ASSESSMENT COMMISSIONER

v.

DAON DEVELOPMENT CORPORATION,

Supreme Court of British Columbia (A814007) Vancouver Registry

Before: MR. JUSTICE M.R. TAYLOR

Vancouver, March 22, 23 and 24, 1982

J.E.D. Savage for the Appellant
Miss. J. Ryan for the Respondent

Reasons for Judgment June 22, 1982

This is one of six consolidated appeals by way of case stated from decisions of the Assessment Appeal Board raising questions concerning the assessment of chattels brought onto commercial premises as "improvements" within the meaning of the *Assessment Act,* R.S.B.C. 1979, c. 21, in respect of all of which I gave reasons for judgment dated May 28, 1982, setting out the basic principles to be applied.

The items in issue on the present appeal comprise what is described by the Board as the "main computer equipment" of the respondent. These items are conceded to constitute "machinery" or "similar things" to machinery, but none is affixed save by its own weight to the building in which it is located. They were held by the Court of Revision to constitute "improvements", but that decision was reversed by the Board and the Assessment Commissioner now appeals by case stated from the decision of the Board. In its careful and thorough reasons of November 25, 1981, allowing the appeal, the board reviewed a number of authorities, and I have dealt with these in my decision of May 28, 1982. I find it necessary to deal further with them now only in two, closely-related, respects.

With reference to the leading case of *Northern Broadcasting Co. Ltd.* v. *District of Mountjoy* [1950] S.C.R. 502 (S.C.C.) the Board refers (at page 16 of its reasons) to "the test of permanency laid down in Mountjoy" as one which calls for "great weight", and "a putting in one particular spot and a positive intention not to move the item from that spot during its useful life".

I would observe that these were findings of fact in the *Mountjoy* case which were held to show that the items there in question fell clearly within the class of things which can be said to have been sufficiently "placed" for the purpose of the definition of improvements there being considered, one very similar to our own, rather than a statement of the minimum requirements established by the test itself. The Board seems, with respect, to have mistaken evidence accepted by the Supreme Court of Canada as indicating a more than sufficient degree of placement for a definition of the requirements which have to be met in every case in order to establish that an item has been sufficiently "placed" for the purpose. I think the Board must be said to have erred in law in adopting this interpretation.

The second aspect of the Board's review of the authorities on which I feel it necessary to comment further is its acceptance of the Ontario Divisional Court decision in *Lyons* v. *Corporation of Meaford* (1977) 2 M.P.L.R. 121, a decision which-as the Board was to recognize in subsequent decisions-has been reversed by the Ontario Court of Appeal.

I would say, with respect, that it seems to me that the Divisional Court in that case committed the very same error into which the Board has fallen. Steele, J., says, for the Divisional Court, that "the proper test is as set out in *Northern Broadcasting* v. *Mountjoy*" and proceeds to describe the test as that stated in the finding: "they are heavy articles placed each in one particular spot with the idea of remaining there so long as they are used for the purpose for which they were placed upon the premises". This interpretation was later, quite properly, I think, disapproved by Brooke, J.A., giving the judgment of the Ontario Court of Appeal (1979) 6 M.P.L.R. 245. The learned appeal judge observes (at page 248): "Mr. Justice Steele has converted what was an issue of fact in the case before Mr. Justice Kellock into an element of the test, and this is an error".

Referring to the items of machinery with which it was here concerned, the Board in the present case concludes (at page 20) that they are not "placed" with the required degree of permanence for the reason that "none are very heavy" and "none were put in a particular spot with the idea or intention of remaining there so long as used for the purpose for which these were brought on the premises".

Reaching the conclusion that this machinery could not be said in law to have been "placed", in the sense in which that word is used in the *Assessment Act* definition of "improvements", the Board says (at page 21):

> If and when the superior courts take the word "placed" beyond the heavy items that were installed in radio broadcasting plants, pipeline systems, breweries, public laundromats, asphaltic concrete plants, curling clubs and bowling alleys, it is unsafe, indeed improper, for this Board to endeavour to expand the interpretation of that word. Until then, the benefit of any doubt as to the proper application of the foregoing principle to the facts here present must be resolved in favour of the taxpayer.

I understand the Board by this passage to mean that only heavy items of machinery have been considered "placed" for the present purposes by the Courts, and that the machinery with which it was dealing could not be said, in the context of the things dealt with in the cases, to be "heavy".

The following are the questions asked in the present stated case, and the answers which I give to them for reasons stated in my decision of May 28, 1982, and also those set out above:

> 1. Q. Did the Assessment Appeal Board err in applying as the proper test of whether the items in issue where "placed" within the meaning of "improvements" as defined in section 1 of the *Assessment Act*, R.S.B.C., c. 21, whether they were heavy articles placed each in one particular spot with the idea of remaining there so long as they are used for the purpose for which they were placed on the premises?
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> A. Yes. The Board erred, firstly, in holding that "machinery" can be found to have been "placed", within the meaning of the Act, only if it is "heavy". Weight may be evidence of the necessary degree of placement, but machinery may be found to be "placed" within the meaning of the statute even though not of substantial weight, provided that the evidence as a whole indicates that it more probably falls into the class of things which, once put in place, can generally be expected to remain in that position, than into the class of things which can generally be expected to be moved from time to time in the ordinary course of business. The Board erred, secondly, in holding that to be so "placed" machinery items must have been put in a particular location "with the idea of remaining there so long as they are used for the purpose ". The particular intention of the person actually placing the item in question is not the decisive factor. The question for the Board

in each case is whether the item is shown by its character, its particular function and the manner of its placement to be one which more probably falls into the first class of things mentioned above than the second. Absolute permanence of location is not necessary in order that any item be held to have been so placed. Nor can mere subjective evidence of intention of a particular owner render not assessable as an "improvement" a machine which, used in the same way in the same sort of business in the same place, would be assessable against another.

2. Q. Did the Assessment Appeal Board err in directing themselves as to the meaning of "improvements" in their reasons for decision?

A. Yes. For the reasons stated in answer to Question 1.

3. Q. Is the proper test of whether an item is "placed" within the meaning of "improvements" as defined in section 1 of the *Assessment Act*, R.S.B.C. 1979, c. 21, whether the items in question improve the quality of the freehold?

A. No. As stated in reasons for decision dated May 28. 1982, intention to improve the freehold is not necessary in order that an item may be found to have been "placed", within the meaning of the statute, although such an intention may be relevant in deciding whether it is assessable as a "fixture".

The decision will be remitted to the Board for reconsideration in accordance with principles expressed here and in the reasons given May 28, 1982. In view of the uncertain state of the law, and because the ultimate outcome remains uncertain, there will be no order as to costs.