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BRITISH PACIFIC PROPERTIES LTD.

v.

THE ASSESSOR, MUNICIPALITY OF WEST VANCOUVER

Supreme Court of British Columbia (X1173/70)

Before: MR. JUSTICE T.A. DOHM

Vancouver, January 4,5, 1971

M.R. Taylor for the Appellant
J.R. Lakes for the Respondent

Reasons for Judgment

This is an appeal by way of a stated case in which I am asked to answer certain question of law which arose during an appeal before the Assessment Appeal Board dealing with the municipal taxation assessments on properties held by the appellant in the District of West Vancouver and concerning the assessments for the year 1970.

By way of explaining the questions, a narrative of the facts is as follows:

During the year 1969 the appellant appealed the assessments of some 200 parcels of its land situate in the Municipality of West Vancouver and the appeal was actually heard by the Board in the month of September 1969. The Assessor was present and was represented by well-known counsel, Mr. B. E. Emerson, who was also solicitor for the Municipality of West Vancouver. The Board made its substantive order on this appeal on October 30, 1969, in which it ordered that the Assessor amend his assessment roll as directed. This order was sent to the Assessor and was sealed with a seal of the Board.

The Assessor, purporting to act according to his interpretation of the order, amended the 1969 general and school rolls of the municipality, making both reductions and increases in the assessments on the appellant's lands. It should be noted that the Board had before it an appeal by the taxpayer for reductions and no appeal by the Assessor for increases.

When Mr. Taylor, who had conducted the appeal for the appellant, analysed the proposed assessment provisions prepared by the Assessor, he came to the conclusion that the Assessor had. misinterpreted the judgment of the Board by making increases in a large number of the assessments under appeal both on the general roll and the school roll, the total of these increases amounting to a large sum of money. He thereupon wrote to the Board's chairman pointing out what had taken place and requested the Board to clarify its judgment for the purpose of directing the Assessor ,to amend the rolls according to the intention of the Board's judgment.

As a result of this application by counsel for the appellant, same was formally heard by the Board on December 3, 1969, and it is significant to note that the Assessor and his counsel, Mr. Emerson, were both present on the hearing of this application.

To protect the rights of the appellant, its counsel gave the necessary notices and filed a stated case to be heard by the Supreme Court of British Columbia. This step was a safeguard taken by the appellant and I do not feel that the existence of the stated case and its subsequently being abandoned has any effect on my reasons. The appellant abandoned the stated case when the Appeal Board on December 16, 1969, ruled on the application by the appellant for the explanatory order requested and handed down its judgment, a signed and sealed copy of which was sent by the Board to Mr. Emerson, hereinbefore referred to as counsel for the Assessor and solicitor for the municipality involved. Mr. Emerson was present in Court during the hearing of the appeal before me and acknowledged that he bad the original in his file. At or about the same time the appellant received a signed and sealed copy of this second order and wrote a letter to Mr. Emerson as municipal solicitor enclosing a copy of this order "in case this has not reached you directly." Mr. Emerson, who was at that time going on his holidays, put a copy of the letter which he had received from the appellant's solicitor plus a copy of the second order on the desk of the Assessor, who did receive same. The copy left on the desk was not a sealed copy but purported to be signed by Mr. Beckett, Chairman of the Assessment Appeal Board, and had the date on the heading of same as December 3, 1969. The Assessor received a copy of the letter from the solicitor for the appellant to the municipal solicitor as hereinbefore referred to and in which a computation of the refund due to the appellant was claimed on an application of the Board's order as explained by the second order.

The Assessor took no action as a result of the copy of the second order being placed on his desk by his solicitor with the letter referred to from the solicitor for the appellant. His counsel, Mr. Emerson, being away on holiday, Mr. Lakes told me in course of argument (and although it was not evidence I do not hesitate to believe him) that the Assessor consulted him and as a result of his advice took no action toward carrying out the second .order.

During the course of the 1970 assessment appeals reference was made to the 1969 assessments, and Mr. Lakes, who was then counsel for the Assessor, took objection to this procedure. Counsel for the appellant told the Board that he intended to adduce evidence to show that the Assessor had not amended the 1969 roll as directed by the Board. This was also objected to by counsel for the Assessor. It appears that it was during this 1970 assessment appeal that the Board first learned that its second order had not been carried out by the Assessor (although the matter first came to light in the Court of Revision).

The Chairman of the Board then sent letters to the Assessor and to counsel for the appellant asking for replies to certain questions directed to ascertaining why the Board's order had not been carried out and why counsel for the appellant had not brought it to the attention of the Board earlier.

As a result of submissions by Mr. Lakes as counsel for the Assessor, the Board agreed to state this case and submit the questions which are now before me. Four of the questions are submitted at the request of the Assessor of West Vancouver for the opinion of this Court, and they are as follows:

> "1. Did the Assessment Appeal Board have jurisdiction to make the order to answer the questions contained in the letter to the Assessor dated October 3, 1970?
>
> "2. Has the Assessment Appeal Board any jurisdiction to rule on whether the Assessor is in any way in default under the provisions of the *Assessment Equalization Act* in failing to comply with the clarification order?

"3. Can the Assessment Appeal Board consider the matter of the 1969 assessment roll at all?

"4. As a result of the letter sent by the Assessment Appeal Board dated October 3, 1970, has the Assessment Appeal Board any jurisdiction now to continue to hear and determine this appeal?

The fifth question is submitted by the Assessment Appeal Board and reads as follows:

"5. If the report required under section 50 of the Act is sent by the Board to the counsel for the assessor, is that deemed compliance with section 50?

Another question which arose during the appeal before me, and which I should answer, could be worded as follows:

"6. Was the Order in Council 4144 and dated the 29th day of December, 1969, effective to retroactively extend the time within which the Assessment Appeal Board should make its returns and reports to the Assessors under the Statute?"

It is necessary to first decide:

Was the second order made by the Appeal Board a substantive one or was it an explanatory order clarifying for the Assessor the intent of the Board in its first order?

The Appeal Board, in a lengthy and detailed judgment after a three-day hearing, dealt with assessments of specific lots and parcels of land and then stated:

"Unless specifically otherwise stated, all parcels will be increased by 14 per cent over the value fixed for 1968." The Board also stated:

Accordingly the Board directs that no lands subject to this appeal shall be assessed for school taxation purposes in excess of 50% of the amount fixed by the Board for 1969.

Elsewhere, to show the tenor of the judgment of the Appeal Board, it was stated:

. . . it (the Board) has no hesitation, based on all the facts, after a thorough review of all the evidence, both oral and documentary, that many of the assessments fixed by the Respondent, must be reduced. This is particularly so with respect to those parcels of land in the far Western end of the Municipality which cannot by any reasonable approach, be developed for many years.

Further on the judgment reads:

The Board however, takes the liberty of saying that when such a substantial increase as has been applied for 1969 to the lands under appeal, the evidence should be based on something more substantial than the hopes of a developer who is naturally interested in getting the maximum return on his investment. His hopes were not justified on the evidence. The Board has found many examples of over valuation from checking the alleged sale values, by search of the documents relating to such sales in the Land Registry Offices with some surprising results. On many occasions false values have resulted. From a practical point of view such examination puts an additional onus on an Assessor. Nevertheless inaccuracy is not part of the assessment process.

The Assessor took this judgment as a direction to increase assessments. He raised to 14 per cent above the Board's 1968 values the 1969 general roll assessments under appeal which stood at figures below that level and he also raised to 50 per cent of his adjusted 1969 general roll all

school-roll assessments which stood at figures below that level. He also increased the 1969 assessments to 1968 plus 14 per cent in three different instances where in the intervening period the parcels had been reduced in size by reason of portions being subdivided therefrom and which were separately assessed for 1969. He in effect made increases in the appealed assessments and, by overlooking the sizes of the three portions mentioned, he imposed double taxation.

As a result of the application by the appellant to the Board for clarification, the Board handed down the second order on December 16, 1969, which reads in part as follows:

> It is a matter of regret that the substantive order apparently did not make entirely clear the intention of the Board.
>
> As to the general Assessment Roll, the direction contained in the last paragraph on Page 4 reading as follows:- "Unless specifically otherwise stated all parcels will be increased by 14% over the value fixed for 1968," would have conveyed the intention of the Board with more clarity if it read, "Unless specifically otherwise stated all other parcels subject to appeal that have been increased by more than 14% over the value fixed for 1968 will be reduced to a value equal to the 1968 value plus 14%."
>
> The appeal was lodged only on the premise that the lands were assessed in excess of actual value. It follows, of course, that assessed values on this appeal cannot be increased by the Board which has no power to do so in the absence of an appeal by the Assessor. [*The underlining is mine.*] Therefore, assessed values which were already below the 1968 assessed values plus 14% must remain unchanged. In addition the Board has no jurisdiction to change the assessed values of parcels not under appeal. Put another way no assessment for general purposes can be increased by virtue of the substantive order of the Board in this appeal.

The Board continues on in its judgment, clarifying to the Assessor how he should deal with the portions which have been altered by the result of the subdivision:

> With regard to the three parcels of land etc. these parcels were the result of a subdivision effected after the 1968 assessment and prior to the 1969 assessment. The natural and proper computation to follow in these circumstances is to compute the per acre value on 'the basis of the 1968 per acre assessed value (i.e. approximately $12,720.00 per acre in the case of one parcel) and apply this per acre value to the area of the remnants or subdivided parcels and then adding the increment of 14% as ordered by the Board to determine the resultant 1969 assessed values.
>
> With respect to the School Assessment Roll it follows that the assessments for school purposes on the lands under appeal cannot exceed 50% of the final value determined for the general Assessment Roll and as in the former instance no assessment for school purposes can be increased by virtue of the order of the Board in this appeal.

I hope that my language is not too strong when I say that it appears to me that it should have been known to an experienced Assessor that he had misinterpreted the Board's first order. By letter dated December 17, 1969, the Chairman of the Appeal Board sent a sealed copy of what it described as "the Board's directions pursuant to the application for clarification of the Board's order of October 30, 1969" to Mr. Bruce Emerson, who was counsel for the Assessor and also, as I have stated, Municipal Solicitor.

This problem was dealt with by Nemetz, J. (now J.A.), in *Re Assessment Equalization Act and Re Cornwall's Certiorari Application* (1965) 51 W.W.R. 117, wherein that learned Judge held that, if the Board's explanatory order is an attempt to change the original order, same is not valid. He also pointed out that the Board may always correct a mathematical error or, as he put it at page 120, "in so far as the August 24th document is a mere explanatory delineation for the discernible

purpose of assisting the assessor in making mechanical calculations to carry out the intention of the board, it is, in my opinion, within time, regular and not objectionable." In the facts in that case the explanatory order was made after the time for making returns to the Assessors had expired.

Sullivan, J., in *Re Assessment Equalization Act and Re British Columbia Forest Products Limited's Appeal* (1961-62) 36 W.W.R. 145, in dealing with a similar problem, stated at page 157 in the report:

> I feel that common sense and justice should permit the board by its final order to correct its mathematical error in respect of assessment of improvements etc.

He further stated:

> I further feel that the provisions of the statute enable the Board of Assessment Appeal to do so following this expression of the court's opinion.

To the *dicta* of these learned Judges I would respectfully add that where ambiguous language is used by the Board in an order, justice demands that the Board have the power to clarify its intentions and to issue a supplementary order by way of explaining to the Assessor what was intended by its original order. As the Board pointed out in its second order, its intentions were not expressed clearly and the Board's language as interpreted by the Assessor brought about the obvious result of the Board exceeding its jurisdiction. It is clear that the Board had no power to increase assessments on these appeals, could not have intended such a result, and could not have intended the result of double taxation.

The Assessor obviously misinterpreted the substantive order, and a close study of the original judgment of the Board and the supplementary order shows that the Board was trying to point out to the Assessor how he had misinterpreted the substantive order of the Board, and in plain language directed him as to what he should do with the rolls.

THE ORDER IN COUNCIL 4144

Section 56 (1) of the *Assessment Equalization Act* reads:

> (1) For the purpose of carrying into effect the provisions of this Act, the Lieutenant-Governor in Council may make such regulations, not inconsistent with the spirit of this Act, as are considered necessary or advisable, and by such regulations may provide for any proceeding, matter, or thing for which express provision has not been made in this Act, or for which only partial provision has been made.

Subsection (2) reads:

> (2) Without limiting the generality of the provisions contained in subsection (1), the Lieutenant-Governor in Council may make regulations
>
> (d) *extending* the time within which any of the provisions of this Act must be completed;

Other sections in the Act direct the Appeal Board to make its returns or reports to the Assessor before the 15th day of May in each year (*see* sec. 45 (*h*) and 50 (1). No authority was cited to me on the interpretation of Orders in Council, but counsel submitted to me and I accept the principle that I should interpret the Order in Council as one would interpret a statute.

On the 15th of May 1969, the Lieutenant-Governor in Council passed an Order in Council extending the time within which the Assessment Appeal Board shall make its returns to the Assessors to October 31, 1969.

By Order in Council 4144, dated the 29th of December 1969, the time within which the Board should make its returns and reports to the respective Assessors covering appeals received in 1969 "as extended under Order in Council 1573 to be extended to December 31,1969."

Mr. Lakes' argument is that this is an invalid piece of legislation and that the time had died on October 31, 1969, and that the Cabinet could not extend something that had already expired. He submits that by reason of this proposition the Board's second order would be null and void. I have already held that the Board's second order was an explanatory order and in my opinion could properly be made in justice in December of 1969 even if the time had expired on October 31, 1969.
The meaning of the words "extend" or "extension" was submitted by Mr. Lakes to be that as expressed by Lord Ellenborough, C.J., in *Brooke* v. *Clarke* (1818) 1 B & AId. 396, at 403, wherein he stated:

> The word *extension* imports the continuance of an existing thing, and must have its full effect given to it where it occurs.

and

> . . . it seems to me, that predicating the purpose to be to benefit the author by the *extension* of his rights, is adopting a very different idea, from recreating an expired right.

He also quoted in support of this interpretation Adams, J., in *Kinsman* v. *Brown* (1958) N. Z.L.R. 807, in which Lord Ellenborough, C.J., was quoted. Adams, J., however, also stated, "I prefer to guard myself against laying down any general proposition and my decision is limited to the particular enactment." I would, with respect, concur with Adams, J., and it should be pointed out that the interpretation by Lord Ellenborough, C.J., was in connection with a copyright statute.

In my opinion the Order in Council 4144, when read in its entirety, displays an intent that it should have a retrospective effect covering all the appeals in 1969 and that it extended the. time from May 15, 1969, to December 31, 1969. In any event it is my opinion that the Order in Council 4144 is a mere procedural matter and as such valid to cover all the returns and reports made in 1969, providing they were made by December 31, 1969. It follows that if I am wrong in interpreting the second order as an explanatory order then it would be my opinion that the second order was nevertheless made within the statutory period of time.

THE POSITION TAKEN BY THE ASSESSOR

I have already dealt with the submission that the Assessor submitted that he was not bound to carry out the second order made by the Board because it was a substantive order and further because it was made beyond the statutory period of time by reason of his submission that Order in Council 4144 was invalid.

The Assessor further took the position that when the Board of Appeal wrote to him for an explanation as to why he had not carried out the Board's order, the letter was written without authority, that the Board had no authority to order him to answer the questions, that the letter was sent by the chairman alone, and that, instead of sending a letter, the Board should have held an inquiry to see if there was a default on the part of the Assessor. By doing all these matters the Assessor imputes bias on the part of the Board and takes the position that the Board no longer can legally continue with the hearing of the 1970 appeal by reason of its bias and has in effect lost jurisdiction.

The Assessor further submits that the explanatory order was not properly served on him, as the copy which he received was not sealed. He states that this is not effective service on him and, therefore, there was no obligation on him to carry it out in any event. These, in short, are the positions taken by the Assessor.

BIAS

The statute provides that the Board of Appeal may direct someone else to carry out its instructions where an Assessor is in default. The section reads as follows:

> 33. In case default is made in the doing of any act, matter, or thing which the Board directs to be done by the person, municipal corporation, or Provincial Assessor required to do the same, the Board may authorize such person as it sees fit to do the act, matter, or thing, and in every such case the person so authorized may do the act, matter, or thing, and the expense incurred in the doing of the same may be recovered from the person or municipal corporation in default as money paid for and at the request of the person or municipal corporation, and the certificate of the Board of the amount so expended is conclusive evidence thereof. [*The underlining is mine.*]

The Assessor was, by the Board's substantive order and as explained in the second order, directed to amend his assessment roll.

On October 3, 1970, a letter was sent over the chairman's signature (of the Appeal Board) to the Assessor, which reads as follows:

> Dear Mr. Gardner:
>
> The Board has given very anxious consideration to the application raised by counsel for British Pacific Properties with respect to your actions following the Board's clarifying Order of December, 1969.
>
> The Board makes the following order with some reluctance, but the order is as follows. The Board requires an answer to the following questions:-
>
> 1. Why were you not aware of the Board's clarifying decision issued December 17, 1969 and having regard for the fact that you received a copy from the counsel for the Appellant Company, why did you not request confirmation from the Board?
>
> 2. The Board requires that you submit full particulars of precisely the adjustments made on the 1969 roll pursuant to the Board's original Order in 1969. You were completely aware that the Board was involved in consideration of a clarifying Order following your original re-assessment. You were present at the Hearing and had full knowledge of the fact that a further Order would be issued.
>
> 3. If you did not officially have a copy of the Board's sealed decision, why did you not enquire of the Board and request a copy?
>
> These questions must be the subject of a written answer not later than Monday, October 12, 1970, even though it is a holiday.

The Assessor answered this letter, which answer follows:

> Dear Sir:
>
> Pursuant to your letter dated October 3rd, 1970, I submit the following answers to the three questions:
>
> 1. I did not receive a second order from the Board in December, 1969. When a photo-copy of a document was brought to my attention I requested legal advice and acted according to the advice I received. When this point was raised in the hearing of this appeal in May, and I explained this situation, then, according to

the transcript prepared by Office Assistance, the Chairman of the Assessment Appeal Board stated 'I quite agree - - - on the basis of what you tell the Board now, you did the only thing you could do.

2. The particulars are set out in Exhibit #21 in this appeal.

3. I had referred this matter to legal Counsel and followed his advice. In the transcript prepared by Office Assistance Mr. Lakes stated that his opinion is a sixteen page opinion and the Chairman is quoted as saying 'Well lets not put that in.' My conduct was based on the opinion I received and the reasons could only be given by Counsel-namely Mr. Lakes.

The questions were asked and the answers were given, so that the position taken by counsel for the Assessor when he stated to me in argument that the Appeal Board could have asked these questions of the Assessor during a hearing but not in writing, seems untenable. It seems to me that the Board by its questions and statements was simply pointing out to the Assessor (albeit in strong language) the position that appeared obvious from the proceedings.

It would also appear to me that the Assessor's main objection was that he had not received a sealed copy of the December order. In my view the Appeal Board was not overly zealous in demanding to know why its order had not been carried out by the Assessor, and as they are the last bulwark (apart from an appeal to the Courts) in the taxation structure between the taxation authorities and the citizens, they should be concerned if any Assessor has not carried out their directives.

In my view the Board had the right to carry out an inquiry, and there is no particular machinery for carrying out same. It might have been better to have had a *viva voce* hearing on this issue. I do find, however, that pursuant to section 25 of the statute, the Board "may in its discretion accept and act upon evidence by affidavit or written statement or by the report of any officer appointed by it or obtained in such other manner as it may decide." I find that the Board had the authority and indeed the duty to call for an explanation.

Mr. Lakes' submission of bias is also based on the allegation that the Board itself committed the default by sending the original sealed second order to Mr. Emerson and is now accusing the Assessor of a default.

I find no wrong done by the Board and no real likelihood of bias (see *Regina* v. *Camborne Justices* (1955) 1 Q.B. 41).

Mr. Lakes further submitted that the chairman acted on his own in sending the letter to the Assessor and that there is no evidence that this was authorized by the Board. I must presume that the letter was authorized, and it has not been shown to the contrary.

I would also point out that under section 21 of the statute "anyone member of the Board may hold an inquiry or conduct a hearing for the Board." It seems to me that the letter to the Assessor was part of the inquiry and it appears from the evidence that no decision has yet been made by the Board on the question of whether or not the Assessor made a default.

SERVICE OF SECOND ORDER

There is no statutory authority requiring that the Board's returns or reports to the Assessor should be "under seal" (*see* secs. 45 (h) and 50 (1).

It was common ground that the original of the second order was sent to the solicitor for the Assessor and was always in his possession. It would, of course, have been available for inspection of any ratepayer as it was in the custody of the municipality by its solicitor.

The Assessor is only required by the statute to attach a copy of the report to the roll. He did in fact have a copy and the statute provides that he can obtain any certified copies that he wishes free of charge from the Board. I do not find that any of the sections of the statute were violated by the service of this document on the solicitor for the Assessor.

For some reason the Assessor, when he received his copy of the explanatory order, instead of obeying its directions or telephoning to the Appeal Board's office or to his own solicitor's office (if he doubted the authenticity of his copy of the order) chose to seek advice elsewhere and received a 16-page opinion. The Assessor was present at the hearing for the clarification order and no doubt expected an order to be handed down. When he received a copy he certainly would be put on inquiry, especially since the copy was accompanied by a letter from the solicitor for the appellant to which I have previously referred. In find that the receipt by his counsel of the original was receipt by the Assessor.

I now answer the questions:

Question 1: Did the Assessment Appeal Board have jurisdiction to make the order to answer the questions contained in the letter to the Assessor dated October 3, 1970?

Answer: -"Yes," providing that the answers are used on the basis of determining only whether a default was made under section 33 and not for the purpose of incriminating the Assessor in any offence under the Act.

Question 2: Has the Assessment Appeal Board any jurisdiction to rule on whether the Assessor is in any way in default under the provisions of the *Assessment Equalization Act* in failing to comply with the clarification order?

Answer: "Yes." Here I would respectfully suggest that the Assessor should be given a further opportunity of carrying out the Board's order as clarified in the second order.

Question 3: Can the Assessment Appeal Board consider the matter of the 1969 Assessment Roll at all?

Answer: "Yes." An injustice would otherwise result to the taxpayer, and the 1969 assessments as they should have been amended are relevant to the 1970 assessments. I can find no statutory restriction in time for the amending of the rolls pursuant to the Appeal Board's orders. Section 50 (2) assumes that the assessments are completed as directed after all the appeal machinery has been exhausted.

Question 4: As a result of the letter sent by the Assessment Appeal Board dated October 3, 1970, has the Assessment Appeal Board any jurisdiction now to continue to hear and determine this appeal?

Answer: "Yes."

Question 5: If the report required under section 50 of the Act is sent by the Board to the Counsel for the Assessor, is that deemed compliance with section 50?

Answer: "Yes."

Question 6: Was the Order in Council 4144, and dated the 29th day of December 1969, effective to retroactively extend the time within which the Assessment Appeal Board should make its returns and reports to the Assessors under the statute?

Answer: "Yes."

The appellant should have its costs.