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KELFOR HOLDINGS LIMITED

v.

ASSESSMENT AREA OF PRINCE GEORGE (26)

British Columbia Court of Appeal (CA781067)

Before: MR. JUSTICE B. BULL, MR. JUSTICE M.M. McFARLANE, and MR. JUSTICE J.D. LAMBERT

Vancouver, November 26, 1980

J.R. Lakes for the Appellant
P.W. Klassen for the Respondent

Reasons for Judgment of Mr. Justice McFarlane (Oral)

November 26, 1980

McFARLANE, J.A. (Oral): I hope that in stating my opinion about this appeal at the present time and at this late hour of the day that it will not be thought that I am being in any way discourteous to the appellant's counsel or that I have failed to appreciate the able argument that he has addressed to us.

I have, however, reached the firm conclusion as to what I think the judgment of the Court should be and, accordingly, I will try to say so with my reasons, briefly, now.

The appeal is brought before us by the owner of a shopping centre at Prince George by way of an appeal from a decision of Mr. Justice Hutcheon, who is now our brother Hutcheon, upon a stated case presented to him under the *Assessment Act*.

In the revised statutes of 1979, the section under which we act is section 74.

The property involved is a large shopping centre at Prince George which was erected in two phases and was a comparatively new operation in the period of time for which the assessments have had to be made.

The rather unique characteristics of the shopping centre, having regard to its position at Prince George, have created difficulties of assessment which are apparent in our examination of the arguments presented to us.

The stated case states facts as found by the Assessment Appeal Board, and includes by way of reference schedules of briefs or evidence which were considered by the Board. To that extent, the evidence has been looked at and has formed the basis for the argument here.

I must, however, remember that what this Court is doing is dealing with a stated case which basically states facts and asks the Court to answer questions of law.

In this case the questions asked in the stated case are (1) was there valid evidence in law upon which the Board could find that the values on land and improvements as determined by the Court of Revision were correct?

Mr. Justice Hutcheon answered that question in the affirmative.

The second question:

Did the Board err by accepting the residual value referred to in paragraph 6 as the land value?

Mr. Justice Hutcheon answered that question, no.

I will not read paragraph 6, which is rather long, and perhaps complicated. It does refer specifically to the evidence of a witness, Stanhope, who gave expert evidence as an appraiser, before the Board, and filed a brief which the Board annexed to the stated case as Schedule C.

The contents of Schedule C have been the subject of detailed analysis and criticism by counsel for the appellant here. The sum of his argument in that respect appears to me to be that there are errors in the reasoning of the witness which show that the basis upon which his opinion was formed and expressed to the Board was in error.

Those arguments, in my opinion, affect, or would affect, the Board's decision as to the weight which it would attach to the evidence of that witness.

This Court cannot, however, be asked to change the facts as they are stated in paragraph 6 of the stated case.

Now, in asking this Court to say that Mr. Justice Hutcheon's answers to the questions were wrong, the argument presented to us on behalf of the appellant is that, having regard to all of the circumstances, the decision of the Assessment Appeal Board was an arbitrary decision, and was not a decision properly taking into account and acting upon the factors which the statute provides must be acted upon by section 24. That was the section earlier in the 1974 legislation, and we find it now in the revised statutes of 1979, chapter 21, at section 26. I will not take the time to read it.

When I say arbitrary, I think that I am stating correctly the basis of the argument of appellant's counsel that the Board acted not in accord, but in violation of that statutory provision, and I take his use of the word "arbitrary" to be that which was used in the case of *Pacific Logging Company and the Assessor*, which went to the Supreme Court of Canada. The judgment of the Supreme Court of Canada in that case, on appeal from this Court, really consisted, I think, of these words by Mr. Justice Martland. He said:

"We are in agreement with the reasons for judgment delivered by Mr. Justice McIntyre in the Court of Appeal"

That is all I need to read of the judgment. They proceeded then to allow the appeal and set aside the judgment of this Court.

Now, the language of Mr. Justice McIntyre, which was thus approved by the Supreme Court of Canada, concludes with these words:

"When I use the word 'arbitrary' I mean, and from the context in which the word is used in the case, I conclude, the assessor meant a decision made at discretion in the absence of specific evidence and based upon opinion or preference (see Shorter Oxford English Dictionary). The resulting assessment is then made without regard for the statutory provisions and uncontrolled by them." It is my opinion that, applying the word "arbitrary"

in that sense, that the appellant has failed to show that this Assessment Appeal Board acted in that manner.

The decision of the Board is attached to the stated case and it shows that the evidence pro and con on value and methods of arriving at value were considered by the Board. At most, it seems to me, it might be argued that the Board had attached too much weight to this factor and too little to another factor, or even that it may have misunderstood the effect of some of the opinion evidence.

It, however, does not support the argument of "arbitrary" in my opinion. On the contrary, I think it shows that the Board examined the evidence and performed the functions which it was required to perform under the statutory provision.

It will be noted that I have not discussed the reasons for his judgment which were given by Mr. Justice Hutcheon. My reason for saying nothing about them is that the argument addressed to us is that which I have just tried to describe. I, therefore, express no opinion upon the reasoning of Mr. Justice Hutcheon, from whom this appeal is taken. I agree with him, however, that the answers to the two questions propounded by the stated case should be those which he gave. I would, therefore, dismiss the appeal.

LAMBERT, J.A. (Oral): I agree. There were some frailties in the evidence that was offered, both at the Court of Revision and to the Assessment Appeal Board, in this case, but, in my opinion, the Assessment Appeal Board did the best they could and reached the right result on the basis of the evidence that was offered to them.

For the reasons of my brother presiding, I would dismiss the appeal.

BULL, J.A.: I would dismiss the appeal for the reasons stated by my brother.