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GENSTAR LTD.
v.
DISTRICT OF MISSION

SUPREME COURT OF BRITISH COLUMBIA (A810072) Vancouver Registry

Before CHIEF JUSTICE ALLAN McEACHERN (in chambers)

Vancouver, April 13, 1981

John R. Lakes for the appellant.

C. D. McQuarrie for the respondent.

Reasons for Judgment May 25, 1981

This is a Stated Case appeal by Genstar Limited ("Genstar"), against a decision of the Assessment Appeal Board ("the Board"), with respect to certain lands in the Silverdale area of the District of Mission.

The lands in question comprise 28 different lots which Genstar acquired between 1975 and 1977 at various prices averaging $4,100.00 per acre for land and buildings, and $3,748.00 per acre for land alone. The area is 1149.67 acres but there is no dispute regarding 346.50 acres. What is in question is 710.03 acres.

In November 1979 Mission offered to sell a further 439.71 acres, in 13 different packages (comprising 25 lots) in the centre of Genstar's lands. Only Genstar and Block Bros. Limited bid for these lands which were not widely advertised. Block Bros. was the successful bidder at $3.925,620.00 payable 25 per cent in cash, and the balance payable over 10 years at 9 per cent. Genstar's tender was close to Block Bros. but was structured differently. Genstar offered a cash payment for each package, and a further payment of $3,000.00 per acre upon an application to develop the property being approved by Mission. Assuming all the property was approved for development, Genstar's total offer would be $3,787,505.00. One of the witnesses described Genstar's deferred $3.000.00 per acre as "insurance" that the property would be approved for subdivision.

Block Bros.' bid was for all or none of the packages. Genstar did not impose such a condition.

The Assessor determined the value of the Genstar lands by comparison with a number of sales in the area, but he excluded the Genstar acquisitions and the Block Bros.' purchase because he considered they represented special values to the owners. From these other sales the Assessor determined value, and, by relating price to size, the Assessor arrived at a schedule of values ranging from $7,200.00 per acre for 5 acre lots, to $1,145.00 per acre for 100 acre lots. His average value per acre was $2,310.00.

An appeal by Mission to the Court of Revision was unsuccessful. Mission then appealed further to the Board which allowed the appeal as to all the 28 lots in dispute. The Board fixed a substantially higher average value for the properties of $7,000.00 per acre, based entirely upon the adjusted price paid by Block Bros. That adjustment was made necessary because of the uneconomic interest rate payable by Block Bros. on the deferred balance.

As mentioned earlier, the Assessor fixed individual values for each lot mainly because of differences in size, but his average value was $2,310.00 per acre. As the Board determined the new per acre value was $7,000.00, it directed that each of Genstar's lots should be assessed at an increased value from what the Assessor found, such increased value to be determined by applying the ratio of $7,000.00/$2,310.00 to the value given by the Assessor.

Amongst other things, Genstar complains that the Board has not attempted to determine the value of any of its lots. Rather, Genstar argues, the Board has assumed that all of Genstar's and Block Bros.' acreage has the same value, and the Board only found different values for different lots by means of the formula mentioned above. As a result, the Board has determined that all the lots at the higher per acreage value have the same value for assessment purposes in relation to each other as they had under the original assessment.

I believe it is accurate to summarize Genstar's first two submissions by saying that the method followed by the Board is arbitrary, and that it assesses the property at value to owner.

In fairness to the Board it may be said that the subject lands, and the Block Bros.' 1979 acquisition are, generally speaking, comparable as to topography and, of course, location. The lots are not of equal size.

This appeal is governed by section 26 (1) and (2) of the *Assessment Act*, R.S.B.C. 1979 c. 21 which provides:

> "26. (1) The assessor shall determine the actual value of land and improvements.
>
> (2) In determining the actual value under 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."

In *Pacific Logging Co.* v. *British Columbia*, (1977) 16 N.R. 513, McIntyre, J.A., (dissenting, affirmed in the Supreme Court of Canada), described the assessment process at p. 523 as: "The assessor must determine the actual value of these lands. He must do so in accordance with (s. 26). In doing so he may give consideration to the various factors mentioned in the section, or some of them, and he may as well consider 'any other circumstances affecting the value.' Failure to assess according to this section amounts to error in law. . . ."

In support of its submission that the Board's assessment is arbitrary Genstar relies upon *Pacific Logging* v. *British Columbia*, supra, *Assessment Commissioner* v. *Seaspan International Ltd. et al* (1979) B.C. Stated Cases, No. 129, p. 771; and *Assessment Commission* v. *Kingsview Properties* (1979), 12 B .C.L.R. 138.

In response, Mr. McQuarrie for the District of Mission, contends that these lands were part of a land assembly, and that the Board found as a fact (which is not really disputed), that the highest and best use of these lands is "for holding as a land bank for future development". He says, further, that this is an exceptional case where the ordinary rules cannot be applied: *Montreal* v. *Sun Life Assurance Co. of Canada* (1952) 2 D.L.R. 81 per Lord Porter at p. 101. For these

reasons, Mr. McQuarric argues, it is permissible to value the Genstar lands on an acreage basis, giving weight to the different size of the various parcels.

In my view the Board erred in deciding, as it did, that the Genstar lands may be valued by the formula it employed. The use of a formula by its nature tends to be arbitrary in the sense used by McIntyre, J.A., in the *Pacific Logging* case, i.e., "a decision made in absence of specific evidence and based upon opinion or preference". It is arbitrary in this case because it assumes that the increased value of each lot, regardless of its size, may be determined by a ratio of the increased per acre value to the former value. It is probable, in my view, that the increased value would not be found in the various lots in the absolute terms required by the formula. The increased value may be distributed quite differently. In other words, it is my view that the spread between the larger and the smaller lots may be greater or less in view of the much greater per acre value. In that sense, the conclusion reached by the Board is arbitrary. I am comforted in this conclusion by the helpful statement of Trainor, J. in the *Kingsview Properties* case, supra, at p. 142.

"The responsibility of the Board was to determine the value of each lot. This responsibility was not met by designing a formula, however accurate, which was handed back to the assessor." I turn next to consider the question of value to owner. What has happened is that Genstar has assembled a large tract of land including many separate lots of varying sizes at values which are greater per acre for smaller lots than for larger lots. Genstar's cost per acre is greater than the indicated market value derived from other sales which the Assessor used as comparable properties in his assessment. When the District of Mission offered an additional 439.71 acres to the market, Genstar was willing to purchase and thereby increase its acreage, and it bid what it was willing to pay but hedged its offer by including a $3,000.00 per acre holdback until the property was ready for development.

Block Bros., on the other hand, which is developing a large tract of land in joint venture with Genstar in Coquitlam, wished to buy into a possible joint venture with Genstar in the development of these lands. Block Bros. accordingly bid what it thought it would have to pay in these circumstances in order to get the land, knowing as it did that Genstar would probably be interested in increasing its already substantial holdings.

The Assessor relied upon other sales and disregarded the other Genstar acquisitions and both the Genstar and Block Bros. offers for the additional lands. The Assessor's opinion was that the other sales were the best indication of value, and that Genstar's assembly acquisitions, and the sale to Block Bros., were special cases which did not indicate true value.

I cannot weigh the evidence and reach a conclusion on value. I may only look at the evidence for the purpose of interpreting or explaining the Statement of Facts: *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach Canada Limited et al* (1963) 42 W.W.R. 449.

Genstar argues that the sale to Block Bros. upon which the Board relied as the sole indicator of value, is a reflection not of value generally, but of value to large developers such as Genstar and Block Bros. Genstar points out that the Board found the 9 per cent interest rate on the deferred balance was uneconomic and required adjustment to 15 per cent. It was argued that the District of Mission was really making a special arrangement because it would not sell to every purchaser on similar terms, i.e., 9 per cent over 10 years. Genstar relies upon: *C.N.R.* v. *Vancouver*, [1950] 2 W.W.R. 337 (B.C.C.A.); *Re Desautels Appeal* (1959), 29 W.W.R. 665 (B.C.S.C.); *Shell Oil Company of Canada et al* v. *Corporation of District of North Vancouver* (1961), B.C. Stated Case No. 24, page 96 (B.C.S.C.); and *Provincial Assessors of Comox et al* v. *Crown Zellerbach Canada Limited et al*, supra.

In short, Genstar says the Board accepted value to an owner (Block Bros.) as value for assessment purposes, and acted upon one sale which is an unreliable indicator of value. It is argued that that sale is coloured by unusual and uneconomic terms. Why, Mr. Lakes asked rhetorically, would Mission sell land for future development with only 25 percent down, and the balance over 10 years at an uneconomic (and unrealistic) rate of interest? It must be, Genstar argues, that Mission and Block Bros. have their reasons, but a transaction consummated on such a basis does not establish value for assessment purposes.

The District of Mission argues that the best evidence of value is the price paid at or near the date of valuation: *Assessment Commissioner for British Columbia* v. *Houston*, [1979] 5 W.W.R. 639 (B.C.S.C.), and that, as the Board was considering both the Block Bros.' land as well as Genstar's land, and as the lands are similar, the prices paid by Block Bros., in competitive bidding, is the best evidence of value. Further, it was argued, that when there are two willing purchasers, the concept of special value to the owner is inapplicable.

Mission argues forcefully that a land assembly or land bank distinguishes this case from cases such as *Pacific Logging, Seaspan* and *Kingsview*, and that, as value in section 26 means market value, it is permissible to apply an acreage price to all the lands. It is argued that the lands being assembled have a greater value than lands not being assembled, and that this greater value or potential is an attribute that must be considered: *Shell Oil Co. of Canada Ltd. et al* v. *Corporation of District of North Vancouver* (1961) No. 24 Stated Cases p. 96 (B.C.S.C.). I agree that the potential of land must be considered.
Mission also relies upon *Assessment Commissioners of the York Assessment Office* v. *Office Speciality Limited*, [1975]1 S.C.R. 677 (S.C.C.); *Arpro Developments Ltd.* v. *The Queen* (1978), 5 B.C.L.R. 184 (B.C.C.A.), affirmed S.C.C. (1978) 22 N.R. 451; and *Weidman et al* v. *Minister of Public Works* (1979), 14 B.C.L.R. 129. The latter two cases, of course, are expropriation cases.

Lastly, Mission argues that there was independent appraisal evidence that the lands had a market value as at December 31st, 1979 of between $8,000.00 and $9,000.00 per acre. That is so, but it is based entirely upon the Block Bros. sale, and it is subject to the same infirmities, if that is the word, as the decision of the Board.

My conclusion is that the Board did err in acting solely upon the one transaction, and in attempting to apply that price to all the Genstar lands with only an adjustment for the uneconomic interest rate. The price offered by Block Bros. for all 13 packages does not establish the value of the Genstar lands. Rather, that price reflects the special value of those lands, and only those lands, to Block Bros. Genstar's bid, also, indicates only the special value those same lands had to Genstar in the circumstances, but does not indicate the value of Genstar's other lands: The Crown Zellerbach case, supra, per Davey, J.A., (as he then was) at page 460.

For these reasons the conclusion of the Board was reached upon an incorrect basis and cannot be allowed to stand.

What the Board is required to do is to determine the actual value of the Genstar lots on an individual basis. In that determination, the Board must give consideration to the other sales relied upon by the Assessor, but, it seems to me, the Board may also consider the Genstar purchases and the Block Bros. purchases. In this latter connection, however, it is my view-although this is entirely a matter for the Board-it should consider the circumstances of that acquisition, and it should make such discounts as it thinks proper not just for the uneconomic interest rate, but also for the other terms particularly the deferred payment provision and the question of special value.

I wish to mention one particular finding of the Board. It said, "A close examination of the two bids, on the basis of what each would be likely to return to the vendor in a 10 year period, shows them to be remarkably close."

It is not for me to determine the basis upon which the Board made this finding. Many assumptions and discounts would have to be made and calculated in order to support such a conclusion. It is sufficient for me to say that a comparison of these two bids, and an attempt to rationalize them, illustrates why it is dangerous, and perhaps unfair, to base an assessment upon one unusual transaction, even where there are competing bids. The Board has really accepted special value to Block Bros. as conclusive evidence of the value of all comparable lands.

Lastly, Genstar relying upon section 44 (1) (b) and section 69 (1) (d) of the *Assessment Act*, supra, and numerous authorities, argues that the Board has not, as required, adjudicated upon the appeal in such a way so as to ensure that all assessments shall be fair and equitable, and fairly represent actual value within the area.

It seems clear on the authorities that the first duty of both the Assessor and the other assessment tribunals is to arrive at actual value. In view of the disposition of this appeal, that stage has not yet been reached. I do not, therefore, propose to pronounce on this interesting submission. It would be wrong for me to conclude at this time that the Board will not give proper consideration to these statutory provisions when it considers the matter further.

Questions 1 and 2 ("Did the Board err. . .") of the Stated Case must be answered in the affirmative. I do not propose to answer questions 3 and 4. I decline to make a specific response to question 3 because there may be confusion between value to owner (Genstar) with value to Block Bros. The second part of my reasons is reflected in my answer to question 1. I have already stated why I do not propose to answer question 4.

The case is remitted to the Board for further consideration in accordance with these reasons. Genstar is entitled to costs.