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**SIMPSONS-SEARS LIMITED**

**v.**

**ASSESSMENT AREA OF SURREY/WHITE ROCK**

British Columbia Court of Appeal (CA 800608) Vancouver Registry

Before: MR. JUSTICE P.D. SEATON, MR. JUSTICE A.B.B. CARROTHERS, and MR. JUSTICE J.D. LAMBERT

Vancouver, January 22, 1981

J.E.D. Savage for the appellant, Assessor of Area 14 – Surrey-White Rock
John R. Lakes for the respondent, Simpsons-Sears Limited

**Reasons for Judgment of Mr. Justice Lambert (Oral)** January 22, 1981

SEATON, J.A.: I will ask my brother Lambert to give the first judgment.

LAMBERT, J.A. (Oral): This is an assessment appeal. It relates to a Simpsons-Sears store attached to a shopping mall in the Surrey-White Rock District. At the other end of the shopping mall is a Hudson Bay store. The evidence indicates that about a block away there is a K-Mart and that about two miles away another shopping centre where there is a Woodward's store and an Eaton's store.

The Assessment appeals are brought under the *Assessment Act* by stated case. Since there are some problems in discerning the true content of the questions, I think it is desirable to set out the stated case in the full.

> "This case stated by the Assessment Appeal Board came before the Board in Surrey, British Columbia on Wednesday, the 19th day of September 1979 in the presence of John R. Lakes, Esq., Counsel for the appellant and Messrs. M. Ratson and G. T. Howard for the respondent Assessor.
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> The facts are as follows:
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> 1. The appellant has a department store situate at 10045 King George Highway, Surrey, British Columbia consisting of about 10.48 acres which is part of the Surrey Place Shopping Centre which also includes a shopping mall and Bay Department Store. The appellant's property is on the southern part of the Surrey Place Shopping Centre on King George Highway and 102nd Avenue.
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> 2. The assessment of the appellant's land and premises was in the amount of $1,940,150 on the land, $4,966,002 on the improvements and $542,590 on the machinery and equipment. The land value was on the basis of $4.25 per square foot for 556,508 square feet. The land assessment on the immediately adjoining property, being the Surrey Place Shopping Centre, was assessed at $4.00 a square foot and the land owned by The Bay Department Store adjacent to the shopping centre and being the northern part of the shopping complex, was assessed at $3.75 per square foot. The Assessor compared the land values of the appellant's property to the land assessment of a K-Mart store which is

not adjacent to the appellant's property and also a Woodward's and Eaton's Department store located at Guilford Shopping Centre which is approximately two miles from the appellant's land. The topography of the appellant's land is not identical to the topography of the K-Mart or the Eaton's and Woodward's lands. The Assessor also applied a cost approach based on the Marshall Swift calculator system on the improvements of the appellant's property and also calculated an income approach by applying a cap rate of 9.5 per cent and comparing the appellant's improvements to rentals of department stores situate in Richmond, West Vancouver, Vancouver, Brentwood, Lansdowne Park and Coquitlam. At the Assessment Appeal Board the Assessor recommended a reduction of the assessment of the improvements to $4,932,000 which was accepted by the Board. The assessment of machinery was an issue to the extent of the inclusion of cash registers and the Assessment Appeal Board held that the cash registers were not assessable and directed the Assessor to make the necessary adjustments and therefore the assessment of the machinery as adjusted is no longer an issue in this appeal.

3. The appellant submitted evidence by A.T. Ray Jones, an accredited appraiser, that the land should be valued at $1,826,032 and the improvements at $4,140,968 or for a total assessment on land and improvements of $5,967,000. The appellant submitted that the land assessment should be at the same rate per square feet as the other land in the Surrey Place Shopping Centre and that this land is not topographic ally identical to the lands which the Assessor used for comparison. The appellant also submitted that there should be an allowance for functional and economic obsolescence concerning the appellant's building because the building was constructed with super structure and foundations in order to take a third floor whereas in fact the building is only two stories and also because there was exterior stairways to the appellant's building which are not extensively used. In addition to this, the Surrey-White Rock area has a high percentage of space in shopping centres and the department store has not, in Mr. Jones' submission, reached a level on sales performance that would be accepted considering the size and age of the department store. The submission of the appellant is filed with this Stated Case as Schedule 'A'.

4. The Assessor made a submission to the Assessment Appeal Board which is filed as Schedule 'B'.

5. The Assessment Appeal Board confirmed the land assessment and directed the Assessor to reduce the assessment on the improvements to $4,376,000 and a copy of the decision of the Assessment Appeal Board is filed herewith as Schedule 'C'. In the Assessment Appeal Board decision there is no reference made to the appellant's submission concerning economic and functional obsolescence.

6. The appellant requires that the case be stated and signed to this Honourable Court on the following questions of law:

(1) Did the Assessment Appeal Board err in law by confirming the assessment on the appellant's land at a higher 'actual value' than the similar land adjoining the appellant's land?

(2) Did the Assessment Appeal Board err in law by disregarding the evidence of economic and functional obsolescence as a valid factor in determining the 'actual value' of the appellant's improvements?

(3) Did the Assessment Appeal Board err in law by accepting the Assessor's 'gross income' where there was no evidence before the Board to establish that either:

(a) this did determine 'actual value' of the appellant's improvements, and

(b) that the said assessment bears a fair and just relation to the value at which similar land and improvements are assessed in Surrey?

(4) Did the Assessment Appeal Board err in law by accepting the Assessor's submission of $4.40 as 'economic rent' on the appellant's property where there is no evidence to establish that either:

(a) any such rent does apply to the appellant's land and improvements at all, and

(b) that the resulting assessment of the appellant's land and improvements bears a fair and just relation to the value on which similar land and improvements are assessed in Surrey?

Pursuant to section 67 of the *Assessment Act* aforesaid, the Assessment Appeal Board submits this Stated Case and humbly requests the opinion of This Honourable Court on the said questions of law.

All of which is respectfully submitted.

Dated at Maple Ridge, B.C. this 27th day of December AD 1979."

The appeal by stated case came on for hearing before Mr. Justice Mackoff, who directed that it be sent back for amendment under the specific provisions in the *Assessment Act* dealing with amendment, and there was an amendment to the stated case and it is as follows:

"The Assessment Appeal Board decision dated the 5th day of November, 1979, and appealed by way of Stated Case came on for hearing before the Honourable Mr. Justice Mackoff on Tuesday, the 12th day of February 1980. By order of the Honourable Mr. Justice Mackoff dated the 12th day of February 1980, the Stated Case was sent back to the Assessment Appeal Board for amendment of the facts to clarify the finding of the Board that the value of the land of the appellant be $4.25 per square foot regardless of the value of the land applied to the Bay and to the mall.

In accordance with the order aforesaid, the Board states the following facts:

The Board finds that the Assessor has been inconsistent in valuing the Simpsons-Sears land at $4.25 per square foot, the mall at $4.00 per square foot and the Bay at $3.75 per square foot. [n the interest of equity, the Board is of the opinion that these three parcels of land should be valued at the same square foot rate in accordance with the appellant's contention that 'purchasers and users of the centre would place as much value on one parcel as the next'. However, the Board is restricted to a decision in this appeal on the Simpsons-Sears property only and finds that the actual value of the land is $4.25 per square foot. $4.25 per square foot is a value which is supported by other shopping centres as detailed in Mr. Ratson's evidence which is referred to in the final paragraph of page 2 of the decision of the Board dated November 5, 1979.

The Assessment Appeal Board submits this amendment of the stated case and humbly requests the opinion of This Honourable Court on the questions at law heretofore submitted."

The appeal by stated case came on again before Mr. Justice Dryer, who answered the four questions in this way: He answered questions 1 and 2 by saying: "Yes" and he answered questions 3 and 4 by saying "No".

I propose to deal with the four questions in order.

Before doing so I would like to refer to the *Assessment Act* and to section 74 where the jurisdiction of the Court of Appeal is set out in subsection (7) in these words:

> "An appeal lies from the determination of the Supreme Court to the Court of Appeal on any point of law raised or determined on the hearing of the appeal by the judge."

I particularly refer to that subsection because there is an ambiguity in all four of the questions in this case.

It is suggested that Mr. Justice Dryer answered a question that may not have been the question that was intended to have been stated.

The jurisdiction of this Court is to deal with the points of law raised by the stated case as well as the points of law determined on the hearing of the stated case by the Supreme Court Judge, and I propose to deal with the alternative interpretations, both those taken and decided by Mr. Justice Dryer and those that were argued before us as having been intended.

In adopting that course I wish to say that I do not want to be taken as deciding that we are obliged, in this case or any other case, to answer any question that was not asked and dealt with by the Supreme Court Judge.

I turn now to question 1, and I will restate it:

> "(1) Did the Assessment Appeal Board err in law by confirming the assessment on the appellant's land at a higher 'actual value' than the similar land adjoining the appellant's land?"

There are three possible interpretations to be made of that question.

The first would ask whether there was an error in arriving at an assessment for land that was higher than the assessment for land that was arrived at for the mall that immediately adjoined Simpsons-Sears store, or that was arrived at for the Hudson's Bay Store that formed a part of the same shopping centre. That was not the question that was dealt with by Mr. Justice Dryer.

In my opinion, there was no such error on the part of the Assessment Appeal Board. In this case the Assessment Appeal Board specifically dealt with that question. They said that it would have been appropriate for all three properties to be assessed at the same value for land, but they were required, as a prime and absolute requirement, to assess the land under appeal in this case on the basis of actual value and they had concluded, on the basis of the evidence before them, that the actual value was $4.25 per square foot. They said that the error, if there was one, lay in underassessment of the land of the two adjoining properties.

There is provision in the *Assessment Act* for the owner of one property to appeal an assessment of an adjoining property, or any other property in the municipality, on the ground that it is too low and does not result in just and equitable treatment for the owner of the first property.

In my opinion, the approach that was taken by the Assessment Appeal Board in relation to that interpretation of the first question was the correct one.

The second interpretation of the first question was that it asks whether there was an error in law in using the assessed actual value of the land in the K-Mart, the Eaton's and the Woodward's Stores in arriving at the figure for the assessed actual value of the land under appeal.

That was the question that was considered by Mr. Justice Dryer. He decided, in essence, that there was an error and that it lay in the fact that the actual value of the land under appeal was not being determined by that method.

As it was put by counsel for the respondent, the assessed actual values of land elsewhere in the municipality were being dumped on the land in appeal here. We were referred to a number of authorities by counsel for the respondent that supported the proposition that that would have been an error in law and an improper mode of assessment if, indeed, that dumping process had taken place.

But those cases, primarily, and most directly, deal with the question of making a change in a land value because of a desire to reach a fair, just and equitable result and so to move away from the prime requirement of determining actual value. But, if the prime requirement is kept in mind and the determination is being made of actual value of the land precisely in question, but that actual value is being determined on the basis of evidence that consists wholly, or in part, of evidence of the assessed actual values of comparable land, then, in my opinion, there is no error in law. That evidence may not be the best evidence of the actual value of the land in question, but it is some evidence. It was the type of evidence led by both the appellant and the respondent in this case before the Assessment Appeal Board. Perhaps better evidence could be contemplated, but it was up to the Assessment Appeal Board to do its best with the evidence before it and, in my opinion, in reaching the conclusion that they did on the actual value of the land in this case through the method that they did there was no error in law.

The third possible interpretation of that question is the full broad question of whether there was any error in law in the confirmation of the assessment, with the remaining words being merely descriptive of the assessment that was confirmed.

In my opinion, the statement of the question in that way would not be in conformity with the intention of the *Assessment Act*. It is not intended that broad questions of whether there was an error in law in the assessment should come without any specification of the error in law.

In any event, I have dealt with all the specific errors that were argued and nothing more need be said about that third interpretation.

I pass on to question 2.

> "(2) Did the Assessment Appeal Board err in law by disregarding the evidence of economic and functional obsolescence as a valid factor in determining the 'actual value' of the appellant's improvements?"

In this case, rather than three alternative interpretations of the question, there are four alternative interpretations, as I see it.

The first would be: Did the Assessment Appeal Board completely overlook the evidence of economic and functional obsolescence?

The second question would be: Did the Assessment Appeal Board have that evidence in mind, but decide to ignore it?

The third question would be: Did the Assessment Appeal Board have that evidence in mind and consider it, but reach a conclusion that does not appear to have been influenced by it?

The fourth question would be: Did the Assessment Appeal Board err in law by not referring specifically to the view they took of the evidence of economic and functional obsolescence in their reasons?

In trying to separate out these four questions it is important to consider the precise words of the stated case; the final sentence of paragraph 5 of which reads in this way:

> "In the Assessment Appeal Board decision there is no reference made to the appellant's submission concerning economic and functional obsolescence."

In my opinion, you cannot go outside the words in the stated case. The only complaint that can be made on the basis of those words is that there is no reference in the reasons to economic and functional obsolescence evidence and submissions. That was the view that was taken by Mr. Justice Dryer of the question that was before him and I agree with that view.

However, I would reach a different conclusion than Mr. Justice Dryer on that question of law.

We were referred by counsel for the appellant to *S.A. DeSmith, Judicial Review of Administrative Action* at pages 207 and 208 and to the decision of the Manitoba Court of Appeal in *Re: Glendenning Motorways Inc.* (1976) 59 D.L.R. (3d) at 89. I think that both of these authorities support the proposition that unless the statute which sets up a Board or court specifically requires that Board or court to state all of its reasons, then it is not an error in law not to state all of their reasons. There may be exceptions to that general principle, but if there are, then they do not, in my opinion, apply to the Assessment Appeal Board. The Assessment Appeal Board is not required, as a matter of statute, to deal explicitly in its reasons with every piece of evidence and every argument put before it and either to accept it or reject it.

Accordingly, the only question being whether they are required to deal with this argument explicitly in their reasons, I would decide that there is no error in law as raised by question 2.

I would add that as I apprehend the reasoning of the Assessment Appeal Board they appear to me to have given consideration to the submissions that were made to them and not to have followed merely one side or the other side, and they have balanced a number of factors and reached an independent conclusion and I would be very loathe to reach a conclusion, were it a conclusion that I had to consider, that they had not given. careful consideration to the argument of economic and functional obsolescence.

I turn now to questions 3 and 4, which I propose to deal with together and which I will state together:

> "(3) Did the Assessment Appeal Board err in law by accepting the Assessor's 'gross income' where there was no evidence before the Board to establish that either:
>
> (a) this did determine 'actual value' of the appellant's improvements, and
>
> (b) that the said assessment bears a fair and just relation to the value at which similar land and improvements are assessed in Surrey?
>
> "(4) Did the Assessment Appeal Board err in law by accepting the Assessor's submission of $4.40 as 'economic rent' on the appellant's property where there is no evidence to establish that either:
>
> (a) any such rent does apply to the appellant's land and improvements at all, and
>
> (b) that the resulting assessment of the appellant's land and improvements bears a fair and just relation to the value on which similar land and improvements are assessed in Surrey?"

These two questions were the subject of the cross-appeal. Mr. Justice Dryer had answered both of them "no". He does say that he finds the questions by no means clear.

The essential part of the argument made by the appellant on the cross-appeal, as I understand it, is that the stores in the shopping centres that were considered for the purpose of arriving at gross income and for the purpose of arriving at economic rent, in the course of the income approach, were department stores in shopping centres located outside the municipality that is being considered here, namely, Surrey.

The appellant on the cross-appeal also says that when those stores are taken as comparisons, if it is proper to take them as comparisons, then their similarities and differences must be carefully considered in relation to the property under appeal and then the figures for gross income and economic rent must be adapted so that they reflect the precise land and improvements in question and so that the final result is an assessment of the land and improvements in question. With that submission I would find it hard to disagree.

But we are dealing with questions of opinion. The income approach is used because, at least in part, the market approach is not available at all, there being no sales of shopping centres that are comparable within the municipality in question and, indeed, even for purposes of the income approach, to arrive at economic rent capitalization there have to be considerations given to similarities that go beyond the boundaries of the municipality in order to arrive at any worthwhile comparables. Even if there was a comparable within the boundary of the municipality it does not seem to me that that would be any reason for rejecting the comparables from outside the boundary of the municipality.

The true question is whether they are truly comparable and can, either directly or through appropriate adaptations, lead to the right result in forming an opinion as to the assessed value of the particular land and improvements.

Counsel for the appellant on the cross-appeal referred to section 41 (1) (b) of the *Assessment Act* and to section 69 (1) (e) of that Act.

The first reference is to the powers of the Court of Revision, where the requirement is that the assessment fairly represent actual values within the municipality.

The second reference is to the powers of the Assessment Appeal Board which, in addition to adopting the powers of the Court of Revision, refers to a determination of whether the value of an individual parcel under consideration bears a fair and just relation to the value at which similar lands and improvements are assessed in the municipality in which it is situate.

In my opinion, both of those requirements must be observed, but they do not prevent consideration being given to appropriate comparisons from outside the boundary of the municipality, if those comparisons have relevance in forming an expert and informed opinion on matters that are required to be determined by the Board.

For those reasons I would dismiss the cross-appeal and maintain the answers given to questions 3 and 4 by Mr. Justice Dryer.

I would, therefore, allow the appeal with respect to both question 1 and question 2, and dismiss the cross-appeal with respect to both question 3 and question 4.

Before concluding this appeal, I would like to refer to the stated case itself and to the fact that both Mr. Justice Dryer and this court have wrestled with considerable difficulties because of ambiguities in the questions that were stated.

The relevant subsections of the *Assessment Act* are subsections (2) and (5) of section 74. They contemplate that the person affected by the decision who wishes to appeal may require the Board

to submit a case for the opinion of the Supreme Court on a question of law alone and, where the case is stated, the secretary of the Board shall promptly file the case.

Of course, the views of counsel for the person affected by the decision and who wishes to appeal must be of great significance in deciding the question of law, but, in my opinion, that does not end the responsibility of the Assessment Appeal Board to do its best to insure that there is a clear question of law stated in the stated case and that it is a question raised by the facts of the case.

I do not wish to be taken as trying to make definitive rules as to how a stated case should come forward but, in my opinion, the Board itself and all parties to the appeal to the judge of the Supreme Court have some responsibility to insure they raise the proper questions.

SEATON, J.A.: I agree.

CARROTHERS, J.A.: I agree.

SEATON, J.A.: The appeal is allowed. Questions 1 and 2 are answered in the negative. The cross-appeal is dismissed.