

# Memorandum

**To:** Caymanian Bar Association  
**From:** Alison Maxwell, Joe Jackson, Joni Ebanks & Michael Lockwood  
**Date:** 17 December 2012  
**Subject:** **CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands, the Channel Islands, Bermuda and the UK"**

## 1. Introduction

Presently in the Cayman Islands, under the Stamp Duty Law (2011 Revision), first time Caymanian buyers are exempt from paying stamp duty on the purchase of land -

(a) valued at \$200,000 or less in the case of land with a building; and

(b) valued at \$50,000 or less in the case of land without a building.<sup>1</sup>

Save that the full stamp duty which is applicable on purchases of land in certain special areas of George Town and Seven Mile Beach.

The Cayman Islands Constitution Order 2009 expressly provides a defence under section 16(1) for persons against discriminatory measures adopted by the government or a public official pertaining to treatment of an individual, namely, with respect to rights granted to them under the Constitution. The defence is subject to whether the legislation or the decision acquiesced to has objective and reasonable justification. Also taken into consideration is the proportionality to its aims in the interests of defence, public safety, public order, public morality or public health. Under section 16(2) "*Discriminatory*" means *affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.*"

Before the recently enacted Gender Equality Law 2011, forms of protection provided for non-discrimination were lacking. The Constitution Order 2009 possesses a much wider span to provide more of a blanket approach, tailored against discrimination for an increasingly diverse range of social groups.

Section 16 subsections (3), (4), (5) and (6) operate as escape clauses for any law or decision that can be seen as reasonably justified or necessary.

- Section 16(1) *shall not apply to any provision of law which is seen to be expressly or of necessary implication to be done as laid out in subsections (3), (4) and (5).*

Section 16(7) ensures necessary compliance with section 16(1) when relating to any restriction on rights and freedoms guaranteed such as private and family life, conscience and religion, expression,

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<sup>1</sup> Paragraph 10 under the section "Conveyance or Transfer of any immovable property", Pg. 20 - 21, Stamp Duty Law (2011 Revision).

## **CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands**

17 December 2012

assembly and association, movement or marriage. If that restriction is authorised for the purpose of that section, it must be reasonably required or reasonably justifiable in a democratic society.

The Bill of Rights in the draft Constitution Order 2009 impact the Cayman Islands on a monumental scale and as such, can be perceived as a legislative milestone for the Islands. The present Constitution does not contain a bill of rights, meaning human rights protections were non-existent until the 2009 draft was brought about. The provisions of the 2009 draft identify guaranteed personal rights and protections that an individual is entitled to, yet appear to concentrate solely on the vertical relationship between citizen and state. It should be noted that no protection is offered for horizontal forms of discrimination in non-state actions i.e. the private sector, meaning there still remains ample room for discrimination to arise unless explicit language is recognised and subsequently incorporated into the legislation.

In exploring the risk of discrimination in the context of property, a recent Government proposal method to generate revenue relates to an increase in stamp duty on property transfers of 7.5% for both Caymanians and non-Caymanians. In essence this is reverting back to the previous levies placed on the purchase of real estate. This particular aspect of the proposed measure appears on the face of it, to be compliant with the Bill of Rights as there are no ostensible distinctions relative to citizenship. However, the controversy lies not only in the present legislative regime but also where the Government has compensated for the spike in fees, that is, where a Caymanian is a first time home buyer, the value for the concession has also increased. There would be no stamp duty payable for vacant land worth up to \$100,000 or homes worth up to \$300,000. First time Caymanian buyers who purchase land worth between \$100,000 and \$150,000 or houses or apartments for between \$300,000 and \$400,000 would pay 2% on stamp duty. Under the Stamp Duty Law (2011 Revision) section 10(b)(ii), exists a claw-back provision exercisable by the discretion of the Minister of Finance which states, *"An exemption of concession afforded by this paragraph in respect of duty shall be subject to such conditions as the Minister of Finance may think fit to impose in order to prevent exploitation of those provisions by persons who are not bona fide purchasers of land for first home building purposes."* Arguably, the exemption for first time Caymanian home buyers can be seen as an exception to being discriminatory in nature as it was proposed in order to encourage the number of Caymanian home owners and to promote purchasing and investing in locals.

- Section 16(4)(a) of the Bill of Rights states *"Subsection (1) shall not apply as far as the law makes provision for the appropriation of revenues or other funds of the Cayman Islands or for the imposition of taxation (including levying of fees for grants of licences)."*

In essence this means; the provision exempts the measures from its general non-discrimination rules, meaning a gap for possible implications to arise. The current stamp duty charge is arguably discriminatory on the grounds that Caymanians are required to pay 4% whereas non-Caymanians are to pay a higher fee of 6%. Presently as is, this inconsistency fits the description of discrimination, but is not necessarily bad discrimination, the definition includes affording different and unjustifiable treatment to different persons on any ground such as national origin and also property as under the current scheme, the rate of stamp duty depends on the location of the property being charged. The justification for the present dissimilarity in duty charged is that it is a reasonable and necessary measure as much of the real estate around the island was sold off by predecessors, which resulted in many foreign investors buying masses of land, making it more difficult and expensive for Caymanians to own land or property today.

## CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands

17 December 2012

### 2. Jurisdiction Comparison - Jersey (Channel Islands)

In Jersey, on the purchase of a freehold property, there are various rates of stamp duty payable depending on the value of the property being purchased. However, similar to the Cayman Islands, first time buyers purchasing a house or freehold property for their own occupation, are exempted from stamp duty for properties valued at £300,000 and below. It should be noted that to be granted the exemption, the transaction must fulfil all the following conditions:

- *"The purchaser is a person to whom Regulations 1(1)(a) to (h) or (n)(ii) of the Housing (General Provisions) (Jersey) Regulations 1970 applies;*
- *The purchaser can prove that he or she had never owned a reversionary interest in any dwelling accommodation wherever situated nor has he/she ever previously been entitled to occupy such dwelling accommodation [or would have been so entitled if condition [B] applied] by virtue of having owned the accommodation, and for the purpose of this clause "owned" includes; -*
  - (a) having held such accommodation on contract lease;*
  - (b) having owned such accommodation together with any other person;*
  - (c) having owned shares that confer entitlement to occupy such accommodation; and*
  - (d) any arrangement whereby such accommodation was held in the name of a nominee or trustee, or of a company owned by such nominee or trustee, for benefit of the purchaser; and*
- *The consideration of the sale is not less or not substantially less than the gross value of the property sold".<sup>2</sup>*

A brief summary of the Regulations 1(1)(a) to (h) or (n)(ii) of the Housing (General Provisions) (Jersey) Regulations 1970 is given below -

- Regulation 1(1)(a): An individual who was born in Jersey and has resided in Jersey for 10 years.
- Regulation 1(1)(b): An individual who was a resident before 5th of April 1949.
- Regulation 1(1)(c): An individual who was previously granted consent to purchase, to take transfer of, or to lease a property. The acquirement of which was a transaction exempt under the Housing Law, and who has remained resident in this accommodation.
- Regulation 1(1)(d): An individual who was previously granted consent to purchase property, and upon purchase, continually resided for the whole period commencing no later than six months from the date of the relevant Housing Consent.
- Regulation 1(1)(e): An individual who was granted previous consent to rent and has resided in Jersey for 10 continuous years.
- Regulation 1(1)(f): An individual who has resided in Jersey for 10 continuous years.
- Regulation 1(1)(g): An individual who would experience hardship (other than financial hardship) if consent was not granted by Housing Minister.

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<sup>2</sup> Citizens Advice Bureau, "Stamp Duty on property purchase/transfer and death", [http://www.cab.org.je/index.php?option=com\\_content&task=view&id=651&Itemid=57](http://www.cab.org.je/index.php?option=com_content&task=view&id=651&Itemid=57)

## **CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands**

17 December 2012

- Regulation 1(1)(h): An individual who is the child of a residentially qualified parent and has resided in Jersey for a total of at least 10 years prior to his or her 20th birthday.
- Regulation 1(1)(n)(ii): An individual, who is the intending purchaser, transferor or lessee and is purchasing property with his or her spouse to whom the provisions of any of sub-paragraph (a),(b),(c),(d),(e),(f),(g), (h), (j) or (k) apply.

For properties valued between £300,000 and £400,000, it is nil in respect of the first £300,000 plus £1 for £100 or part of £100 pounds in excess thereof, subject to a minimum of £25. For properties valued at £400,000 and over, normal tariff applies.<sup>3</sup>

In conclusion, although the stamp duty exemption for first time Caymanian buyers is prima facie discriminatory, the concept of giving a tax concession to first time property buyers is applied in other similar jurisdictions, such as in Jersey in the Channel Islands. Nevertheless, it is still a form of discrimination but can be classified as good discrimination as it encourages locals to invest in the ownership of a home.

### **3. Jurisdiction Comparison - Guernsey (Channel Islands)**

Also known as Stamp Duty, 2% Document Duty is payable on realty from £1 to £150,000. 2.5% is payable on realty from £150,001 to £250,000 and 3% on all realty above £250,000 and now includes Congè.

#### **Document Duty on Purchase of Real Property**

Transfers of real property in Guernsey (other than by way of gift) are generally subject to document duty of 3% of the value of the property transferred. However, where the property includes a dwelling, reduced rates may apply, depending upon the purchase price. Document duty is borne by the purchaser.

#### **Cost of Guernsey Conveyancing**

The principal cost associated with Guernsey conveyancing is in respect of document duty, payable to the States of Guernsey. This is almost invariably payable (other than in respect of transactions for a consideration of less than £250,000) at 3% of the purchase price of the realty. More modest costs will be incurred by purchasers in respect of legal fees (levied at a tariff rate of .75% of the purchase price for the realty) and Court fees amounting to a few hundred pounds.

#### **Conveyance by way of Share Transfer**

It is also possible to acquire real property in Guernsey through the purchase of the issued share capital of a property holding company. The distinct advantage of such an acquisition is that for the purchaser, it avoids the payment of any document duty and so represents a significant cost saving. In addition, it is a more discreet way of acquiring property, requiring no appearance in the Royal Court or entry on the Greffe conveyancing records.

#### **Document duty**

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<sup>3</sup> Citizens Advice Bureau, "Stamp Duty on property purchase/transfer and death", [http://www.cab.org.je/index.php?option=com\\_content&task=view&id=651&Itemid=57](http://www.cab.org.je/index.php?option=com_content&task=view&id=651&Itemid=57)

## **CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands**

17 December 2012

The States intend to introduce legislation to stop the avoidance of document duty on sale of Guernsey property.

Currently, document duty is applied on conveyance of Guernsey property held by individuals. It is a fairly simple matter to avoid this charge by owning the property through a company and when it comes to selling the property, to sell the shares in the company instead. The new proposal introduces the principle that the sale of shares in such a company will trigger a Share Transfer Duty charge equivalent to the document duty charge which would have arisen were it not for the existence of the company.

### **4. Jurisdiction Comparison – Bermuda**

In Bermuda, there are heavy Government stamp duty charges on sale or re-sale of all homes owned by Bermudians and non-Bermudians. The Stamp Duties Amendment Act 2008, a revenue-raising act, changes the various rates of stamp duty payable on the conveyance or transfer of property and land on the Island. It will need to be clarified whether the seller or buyer pays these or if they agree to split the cost. The new tiered rate structure from April 1 2008 is:

- two percent on the first \$100,000 or any part thereof;
- three percent on the \$400,000 or any part thereof;
- four percent on the next \$500,000 or any part thereof;
- six percent on the next \$500,000 where the value is more than \$1 million but not exceeding \$1.5 million, and
- seven percent on any remaining value or amount.

Most first-time home purchasers seek properties (usually condos) valued at less than \$1 million. Home buyers in this segment of the housing market will have the full benefit of the reduction in the rate from 2.5 per cent to two percent in the lowest tier. For properties that sell for more than \$1 million the rate of stamp duty will be higher. Like Cayman, Bermuda has 0% stamp duty for first time home buyers where the house or condominium is valued at \$750,000 or under. The justification or motive lies in the Government initiative to assist young people in securing their first home investments. Issues of discriminatory treatment arose where Bermudians who were married to non-Bermudians were barred from an exemption of stamp duty on homes under \$750,000 for first time buyers. The measure became unfair as the conditions for eligibility was that all purchasers that were party to the conveyance of the property had to be of Bermuda status. The policy was amended in July of 2009 as it was unreasonable to exclude a Bermudian of the benefit on the premise that they were married to a foreign national.

### **5. Jurisdiction Comparison - United Kingdom**

In contrast, the United Kingdom in their recent 2012 Budget announcement cancelled the extension on the 2 year stamp duty holiday for first time home purchasers which was in place since March of 2010. The chancellor reinstated the 1% duty on properties valued between £125,000 and £250,000. In the same announcement there was also an increase in stamp duty on homes worth £2million and up to 7% and a 15% increase on those buying high-value properties through a company in order to

## **CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands**

17 December 2012

avoid paying tax. In April 2003, double stamp duty was abolished for Muslim mortgages taken out in the UK as Sharia law prohibits the payment of interest. There is no mention of religion in either the Finance Act of 2003 or 2005. The tax law merely ensures that Islamic mortgages are only charged one round of stamp duty instead of two if the conventional scheme were to apply. The decision brought much controversy and was initially seen as discriminatory by many as Muslims were allowed to 'indulge' in offshore deals in order to avoid paying interest, breaching the concept of the same law applying to all. Realistically speaking, the abolition is not altogether discriminatory if one analyses the structure of an Islamic home purchase plan. The Islamic compliant system operates whereby a bank buys the property on the customer's behalf then sells it back to the customer, charging an additional lump sum onto the asking price. Technically speaking, the property has been bought and sold twice meaning stamp duty is charged on each transaction. Arguably, those under an Islamic mortgage may experience more difficulty than someone under a conventional mortgage. The bank in a conventional mortgage lends the buyer funds to purchase the home and secures the loan against the property, if default occurs, the bank has the ability to repossess and get the money back via sale. In the case of default in an Islamic mortgage, one may be left with nothing as there is no capital asset in the buyers' title and it is a fixed term lease so there is no protection for tenants.

### **6. Conclusion**

Although the stamp duty exemption for first-time Caymanian buyers appears to be prima facie direct discrimination, beneath the surface we see that there is an inherent need for this in Caymanian society. Further, subsequent to comparisons between the Cayman Islands, Bermuda, The Channel Islands and the United Kingdom's legislation, we see that provisions facilitating natives in owning native land is a staple in Property law.

When ruling on whether a certain measure is discriminatory, an effective rule of thumb is whether the measure is negative or positive discrimination and whether it is necessary for the functioning of society; both questions here can be answered in the affirmative. The stamp duty exemption is necessary as it allows for first-time Caymanian buyers to establish themselves within the fast-paced Cayman Islands property market. Further, Caymanians no longer have reason to feel that only expatriates are in the financial position to own native land as the government has taken great measures in ensuring that the acquirement of land by Caymanians is now easier by removing some of the financial burden.

**CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands**  
17 December 2012

**ANNEX 1**

Cayman Islands Historic Stamp Duty Rates<sup>4</sup>

The rate of Stamp Duty has varied over time, and the summary below outlines the date of rate changes. In every case the rate is applied to the consideration or the Market Value, whichever is higher:

<b>Date</b>	<b>Criteria</b>	<b>Rate</b>
12 July 1973		7.5%
4 April 1995	Consideration less than CI \$250,000	7.5%
4 April 1995	Consideration of CI \$250,000 or more	10%
9 June 1997	Blocks OPY, 5C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 5D, 10A, 10E, 11B, 11C, 11D, 12C, 12D, 12E, 13B, 13C, 13D (parcels with frontage to Eastern Avenue), 13E, 13EH (parcels with frontage to West Bay Road, Eastern Avenue and North Church Street), 14BG, 14BH, 14BJ, 14CJ, 17A, 18A	9%
9 June 1997	All areas except those specified above	7.5%
14 November 2001		5%
1 July 2006	Blocks OPY, 5C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 5D, 10A, 10E, 11B, 11C, 11D, 12C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 12D, 12E, 13B, 13C, 13D (parcels with frontage to Eastern Avenue), 13E, 13EH (parcels with frontage to West Bay Road, Eastern Avenue and North Church Street), 14BG, 14BH, 14BJ, 14CJ, 17A, 18A	7.5%
1 July 2006	All areas except those specified above, where the purchaser is not Caymanian	6%
1 July 2006	All areas except those specified above, where the purchaser is Caymanian	4%
1 April 2009	Blocks OPY, 5C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 5D, 10A, 10E, 11B, 11C, 11D, 12C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 12D, 12E, 13B, 13C, 13D (parcels with frontage to Eastern Avenue), 13E, 13EH (parcels with frontage to West Bay Road, Eastern	5%

<sup>4</sup> <http://www.caymanlandinfo.ky/Services/StampDuty/TransferofLand/tabid/110/Default.aspx#caymanian>

**CBA Summer Research Project - "Purchase of Property and Discrimination: Jurisdiction Comparison between the Cayman Islands**  
 17 December 2012

	Avenue and North Church Street), 14BG, 14BH, 14BJ, 14CJ, 17A, 18A	
1 April 2009	All areas except those specified above, where the purchaser is not Caymanian	5%
1 April 2009	All areas except those specified above, where the purchaser is Caymanian	3%
1 October 2009	Blocks OPY, 5C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 5D, 10A, 10E, 11B, 11C, 11D, 12C (parcels with water frontage, including any parcel subsequently derived from a parcel with water frontage), 12D, 12E, 13B, 13C, 13D (parcels with frontage to Eastern Avenue), 13E, 13EH (parcels with frontage to West Bay Road, Eastern Avenue and North Church Street), 14BG, 14BH, 14BJ, 14CJ, 17A, 18A	7.5%
1 October 2009	All areas except those specified above, where the purchaser is not Caymanian	6%
1 October 2009	All areas except those specified above, where the purchaser is Caymanian	4%