BFC Development LLP *v* Comptroller of Property Tax
[2014] SGCA 9

Case Number : Civil Appeal No 171 of 2012

Decision Date : 24 January 2014

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; Andrew Ang J

Counsel Name(s) : Tan Kay Kheng, Novella Chan and Jeremiah Soh (WongPartnership LLP) for the Appellant; Foo Hui Min, Lau Kai Lee and Michelle Chee (Inland Revenue Authority of Singapore (Law Division)) for the Respondent.

Parties : BFC Development LLP — Comptroller of Property Tax

Revenue Law – Property Tax – Occupier

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 1 SLR 1053.]

24 January 2014 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 This is the appeal of the Appellant (the Plaintiff in proceedings below) for property tax refunds ("vacancy refunds") in respect of its various leased premises (hereinafter referred to as "the Units") for the period between issuance of the Temporary Occupation Permit ("TOP") for the Units, and the commencement of the lease ("Term Start Date"). The appeal raises questions as to the interpretation of the word "unoccupied" in s 8 of the Property Tax Act (Cap 254, 2005 Rev Ed) ("the Act"). More fundamentally, the heart of the dispute lies in apprehending Parliament's rationale for providing for a refund in respect of vacant properties under our property tax legislation ("vacancy refund provision").

Facts

2 The appellant is the owner of Towers 1 and 2 of Marina Bay Financial Centre, situated at Nos 8 and 10 Marina Boulevard. The respondent is the Comptroller of Property Tax.

3 The TOPs for Nos 8 and 10 Marina Boulevard were issued on 18 March 2010 and 27 August 2010 respectively. Prior to the issuance of the TOPs, the Appellant had secured a number of tenants. [note: 1] The tenants had each signed the acceptance of a Letter of Offer enclosing the Form of Lease agreement. [note: 2] The Letter of Offer provided for a rent-free fitting-out period starting on the date on which the tenant was required to take possession of the premises ("Possession Date"). The fitting-out periods varied amongst the different tenants. Rent was only payable from the date of commencement of the lease, which was immediately after the end of the fitting-out period. During the fitting-out periods, the tenants did not move into the Units, but their contractors conducted fitting-out works in the Units. The Appellant's permission had to be sought for air-conditioning and use of toilets by the tenants and/or their contractors during the fitting-out period. [note: 3] It is not in dispute between the parties that the rent-free fitting-out period was *bona fide* for that purpose.

4 The Appellant filed claims for refunds of property tax from the date of issuance of the TOP until the Term Start Date ("Claim Period"). The Claim Period therefore included the fitting-out period. The

Respondent initially allowed the claims for refunds for the entirety of the Claim Period. However, the Respondent later changed its mind and withdrew the refunds relating to the fitting-out period because it took the view that since the Appellant had by then secured tenants, and the tenants had taken possession of the Units and were carrying out fitting-out works, the Units were not "unoccupied" for the purpose of s 8 of the Act. In letters dated 12 April 2012 [note: 4] and 7 June 2012, [note: 5] the Respondent explained to the Appellant that the vacancy refund was meant to give relief in situations where a building was either fit for occupation but could not be rented out, or unfit for occupation and was undergoing repairs to make it so fit. The fitting-out period did not fall into either of these categories.

5 On 2 July 2012, the Appellant sought leave to apply under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") for a Mandatory Order that the Respondent refund the property tax in respect of the Units during the fitting-out period, and a declaration that the Appellant was entitled to such refund ("Declaration"). [note: 6] The Judge granted leave on 17 July 2012. [note: 7] The Appellant duly took out an originating summons on 19 July 2012 for the said Mandatory Order and Declaration. [note: 8] The Judge heard the parties on 25 October 2012. He dismissed the Appellant's application by a written judgment on 28 November 2012. Consequently, the Appellant filed the present appeal. [note: 9]

Decision below

6 The Judge found that the Units were not "unoccupied" during the fitting-out period, and that no vacancy refund was due to the Appellant. Based on a review of legislative history and parliamentary debates surrounding s 8 of the Act, he concluded that its legislative purpose was "clearly to alleviate the financial burden of property owners who failed to obtain tenants for their properties" (see *BFC Development LLP v Comptroller of Property Tax* [2013] 1 SLR 1053 ("the Judgment") at [18]). As such, it would be inconsistent with legislative intention to construe the word "unoccupied" such that owners who had already secured tenants could be eligible for the vacancy refund. The Judge rejected the Appellant's reliance on a number of English cases for an alternative definition of "occupation" which was rooted in "enjoyment of the property". He opined that these cases were decided in a different legislative context as in England property tax is levied on occupiers of property, whereas in Singapore it is imposed on owners of property regardless of whether the property is occupied or used.

7 The Judge further rejected the Appellant's argument that there was no need for *all* four conditions for refund stipulated in s 8(4) of the Act to be fulfilled throughout the entire Claim Period and that vacancy refund could still be sought after a tenant had been found so long as no rent was payable in respect of such Claim Period. The Judge opined that the condition at s 8(4)(*b*) of the Act presupposed that *no tenant had been found* for the Units. In this case, the conditions at s 8(4)(*b*) ceased to be fulfilled once tenants had been found for the Units (see the Judgment at [19]-[20]).

8 The Judge then went on to find that the tenants' taking of possession of the Units gave them a sufficient degree of control so as to constitute occupation. Therefore, he found "possession" to be the touchstone of "occupation" for the purposes of s 8(1) of the Act (see the Judgment at [21]–[22]).

9 Finally, the Judge also rejected the argument that refunds ought to be made during any period where rent was not collected. In his view, to accord determinative weight to the receipt of rent would open the vacancy refund scheme to abuse, as owners could grant their tenants long rent-free periods and simply backload the rent after the commencement of the lease (see the Judgment at

[33]).

The arguments

10 It is not disputed that the words "unoccupied" and "vacant" are synonymous under s 8 of the Act. [note: 10] We should at this juncture explain that in the operative provision of the Act, which is s 8(1), the word "occupation" is not used and instead the word "unoccupied" is used. We do not think it matters. The word "occupation" is a noun denoting that the property is being occupied. The word "unoccupied", an adjective, bears the reverse sense of "occupied". It is pertinent to note that the word "occupation" is indeed used in s 8(4) which provides, *inter alia*, that no refund will be allowed unless the property "is in good repair and fit for occupation". Therefore, in our opinion, there cannot be any doubt that the basis (assuming that the other requirements prescribed in s 8(4) are fulfilled) upon which a refund will or will not be effected under s 8(1) is the fact of "occupation" and parties have submitted (both here and below) on that basis.

11 As was canvassed in the court below, the Appellant's case before us is based on a definition of "occupation" used in English rating cases. The Appellant argues that there can be no occupation where premises are unfurnished and not ready for use for the particular tenant's purposes. The Appellant also contends that the Judge erred in disregarding the English rating cases on the ground that they were irrelevant. It takes issue with the Judge's stance of equating possession with "occupation" for the purposes of the Act, arguing that the two concepts are legally distinct. In relation to s 8(4) of the Act, it points out that Parliament's intention in imposing the conditions set out therein was to exclude owners who had no intention of letting out their properties at all, rather than denying refunds to those who had through diligence secured a timeous tenancy. [note: 11]

12 The Respondent's case is that the Judge correctly apprehended Parliament's intention, and that the vacancy refund was introduced for the specific and limited purpose of providing relief to an owner who is genuinely unable to let out his property. It argues that the shade of meaning for "occupation" which is most consistent with Parliamentary intention is a "sufficient measure and control" over the premises held by the tenant *vis-à-vis* the owner. This sufficiency of control is in turn best demarcated by the tenant's taking over possession from the owner, regardless of whether the tenant then goes on to fit-out the premises or commence substantive use. [note: 12] Finally, the Respondent says that the conditions prescribed in s 8(4) have to be fulfilled throughout the Claim Period, to guard against abuse lest claims be made in respect of long periods during which the conditions are not fulfilled. [note: 13] The Appellant would not have fulfilled the s 8(4) conditions once tenants had been found for the Units because it could no longer be said that the Appellants were still making reasonable efforts to obtain a tenant, or demanding a reasonable rent. [note: 14]

Issues in this appeal

13 On the arguments, the following issues arise for our consideration:

(a) what is Parliament's intention behind the vacancy refund scheme as encapsulated in s 8 of the Act;

(b) was the Judge correct in his interpretation of the term "occupation" as used in s 8 of the Act; and

(c) the significance of the four conditions under s 8(4) of the Act, and whether, in the circumstances in relation to the Units, they were fulfilled during the Claim Period.

Legislative history and Parliamentary intention

14 As this court recently reiterated in *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 (at [16]), the purposive approach mandated by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act") takes precedence over common law principles of statutory interpretation. Section 9A of the Interpretation Act provides as follows:

> 9A.-(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.
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> (2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material -
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> (*a*) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
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> (*b*) to ascertain the meaning of the provision when -
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> (i) the provision is ambiguous or obscure; or
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> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.

15 Purposive interpretation is all the more necessary given that the term "occupation" has been recognised as having no single legal meaning applicable in all circumstances, but is capable of taking on different shades of meaning depending on the purpose for which the term is being used (see *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] 1 AC 329 at 334F –335C) ("*Graysim Holdings*"). It is therefore necessary to examine the legislative history of the vacancy refund provision and see what this reveals about the purpose of the provision.

A brief history of the vacancy refund provision

16 The vacancy refund provision can be traced back to s 59 of the Straits Settlement Ordinance of 1913 (No 8 of 1913) ("the 1913 Ordinance"). The section was worded as follows:

> 59(1) Where a building is unoccupied and *no rent is received* in respect thereof during the period of one calendar month or thirty consecutive days part of a half-yearly period in respect of which a rate has been paid under the provisions of section 58 and notice has been given in writing to the Commissioners of its being unoccupied the Commissioners shall refund a proportionate part of the amount paid in respect of such part of the said period as shall have elapsed after the date of the giving of such notice aforesaid. [emphasis added]
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> ….

17 There appears to be no particular English statute to which this section can be traced. However, it is possible that this exception, based as it was on the fact that property was unoccupied, could

have been coloured by the English concept of tax liability. In England, rates are levied on the occupier rather than the owner of property; a property which is unoccupied and/or unused is not subject to rating (see *Ryde on Rating: The Law and Practice* (Butterworth & Co, 13th Ed, 1976) at p 28). Further, quite apart from the fact that under our law, property tax was levied on the owner and not the occupier, what was provided in s 59(1) of the 1913 Ordinance had other differences from the English rating system – an owner who kept the property vacant and was not collecting rent would be entitled to a refund. However, where a property was in fact unoccupied but rent was in fact received by the owner, the latter would have to pay rates on the property even though it was unoccupied by the tenant, a situation which under the English scheme no rates would have been payable.

18 Section 59(1) of the 1913 Ordinance was subsequently amended and was replaced by s 60 of the Municipal Ordinance (Cap 133, 1936 Ed) ("Municipal Ordinance 1936") which read:

> 60(1) If any building is unoccupied and no rent is payable in respect thereof during a period of not less than one month, part of a half-yearly period in respect of which a rate has been paid under the provisions of section 59, the Commissioners shall refund a part of such rate proportionate to the period during which the building has been unoccupied.
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> ...
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> 60(4) No refund shall be allowed in respect of any building, unless the owner proves to the satisfaction of the Commissioners –
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> (*a*) that such building is in good repair and fit for occupation;
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> (*b*) that every reasonable effort to obtain a tenant has been made;
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> (*c*) that the rent demanded is a reasonable one;
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> (*d*) that the building has been vacant during the whole period in respect of which refund is claimed:
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> ...

19 The changes made to the 1913 provision related to the introduction of the four additional conditions prescribed under s 60(4) of the Municipal Ordinance 1936 and their object would appear to ensure that a building's fulfilment of the two conditions under the 1913 provision, namely, the property being unoccupied and no rent being received in respect thereof, were not deliberately brought about by the owner. Therefore the changes required the owner to show that he was genuinely looking for a tenant (thus the requirements that the property must be in a fit state, reasonable effort must be made to seek rental and the rent asked for must be reasonable). An owner who allowed his property to fall into a dilapidated state would not be permitted to claim for a refund even though the property might be vacant. So hoarding of a property with the hope of capital appreciation was discouraged.

20 The next significant change to the property tax regime occurred in 1959. Prior to that, property tax, or rates as they were then called, were levied on owners of property by the then city and/or district councils for the provision of local services. With the attainment of self-government in 1959, the city and district councils were integrated into a one-tier government, and with that local rates were replaced by a property tax which was to be paid directly by the owner to the consolidated fund of the government. The vacancy refund provision was omitted from the newly-enacted Property Tax

Ordinance 1960 (No 72 of 1960) ("the 1960 Ordinance"). One of the reasons for the omission given by the then-Minister of Finance, Dr Goh Keng Swee ("the Minister"), during the second reading of the Property Tax Bill, was that a vacancy refund scheme based on occupation was inconsistent with a system where tax was levied on owners (as opposed to occupiers) based on their ownership of property. He said (see *Singapore Parliamentary Debates*, Vol 14, Col 896 (29 December 1960)):

> It is proposed to make it mandatory for any person who owns property which has not been assessed to give notice thereof to the Chief Assessor. It will also be mandatory for him to notify the Chief Assessor when a building ceases to be occupied by the owner thereof and is let. *Because the tax is a tax on the ownership of property irrespective of whether it is occupied or not, refunds of tax for 'letted' buildings which have become unoccupied during the tax year will cease.* [emphasis added]

21 The Judge read the Minister's speech as indicating that the vacancy refund provision was omitted due to a change to the basis upon which property tax was levied, *viz*, from beneficial use to ownership (see [14] and [31] of the Judgment). In fact, no change was made with regard to the basis of taxation in 1960. Rates had always been levied against "owners", as statutorily defined under the various tax laws prior to the 1960 Ordinance. Section 21 of the Indian Legislative Act No 27 of 1856, which statute applied to Singapore when it was under the legislative authority of the Governor General of India in Council, provided for a rate based on the annual value of an immovable property to be paid by its *owner* in half-yearly instalments. The owner's liability for rates was retained in s 58(3) of the 1913 Ordinance, and in s 59(3) of the Municipal Ordinance 1936.

22 It would appear that the new, consolidated tax regime introduced in 1960 turned property tax from an avenue to obtain funds to finance local services, into a policy tool to encourage development and discourage vacancies (see N Khublall, *Singapore Property Tax: Law and Valuation* (Longman, 1988) at pp 21-22 and Leung & Usilappan, *Property Tax in Singapore and Malaysia* (Butterworths, 2nd Ed, 1997) ("*Leung & Usilappan*") at p 20). This was so as the Minister went on to say (see Singapore Parliamentary Debates, Vol 14, Col 904 (29 December 1960)):

> Today we know that there is a shortage of housing. It is very difficult to get accommodation at reasonable rents. There is no excuse whatsoever for any large number of houses to go vacant for any long period of time. If that happens, it merely means that the land-owners are charging too high a rent. This being the case, it is only fair, taking the long-term view of their net income, that they should pay tax during the periods when their property is vacant.
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> In the event that there is a slump - one does not know, of course, what the future governments would be then, of course, the situation may arise where there is a surplus of housing and many houses are vacant, although the rents charged are quite reasonable. In that event of course, there would be a case for reconsidering the position. *But in the present circumstances, where there is a shortage of housing, it is absolutely scandalous that any large numbers of houses should be vacant. If the tax on vacant houses will have the effect of inducing landlords to lower their rent, then I think we will have achieved a very desirable social objective*.
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> [emphasis added]

23 It was therefore policy needs rather than legal inconsistency which brought about the removal of the vacancy refund provision. The proposed removal indeed caused a heated debate in the Legislative Assembly. The speeches of the opposing Members of the House gave some insight into the purpose and justice of the vacancy refund provision. Legislative Member AP Rajah argued that there was no basis to levy property tax on an owner of a vacant house which was not utilising municipal

services; and that the removal of the vacancy refund provision would unfairly prejudice those who chose to park their money in property rather than in the bank (see the Second Reading of the Property Tax (Amendment) Bill 1960 in Singapore Parliamentary Debates, Vol 14, Cols 898-900 (29 December 1960)). Legislative Member Seow Peck Leng also argued that the four conditions built into the vacancy refund scheme ensured that the refund was limited to cover properties genuinely intended for letting, as opposed to those which were "kept vacant purposely for the benefit of the owner" (*ibid* at col 903). However the housing shortage concern ultimately won the day and the Bill was passed by the House without the vacancy refund provision.

24 As it turned out, the housing situation improved in 1963 and consistent with what the Minister said in 1960, the vacancy refund provision was re-introduced in the Property Tax (Amendment) Ordinance 1963 (No 25 of 1963) ("the 1963 Ordinance"). Section 6A of the 1963 Ordinance provided as follows:

> Where tax has been paid under the provisions of this Ordinance in respect of any building the Comptroller shall, subject to the provisions of subsections (2) and (3) of this section, refund a part of such tax proportionate to any period during which the building is unoccupied: ...

25 At the Second Reading of the Property Tax (Amendment) Bill the Minister gave the following explanation for the re-introduction of the vacancy refund provision (see *Singapore Parliamentary Debates*, Vol 22, Col 1019-1020 (19 December 1963):

> But when the property tax was imposed in 1961 [the year from which the 1960 Ordinance came into force], no provision was made for a refund of tax on unoccupied buildings as the tax was on ownership of property as an additional source of general revenue. Unlike the former rates, it covered the cost of services provided by the local authorities. There was also at that time an acute shortage of housing and it was intended to discourage house owners from exploiting the situation by holding the houses in vacancy in the hope of
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> collecting higher rentals later. Due to the successful efforts of the Housing and Development Board and due to extensive private development, the housing shortage has eased considerably since then. And it is now possible to allow a house owner, who has made a genuine effort to let out his house at a fair rental but has failed to do so, to claim a refund of tax for any period his house has been vacant for 30 days or more continuously.

26 The reappearance of the vacancy refund provision was therefore as policy-driven as its removal had been. The consistency of refunds premised on occupation in a taxation regime based on ownership was not discussed in the Legislative Assembly. The vacancy refund has therefore continued to exist as somewhat of an anomaly in our ownership-based property tax regime. As will be seen, much of the difficulty faced in interpreting the term "occupation" in the present case has arisen from the amalgamation of a regime in which tax is levied based on ownership regardless of beneficial use, but with a refund scheme based on the wholly distinct ground of "occupation" used in English rating law.

27 After the 1963 Ordinance, the vacancy refund provision underwent a number of amendments, most significantly the Property Tax (Amendment) Act (No 46 of 1996) which introduced a new procedure for making vacancy refund claims. However the substance of entitlement to the vacancy refund remained unchanged, and the provision took its current form in s 7 of the Property Tax Act (Cap 254, 1997 Rev Ed).

Purpose of the vacancy refund provision

28 Why then did the Legislative Assembly (which upon Singapore attaining independence in 1965 became known as Parliament and for ease of reference, we will hereinafter refer to the Legislature Assembly as "Parliament" too) decide to reinstate the earlier vacancy refund to owners when the housing situation had improved in 1963? It seems to us that some merit was seen by the government in the vacancy refund scheme which Parliament was happy to make available to property owners, as long as the economic and housing situation here so permitted.

29 The parties agree that s 8 of the Act is intended to apply to properties which are unoccupied and which are intended for letting. That this is the ambit of the provision can be seen from the Parliamentary debates, which referred to "refunds of tax for 'letted' buildings which had become unoccupied" (see [20] and [22] above) and an owner who "has made a genuine effort to let out his house at fair rental but has failed to do so" (see [25] above). Further, the four conditions set out in s 8(4) of the Act quite clearly restrict the ambit of s 8 of the Act to owners who can show that they genuinely intended for their properties to be let out. This is also recognised in *Leung & Usilappan* at pp 93-94:

> The tax refund for vacancy is only given where a building is vacant when the owner is unable to get a tenant meanwhile. In support of this policy, [there are four conditions] for the giving of the refund… No refund is given for a property left vacant for sale or for any other purpose.

30 The Respondent argued that it was clear from the Parliamentary speeches that the vacancy refund was meant strictly for owners of properties who had failed to secure any tenants, rather than those who had secured tenants but whose rent paying period would only start later. Furthermore, the omission of the phrase "and no rent is payable" from s 6A of the 1963 Ordinance lent support to the view that receipt of rent was irrelevant to the question of entitlement to the vacancy refund.

31 We agree that there is no reference in the Parliamentary speeches to the receipt of rent, but only to the property being unoccupied and provided there must have been a genuine procurement of a tenant for the property. In our view however, a more realistic reading of the Parliamentary speeches suggests that the reference to procurement of a tenant instead of receipt of rent merely shows that Parliament recognised that a property could well be occupied and yet no rent was received by the owner. This could happen when the rent payable was made in kind or based on some other non-monetary considerations such as love and affection, which could occur where the owner lets a relative reside therein rent free. To allow a refund of the property tax in such circumstances would be wholly unjustified. We note that the reasons why the words "and no rent is payable" were omitted from the 1963 Ordinance were never discussed. Nonetheless, we think it both fair and sensible to regard the underlying purpose of the vacancy refund scheme as the provision of *financial relief to an owner who is not able to reap the return for which his property was intended, through no neglect or unreasonableness on his part*. As the Judge himself put it at [18] of his Judgment, Parliament's intention was to "*alleviate the financial burden* on property owners who have failed to obtain tenants for their properties despite having expended reasonable efforts to let out their properties at a fair rental" (emphasis added). The conditions prescribed in ss 8(4) and (5), read together with the Parliamentary speech cited at [25] above, show that this financial relief was deemed not appropriate where the owner brought the financial burden upon himself by depriving himself of a tenant and therefore rent, because he has not made reasonable efforts to secure a tenant, or insists on charging too high a rent. On the other hand, it was deemed appropriate to grant a refund of the property tax where the owner was deprived of financial return on his property (a) despite his best efforts at securing a tenant or (b) because the property is undergoing essential repairs and is therefore not able to take a tenant.

32 We are, therefore, unable to agree with the Judge that Parliament's intention was to only grant

financial relief to owners unable to secure tenants and not to an owner who agrees with a tenant under a lease where the date from which the tenant would occupy the premises and pay rent would be on a date later than the date on which the lease agreement was executed ("the gap period"). Having secured a tenant who would only occupy it from a future date does not mean that the condition specified particularly in s 8(4)(*b*) has not been fulfilled. Until occupation, the premises would still be vacant. But understandably, in this situation, no sensible owner would be making any further efforts to find a tenant to occupy the premises for the gap period. And realistically, no matter how hard he tries he would be most unlikely to find a tenant to fill the gap period. Every owner would naturally want to have the tenancy start on the day the lease agreement is executed. But reality is reality. The tenant-to-be may need time to arrange his own affairs. We do not think that the Respondent will be contending, in such a straightforward situation, that no refund should be made in respect of the gap period. It would be wholly unreasonable to deny the owner a refund simply because he did not make any effort to get a tenant for the gap period. In a sense, this argument, if made, would show a lack of appreciation of things on the ground and run contrary to the rationale behind the vacancy refund provision. We recognise that there is a slight difference in the situation in the present case in the sense that while effective tenancy of the Units (and for which the tenants-to-be would be using the Units for the purposes intended and paying rent) would only commence later, the owner had agreed to allow the tenants-to-be of the Units to take possession and carry out fitting-out works in the Units during the gap period to meet their physical needs. This is the cause of the different stances adopted by the parties in this appeal. The way we view the problem is simply this. Suppose, for the sake of argument, that it is provided in the lease agreements that *the owner* (instead of the respective tenants-to-be) will carry out the fitting out works during the gap period. We do not see how the Respondent can reasonably deny the owner's entitlement to a refund of property tax for the gap period. Apart from the general scheme of things implicit in the vacancy refund provision, s 8(5) is particularly germane. The only question that remains is whether the identity of the person who carried out the fitting-out works would be relevant. Why should it make a difference that instead of the fitting-out works being carried out by the *owner* himself, it is *the tenants-to-be* who are permitted to carry out the fitting out works with possession to the premises being granted by the former to the latter for that very specific purpose?

Various definitions of "occupation"

33 Before we come to answer this question it may be useful to do an analysis of the word "occupation": what shade of meaning of the term "occupation" should be adopted which would best promote the legislative object of granting financial relief to owners of rental properties as envisaged under s 8 of the Act?

34 Two shades of meaning of the term "occupied" are raised for our consideration. The appellant's suggested meaning is the *enjoyment and use of the premises for the purpose for which those premises were created*. This is the definition adopted under English rating law, where rates, as mentioned earlier at [17], are levied on the occupier rather than the owner. "Occupation" under English rating law is defined as that which is actual, exclusive, sufficiently permanent and beneficial (see *London County Council v Wilkins (Valuation Officer)* [1957] AC 362 and *Ryde on Rating* at p 27). In *Jones v Mersey Dock and Harbour Board* (1864) 11 HLC 443 Lord Blackburn stated that (at 462):

> It is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate.

35 An illustrative case is *Arbuckle Smith & Co Ltd v Greenock Corporation* [1960] 1 AC 813

("*Arbuckle Smith*"). The question there was whether a warehouse, which was undergoing alteration works so as to render it suitable for its intended use as a bonded store, was considered "unlet, unoccupied or unfurnished" so as to be relieved of rates under s 243 of the Local Government (Scotland) Act 1947 (c 43) (UK). The House of Lords found that the making of alterations with the intention of later carrying on a business did not constitute rateable occupation within the meaning of the said act. As Lord Radcliffe explained (at 827-828):

> …the principle [is] that, to be a rateable occupier, a person must enjoy some benefit from the land: his occupation must be "a thing of value." The explanation has been said to be that the owner of an empty house does not use it "as a house" within the meaning of the original Poor Relief Act of 1601 (see *per* Lord Atkinson in *Liverpool Corporation v. Chorley Union Assessment Committee* [[1913] AC 197 at 211]); and it has been decided at various times that, while putting the owner's furniture in the house does set up rateability, presumably because some use of it as a house, is being obtained, keeping a caretaker in the house merely as a custodian does not constitute occupation by the owner.
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> It is evident, therefore, that there will not be occupation in the context of rating unless some use is made of the hereditament in the course of the relevant year. "Use" is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed.
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> [footnotes in original omitted]

Lord Reid also said (at 824):

> But I can see a clear distinction between maintaining, repairing or improving the fabric, on the one hand, and enjoying the accommodation which it provides, on the other. And I think that it would accord with the ordinary use of language to say that the owner who in some way enjoys the accommodation is occupying the premises, but that the owner who merely maintains, repairs or improves his premises is not thereby occupying them: he is preparing for future occupation by himself, his tenant or his disponee.

36 As can be seen, the definition of "occupation" in English law involves both physical presence in the form of one's person or possessions, and beneficial use for the purpose for which the premises were intended. This definition has been employed also in non-rating situations where the statutory scheme places emphasis on the purpose for which property is held. In *Graysim Holdings*, the question raised was whether premises were "occupied by the tenant and are so occupied for the purposes of a business carried on by him", so as to entitle the tenant to tenancy protection under Part II of the Landlord and Tenant Act 1954 (c 56) (UK) ("the Landlord and Tenant Act"). The court interpreted "occupation" as "some physical use of the property by the tenant for the purposes of his business" (at 335C). In *Poland and anor v Earl of Cadogan* (1980) 40 P & CR 321 ("*Poland*"), the question was whether a tenant "occup[ied] a house as his residence" so as to enable him to acquire the freehold of the house under s 1 of the Leasehold Reform Act 1967 (c 67) (UK). In both these cases the court expressly drew on the definition of occupation as applied in rating law.

37 On the other hand, the Respondent advocated a definition of occupation that was tied to a "sufficient measure of control". This definition was applied in *Lee Wah Bank Ltd v The Commissioner of Federal Capital of Kuala Lumpur* [1962] 1 MLJ 23 ("*Lee Wah Bank*"), where the court stated that a holding undergoing construction work could not be regarded as "unoccupied" because the bank's building contractors and workmen were in continuous possession and physical occupation of the holding, and had sufficient control to exclude strangers. The Respondent also cited the Privy Council

decision in *Newcastle City Council v Royal Newcastle Hospital* [1959] 2 WLR 476 ("*Newcastle*"). The question there was whether land kept vacant for the purpose of providing fresh air and quiet surroundings for the adjacent hospital owned and occupied by the Respondents qualified for a statutory tax exemption by virtue of being "used or occupied by the hospital". The Respondent in the present case cited Lord Denning's comment that "occupation is a matter of fact and only exists where there is a sufficient measure of control to prevent strangers from interfering" (at 479), in support of its preferred definition of "occupation".

38 The Respondent however went a step further and argued that the "sufficient measure of control" which characterised "occupation" was for the purpose of the Act fulfilled when a tenant took possession of the Unit. In other words, "possession" of the property by the tenant should be the demarcator in determining whether the Units ceased to be "unoccupied". The Judge adopted this argument as a "sensible and workable solution". He opined that in this sense "the right to occupy is equated with occupation even if the tenant has not factually shifted into the units" (at [22] of the Judgment).

Our decision on the meaning of "occupation" to be applied

39 We find that the meaning of "occupation" advocated by the Appellant best advances the intention of Parliament when it re-introduced the vacancy refund provision in 1963. Viewed in its proper context, the vacancy refund is really a means of granting financial relief to the owner of the property for his inability to obtain the use value of his or her property. When an owner is staying in the property, he does not receive rent but has personally enjoyed the value of his own property. When the owner neither stays in the property nor attempts to rent it out because he wishes to sell it with vacant possession, it may be said, in an extended sort of sense, that he is enjoying the financial advantage of that potential value. In any event, in the context of the vacancy refund scheme, when an owner does not reside therein and does not want to rent it out, then there can be no basis for such an owner to claim a refund as the very premise for claiming a vacancy refund is that the owner must have the intention to let out the premises for rent. In the absence of such an intention the owner would not be entitled to a refund. When the owner holds out a property for rental, the intended use value of the property is clearly the rent. It seems to us entirely consistent to view the vacancy refund scheme as alleviation from the tax burden for someone disadvantaged by not being able to realise that use value. To attribute the sense of beneficial use to the term "occupation" best captures this paradigm, because the beneficial use of the property can be seen as the ability to realise the use value of the property as it was intended to be used. In this regard, we are not referring to the beneficial use by the *tenant-to-be* when he is carrying out the fitting-out works, but the beneficial use by the individual bearing the tax burden and for whom the relief was meant, *ie*, the *owner*. Whether the conduct of fitting-out works counts as beneficial use by the *tenant* is a separate question. In any case, we are also convinced that when fitting-out works are being conducted, even the *tenant* is not obtaining the beneficial use of the premises for which he intended them. We accept the proposition made in *Arbuckle Smith* concerning the status of premises undergoing renovation to make them suitable not merely for habitation but for the purpose for which they were intended (see [35] above). It is also significant, in our view, that s 8(5) of the Act identifies the conduct of essential repairs, coupled with the vacant state of the premises, as a situation in which the vacancy refund may be granted. While a distinction may be drawn between repairs and fitting-out, the reality of the situation is that, given s 8(5) of the Act, Parliament accepted that buildings undergoing works so that they could be used for the intended purposes, could not be put to beneficial use by anyone and therefore a lack of tenancy in such circumstances would be wholly expected and excusable. As a matter of principle, it should not matter whether the works are commissioned by the owner, the tenant-to-be, or by someone else. It is the condition of the property which is under examination. The identity of the person commissioning the works is irrelevant. The truth of the matter is that when

fitting-out works are being carried out, no one is really enjoying the use of the premises. To say that during the fitting-out period such tenant-to-be (assuming he was commissioning the works) is enjoying the use of the premises is to take a wholly strained and artificial view of the situation.

40 The Respondent has argued that the definition of "occupation" adopted in the English rating cases was of limited relevance because it was developed in a rating regime based on occupation rather than ownership. The Judge accepted this argument. We acknowledge that under our law the concept of occupation does not underpin the determination of whether properties are assessable for property tax. However, despite the fact that ownership has always been the basis for tax liability under the Act, Parliament has instead chosen to make *occupation* the basis for determining entitlement to the vacancy refund. We therefore see no reason why this court should not, when construing the vacancy refund provision, fully consider the spectrum of definitions which the word "occupation" is capable of taking on in different contexts, and then select the definition which best gives effect to the legislative purpose of the vacancy refund provision.

41 Conversely, we have difficulties with the Respondent's argument of equating a tenant-to-be's taking possession of a Unit with "occupation" under s 8 of the Act. Our difficulties are twofold.

42 First, it is well-established that the concept of legal possession is quite distinct from "occupation", whatever the shade of definition we may adopt in relation to the latter. In Gray and Gray, *Elements of Land Law* (Oxford University Press, 2009, 5th Ed) ("*Gray & Gray*") at p 153 it is stated that:

> At common law the phenomenon of "possession" involves much more than a bare physical occupancy of land. Indeed, a person may be in "possession" of land without being in occupation of it at all. Possession is an inherently behavioural phenomenon which incorporates a particular mindset. Far from connoting mere factual presence upon land, possession is constituted by a range of inner assumptions about the power conferred by such presence. The relevant emphasis is on the deliberate, strategic control of land... For this reason, whereas "occupation" is a question of *fact*, "possession" is a conclusion of *law*... [emphasis in original]

43 It is of interest to note that *Gray & Gray* states that a person can be in possession of land without being in physical occupation. This point was indeed made in the early English case of *The Queen v The Assessment Committee of St Pancras* (1877) 2 QBD 581 ("*St Pancras*"), which raised the question whether advertisement hoarding erected on the façade of an otherwise empty house by a licensee of the owners constituted rateable occupation, and wherein Lush J opined that (at 588):

> It is not easy to give an accurate and exhaustive definition of the word "occupier". Occupation includes possession as its primary element, but it also includes something more. Legal possession does not itself constitute an occupation. The owner of a vacant house is in possession, and may maintain a trespass against any one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he made not reside in it one day in a year.

44 A right or intention to occupy, without more, does not qualify as rateable "occupation" under English law. In *Associated Cinema Properties, Limited v Hampstead Borough Council* [1944] 1 KB 412, a case concerning the ratability of premises kept empty as reserve offices in the event that the company's ordinary offices might be bombed during the war, the English Court of Appeal stated that (at 416):

> In our judgment, a mere intention to occupy premises on the happening of a future uncertain event, cannot, without more, be regarded as evidence of occupation.
>
> …
>
> … intention is relevant only when it goes to show present occupation and user.

45 It is clearly well-established that possession and occupation are distinct concepts both within and without the context of rating, the former being a legal relationship with land while the latter involves a degree of physical presence, with enjoyment of the premises. Such enjoyment could be by the owner, by a tenant who pays rent, or by someone who is using the property rent-free. In the present case, the Respondent sought to rely on Lord Denning's dicta in *Newcastle* that "occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from entering" (see [37] above). It was argued that when a tenant took possession of the premises, he acquired a sufficient measure of control to exclude strangers, and should therefore be treated as having occupied the property under the *Newcastle* formulation. The Judge agreed with this reading and stated that the right to occupy could, for the purpose of the Act, be equated with occupation. With respect, this reading of *Newcastle* overlooks the context in which the comment was made. In fact, Lord Denning in that passage had expressly drawn the distinction between legal possession, which the hospital in question clearly had, and occupation. He said (at 479 – 480):

> The hospital was undoubtedly in legal possession of the 291 acres; for the simple reasons that, where no one else is in possession, possession follows title. *But legal possession is not the same as occupation.* Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering... *There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole.* [emphasis added]

46 It seems then that the type of control associated with occupation is control arising from a degree of physical presence. A number of cases illustrate. In *Wandsworth LBC v Singh* (1991) 62 P & CR 219, a public authority was found to be the occupier of an open public space for the purpose of the Landlord and Tenant Act, because it exercised a sufficient degree of physical presence and control on the facts, by way of its investment in and maintenance of the public space through its agents or servants (at 229-230). In *Lee-Verhulst (Investments) Ltd v Harwood Trust* [1972] 3 WLR 772, which also was concerned with the same Act, the court opined that the natural and ordinary meaning of "occupied" in the context of that Act involved an examination into the degree of control exercised by the alleged "occupier". Sachs LJ said that (at 778E–F):

> … it is neither necessary nor desirable to provide a universal definition of that word [occupation] which would deal with all the greatly varying sets of circumstances that can exist. As a number of elements have been taken into account, *each of a physical nature and each involving a degree of presence on the part of the tenant personally or by goods under his ownership*, it is however as well to observe that it could be proper in some other case to reach the same conclusion even if one or more of those elements were subtracted...Much depends on questions of degree… [emphasis added]

47 In our opinion, the Respondent's and the Judge's equation of a legal entitlement to occupy with occupation finds little support in authority. We appreciate that the Judge was contemplating a practicable solution against the background of what he understood to be Parliament's intention behind the vacancy refund provision. However, given our understanding of Parliamentary intention (as stated at [31] above), we find it unnecessary to make the somewhat awkward link between the taking of possession and the fact of occupation.

48 Second, even if it were accepted that a sufficient degree of control, demarcated by the event of taking possession, is to be equated with occupation, such an interpretation does not in fact sit well with the construction of s 8 of the Act. Rather, it creates an arbitrary distinction between possession or occupation by the owner and that by a tenant. An owner who has vacated his property because he intends to let it out, but has failed to secure a tenant and/or hand over possession to a tenant, would retain control and have legal possession over the empty and unused property. However, it would be contrary to the legislative purpose of s 8 of the Act to say that the property is, by virtue of the owner's continued legal possession, "occupied" (by the owner) and therefore not entitled to the vacancy refund. In fact, if that were the case, property would never be truly "unoccupied" and an owner of such property could never claim a vacancy refund. The problem is compounded when one considers s 8(5) of the Act. This subsection essentially allows an owner of a property which is *both* "vacant" as well as undergoing essential repairs, to claim a vacancy refund, without having to show that efforts have been made to let out the property at a reasonable rent. However, an owner conducting repair works on his property would necessarily be in "sufficient control" or "possession" of the property. Therefore, if this were taken to be the demarcator of "occupation", then a property undergoing repairs could never be regarded as "vacant", and the owner will not be able to rely upon s 8(5) of the Act to claim the refund, thus defeating the purpose of s 8(5). The Respondent's counter to this is that whether a property is "unoccupied" must be construed in relation to the position of the owner-landlord. [note: 15] The Respondent argues that a property will be occupied *vis-à-vis* the landlord/owner for the purposes of s 8 only once a tenant takes possession of the property from the landlord/owner. In other words, the only occupation relevant for the purpose of s 8 of the Act would be the occupation (and therefore possession) of a *tenant* and not that of an owner. We are unable to accept this dichotomy because nothing in the words of the Act or in the relevant Parliamentary debates sanctions such an approach.

49 To conclude, we find that in the context of the scheme envisaged under s 8 of the Act, the term "occupation" should be construed to mean beneficial use for the purpose for which the property is intended. In so far as the property is for obtaining rental, this purpose must be the collection of rent. On the other hand, if the owner were to permit a relative to occupy the property rent-free, the beneficial use is the enjoyment of the premises by the relative, not the collection of rent. Possession *per se* should not be the basis to determine whether an owner would be eligible for property tax relief under s 8 as a property, even when not occupied by anyone, would be under the possession of the owner. To say therefore that because the owner was in possession he would not be eligible for the refund would run counter to the object of the vacancy refund scheme. As stated by Lord Denning in *Newcastle* (see [45] above) "legal possession is not the same as occupation". Occupation is a question of fact which has to be established. Nor is there any basis for the Respondent's contention that when a tenant-to-be was given early possession of the property by the owner-landlord for the specific purpose of fitting out (which is not in dispute), such possession by the tenant-to-be would constitute occupation, in the sense of the tenant-to-be having had the enjoyment of the property. With respect, this would be a skewed interpretation of the situation.

50 Before we move away from this issue we wish to make one further observation. It is a well-established practice in the property rental market in Singapore that tenants which require a big space for their business often ask for a rent-free fitting-out period to do the necessary pre-occupation works in order to ensure that the premises would be in a state to meet the physical needs of their business. Let us suppose that the lease is for five years with a three month rent-free fitting-out period. If one were to say that occupation starts from day one of the fitting-out period, one would have to recognise that the monthly rent specified in the lease agreement is not really the true rent received monthly by the owner-landlord. The true monthly rent will involve working out the total rent received during the entire five year period and dividing it by 63 instead of 60 months ("the lower

sum"). That is the reality of the situation. Consistently the Respondent must be prepared to reckon the monthly rental to be the lower sum in assessing property tax. Only if such an adjustment is made will it be fair to the owner-landlord. The Respondent has not made any such proposition.

The four conditions of s 8 of the Act

51 Section 8(4) of the Act sets out four conditions which an owner must satisfy before a vacancy refund is allowed. The respondent argues that all four conditions would have to be met throughout the Claim Period before a refund is possible, and here the Appellant would have failed to fulfil the conditions under s 8(4)(*b*) and (*c*) once a tenant was found for the Units. On the other hand, the Appellant argues that only s 8(4)(*d*) needs to be complied with throughout the Claim Period; in any event, even if the respondent was correct to contend that all the four requirements had to be met throughout the Claim Period, the securing of a tenant does not mean that ss 8(4)(*b*) and (*c*) could not be satisfied.

52 We agree that the Judge was correct to find that generally all four requirements must be met before a claim for refund could be allowed in respect of a period. But the requirements must be applied with a certain amount of common sense. It stands to reason that an owner should not be allowed to claim for refund for any period where the property was not let out due to the owner not making any effort to obtain a tenant or demanding an unreasonably high rent. However, we are unable to accept the proposition that once a tenant is found for the property, and where the tenant would only take occupation of it in a couple of months' time, the owner would not be able to claim refund for the gap period because he had made no effort to obtain a tenant for the gap period. It is clear from the Parliamentary debates that the vacancy refund was intended to grant relief to an owner of a building which was at all material times meant to be rented out rather than kept vacant for other reasons (see [20] and [22] above). It was also stated in the course of the second reading of the Property Tax Bill that the four requirements served as "precautionary steps" to prevent an owner who kept his property vacant for other types of benefit, such as sale with vacant possession, from claiming the refund (see the Second Reading of the Property Tax (Amendment) Bill 1960 in *Singapore Parliamentary Debates*, Vol 14, Col 903 (29 December 1960)). In light of this, we think that the four conditions should be understood as a specific mechanism prescribed by Parliament to differentiate between owners who genuinely intended to let out their properties and those who kept their properties vacant for other reasons. As stated earlier at [33], in reality tenants rarely move into property, whether residential or commercial, immediately after confirming their interest in renting the property. One obvious reason could well be that the tenant-to-be was then renting other premises and needed time to give notice, or was waiting for the expiry of his current lease. We must reiterate that the legislative purpose of the four conditions is to discourage the inefficient holding out of property, and not to penalise those who through great efforts managed only to obtain a tenant who wanted the tenancy to start only a couple of months later. Of course the owner could reject such a tenant in the hope of finding someone who would take it immediately. If the owner takes that course he runs the risk that he might not be able to find a tenant for an even longer period than the couple of months which the first tenant-to-be requested. If the owner accepts the first tenant-to-be, one cannot sensibly expect the owner to make any further effort to find another tenant to fill the gap period in order to literally satisfy the condition in s 8(4)(*b*) – no one will take up a tenancy of such a short duration and no estate agent will accept such an engagement. It would be a total waste of time and effort. With respect to counsel for the Respondent, we think that s 8(4)(*b*) should be construed in accordance with the spirit of the provision. The reasoning which we have set out above apply equally here where the gap period was being used by the then tenant-to-be to do fitting out of the premises.

Our decision

53 On the basis of the foregoing analysis, we find that the Appellant met the criteria for entitlement to the vacancy refund under s 8 of the Act. The Units were "unoccupied" during the fitting-out period for the purpose of s 8 of the Act because the Appellant, receiving no rent, was not obtaining the beneficial use of the property for which it was intended. The Appellant would only begin receiving this benefit when the lease commenced, and the tenant started paying rent for its own beneficial use of the Units. For completeness, we would add that the tenants did not obtain beneficial use of the Units for the purpose of their businesses when the Units were undergoing fitting-out works.

54 We also find that the appellant met the four conditions under s 8(4) of the Act throughout the Claim Period. It was not disputed that the Units were in good repair and fit for occupation under s 8(4)(*a*) of the Act, when TOP was granted. As for the conditions under ss 8(4)(*b*) and (*c*), it was not disputed that the appellant had made reasonable efforts to secure tenants by enlisting the services of various estate agents, and by asking for a reasonable rent. The conditions under ss 8(4)(*b*) and (*c*) are therefore also satisfied based on the reasoning we have elaborated on at [51]-[52] above.

55 Before we conclude we need to address the question of abuse if the court were to allow relief in respect of the fitting-out period. In [33] of the Judgment, the Judge stated that allowing relief in these circumstances might encourage the owner to "provide tenants with longer rent-free fitting-out periods in order to claim tax refunds while recouping the rent lost … by back-loading the rent after the [lease formally commences]". However, he also acknowledged that such back-loading of rent "may also have the effect of raising the annual value of the property, resulting in higher taxes being paid by the owner". First, we do not think the question of possible abuse should come into the picture in the construction of s 8. Second, by its very nature a fitting-out period must be relatively short and reasonable. Third, when there is an abuse, the Respondent would no doubt react appropriately. The Respondent need not grant a refund for the entire period claimed. Fourth, for the reason which the Judge himself countenanced — that back-loading could cause the annual value of the property to be enhanced — we do not think such abuses are likely.

56 In the result we would allow the appeal with costs here and below. There will be the usual consequential orders.

[note: 1] See Appellant's Core Bundle of Documents ("ACB") Vol 2 at p 5, para 5

[note: 2] See sample at Record of Appeal ("RA") Vol 3 pp 37-39

[note: 3] See Affidavit of William Bright in ACB Vol 2 at p 5

[note: 4] See RA Vol 3 at p 46

[note: 5] See RA Vol 3 at p 48

[note: 6] See RA Vol 2 at pp 4-12

[note: 7] See RA Vol 2 at pp 23-29

[note: 8] See RA Vol 2 at pp 30-37

[note: 9] See RA Vol 2 at at pp 38-41

[note: 10] See Appellant's Case ("AC") at [9]

[note: 11] See AC at [51]-[55] and [58]-[63]

[note: 12] See AC at [44]-[46]

[note: 13] See AC at [62]

[note: 14] See AC at [65]-[73]

[note: 15] See RC at [46] and [56]

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