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OXFORD DEVELOPMENT GROUP LTD.

v.

ASSESSOR OF AREA 2 - CAPITAL

Supreme Court of British Columbia (No. 163/80)

Before: MR. JUSTICE L.G. McKENZIE (In Chambers)

Victoria, April 24, 1980

E.H. Alan Emery for the Appellant
John Savage for the Respondent

Reasons for Judgment May 5, 1980

This is the question of law asked in a Stated Case by the Assessment Appeal Board:

> "Did the Board err by failing to give consideration to whether or not the value at which the improvements under consideration were assessed bears a fair and just relation to the value at which similar improvements were assessed in the municipality?"

The Board accepted the capitalized income approach to actual value and chose not to consider evidence of the assessed actual values (on a square foot basis) of other buildings in downtown Victoria of similar construction to the 13 storey office building under appeal. There were no circumstances requiring different income capitalization rates to be applied to the various buildings to arrive at their actual values. After hearing the evidence the Board came to the conclusion that a correct figure for actual value having been established to its satisfaction it was unnecessary to go on and consider the relationship between such actual value and the actual values assessed for the comparable buildings. As the respondent sees it, the taxpayer is now saying that even after it has made a correct determination of actual value the Board would be obliged to lower the assessment below actual value upon being satisfied that the individual parcel under consideration does not bear a fair and just relation to the value at which similar land and improvements are assessed in the municipality. The respondent says that after it makes a correct determination of actual value the statutory duty of the Board is fulfilled and it would have to depart from this duty to lower it for any reason including that of a similar building carrying a lower assessment.

The process of valuation under the *Assessment Act* (1974) S.B.C. c. 6 begins with this:

> "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."

No reference is made there to equity, fairness or comparable property assessments.

The next stage involves the Court of Revision as the first appellate tribunal and it is given the following powers (insofar as are relevant here):

> "37. (1) The powers of a Court of Revision constituted under this Act are
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> > (a) to meet at the dates, times and places appointed, and to try all complaints delivered to the assessor in accordance with this Act;
> >
> > (b) to investigate the assessment roll and the various assessments therein made, whether complained against or not, and, subject to subsection (4), to adjudicate upon the assessments and complaints so that the assessments shall be fair and equitable and fairly represent actual values within the municipality or rural area;
> >
> > (c) To direct such amendments to be made in the assessment roll as may be necessary to give effect to its decision;
>
> . . .
>
> (4) The assessment of property complained against shall not be varied if the value at which it is assessed bears a fair and just relation to the value at which similar or neighbouring property in the municipality or rural area is assessed."

For the first time in the Act mention is made of the concept of fairness, equity and the bearing of a fair and just relation to similar property.

The Assessment Appeal Board functions at the second appellate level and it is empowered to vary an assessment under the following circumstances:

> "62. (1) In an appeal under this Act the board has and may exercise with reference to the subject matter of the appeal, all the powers of the Court of Revision, and without restricting the generality of the foregoing, the board may determine, and make an order accordingly,
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> > (a) whether or not the land or improvements, or both, have been valued at too high or too low an amount,
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> > (b) whether or not land or improvements, or both, have been properly classified,
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> > (c) whether or not an exemption has been properly allowed or disallowed,
> >
> > (d) whether or not land or improvements. or both. have been wrongfully entered on or omitted from the assessment roll, and
> >
> > (e) whether or not the value at which an individual parcel under consideration is assessed bears a fair and just relation to the value at which similar land and improvements are assessed in the municipality or rural area in which it is situated."

Once again the banner is raised of a fair and just relation to similar land.

The respondent relies on *Ladies Hosiery and Underwear Ltd.* v. *West Middlesex* (1932) 2 K.B. 679 which was based on the *Rating and Valuation Act*, 1925, in many ways a spiritual brother of our *Assessment Act*, in that it strives for "uniformity in the principles and practice of valuation" (s. 18 (2) and speaks of "incorrectness or unfairness" (s. 26 and s. 37 (1). The taxpayer's sole ground of appeal in that case was that its premises were incorrectly and unfairly assessed in

comparison with seven assessments of other hereditaments of the same class in the neighbourhood. A significant finding of fact was that the seven others "had been incorrectly assessed according to the statute at less than the hypothetical and statutory gross value" (p. 689).

That English Act and our Act are similar also in giving recourse to an aggrieved taxpayer to appeal an assessment on property owned by someone else (our Act ss. 34 and 35).

In the English case there was evidence that the rent on the premises in question would be at least £25. After noting this Scrutton, L.J. said (at p. 686):

> "One would have thought that this evidence destroyed the ratepayer's objection, but he said: 'No, I will show you that seven other hereditaments in the borough are assessed at sums lower than the rents which their hypothetical tenants would pay, and I require that I also should be assessed at a sum lower than the hypothetical tenant would pay. I do this because the essence of rating is fairness and uniformity, and I prefer my assessment to be inaccurate but uniform rather than it should be accurate but out of harmony with my neighbours. It is true that I can, if my facts are right, secure uniformity by correcting the inaccuracy of my neighbours' assessments, on objection to those assessments, and can get those assessments made uniform with my correct assessment. But I do not want this; I want to indulge my passion for uniformity by securing uniform inaccuracy, though that uniformity makes my correct assessment incorrect, but the inaccuracy is to my pecuniary advantage.' As I said during the argument, this looks all wrong, and I think it is a wrong view."

And at p. 688:

> "The appellants here, however, say that besides the principle of independent valuation, there is another vital principle; that as between different classes of hereditaments, and as between different hereditaments in the same class, the valuation should be fair and equal. I agree, but in my view there is a third important qualification, that the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error."

And finally at p. 690:

> "All the help I can give is to point out that the first vital question is the correct valuation according to the statute of the individual hereditament. Where the evidence on this point is clear and uncontradicted, evidence that another hereditament has been incorrectly valued according to the statute is of no weight, unless for the purpose, on proper notice. of correcting that particular inaccuracy. Where the evidence as to the proper valuation of the particular hereditament is doubtful, evidence as to the assessment of other hereditaments may be of some weight, though as it will involve another investigation whether the assessment of the other hereditament is correct and whether the two hereditaments are comparable, it is of much less value than the direct evidence as to the hereditament whose assessment is in question. Evidence, however, as to the application of different principles of assessment, as between comparable classes, or different parts of the same classes, may, of course, be of importance on the question whether the valuation list is fair and uniform."

Very much to the same effect are these comments by Slesser, L.J. at p. 693 and 694:

> "I am inclined, on consideration, to agree that the requirements of the statute do, in their recognition of unfairness, produce the result that an occupier is entitled to require that all other occupiers of the same comparable class shall be assessed upon a similar basis,

> and, in so far as the seven other hereditaments in this case of the same class are differently assessed, I think that the appellants here may possibly say that their assessment is unfair.
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> "This, however, by no means disposes of the matter. Their assessment is correct, and the unfairness, if it exists, is solely due to the under-assessment of the other hereditaments of the same class. The only method by which the apparent unfairness could be corrected would be for the appellants to give notice to the seven other hereditaments concerned, and then apply under s. 37 to have them raised up to the level of the appellants. This, of course, the appellants have not done, and do not seek to do. In the special case it is stated that the appellants 'did not seek to prove or contend that the seven other hereditaments were under-assessed, but accepted their assessments as correct.' It is scarcely possible, if the appellants' assessment is correct, that the seven other hereditaments can both be in the same class as the appellants and comparable to them, and at the same time that they should be correct at the present time, although they may have been correct at the time of the last quinquennial valuation.
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> "However that may be, it is clear to my mind that the appellants have taken the wrong course in attempting to correct their grievance of unfairness. If the grievance be, as it may well be, that there is economic inequality in requiring competing businesses to pay less proportionately than the appellants, that inequality can only be removed by increasing the assessments of their competitors. But I find it quite impossible to hold that the mandatory requirements of the *Rating and Valuation Act* as to the assessment of gross value in a particular case can be avoided or modified by a consideration of unfairness."

And Eve, J. at p. 696:

> "Standing by themselves, the findings that the seven other hereditaments were comparable with and formed part of the same class as the premises under appeal, and that the appellants' premises were assessed on a comparatively higher basis than the seven other hereditaments, may point to either of two alternatives, the one that the appellants' premises are over-assessed, and the other that the comparable premises are underassessed, but when they are accompanied by a finding that the comparable hereditaments were assessed by rents below those which could be obtained therefor. and when the appellants have themselves proved that the gross assessment of their own hereditament is correct, it is impossible to arrive at any other conclusion than this, that the want of uniformity-if it really exists - cannot be due to over-assessment of the appellants' hereditament."

Before the Assessment Appeal Board this taxpayer tendered evidence and made argument to prove that the actual value as calculated according to the capitalized value approach was wrong in having used an inappropriate capitalization rate and inappropriate vacancy rate. The Board altered each of these rates somewhat to favour the taxpayer's contentions and thus found that the building (not the land) had been valued by the assessor in excess of actual value. The taxpayer did not contend that the capitalized value approach was wrong in principle but rather that the assessor had chosen some unjustifiable numbers in making his calculations. The Board was at least partly persuaded that the taxpayer was right and reduced the valuation accordingly. The taxpayer then urged upon them a further correction downward to take account of the lower comparable assessments and this was met with the Board's refusal, and that refusal is the basis of this appeal.

My conclusion is that the Board was wrong in "failing to give consideration" to whether or not the subject property bore "a fair and just relation" to comparable properties. In the English case consideration was given at all levels to the other properties and findings of fact were made that (a) they were comparable; (b) that the premises under appeal were assessed on a comparatively

higher basis than the seven others; and that (c) the seven others were assessed at sums below the rents which would be obtained therefor. Manifestly, finding (c) was the main support for all the judgments.

The crucial distinction in the present case is that the Board did not consider the evidence of comparable assessments and, of course, made no observation as to whether or not those buildings were under-assessed.

Scrutton, L.J. said that "the first vital question is the correct valuation according to the statute". In his case the evidence on that point was "clear and uncontradicted", to wit that the property was assessed on the basis of £325 annual rental and the only witness on the point said that "the rent would be at least £325". Nothing could be clearer. Contrast that to the situation here where the computation of actual value by the capitalized income approach involved the collection and selection of such variable data as vacancy rates, capitalization rates, economic gross income and operating expenses. As evidenced by the decision of the Board in correcting the assessor's valuation, there was room for a difference of opinion as to which data were correct. After substituting its opinion for that of the assessor the Board found what it considered to be the true actual value and declined to test its conclusion against comparable assessments. As Scrutton, L.J. said (at p. 690) "Where the evidence as to the proper valuation of the particular hereditament is doubtful, evidence as to the assessment of other hereditaments may be of some weight, though as it will involve another investigation whether the assessment of the other hereditament is correct and whether the two hereditaments are comparable, it is of much less value than the direct evidence as to the hereditament whose assessment is in question."

As I see it the evidence should have been analysed and used in the weighing process for what it was worth - not ignored.

The respondent disagrees saying that if this process should result in a variation from the original finding of actual value then that result must be something different from actual value and therefore contrary to the Act.

In *Corporation of City of North Vancouver and Jellis v. Philps et al*, *Attorney General of British Columbia and Lynn Terminals Ltd.* (1973) 3 WWR 262 the B.C. Court of Appeal was dealing with a predecessor statute, the *Assessment Equalization Act*, R.S.B.C. 1960, c. 18 and there the "fair and just" criterion ran alongside the valuation section as follows:

> "37. (1) The assessor shall determine the actual value of land and improvements. In determining the actual value, the assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.
>
> (2) The assessed value of any parcel of land and improvements (including. in particular. new homes) shall be commensurate with that of comparable parcels of land and improvements in the same municipal corporation or rural area, the assessed value of later development bearing a fair and just relation to that of earlier development, notwithstanding any differences between the costs of comparable items."

When the *Assessment Act* was put together, at s. 24 (1) and (2), (supra) liberal borrowing was made from the old s. 37 (1) but s. 37 (2) was cast adrift and brought ashore later in altered form in the new s. 37 (1) (b) and (4) and 62 (1) (e).

The majority of two in the *Lynn Terminals* case based its decision on considerations not relevant here, and dismissed the municipality's appeal. Branca, J.A. gave separate reasons for dismissing the appeal without being concurred with or concurring. At p. 272 he summarized the effect of the old s. 37 (1) and (2) as follows:

> "The assessed value of lands, that is, the value for taxation purposes, is not the actual value that is spoken of in the first subsection but is a value which must be commensurate with the value of comparable parcels of land and improvements in the same municipality, that is to say, a value that is commensurably fair in order that land and improvements are burdened only with a just and equitable proportion of taxation."

Counsel for the taxpayer, while conceding that these words were probably obiter dicta in the context of that case, says that they are apt comment in the context of the present case. If the words of the old s. 37 (2) remained in place immediately alongside those of the present s. 24 (1) and (2) then I would unhesitatingly adopt Branca, J.A.'s words as an accurate summary of the total effect of the combined sections. The question then becomes whether the shifting of the old s. 37 (2) to the other places in the new Act in slightly altered forms deprives Branca, J.A.'s words of aptness. My conclusion is that the shift has not made any material difference. As I construe the present act the assessor follows the code prescribed by s. 24 and in so doing, under the aegis of "any other circumstances affecting value" may have regard to data derived from comparable properties. He is under no statutory compulsion to do so.

Should his assessment reach the first appellate level, under s. 37 (b) the Court of Revision is obliged "to adjudicate upon the assessments. . . so that the assessments shall be fair and equitable and fairly represent actual values within the municipality." In this context "fair and equitable" must mean "as compared to one another" which implies a comparative standard. This obligation is subject to 37 (4), already quoted, which says, in effect, that if measured by the comparative standard, the assessment under appeal bears a fair and just relation to the assessed values of similar or neighbouring property then the appealed assessment shall not be varied. In other words the comparative test becomes the decisive test.

These processes having been exhausted, the taxpayer might take his assessment to the second appellate level where the Assessment Appeal Board under s. 62 can do anything that the Court of Revision could or should have done, including adjudicating on fairness and equitability. This discretionary power is given to the Board not only in a general way ("may exercise all the powers of the Court of Revision") but also in a specific way ("may determine. . . (e) whether or not the value, etc. bears a fair and just relation, etc.").

The Stated Case does not reveal whether or not the assessor considered comparable data, or if the Court of Revision adjudicated upon this assessment so that it would be fair and equitable or, having done so, whether or not it declined to vary the assessment because it bore a fair and just relation to similar or neighbouring assessments. It is clear, however, that the Board stopped short of considering comparable assessments. Was it justified in doing so in the light of its discretionary powers under s.62?

In my view s. 62 (e) is meaningless unless it is invoked in an appropriate case. The assessor is obliged to find actual value. In testing the accuracy of his determination in any given case the Court of Revision is obliged to "adjudicate. . . so that the assessments shall be fair and equitable" and it would be impossible to do so until it gave consideration to evidence tendered on comparable assessments. The Board in its turn cannot pass over such evidence in an appropriate case where there is, as here, doubt over the accuracy of the assessment. It is for the Board to decide on its relevance, comparability and weight but it cannot ignore the evidence.

I am sensitive of the complications which can arise and the potential added labours to be borne by an Assessment Appeal Board having to give consideration to comparable assessments but if each assessment is to be "fair and just" that additional labour must be borne.

The case must be remitted to the Board for its consideration of the evidence to determine whether or not the assessment on this building bears a fair and just relation to the assessed values of the similar buildings.

In reaching this conclusion I have considered the theoretical remedy which the taxpayer might have pursued in appealing the assessments on the other buildings but those considerations have not provided any satisfactory answers apart from this order of remission.

If there is any dispute over costs that issue may be spoken to.