premises situated at Shop Number One (also known as Shop Number 22) Lane Plaza, Liguanea in the Parish of Saint Andrew

AND

IN THE MATTER of the Rent Restriction Act

BETWEEN	GEORGE GRAHAM	APPELLANT
AND	LANE INVESTMENTS LIMITED	RESPONDENT

D. Muirhead, Q.C. & Edward Ashenheim for Appellant

Dr. L. Barnett & Mrs. Priya Levers for Respondent

February 20, 21 & April 9, 1992

GORDON, J.A.

In this appeal the appellant challenged the decision and order of the Rent Assessment Board for the parish of Kingston (Corporate Area Zone) dated 25th November, 1986 but handed down on 12th December, 1986 under cover of letter dated 9th December 1986, confirming an Assessment Officer's grant of a Certificate of Exemption in respect of shop No. 22 Lane Plaza, Liguanea in the parish of St. Andrew. By the Certificate of Exemption the value of the shop was declared to be such as to permit the premises being let at $6.00 or more per square foot on 31st August, 1980 thus removing the premises from within the scope of the operation of the Rent Restriction Act.

The appellant had on the 14th March, 1967 entered into an agreement with Lane Investments Limited to lease the demised shop, as a Barber's Shop, for a term of five years at $500 per year and had continued in occupation of said premises up to the hearing of this appeal. On 25th April 1983 the landlords applied to the Rent Restriction Board for a Certificate of Exemption under the provisions of Section 3 of the Rent Restriction Act (the Act) in respect of the entire premises which comprised a shopping plaza of which the appellant's shop was but a part. Pursuant to the requirements of the Act the premises were inspected and assessed by the Rent Assessment Officer who issued his Certificate of Exemption on 14th December, 1984. The appellant applied to the Rent Assessment Board on or about 19th April, 1985 for a review of the decision of the Assessment Officer and the Board in the review exercise heard evidence and submissions on five dates over the period 24th June, 1985 to 18th September, 1986. The decision of the Board, which was reserved, was dated the 25th November, 1986 and was delivered as indicated supra. It is but fair to point out that prior to 1983 commerical property let at $2.50 and over per square foot per annum did not fall under the purview of the Act. This was changed by an amendment to the Act made in 1983 which provided for a Certificate of Exemption.

In the application for a Certificate of Exemption the landlord sought to remove the demised premises from the control of the Act by praying in aid the provisions of the said Act. Section 3 of the Act so far as is relevant provides:

> "3. - (1) This Act shall apply, subject to the provisions of section 5 to all land which is building land at the commencement of this Act or becomes building land thereafter, and to all dwelling-houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished:

"Provided that this Act shall not apply to -

...

(e) a public or commercial building which, pursuant to an application by a landlord for a certificate of exemption, an Assessment Officer certifies -

(ii) is of such a valuation at the prescribed date as to warrant being let at such standard rent (exclusive of any amount payable for service) as the Minister may, by order, prescribe; ..."

Section 8 (1) provides:

"8 (1) - The Minister may by order declare any class of premises specified in such order to be exempted premises."

Invoking the provisions of Section 3 (1) (e) (ii) of the Act the Minister made the following order on 5th April, 1983 -

"1. This Order may be cited as the Rent Restriction (Public and Commercial Buildings-Exemption) Order, 1983.

2. Any public or commercial building which an Assessment Officer certifies would have been of such a valuation at the 31st day of August, 1980, as to warrant being let at that date at a rent of -

(a) $6.00 or more per square foot, where such building is in the urban and suburban districts of the Corporate Area (as defined in the Second Schedule to the Kingston and St. Andrew Corporation Act); or

(b) $4.00 or more per square foot, where such building is in any area outside the urban and sub-urban districts of the Corporate Area as so defined,

is exempt from the provisions of the Act."

The date for determining exemption and the qualification for exemption were thus stipulated. Commercial buildings within the corporate area were made exempt from the control of the Act if at the base date i.e. 31st August, 1960 the assessed value for rental purposes was $6.00 or more per square foot. The existing rental was immaterial. By the Rent Restriction Percentage of Assessed Value Order 1983, made on the 25th March, 1983, the Minister provided that the percentage of the assessed value of premises to be used by an assessment officer in determining the annual rate of the standard rent of public and commerical buildings let unfurnished should be - Building 15% - Land 5%. This Order was made under the provisions of Section 19 (1) of the Act which requires that:

> "19. (1) - An Assessment officer shall, in determining the standard rent of any premises in any category of letting, act according to the principle that the standard rent shall be a rent of which the annual rate is such percentage of the assessed value of the premises as the Minister shall prescribe by order.
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> ...
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> (3) An order made under subsection (1) may prescribe different percentages in respect of
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> (a) different categories of letting;
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> (b) the portion of premises which consists of a building;
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> (c) the portion of premises which consists of land (including any swimming-pool, water tank, well, fence, driveway and paved area) occupied and enjoyed with the building under the tenancy.
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> (4) In subsection (1) 'the assessed value of the premises' means the value of the premises assessed by the Assessment Officer -
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> (a) as being such value as obtained on the prescribed date;"

The assessment officer, Mr. Donovan Hayden, visited the premises on 7th December and on 14th December 1984, he issued his certificate signifying that in his opinion the premises (Shop 22) occupied by the appellant would have been of such a valuation on the 31st day of August, 1980 as to warrant being let at that date at a rental of $6.00 or more per square foot.

Nine grounds of appeal were filed and Mr. Muirhead submitted at the outset that the failure of the Rent Restriction Board to give reasons for its findings made presentation of the appeal difficult. The decision of the Board was challenged under broad heads, namely:

(1) That the method of valuation employed in exempting the said shop from the provisions of the Rent Restriction Act was unsound and wrong in law.

(2) That as no land was occupied with the letting the 5% in respect of the value of the land, does not fall to be added to the 15% in respect of the building so the standard rent is the 15% of the building.

(3) If some percentage value was to be given to the land then, if that value can be determined, having regard to the adverse features of the location of the shop the value would have to be considerably discounted in order to have regard to the disadvantages. This shop it was submitted, was the most disadvantaged of the shops in the plaza as it had the worst location of the shops in the plaza. It did not face the parking area of the plaza. Access to it was gained by steps from Old Hope Road which it faced and by a narrow passage along the southern side of the plaza.

The Board heard evidence from the Rent Assessment Officer, Mr. Donovan Hayden, who assessed the value of the demised premises, Mr. Trevor Carby and Mr. Roy McDaniel, real estate consultants who also carried out valuations of the premises. Of Mr. McDaniel's evidence Mr. Muirhead said:

> "Mr. McDaniel never attempted to apply the ministerial formula, he went on a rental exercise. His evidence is of little help."

On his submission the evidence which the Board had to consider was that of Mr. Hayden and Mr. Carby.

Mr. Muirhead embarked on an examination of the definition of public and commerical building in the Act which runs thus:

> " 'public or commercial building' means a building, or a part of a building separately let, or a room separately let, which at the materiel date was or is used mainly for the public service or for business, trade or professional purposes, and includes land occupied therewith under the tenancy but does not include a building, part of a building or room when let with agricultural land;"

He placed particular emphasis on the phrase "and includes land occupied therewith under the tenancy," and the words "occupier," "occupy", "occupation" as defined in the Oxford Shorter Dictionary. These words were considered in the cases of **Newcastle City Council vs. Royal** N.H. [1959] 1 All E.R. 734 and **M & J.S. Properties Ltd vs. White** [1959] 2 All E.R. 81. He submitted that the appellant occupied no land as an adjunct of his tenancy but was a mere licensee of the common parking area in the plaza which was there for the use of the licensees invitees or tenants. On the basis that no land was occupied by the appellant he submitted that the 5% in respect of the value of land did not fall to be added to the 15% for building, so the standard rent was the 15% of the building, Mr. Muirhead submitted.

The separation of land from building is the accepted mode of land valuation for the purposes of taxation. The unimproved value of land is used to determine the annual tax to be paid. This method is considered the best because, for the purpose of ascertaining market value on a sale, the location of the land on which a building

stands is a major determinant. Lane Plaza is situated at Matildas Corner, Liguanea, in St. Andrew. There are two major roads from which access can be gained to this shopping plaza: Old Hope Road on the southern side and Barbican Road on the northern. These roads lead to large residential areas and the evidence discloses, that this plaza is heavily patronized in the evening peak hours. Other plazas, Liguanea and Northside, in the same vicinity are serviced by Old Hope Road only and they do not offer a comparative mix of shops. In addition, Northside Plaza had the added disadvantage of not having a supermarket and being not as well maintained as Lane Plaza. The value of a building which of necessity must relate to its "replacement costs" is not affected by its location but "the assessed value of the premises" of necessity is greatly influenced by the location of the land on which the building stands. Mr. Muirhead's submission therefore, that if some value should be given to the land then that value, having regard to its location should be considerably discounted, is untenable.

The parking area, in the plaza which serves all the shops in the plaza is some 12000 square feet and the appellant's lease provides for -

> "... him in common with the other Tenants and licencees of the Company to pass and re-pass with Motor Vehicles and on foot within the said shopping centre with such trolleys or similar appliances as may be necessary and proper for the carriage of goods and such other things as are necessary for the occupation of the shop for the purpose hereinafter set out and subject to such regulations as to the type of such user as the Company may prescribe."

By construction therefore the parking area was in terms of Section 19 (3) (c) -

> "Land occupied and enjoyed with the building under tenancy."

Mr. Hayden used the investment approach in assessing the value of Lane Plaza. He made a global assessment of the entire plaza and submitted his Certificate of Exemption. He supplied to the Board a detailed schedule of values of the 30 shops in the plaza. The value he gave for the shop the appellant occupied is, Building $17,000, Land $10,000: the area of the shop is 429 square feet. He also gave evidence of comparative values of shops in plazas along Constant Spring Road, and those in Northside Plaza.

Mr. Carby used the comparative market value study in arriving at the valuation he placed on the premises. He assessed the value at $13,299. In arriving at this valuation he accessed records at the Registrar of Titles of sales of shops in Kings Plaza on Constant Spring Road and Northside Plaza.

Mr. Muirhead in a mathematical exercise of some expertise, making discounts consonant with his proposition, arrived at a valuation $5.69 per square foot on Mr. Hayden's figures and $5.62 on Mr. Carby's figures. These values were below the $6.00 per square foot required for exemption.

Dr. Barnett submitted that it is well established that value, unless the context otherwise indicates, means market value. Also well established is that the principle in sale transactions is whether an average willing seller is willing to accept a particular price from an average willing purchaser. All methods of valuation, he said, are methods of comparison. In his evidence before the Board, Mr. Hayden said he employed in his valuation factors which discounted the value so that there are balances.

He used (1) 1974 Tax valuation
(2) Unimproved values
(3) Rentals as they existed -

These did not reflect market values under the 1978 Act which exempted from the provisions of the Act valuations of $2.50 and above per square foot.

Mr. Carby's valuation, Dr. Barnett further submitted, when analysed, supported the Certificate issued by Mr. Hayden. Mr. Carby used sales of shops in Kings Plaza, Premier Plaza and Northside Plaza in the relevant period and used comparisons to justify his conclusion in respect of the valuation of Lane Plaza. There was, he said abundant evidence before the tribunal which established that the valuation of Mr. Carby was erroneous and lower than it should be. At the very least, Dr. Barnett submitted, from Mr. Carby's evidence it was clear, there was material to support the Certificate of Exemption.

Dr. Barnett conceded that Mr. Hayden did not make deductions for expenses and there was no evidence of the quantum of expenses. The expenses used in arriving at the net income figure would be the operational expenses and since the internal maintenance of the shops was the responsibility of the tenants, the operational expenses of the landlord are minimal. There was therefore before the Board sufficient evidence to support the conclusion at which the Board arrived, he said.

Proceedings before the Board are regulated by Section 11 of the Act. This section so far as is material is as follows:

> "11. (1) At meetings of a Board, the decision of the majority of the members shall prevail:
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> Provided that if no majority decision is reached, the decision of the Chairman shall prevail.
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> (1a) The Board shall have power to review any decision of an Assessment Officer under this Act and make such order as it thinks just and, for that purpose, may obtain, if it thinks fit, a fresh valuation of any premises.
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> (1b) Without prejudice to the generality of subsection (1a), the Board may exercise any of the powers of the Assessment Officer.

" (2) Before making any order, a Board shall give all interested parties an opportunity of being heard and of adducing evidence.

(3) Evidence shall be given on oath and the proceedings of a Board shall be deemed to be judicial proceedings for the purposes of the Perjury Act."

As regards the functions of the Board under this section I quote with approval from the judgment of this court in **Virgo Enterprises Limited et al v. Newport Holdings Limited - Rent Assessment Officer** Miscellaneous Appeal Nos. 1,2, & 3/89 dated 15th May, 1989 per Carey, J.A.

"From this, it is apparent that the Board exercises judicial functions but of even greater significance is the power given to the Board to perform any of the powers of the Assessment Officer. The Board could, therefore, itself, act as a valuer or an inspector which means that it is free to act not only as the arbiter in an adversarial sense, but also as an inquisitor or investigator, where the circumstances require such a course of action."

The tribunal had the evidence of the experts Mr. Hayden and Mr. Carby and the comparative values based on actual sales in other plazas. Mr. Carby admitted that in his valuation there was an "area of speculation of 10 - 20%. The tribunal had evidence of the rental of shops in comparable plazas and of the letting of shop 24 in Lane Plaza, which was on the same wing as shop 22, in February 1980 at $8.00 per square foot. There was also evidence of the advantage/disadvantage of the appellant's location.

There was thus before the tribunal (i) evidence which indicated that there were income values which were capable of attracting such capital values as placed the premises within the exemption provisions and (ii) evidence capable of supporting the conclusion that on a comparison of sales, Lane Plaza had that capital value.

Having regard to modern trends I find that in valuing a property which consists of many components, it is both legally and practically permissible to look at the entire property as well as the individual components and to arrive at a value for the entire property as well as the components. The value of the components bears a direct relationship to the total value and there was nothing wrong with Mr. Hayden's approach to the valuation.

The tenant's particular user of the demised premises is not a determining factor in the valuation; rental is not fixed by user.

It is true that the tribunal failed to give reasons but it had before it evidence , which if accepted would support the conclusion at which it arrived. I find that the Board acted on this evidence and found facts which justified the Certificate of Exemption it confirmed. For these reasons the appeal is dismissed with costs to the respondent to be taxed if not agreed.

ROWE, P.:

I agree.

WRIGHT, J.A.

I agree.