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DAON DEVELOPMENT CORPORATION

v.

CORPORATION OF THE DISTRICT OF WEST VANCOUVER

Supreme Court of British Columbia (No. X6235L)

Before: MR. JUSTICE HUTCHEON (In Chambers)

Vancouver, September 25, 1974

Mr. D.W. Shaw for the Appellant
Mr. J.M. Giles for the Respondent
Mr. J.D.N. Edgar for the Respondent

Reasons for Judgment October 2, 1974

A case has been stated by the Assessment Appeal Board pursuant to the . provisions of section 51 of the *Assessment Equalization Act*. That Act was repealed on June 20, 1974 and the proceeding before me is continued under the *Assessment Act*, Statutes of British Columbia 1974, c. 6.

The questions submitted for the opinion of the Court are set out in the stated case in the following way:

> "1. Whether, pursuant to the provisions of the *Assessment Equalization Act*, R.S.B .C. 1960, Chapter 18, and in particular, s. 37 thereof, and the provisions of the *Strata Titles Act*, R.S.B.C. 1966, Chapter 46 and in particular, s. 17 thereof, an increase in value to the strata title lots caused by stratification of an apartment building pursuant to the *Strata Titles Act* should be allocated in the assessment to the land upon which the apartment building is situate;
>
> 2. Whether the Assessor, in his written submission to the Assessment Appeal Board, has assessed values in accordance with the requirements of the law set out in the *Assessment Equalization Act* and in particular s. 46 (1) thereof.
>
> Questions numbered one and two above are submitted precisely as set out by the Appellant.
>
> The Board is of the opinion that question number one above should be rephrased and therefore submits as question three the following:
>
> 3. Whether, pursuant to the provisions of the *Assessment Equalization Act,* R.S.B.C. 1960, Chapter 18 and in particular, s. 37 thereof, and the provisions of the *Strata Titles Act*, R.S.B.C. 1971, Chapter 46 and in particular, s. 17 thereof, the Board erred in holding with the Assessor that increments of value which have been created by a subdivision of

the strata of a property should be reflected in the land assessments of the individual strata lots."

In recent times a procedure in property holding has been developed whereby, in defiance of traditional thought, the sum of the parts is greater than the whole. The same apartment building occupied by tenants has a value in the order of 50 percent higher if each suite is "owned" by the occupant.

In 1973 two apartment buildings, The Crescent View and The Dolphin, were converted from rental apartments into self-owned apartments by means of the subdivision of the properties under the provisions of the *Strata Titles Act*, Statutes of British Columbia 1966, c. 46. Because of this change the 1974 assessments resulted in a substantial increase of the value at which the lands and improvements were assessed. The appellant does not complain of the increase in the case of either property and the dispute with the Assessor concerns the allocation between land and improvements of the total amount of the assessments. The significance of the outcome is that in the taxation for general purposes the land is taxed at one hundred percent of the assessed value and the improvements are taxed at seventy-five percent of assessed value.

Mr. Giles raised the preliminary objections that Questions 1 and 3 were not questions of law and that Question 2 was too general. A stated case which comes forward from the Assessment Appeal Board for the opinion of the Court pursuant to section 51 must be concerned with a question of law arising in connection with the appeal.

As to Questions 1 and 3, it was argued that the method employed by the Assessor to determine actual value is a question of fact or at best mixed fact and law.

The Assessment Appeal Board accepted the approach of the Assessor. This approach is set out in a written submission which is Exhibit A-1 to the stated case. The essence of the reasoning of the Assessor appears to me to be found in the passage on page 5 of his submission, where he states:

> "(v) Subdivision of land or the strata creates an increment of value which is attributable to the land or *to the strata which must be considered to be land*. (my emphasis).
>
> (vi) The increment of value created by conversion of rental properties to strata cannot be added to the improvements any more than can the difference in value between a waterfront and non-waterfront property. Improvements must therefore be assessed on replacement value as are all other residential improvements within the municipality and thus equity will be maintained."

In accordance with that view the Assessor determined the value of the improvements for the entire building by their replacement cost less depreciation. This amount was then subtracted from the total assessed 1973 market value leaving a residue to be attributed to land. This market value figure appears to be the total of the asking prices for all of the suites in the apartment building. In addition to the size of the suites, the division among the suites of this residual figure for land is governed by two differentials, a height differential and a location differential.

The decision of the Assessor which gives rise to the dispute is that by section 17 of the *Strata Titles Act* parcels of land have been created in the air above the surface by the subdivision into strata lots. Amongst other things the advantages of location and height expressed in the higher market value of one strata lot over another are to be attributed to this concept of a parcel of land. What is more significant is that that part of the actual value which is derived from the combined willingness of 46 owners of strata lots to pay more than a purchaser of the apartment building as a rental property must be attributed to the rights being acquired by the owners rather than to the improvements.

Section 17 of the *Strata Titles Act* was amended in 1971 and reads in its present form:

> "17. For the purposes of assessment and taxation, each strata lot, together with the share of the owner thereof in the common property, shall be deemed to be a separate parcel of land and improvements."

I agree with Mr. Shaw that the interpretation to be placed upon section 17 of the *Strata Titles Act* is a question of law. Several decisions were cited but I need refer to two only. In the case of *Cardiff Rating Authority* v. *Guest Keen Baldwin's Iron and Steel Company Limited* (1941) 1 K.B. 365 the question was whether movable tilting furnaces resting by their own weight on steel rollers were rateable as being "a building or structure" or "in the nature of a building or structure". At p. 396 Denning, L.J. said:

> "The learned recorder has held that they are not structures, or in the nature of structures, and Mr. Comyns Carr says that his finding is a finding of fact with which an appellate court should not interfere. That is, however, an over-simplification. The primary facts, that is, the real facts relating to the physical state of the tilting furnaces and mains, are not in dispute. The question is what is the proper conclusion from those primary facts. In so far as that involves the proper interpretation of the words of the order, it is a question of law. Once, however, those words have received a clear interpretation, which can be applied by laymen as well as by lawyers, then, so long as there is a proper direction as to their meaning, the conclusion of fact is one for a tribunal of fact, with which an appellate court will not interfere, unless the conclusion is one which could not reasonably be drawn from the primary facts."

The second case is that of *Belyea* v. *The King* (1932) W.W.R. 279 in which Anglin, C.J.C., speaking for the Court, said at p. 296:

> "Upon the material facts found by the learned trial judge, we think that manifestly his conclusion, resulting in the acquittal of the appellants, was erroneous, and that such error was the direct result of a misdirection in law.
>
> The right of appeal by the Attorney-General, conferred by s. 1013 (4), Cr. C., as enacted by c. 11, s. 28, of the Statutes of Canada, 1930, is, no doubt, confined to 'questions of law'. That implies, if it means anything at all, that there can be no attack by him in the Appellate Divisional Court on the correctness of any of the findings of fact. But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury, as the case may be, to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law,-especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge."

In the present case there is no dispute about the facts and those facts include the increase in value of the suites in the two apartment buildings due to, what has been called, stratification under the *Strata Titles Act*. This emphasis on increase in value which figures prominently in Question 1 and to a lesser extent in Question 3 tends to obscure what the Assessor is about, namely the determination of the actual value of the land and improvements. To achieve a fair and just result he must apply the same principles to a new building divided into strata lots as he does to an older building converted to strata lots which has a history of a rental property.

In my opinion the question propounded by the Board raises the question of law which underlies the dispute which is the proper interpretation of section 17 applicable to strata lots whatever their history.

If the wording of section 17 had been

> "For the purposes of assessment and taxation, each strata lot shall be deemed to be a separate parcel of land and improvements."

it would have been necessary to give some meaning to the expression "parcel of land" in relation to a suite on the 10th floor of a building. In law the word "land" is capable of including in its meaning not only the surface but an indefinite extent upward or downward. There is no difficulty, therefore, in the acceptance of the concept of a parcel of land several levels above the surface bounded by the walls, floor and ceiling of the strata lot.

In addition to the words of section 17, which I have just quoted, there are the following words:

> "together with the share of the owner thereof in the common property"

Mr. Shaw's point, as I understood it, was that the definition of common property refers to land in the sense of surface and that in the common property we find the explanation for the use in section 17 of the expression "parcel of land".

"Common property" is defined in section 2 as follows:

> "'Common property' means so much of the land for the time being comprised in a strata plan that is not comprised in any strata lot shown in the plan;".

My view is that the word "land" used in the definition of "common property" is to be given the extended meaning of section 24 (u) of the *Interpretation Act*, R.S.B.C. 1960, c. 199 (now Statutes of British Columbia 1974, c. 42, s. 25 (29) as *including* all buildings.

"Common properties" as used in section 4 (2) and section 5 must include the hallways and stairways in the building as well as the surface in order that title to all of the rights vest in the owners of the strata lots either singly or collectively. Section 5 (1) provides that the common property is held by the owners as tenants-in-common in shares proportional to the unit entitlement of their respective strata lots.

In order to give a sensible meaning to the words "each strata lot, together with the share of the owner thereof in the common property, shall be deemed to be a separate parcel of land", it is not necessary to single out the share of the owner as a tenant-in-common of the surface. The *Strata Titles Act* describes the owner as the person registered in the books of any Land Registry Office as owner in fee-simple of a strata lot. By section 3 (1) a strata lot may "devolve or be transferred, leased, mortgaged, or otherwise dealt with in the same manner and form as any land the title to which is registered under the *Land Registry Act*."

In my opinion section 17 means that for the purposes of assessment and taxation each strata lot shall be deemed to be a separate parcel of land of which the boundaries are defined by reference to the floor, walls and ceiling.

This is the interpretation given to section 17 by the Assessor and accepted as correct by the Assessment Appeal Board.

I hope I do not misunderstand the position of the Appellant when I say that on the assumption of the correctness of the interpretation given to section 17 by the Assessor there is no criticism of the procedural approach he used to determine actual value of the land and improvements.

For the reasons I have given I agree with the Assessment Appeal Board in accepting the appraisal of the Assessor and I answer Question 3 in the negative. I need not answer Question 1 or Question 2, both of which are intended to elicit the same question of law as Question 3.

Because this case raises a point of principle which is of importance to a great many others than the Appellant I make no award of costs.