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CITY OF VANCOUVER

v.

SCHENLEY HOLDINGS LIMITED

Supreme Court of British Columbia (No. X773/65)

Before: MR. JUSTICE H.W. MCINNES

Vancouver, September 22, 1965

J. Alan Baker, Q.C. for Schenley Holdings Limited
Russell K

Reasons for Judgment

This matter comes before me by way of a case stated by the Assessment Appeal Board on the application of the appellant, Schenley Holdings Limited, the respondent before the Assessment Appeal Board, and the appellant in this Court, pursuant to the provisions of the *Assessment Equalization Act*, chapter 18, R.S.B.C. 1960, and amendments thereto.

The questions propounded by the Board for the opinion of this Court are three in number and read as follows:

> "1. Did the Board err in law in failing to value the land as the property of a going concern?
>
> "2. Did the Board err in law in holding that the principal factor in determining the actual value of the land in question is the market value of land sold in the same area of the city for high-rise apartment purposes?
>
> "3. Did the Board err in law in holding that the improvements were not under appeal and that it could not therefore alter their valuation?"

Certain preliminary objections, three in number, were taken by counsel for the City of Vancouver, namely:

> (1) That I was not entitled to look at the reasons for judgment of the dissenting member of the Assessment Appeal Board.
>
> (I do not require to deal with this because no reference was made by counsel for the appellant in this Court to these reasons, and I have not read them.)
>
> (2) That Question No. 2 involves a finding of fact and is not open to review by this Court.
>
> (3) The same objection applies to Question No. 3.

Inasmuch as I will be dealing with these two latter preliminary objections in the course of my judgment on the main issue, I do not find it necessary to dispose of them at the outset.

I turn, therefore, to Question No. 1 stated *supra*.

Mr. J. Alan Baker, counsel for the appellant in this Court, bases his submission on the wording of section 37 (1) of the *Assessment Equalization Act* and in particular on the concluding words, reading as follows:

> . . . and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, *the land and improvements so used shall be valued as the property* of a going concern." [Italics are mine.]

I find that the Board considered this submission and, in my opinion and with respect, dealt with it adequately in the following language in the majority report at page 2 thereof:

> . . . However, the Respondent takes the objection that all sales used by the Appellant are based on prices paid by developers for the construction of "high rise" apartments. The improvements on the subject lands are not in this category. The evidence is clear that the Respondent's complaint is, as that of many other owners, that his improvements could not compete with the "high rise" developments taking place in the last 2 or 3 years in this area. It therefore becomes clear cut that any diminution in value must be reflected in the value of the improvements. If the Board was to adopt the principle that two identical pieces of land, one occupied by a three-storey apartment, the other occupied by a "high rise" apartment, sitting side by side are to be valued differently, purely because of the under-improvement on the land, it would result in .. potato patch" [sic] assessments or an assessment pattern that bore no relationship to reality. It is not considered necessary to review the many authorities which have established that land must be valued in its highest and best use. Accordingly it follows that the appeals must be allowed and the original assessments restored.

In any event, I do not think it was competent for the Appeal Board to value the property as a going concern having regard to the fact that the assessment of the land only was under appeal. In this connection, I refer to the concluding words of section 37 (1) of the *Assessment Equalization Act* which I italicized when quoting part of the section earlier, namely, "the land and improvements so used shall be valued as the property of a going concern." If the assessment is to be based upon the value as a commercial undertaking, then it follows that both the land and improvements so used shall, as the section says, he valued as the property of a going concern. There being no appeal as to the assessment of improvements, the property cannot be assessed as a going concern.

Dealing with Question No. 2, I refer to the first part of section 37 (1), reading as follows:

> The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value.

In *Regina* v. *Penticton Sawmills Limited* (1954) 11 W.W.R. (N.S.) 351, Sloan, C.J.B.C., says at page 353:

> It seems to me that sec. 30, in its present form, clothes the assessor with a very wide and flexible discretion as to the methods he may pursue in his determination of "actual value."

Again, at page 356, the learned Chief Justice says this:

> We are not, however, in this appeal, troubled with the actual assessment in terms of quantum, but whether or not the assessor erred in principle in adopting as a guide to values the upset price of timber sales, subject, of course, to his adjustment of his assessments as differing circumstances demanded. If the upset price was a mere arbitrary figure with no relation to reality, some criticism might be directed against its use even as a guide, but it is a price arrived at only after a prolonged and careful study of all physical and other factors. It is my view, with deference, that the assessor is within the power conferred upon him by sec. 30 of the said Act when he considers such a price as a guide and indeed an important factor leading to his conclusion of value.

This decision was referred to and followed in the decision of Sheppard, J.A., in *City of Vancouver* v. *The Corporation of the Township of Richmond*. I quote from the judgment of that learned Judge in the Province of British Columbia Stated Cases, *Assessment Equalization Act*, 56, at page 58 as follows:

> There appears nothing in section 37 which requires any or all of the adjoining lands to be considered. It is to be observed that section 37 (1) in designating the items which may be considered, uses language that is permissive and not mandatory, and it is therefore open to the Assessor or others concerned in fixing the value, to consider one or all of those designated items, but it is not obligatory to do so. That was stated in *R.* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351, where Chief Justice Sloan, in construing an equivalent section, said at page 353:
>
> > "It seems to me that section 30, in its present form, clothes the Assessor with a very wide and flexible discretion as to the methods he may pursue in his determination of 'actual value.'"
>
> It is therefore discretionary as to whether adjoining lands be considered. Moreover, section 37 (1) does not state what adjoining lands are comparable, so that their assessed value may be considered to be "other circumstances affecting the value of the lands in question," and hence the question of what adjoining lands are comparable, not being ascertainable from the section, is not a matter of principle, but is in each instance primarily a question of fact.
>
> It therefore follows that in the circumstances of this case the "actual value" is a question of fact and not one of law to be determined from the Statute. That conclusion is supported by authority. In *Dreifus* v. *Royds* (1922) 64 S.C.R. 346, the Chief Justice, in construing a comparable section, said at pages 348 and 349:-
>
> > "I am of the opinion that in a question of this kind as to the 'actual value' of lands for purposes of assessment this Court would not and should not interfere with the finding of fact as to such 'actual value' if there was any evidence to sustain that finding. The Board is constituted of men of experience on questions of this character. They have the great advantage of visiting and viewing the lands in question, and of seeing and hearing the witnesses who may be called to speak to its value. Unless, therefore, the Board misdirected themselves on the proper principles which should govern them in determining this 'actual value,' or obviously reached their conclusions as to such value by adopting and following some wrong or improper principle, this Court would not and should not interfere with their findings."
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> In *Re Coniagas Mines Ltd. and Town of Cobalt* (1910) 20 O.L.R. 322, Moss, CJ.O., at page 325 said:-
>
> > ". . . and the question of the value is simply a question of fact. . . ."

> Further, the "actual value" being here a question of fact is within the jurisdiction of the Assessment Appeal Board under Part VIII of the Statute, but on the other hand is outside the jurisdiction of the learned Judge of first instance who, acting under a stated case, is by section 51 (1) limited to "a question of law arising in connection with the appeal." Hence the assessment by the Board at $600 per acre not being a question of law was not subject to review by the learned Judge, and that assessment should be taken to stand unvaried.

In the instant case it is clear that both properties of the appellant in this Court, which are the subject-matter of this appeal, were zoned as sites for high-rise apartments. It is also clear from the facts recited in the stated case that in respect to the property at 1310 Bute Street some eight properties, which were acquired as sites for high-rise apartments in 1963 and 1964, and the prices paid, were considered. Although it does not appear in the majority report that they were adjacent or nearby properties to the subject property, a perusal of the evidence makes it clear that they were. In the case of the property at 1940 Barclay Street, the prices paid for seven nearby properties acquired as sites for high-rise apartments were considered as a basis for fixing the assessment value of the land.

In the circumstances, and following the decision of Sloan, C.J.B.C., in *Regina* v. *Penticton Sawmills Ltd.*, *supra*, and that of Sheppard, J.A., in *City of Vancouver* v. *The Corporation of the Township of Richmond, supra*, I am satisfied that the Assessment Appeal Board acted within their jurisdiction and within the provisions of section 37 (1) of the *Assessment Equalization Act*, *supra*, and accordingly their findings are findings of fact and are not subject to review by this Court.

I turn now to Question No. 3 propounded by the Board.

I refer first to section 342 of the *Vancouver Charter*, Statutes of British Columbia, 1953, clause 55, and amendments thereto.

Subsection (1) of the said section thereof reads as follows:

> Each parcel entered in the real-property assessment roll shall be estimated at its actual value, the value of the improvements, if any, being estimated separately from the value of the land to which they are affixed.

This indicates clearly that land and improvements shall be assessed separately.

I refer now to the procedure for appeals to the Assessment Appeal Board from the Court of Revision. Section 44 (1) of the *Assessment Equalization Act* reads as follows:

> Where a person is dissatisfied with the decision of a Court of Revision, or with the omission or refusal of the Court to hear or determine the complaint on the completed assessment roll, he may appeal therefrom to the Board.

By section 45 (a) it is provided that the procedure in such an appeal shall be as follows:

> The appellant shall within ten days from the date of the mailing of the notice of the decision of the Court of Revision, serve upon or send by registered mail to the Assessor of the municipal corporation or Provincial Assessor a written notice of his intention to appeal, *and the notice shall contain the grounds of appeal*. [*Italics are mine*.]

In the instant case no notice of appeal was ever filed or given with respect to the assessed value of the improvements, and hence the assessed value of the improvements was not before the Assessment Appeal Board on the appeal to that body.

It may well be that the assessed value of the improvements on the subject properties is too high, having regard to the fact that the property is zoned for high-rise apartments, because the apartments on the property contain only 28 and 20 suites respectively.

I agree with the majority opinion of the Board that it was not open to the Board to consider an appeal on the improvements. It is a matter to be dealt with following a subsequent assessment and not in the instant appeal.

Mr. Alan Baker, in his very able submission, stresses the fact that inasmuch as the subject properties have been zoned as sites for high-rise apartments, the fact that they contained apartment houses not coming within that category would mean that there would be an inevitable diminution of value in the lands because, in order to be utilized for the purpose for which they were zoned-namely, high-rise apartments-these would have to be pulled down at considerable cost.

In *Re Lefeaux* (1963) 37 D.L.R. (2nd) 235. Hutcheson, J., deals with this point when he says, as he does, at page 238:

> The contention of the appellant is that the property is used by him as his residence and is valuable to him only as such and is not upon the market.
>
> That actual value does not, for the purposes of municipal valuation, mean the value to the owner in its present use but rather its present proper and practical use. . . .
>
> As I view the matter the assessor has come to a decision as to the best potential use of the property and valued it on the basis of the price that it can reasonably be expected a property having that potential would bring if offered for sale today. In other words, the present value of the future potential. I find no error in principle in so approaching the matter of assessment.

It is interesting to note that following that judgment, and it may well be that as a consequence of it, an amendment was passed to the *Assessment Equalization Act*, *supra*, in 1964 adding, as clause (e) to subsection (6) of section 37, the following words:

> where the Assessor receives, on or before the first day of November from the owner and occupier of land and improvements, notice in such form as the Assessment Commissioner shall prescribe that the land and improvements thereon were owned and occupied by the applicant as his principal place of residence for not less than five consecutive years prior to the first day of January, 1964, the actual value of the residential land shall, for the purpose of the assessment roll for the succeeding year, be determined under subsection (1) and the assessed value under subsection (3) with consideration given only to the present residential use of the land and without any consideration that the residential land may have a higher actual value for an alternative use or uses or is zoned for an alternative use or uses.

No such relief was offered to the owners of commercial properties.

In the result, the answers to all three questions propounded by the Board in the case stated must be in the negative.

Costs will follow the event.