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NORTHWEST HOLDING SOCIETY

v.

CORPORATION OF DELTA

Supreme Court of B.C. (X660/66)

Before: MR. JUSTICE V.L. DRYER

Vancouver, October 4, 1966

John R. Lakes for the Appellant

A.K. Thompson for the Corporation of Delta

Reasons for Judgment

This matter comes before the Court as a case stated by the Assessment Appeal Board asking for the opinion of the Court in respect of certain matters. The assessment in question relates to certain parcels of land situate on the waterfront at Tsawwassen within the Municipality of Delta. The lots in question are all situate on Indian reserve land and are subject to a lease wherein Her Majesty the Queen as represented by the Minister of Citizenship and Immigration is the lessor and several persons, all members of the appellant society, are the lessees.

The only access to the said lots is either by water or by way of private road through certain lands which are also leased by members of the appellant and are also within the said Indian reserve. The said road is maintained by the appellant at its cost. There are no municipal water, sewage; or garbage-collection services within the lands so held under lease.

The leases referred to have been executed from time to time between Her Majesty and the individual lessees for terms of 30 years with a prescribed rental which is subject to revision every five years, and there are certain restrictions contained in each lease, but in particular the lessee is responsible for the upkeep and maintenance of the private access road to the area. The lands are restricted to use as single-family residences and related purposes only. The rental is subject to renegotiation each five years, and in the event of disagreement the rental is determined by the Exchequer Court of Canada. The lessees agree not to transfer or assign any part of the demised premises without first having obtained the consent of the lessor, and the lessee further agrees to pay all taxes and at the expiration of the lease to surrender the premises together with all fixtures of the lessee thereon with the proviso that the lessee has the right to remove any buildings if removal is done within 30 days following the expiration of the lease. In default the buildings become the property of the lessor. The Assessor used as his basis of assessment a comparison between the lands under appeal and other lands within the municipality which were held in fee. He did not use in the evaluation any assignment of leases on the Tsawwassen Indian Reserve, but did refer to assignment of leases in his evidence. He did make certain allowances as compensating for poorer access, a poorer water supply, certain rights-of-way or easements affecting the lands in some instances when compared with other lands, and certain restrictions on title consequent upon the lands being leasehold, but not based on the assessment of a leasehold interest as such but rather as a restricted title on a freehold interest.

Paragraph numbered 7 of the stated case reads as follows:-

1. The Board in its decision stated: "Here, however, the Respondent submitted substantial evidence (Exhibits 4 and 5) setting out the prices being paid for similar lands on assignment of similar leases." This statement is in error. The Board misinterpreted the Respondent's evidence that he considered assignment values as being included in the Exhibits filed. No evidence was given by the Respondent of actual prices paid for similar lands on assignment of similar leases beyond the statement that he considered them but did not use them. The Board applied the provisions of section 335 of the *Municipal Act* and the decision in *Re Lynn Terminals Ltd.* 44 W.W.R. (N.S.) 604.

The following are the questions submitted for the opinion of the Court:-

"1. Was the Board correct in holding that the subject lands held under lease from the Crown must be assessed as if held in fee pursuant to the provisions of section 335 of the *Municipal Act*, notwithstanding that section 335 may appear to be in conflict with section 338 of the same Act or other provisions of that Act or of the *Assessment Equalization Act*?

"2. Did the Board correctly apply the decision of this Honourable Court in *Re Lynn Terminals Ltd.* 44 W.W.R. (N.S.) 604?

"3. The following question is submitted unaltered at the express request of the appellant: Did the Board err in law by construing that the respondent had submitted substantial evidence setting out the price being paid for 'similar lands on assignment of similar leases' where in fact the said evidence referred to prices paid for lands which are freehold and therefore that the Board's ruling is based on no evidence?"

The allowance made by the Assessor for what he called restrictions on title is illustrated by the following evidence given by him at the hearing before the Board:-

MR. LAKES: Well, Mr. Bremner, you said that in assessing these parcels you first of all determined actual value under section 335, is that correct?

MR. BREMNER: The actual value was determined under 330.

Q.-Three thirty?

A.-The authority to assess this particular land at actual value I derived from 335.

Q.-Right. In other words in assessing under section 330, did you take into consideration, for example, revenue or rental value?

A.- No, Sir, I did not.

Q.-No. As a matter of fact, am I not correct in saying that in assessing these lands you actually disregarded entirely the fact that there was a leasehold on the land?

A.-No, Sir, my evidence would indicate that I have recognized that there are restrictions on the title.

Q.-Well, what restrictions did you take into consideration?

MR. BREMNER: Examples, the lessees are unable to get the mortgage for the property which had a detrimental effect on the value. No liquor will be permitted on the property.

CHAIRMAN: Is that strictly adhered to?

MR. BREMNER: There is not the freedom with the land that the freeholder would have. You're not allowed to cut trees without permission of the lessor.

MR. LAKES: Well, in other words you did take cognizance of the fact that these are leasehold properties then?

MR. BREMNER: I considered the effect that not being able to chop trees down, what effect this would have on actual value.

Q.-I see, well, may I interrupt you for a minute and say this: Would it be more accurate to say that in approaching the valuation you more or less took the idea that this was in the nature of a freehold property where there may be restrictive covenants, as distinct from the terms of the lease? In other words, Mr. Bremner, you could sell a freehold lot, as you appreciate, and have a restrictive covenant that you can't cut down trees, and I take it, you'd take that in consideration in assessing?

A.-I would say so.

Q.-Yes. Now, so far, you could also have a restrictive title, presumably-restrictive covenant about drinking, and you took that into consideration in this case. You've already said so-

MR. BREMNER: Yes.

MR. LAKES: And then you said you took into consideration that the people could not get mortgages. Now, my question to you is this: Did you analyse all the terms and conditions of the lease in order to determine the actual value?

A.-I considered all the terms of the lease to the best of my ability.

Q.-Except the rental?-because you have already said you didn't take into consideration the rental.

A.-Yes.

Q.-I see, so, in other words, you took parts of the lease and disregarded other parts of the lease?

A.-I'm-I'm not valuing the leasehold interest and this is what the rental is going to be-indicate-I'm seeking the actual value, the market value, not the leasehold value.

Q.-Well then, in determining your actual value you assumed that this was a freehold land subject to certain restrictions?

A.-Yes.

Q.-Rather than a leasehold land in the sense of the revenue or rental value, is that fair?

MR. BREMNER: Yes.

The appellant contends that the Assessor and the Board were wrong in applying section 335 of the *Municipal Act*, R.S.B.C. 1960, chapter 255, and that they should rather have applied section 338 of that Act, and that the Board should not have followed the decision of this Court in *Re Lynn Terminals Limited's Appeal* (1963) 44 W.W.R. (N.S.) 604, but should rather have followed that in *Re Mercer's Appeal* (1961) 36 W.W.R. (N.S.) 199.

The distinction between sections 335 and 338 of the *Municipal Act* is set out in *Re Lynn Terminals Limited's Appeal* at page 606:-

> The provisions of sec. 338(1) are general provisions and apply generally to all assessments of interest in land or improvements other than the ownership of fee-simple. The provisions of sec. 335(1), (2) and (5) are specifically made to apply to a particular class of cases, namely, those in which the fee-simple "is in the Crown or some person or organization on behalf of the Crown, but which are held or occupied otherwise than by or on behalf of the Crown."

Counsel for the appellant, *Northwest Holding Society*, seeks to distinguish *Re Lynn Terminals* on the ground that it dealt with a commercial property and points out that section 37 of the *Assessment Equalization Act*, R.S.B.C. 1960, chapter 18, and section 330 of the *Municipal Act* each require that such properties be "valued as the property of a going concern," and that section 338 of the *Municipal Act* provides that interests in land other than ownership of the fee-simple shall be valued "without including the value of the goodwill of any business connected with such interest" and says that I should, therefore, follow *Re Mercer's Appeal*. Counsel for the Assessor seeks to distinguish *Re Mercer's Appeal* on the ground that it dealt with improvements only.

I am unable to find anything in the reasons for judgment in *Re Lynn Terminals* to indicate that it is dependent on the property being commercial or that relates to the valuation of the property as a going concern with or without goodwill. Nor can I find anything in the reasons for judgment in *Re Mercer's Appeal* to indicate that it is dependent on the property being improvements, with the possible exception of the distinguishing of *Re Assessment Equalization Act*, 1953; *Re de Sautel's Appeal*; *Re Assessment Appeal Board's Stated Case* (1959) 29 W.W.R. 665. *Re Lynn Terminals* dealt specifically with the distinction between the application of sections 335 and 338 of the *Municipal Act*. *Re Mercer's Appeal* does not. It does not mention section 335, except, perhaps, indirectly by the reference to *Re de Sautel's Appeal*. I feel, therefore, that I should follow the decision in *Re Lynn Terminals*.

It follows that the answer to Question 1 is "yes" and the answer to Question 2 is "yes". In the case of Question 3, the evidence shows that the Board did err in finding that the respondent had "submitted substantial evidence setting out the prices being paid for similar lands on assignment of similar leases" *[emphasis added]*, but it did have evidence setting out the prices being paid for similar lands, which lands were, for the most part, freehold, and consequently it cannot be held that the Board's ruling is based on no evidence. It is, I feel, for the Board to decide if the evidence before it is "substantial" or otherwise. It follows that the answer to Question 3 is "no."