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LORDINA LIMITED
and
PRIVEST PROPERTIES LTD.

v.

ASSESSOR OF AREA 9 - VANCOUVER

Supreme Court of British Columbia (A790073)

Before: MR. JUSTICE A.G. MacKINNON (in chambers)

Vancouver, March 14, 1980

J.F. Tollestrup, for the Appellant
J.E.D. Savage, for the Respondent

Reasons for Judgment April 21, 1980

The appellants (hereinafter called the owners) own property situated on Hastings Street in Vancouver, and known as Harbour Centre. It consists of an office tower, revolving restaurant with an observation deck, Simpsons-Sears department store, retail mall, and an adjacent parkade.

The issues arise from the assessment of the improvements which were determined by the assessor at $35 million. That assessment was sustained by the Court of Revision and, on appeal, the Assessment Appeal Board confirmed the decision of the Court of Revision. Under the provisions of the *Assessment Act*, 1974 B.C. Statutes, the matter comes before me by way of stated case.

The respondent made a preliminary objection to the matter being heard in this court on the basis the issues raised do not form questions of law arising in the appeal.

I reserved judgment on the preliminary objection and then heard submissions on the stated case.

I turn to the preliminary objection and will, firstly, look at question No. 4 to decide whether it is properly before me.

> "4. Was the Assessment Appeal Board correct in law in accepting declared costs without giving due consideration to over-runs due to strikes, change orders, acceleration premiums and such other matters that caused the declared cost to exceed the fixed general contract price and resulted in a total considerably higher than replacement cost."

The facts, as they relate to this question, were found by the Board to be:

> "(7) The assessor found the land value from the market place as part of cost approach to value, with the improvement value determined by declared cost. Having found the actual value from the cost approach he then proceeded to check it against a value derived by the income approach.
>
> "(7A) Declared cost is the total projected expenditure as at November 30, 1977 as expressed by agents of the appellants in a letter to the Assessment Authority dated

October 24, 1977 (see Schedules A [1] and A [2] of Exhibit 3 in the hearing before the Assessment Appeal Board).

"(8) The assessor's value of the office tower-department store complex, excluding land, on a declared cost basis was $39,840,014 (Schedule A [2] and on an income basis was $34,638,004 (Schedule B [5]).

"(10) The Board accepted the assessor's evidence on valuation of the retail mall on an income basis. He used contractual rents on leased premises and projected the average of $14 per square foot over the total retail space, not taking into account actual rents received and vacancies. Using actual rents produced an average rent of $10.51 per square foot for the occupied retail premises."

The owners submitted that this development is unique. That considerable expense was incurred so as to preserve some of the old improvements in a manner that was compatible with the new. That the further matter set out in Question No. 4 caused expense that did not add to the actual value of the improvements. As a consequence the owners submitted the Board was wrong in accepting such costs as factors in determining actual value.

I here quote s. 67 (1) of the *Assessment Act*, 1974 S.B.C., Ch. 6:

"67. (1) At any stage of the proceedings before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may submit, in the form of a stated case for the opinion of the Supreme Court, a question of law arising in the appeal, and shall suspend the proceedings and reserve its decision until the opinion of the final court of appeal has been given and then the board shall decide the appeal in accordance with the opinion."

It is my view, that even if this matter were a question of law (and I doubt that it is), it should not be reviewed by the Court because it was not raised in the appeal before the Assessment Appeal Board.

At the hearing before the Board it seems clear that both the owner and the assessor deemed it proper to arrive at actual value of the improvements by applying an income approach. What the owner now submits is that the assessor and the Board were wrong in considering the various costs mentioned above in determining the actual value of the improvements. Inasmuch as the basis of value is not determined by replacement or actual cost, the question of whether such costs should have been included was not a question that was before the Board. Because the matters set out in Question No. 4 were not raised before the Board, they are matters outside the scope of s. 67 of the Act and are not to be reviewed by the Court.

The remaining questions for consideration in these proceedings are:

Question 1

"1. Was the Assessment Appeal Board correct in law in failing to allow for tenants' negative interest in its consideration of the income approach to valuation?

Question 2

"2. Was the Assessment Appeal Board correct in law in not valuing the property based on actual income as it stood and as it was used and occupied at the time of assessment?

Question 3

> "3. Was the Assessment Appeal Board correct in law in failing to allow for lessor's extraordinary expenses in order to obtain tenants as a proper determinant when establishing actual value?"

All of these questions raise issues as to whether the Board was correct in rejecting certain approaches as to valuation. Question No. 1 raises the issue of whether it was proper to reject the owners' submission that actual value on an income basis should be determined by considering the actual rents received as opposed to contractual rents found. Question No. 2 raises the issue of whether the actual value should be determined by actual vacancies as urged by the owners, or on the basis relied upon by the assessor being vacancies found in the surrounding area. In Question No. 3 the owners submitted the Board was wrong in accepting certain expenses incurred by the developer as appropriate items in determining actual value. Can it be said that the foregoing issues are questions of law which the legislature intended the court to review.

In the case of *Swan Valley Foods Ltd. (Creston Valley Foods Ltd.)* v. *Assessment Appeal Board*, B.C. Tax Reports No. 200-106, Meredith J. stated:

> The question of whether the selection of any given method of assessment is wrong in principle is a matter of law, not fact.

In my view the question in that case concerned an assessment which was purported to be wrong in principle. Here, however, the questions raised relate to whether certain factors should be included or excluded in a method of arriving at valuation, and such matters are not questions of law but of fact. See *Provincial Assessors of Comox, Cowichan, and Nanaimo* v. *Crown Zellerbach Canada Limited and Crown Zellerbach Building Materials Limited* (1963), 42 W.W.R. (N.S.) 449 at pages 455 and 456:

> The statutory duty of the assessor is to find the "actual value" of the taxable property, but sec. 37 permits him to use several different methods and to consider many different elements in finding actual value. I do not think that the use of any specifically mentioned method of finding actual value, or the inclusion or exclusion of any enumerated element, provided there is evidence to support the reasoning, can be said to raise a question of law appealable to the courts on a stated case, for those matters lie in the judgment of the assessor and the assessment equalization board: *Reg.* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351, at 353, 356.

Also see *Re A. Merkur & Sons Ltd. and Regional Assessment Commissioner, Region No.14 et al.*, [1979] 21 O.R. (2d) 797 (C.A.) and further the judgment of the Chief Justice in *Dreifus* v. *Royds* (1922), 64 S.C.R. 346 at pp. 348-349:

> 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.

In my view Questions 1, 2 and 3 are questions of fact and not law and, therefore, are not matters which fall within Section 67 of the *Assessment Act*. Accordingly, the motion by the respondent on the preliminary objection is allowed and the petition is dismissed.

In the event I am wrong in concluding the matters raised in Questions 1, 2 and 3 are questions of fact then my opinions on those questions are as hereinafter set out:

Questions 1 and 2:

> "1. Was the Assessment Appeal Board correct in law in failing to allow for tenants' negative interest in its consideration of the income approach to valuation;
>
> "2. Was the Assessment Appeal Board correct in law in not valuing the property based on actual income as it stood and as it was used and occupied at the time of assessment."

The Board rejected the owners' submission that valuation on an income basis should be determined by using actual rentals rather than the contractual rentals that were used.

The relevant facts are found in the stated case, and are:

> "(8) The Assessor's value of the office tower-department store complex, excluding land, on a declared cost basis was $39,840,014 (Schedule A [2] and on an income basis was $34,638,004 (Schedule B [5]).
>
> "(10) The Board accepted the Assessor's evidence on valuation of the retail mall on an income basis. He used contractual rents on leased premises and projected the average of $14 per square foot over the total retail space, not taking into account actual rents received and vacancies. Using actual rents produced an average rent of $10.51 per square foot for the occupied retail premises.
>
> "(13) The Board found, speaking of the parkade . . . that: 'Reference to the slow acceptance of the retail areas is acknowledged, however, an investor does not only look at first year's income but rather must consider all aspects of his income flow in the decision-making process. To consider otherwise would result in an incorrect appraisal technique. To value an apartment building on the basis of an actual 25% vacancy whilst the rest of the area only suffers from 3% would suggest an erroneous value which would not be found in the marketplace."

In the reasons of the Board it was stated at p. 4:

> "The assessor stated that his rentals were based on actual leases signed and filed in the Land Registry Office."

The owners submitted the assessor would no doubt increase valuation in the event there was an acceleration in rentals, and argue that when actual rents received are less than that provided in the leases, in fairness, the assessor should accept the actual rentals as the basis for determining value.

In addition, it is contended and raised in Question No. 2 the vacancies experienced by the developer were in fact considerably in excess of those used in determining net income. The actual vacancies were 25 per cent, but the assessor used a rate of 3 per cent, which was the vacancy rate experienced by other owners in the surrounding area.

The Board stated at p. 2 in its reasons:

> "To value an apartment building on the basis of an actual 25% vacancy whilst the rest of the area only suffers from 3% would suggest an erroneous value which would not be found in the marketplace. The Assessor has considered the subject based on other parkades and the Board finds that there is not sufficient evidence to support the premise

that the assessment exceeds actual value. Similarly there appears to be equity between other parkades."

The assessor has a statutory duty under Section 24 of the *Assessment Act*. It provides:

> 24. (1) The assessor shall determine the actual value of land and improvements.
>
> (2) In determining the actual value for the purposes of subsection (1), the assessor may give consideration to the present use, location, original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value, and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of those values.

The owners argue the assessor did not take the property as it stood, and as it was used and occupied at the time of the assessment; that the assessor should not look to subsequent or potential values to determine actual value; that he should look at conditions as he finds them. As authority for this proposition they rely upon *Sun Life Assurance Co. of Canada* v. *The City of Montreal*, [1950] S.C.R. 220 and *City of Vancouver* v. *Vine Lodge Limited and Balsam Lodge Limited*, and *City of Vancouver* v. *Sea view Construction Limited*, Case 45, British Columbia Assessment Authority Stated Cases.

The statement that the valuation is to be made on the basis of how buildings are being used and occupied at the time of the assessment does not, as submitted by the owners, necessarily prevent the assessor from considering other factors in determining value. Although the actual rent may be less than contractual, and although the vacancies may be greater than that experienced by neighbours, the authorities relied upon do not, in my view, mean that valuation must be based on the actual rentals and vacancies and not on market conditions as found in comparable properties. See *Re A. Merkur & Sons Ltd. and Regional Assessment Commissioner, Region No. 14 et al.* , [1978] 17 O.R. (2d) 339 at 347.

The Board in this case approved of the method of the assessor in arriving at actual value (through the income approach) by using contractual rentals as opposed to actual rentals and comparable vacancies as opposed to actual vacancies. In my view the Board was entitled to do so and they were correct in confirming the assessment.

The answer to Questions No. 1 and 2 is Yes.

Question 3:

> "3. Was the Assessment Appeal Board correct in law in failing to allow for lessor's extraordinary expenses in order to obtain tenants as a proper determinant when establishing actual value."

The facts concerning this question are found in paragraphs 7, 7A, 8 (set out at pages 2-3 of these reasons, *supra*) and paragraph 9, as follows:

> "(9) The Board rejected the lessor's extraordinary expenses necessarily incurred to attract tenants as a legitimate item in determining the actual value of the property."

In the reasons given by the Board it was stated:

> "The Board took issue with his income statement as he deducted from the net income $717,380 as being a loss of income due to incentives offered to gain tenants. It was pointed out that this value loss was a developer's cost which reduced his profit or proceeds rather than affecting value."

The argument submitted by the owners was that $717,380 was an expenditure to attract tenants and a cost that is not a usual and regular expense. It was an expense that reduced the developer's profit but it was argued it did not create value to the improvements, and as such it should not have been a factor in determining actual value. No authority was cited for the proposition that such an item of expenditure should not be considered in the same manner as other expenses.

So long as the expenditure was for the benefit of the development, and it is not argued otherwise, it must in my view be an appropriate item for consideration either on a replacement cost approach or as an expense in determining net income on the income approach. The Board rejected the owners' submission in this regard and it was correct in doing so.

The answer to Question No. 3 is Yes.

In summary, I would dismiss the petition on the grounds that Question No. 4 is not a question of law arising on the appeal, and that Questions 1, 2 and 3 are questions of fact and not law. If Questions 1, 2 and 3 or any of them are questions of law I would dismiss the appeal for the reasons given.

Judgment accordingly.