TRIZEC EQUITIES LTD.

v.

ASSESSOR OF AREA 09 - VANCOUVER

Supreme Court of British Columbia (A842726) Vancouver Registry

Before: MR. JUSTICE J.C. BOUCK

Vancouver November 23, 1984
Victoria December 12, 1984

J.R. Lakes for the Appellant
J. Greenwood for the Respondent

Reasons for Judgment January 30, 1985

Trizec owns a 36-storey office building in downtown Vancouver called the Royal Centre. When a prime tenant moved out during 1983, approximately 30 per cent of the space in the building became vacant. Trizec contends this circumstance should be taken into account when fixing the actual value of the land and improvements for assessment purposes on the 31 December, 1983 assessment roll. In reply, the respondent says the vacancy condition of the building during 1983 is irrelevant because of an order in council dated 25 November, 1983.

This is not an appeal by way of a Stated Case under s. 74 (2) of the *Assessment Act*, R.S.B.C 1979, c. 21. Instead it is a Stated Case brought by the Assessment Appeal Board itself at the request of Trizec, seeking the opinion of the Court on two questions pursuant to s. 74 (1) of the *Assessment Act* (1979).

According to the Stated Case here are the relevant facts:

1. The subject is a class "A", 36-storey office building in downtown Vancouver.

2. The subject was assessed for the 1983 Taxation Roll at an actual value of $119,727,000.

3. Between December 31, 1982 and December 31, 1983, there was no change in the physical state and condition of the building, save for the removal of certain machinery and equipment that was deleted from the Taxation Roll by the 1984 Court of Revision.

4. For some ten years the Insurance Corporation of British Columbia (ICBC) occupied some 30% of the leasable area of the building, being ten of its 36 floors.

5. On December 31, 1982 the occupancy rate of the subject was nearly 100%.

6. In 1980, ICBC indicated to the Appellant that it would depart from the building at the conclusion of its leases.

7. There were many leases concerning the ICBC space. The first of them affecting 10% of the ICBC space (or 3% of the subject), expired on August, 1983.

8. In August, 1983, ICBC began vacating the building and about ten weeks later 30% of the subject was physically vacant.

9. ICBC continued to honour its financial commitments under the leases up to and including the expiry, at midnight on December 31, 1983, of the leases affecting about 90% of the ICBC space (or about 27% of the leasable area of the building).

10. Therefore, on January 1, 1984 the subject was approximately 30% vacant. The Appellant expected during 1984 to relet one-half of that space (or about 15% of the leasable area of the subject).

11. During 1983 the average vacancy rate of class "A" buildings generally comparable to the subject in downtown Vancouver grew from 6.2% as of December 31, 1982 to 7.1 % as of December 31, 1983.

12. Under some circumstances a Board might find that evidence of the actual vacancy rate might affect the actual value of the subject, if the vacancy rate was to be reckoned as of December 31, 1983.

From these facts the Board requests answers to the following questions:

1. Was the fact that there was a change in the average vacancy rate for the buildings in Vancouver comparable to the subject from December 31, 1982 to December 31, 1983 a "state and condition" that the Board must take into account in determining the actual value of the subject for the 1984 assessment roll?

2. Must the Board consider the change in the actual occupancy in the subject from August 31, 1983 to December 31, 1983 as a change in the state and condition of the subject as those words are used in British Columbia Regulation 440/83 and in the *Assessment Amendment Act 1984*, in determining the actual value of the subject for the 1984 assessment roll?

(a) *Description of Proceedings under the* Assessment Act (1979)

Because of the complexity of the *Assessment Act* it may be helpful to examine its legislative history up to the date the *Assessment Amendment Act 1984*, S.B.C. 1984, ch. 11 was proclaimed in force on 14 May 1984.

Section 2 (1) of the *Assessment Act* (1979) required an assessor to complete a new assessment roll not later than 31 December in each year. Since it took time to prepare this roll, it was necessarily based on the "actual value" of the land and improvements as they existed a few months prior to 31 December in any one year. There was no statutory definition of "actual value" as used in s. 26 of the Act. Generally speaking, it was supposed to represent the current worth or the fair market value of the property as of 31 December in any particular year. For the purposes of this inquiry, the relevant provisions of s. 26 of the *Assessment Act* (1979) read:

"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.
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> (3) Without limiting the application of subsections (1) and (2), where an 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."

Upon completion of the assessment roll a notice of the assessment was required to be sent to every person named in the assessment roll and the roll itself sent to the relevant municipal or provincial tax collector: s. 2 (1) and s. 6 (2). If a property owner was dissatisfied with the assessment, he had until 20 January of the month following the assessment to appeal to a Court of Revision established under Part IV of the Act: s. 40 (3).

Within a few weeks after filing a Notice of Appeal to the Court of Revision, a hearing was held by this tribunal to adjudicate upon the complaint of a property owner concerning the assessment. Fourteen days from the time the Court of Revision mailed its decision, the property owner could appeal to the Assessment Appeal Board set up under Part V of the Statute: s. 68.

A hearing was then held before the Assessment Appeal Board. Except for questions of law, its decision was final and binding. From the decision of the Assessment Appeal Board there was a further appeal to this Court under Part VIII of the Act on a question of law: s. 74 (2). With the leave of one judge of the Court of Appeal, the Act allowed an additional appeal to the Court of Appeal: s. 74 (7).

Relying upon the completed assessment roll, the municipal or provincial tax collector sent a tax statement to the property owner for payment of local property taxes covering the calendar year in which the notice was delivered. Payment of these taxes is usually due around the first of July in the year following the assessment made up to 31 December of the previous year. The exact date the taxes are due depended upon the By-laws of the various Municipalities: *Municipal Act*, R.S.B.C. 1979, c. 290, s. 442 and s. 445, *Vancouver Charter*, S.B.C. 1953, c. 55, s. 416.

(b) *Interpretation of O.I.C. #1887*

That procedure remained intact until 25 November 1983 when Reg. No. 440/83 was passed by the Lieutenant Governor in Council (0.I.C. #1887). It reads:

> 2-1: In section 26 of the Act, "actual value" means the actual value that land and improvements would have had on December 31, 1982 had they been on that date in the state and condition that they are in on December 31, 1983, and had their use and permitted use been on December 31, 1982 the same as they are on December 31, 1983.

0.I.C. #1887 set out a new. direction to the assessor when preparing the assessment roll for the year ending 31 December, 1983. Because of its wording it is quite difficult to grasp its purpose. Stripped of the confusing language it seems to say this:

> (a) for the purpose of s. 26 of the *Assessment Act* (1979);
>
> (b) the actual value of land and improvements on 31 December, 1983;
>
> (c) shall be the same as the actual value of the land and improvements on 31 December, 1982;

(d) providing the land and improvements are in the same state and condition on 31 December, 1983 that they were in on 31 December, 1982 and

(e) providing their use and permitted use are the same on 31 December, 1983 as they were on 31 December, 1982

(f) where there is a change in the state or condition of lands or improvements, or a change in their use or permitted use between 31 December, 1982 and 31 December, 1983, then on 31 December, 1983 the assessor must consider these changes existed on 31 December, 1982 and adjust the 31 December, 1982 assessment accordingly. That adjusted assessment will then be the assessment for 31 December, 1983.

Apparently the intention of the regulation was to freeze the 31 December, 1983 assessment roll at the same figures established on 31 December, 1982 except where there were changes in the state and condition of the land and improvements or changes in their use and permitted use during the 1983 calendar year. Whether it accomplished this objective is the subject matter of these reasons.

In this particular instance, there was no change in the use and permitted use of the Trizec building between 31 December, 1982 and 31 December, 1983. Was there a change in its state and condition?

It is the contention of Trizec that the 30% drop in occupancy which occurred during the fall of 1983 was a change in the state and condition of the improvement. Hence, it says the 31 December, 1983 assessment should be less than the assessment shown on the roll for the year ending 31 December, 1982 because that is based upon a completely occupied building.

On the other hand, the assessor submits the words "state and condition" only reflect changes in the physical characteristics of the building. Because none of the physical characteristics of the Trizec building changed between 31 December, 1982 and 31 December, 1983 the assessment for the year ending 31 December, 1983 should be the same as the assessment for the year ending 31 December, 1982.

Section 80 of the *Assessment Act* (1979) allows the Lieutenant Governor in Council to make regulations "defining any expression used and not defined in the Act". Whether O.I.C. #1887 went further is now academic by reason of s. 41 of the *Assessment Amendment Act, 1984*. It purports to enshrine O.I.C. #1887 with the authority of the legislature itself, and not simply as a piece of delegated legislation enacted by the Lieutenant Governor in Council. The new section reads as follows:

"Transitional

41. (1) In this section the reference to section 26 of the *Assessment Act* is a reference to that section as it stood on December 31, 1983.

(2) In relation to the completion during 1983 of an assessment roll for the purpose of taxation during the year 1984, the expression 'actual value' in section 26 of the *Assessment Act* means and shall be conclusively deemed always to have meant the actual value that land and improvements would have had on December 31, 1982 had they been on that date in the state and condition that they were in on December 31 , 1983, and had their use and permitted use been on December 31, 1982 the same as they were on December 31, 1983.

(3) B.C. Reg. 440/83 is confirmed and ratified and shall be conclusively deemed to have been validly made and to have come into force on November 29, 1983.

(4) This section is retroactive to the extent necessary to give it effect."

When one interposes the words of 0.I.C. # 1887 and the relevant words from s. 41 of the *Assessment Amendment Act, 1984* into s. 26 (1) and s. 26 (2) of the *Assessment Act* (1979) the exercise yields this result:

> "26 (1) (As of 31 December, 1983) The assessor shall determine the actual value (that) land and improvements (would have had on December 31, 1982 had they been on that date in the state and condition that they are in on December 31, 1983 and had their use and permitted use been on December 31, 1982 the same as they are on December 31, 1983).
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> (2) In determining the actual value (as of 31 December, 1983 that) land and improvements (would have had on December 31, 1982 had they been on that date in the state and condition that they are on December 31, 1983 and had their use and permitted use been on December 31, 1982 the .same as they are on December 31, 1983), 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. . ."

Because the *Assessment Act* (1979) contemplated the assessor determining actual value as of 31 December, 1983 and because 0.I.C. #1887 changed that procedure by saying the actual value should be determined as of 31 December, 1982, there are conflicts within the 1979, Act as amended by the *Assessment Amendment Act, 1984*, s. 41.

For example, under s. 26 (2) the assessor is required to give consideration to the "present use" of property and its "revenue or rental value". Prior to 0.I.C. #1887 the *Assessment Act* (1979) compelled the assessor to look at such things as present use, value and revenue or rental value as they existed on 31 December, 1983. On the other hand, the purpose of 0.I.C. #1887 is to require the assessor to view the same matters as of 31 December, 1982.

Then there is s. 26 (3). It says the assessor is to determine the market value of commercial undertakings such as the Trizec building as a going concern. Again, the *Assessment Act* (1979) prior to 0.I.C. #1887, conceives the assessor will perform this function as of 31 December, 1983. By direction or implication 0.I.C. #1887 says it should be done as of 31 December, 1982. Does the assessor still use 31 December, 1983 as the appropriate date, and blend in as best he can the ingredients of 0.I.C. # 1887, or does he ignore 31 December, 1983 and use 31 December, 1982 subject to the subsequent changes mentioned in 0.I.C. #1887, and the *Assessment Amendment Act, 1984*, s. 41?

Since the problem is one of statutory interpretation it is helpful to recite a few general principles. In *MacMillan BLoedel Limited* v. *Assessor of Area 07-Sunshine Coast et al* (1983) 47 B.C.L.R. 291 (C.A.), Taggart J.A. *per curiam* set out the guidelines a court should follow when ascertaining the meaning of the words used in the *Assessment Act*. He said at page 302:

> "My opinion is that the Tax Act is an integral part of the statutory scheme whereby taxes are levied on real property and improvements. As a part of that scheme it is to be construed in the same way as a taxing statute.
>
> . . . Shortly put, the principles are that if the words of the statute are in themselves precise and unambiguous they are to be construed in their ordinary sense. If the imposition of the tax is not shown clearly and without ambiguity the construction should be in favour of the taxpayer."

Looking at the *Assessment Amendment Act, 1984*, it implemented a biennial system of assessment. For example, assessments beginning on 30 September, 1984 apply to the 1985 and 1986 taxation years. In certain exceptional circumstances a revised assessment roll may be prepared in odd numbered years beginning with 30 September, 1985. But if the factors do not exist for preparing the revised assessment roll then the normal assessments will occur in even numbered years, such as 30 September, 1986, 30 September, 1988 etc.

It appears the Lieutenant Governor in Council anticipated this development on 25 November, 1983 when it passed 0.I.C. #1887. Instead of allowing the historical process to continue for 1983 it established 31 December, 1982 as the start of the biennial program. Hence, an assessment as of 31 December, 1982 was supposed to prevail for the taxation years 1983, and 1984. Then the plan was picked up on 30 September, 1984 by the *Assessment Amendment Act, 1984* beginning with the assessment on 30 September, 1984 for the taxation years 1985 and 1986.

When attempting to find the meaning of a statute a court should try to reach an interpretation that coincides with common sense and justice. It should avoid an absurd result and try to produce a rational conclusion: *Maxwell on Interpretation of Statutes*: 12th ed., ch. 10. Therefore, while the *Assessment Act* (1979) as amended by s. 41 of the *Assessment Amendment Act, 1984* is ambiguous I think the intent of the legislation is to ignore 31 December, 1983 as a feature in assessments for that year, and use 31 December, 1982.

Consequently, in the fall of 1983 the assessor was required to adopt as the actual or market value of the Trizec building, that value as prescribed on the assessment roll for 31 December, 1982. Then he was supposed to determine if there were any changes in the state and condition of the Trizec building since 31 December, 1982. Any such changes could increase or decrease its actual or market value as of 31 December, 1982. The question is whether the vacancy rate of 30% in late 1983 was a change in the state or condition of the Trizec building since 31 December, 1982 within the meaning of the statute?

The words "state and condition" hide more than they reveal. They do not clearly say a vacancy rate in a commercial building is a state or condition which the assessor must consider or must ignore. But if these words allow the assessor to include a 30% vacancy rate as part of his assessment, there is a possibility this will result in a benefit to the taxpayer and not a detriment because notionally a building with a high vacancy rate should have a lower market value than a similar building that is fully occupied.

Applying the earlier principle that any ambiguity (or uncertainty) in the *Assessment Act* should be resolved in favour of the taxpayer, the vacancy rate in the Trizec building must therefore be taken into account by the assessor. This apparently means the assessor must ask himself what would be the market value of the Trizec building as of 31 December, 1982, if on that date it had a 30% vacancy rate?

(d) *Powers of the Court of Revision and the Assessment Appeal Board*

One other argument was put forward by counsel for Trizec. It goes something like this: s. 26 of the *Assessment Act* (1979) sets out the duties of the assessor in determining "actual value". But that does not mean the Court of Revision and the Assessment Appeal Board are confined to an inquiry as to whether or not the assessor complied with s. 26. Part 4 of the Act (Jurisdiction of the Court of Revision) and Part 7 (Jurisdiction of the Assessment Appeal Board) do not limit these two tribunals to that single purpose. Both are free to determine the "value" of the land and improvements whatever "actual value" may have been fixed by the assessor.

With respect to the authority of the Court of Revision, there is support for this submission in the *Assessment Act* (1979), s. 44. (1). It reads in part:

> "44. (1) The powers of a Court of Revision constituted under this Act are

(b) to investigate the assessment roll and the various assessments made in it, whether complained against or not, and subject to subsection (4), to adjudicate on the assessments and complaints so that the assessments shall be fair and equitable and fairly represent actual values within the municipality or rural area;"

(underlining mine)

The words "actual value" are not defined in the statute. Nor did Order-in-Council No. 1887 affect s. 44. It only enlarged the meaning of the words "actual value" for the purpose of s. 26. Hence the Court of Revision is entitled to determine the meaning of the words actual value as they are used in s. 44. It might reach a different conclusion than what the assessor found was the "actual value" of a particular piece of property under s. 26.

Much the same argument applies to the powers of the *Assessment Appeal Board*. It derives its authority from s. 69 which reads in part:

"69. (1) In an appeal under this Act the board has and may exercise 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,

(a) whether or not the land or improvements, or both, have been valued at too high or too low an amount. . ."

(underlining mine)

Neither s. 44 (Court of Revision) nor s. 69 (Assessment Appeal Board) indicate the legislature intended these two bodies to confine their authority solely to an investigation of the procedure followed by the assessor under s. 26. In the case of the Court of Revision, it is empowered to "adjudicate. . . complaints so that the assessments shall be fair and equitable and fairly *represent actual values*. . .": s. 44 (1) (b). For the Assessment Appeal Board it has "all the powers of the Court of Revision. . . and may determine. . . *whether land or improvements or both have been valued at too high or too low an amount*" (s. 69) (1) (a). It is not just restricted to an inquiry on the correctness of the method used by the assessor because the statute does not say its duty is to find whether lands or improvements have been valued at too high or too low an amount *by the assessor*.

But that does not mean the Court of Revision and the Assessment Appeal Board have a free hand to make dramatic changes in the value of a particular piece of property by ignoring the opinion of the assessor. A Court of Revision cannot vary an assessment if the result brings about inequality of value with comparable property in that municipality or rural area. This direction is contained in the *Assessment Act* (1979), s. 44 (4). It reads:

"44. (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.

A similar restriction is placed on the Assessment Appeal Board although the language used is somewhat different. That tribunal may determine if there is inequality between assessments in a particular municipality or rural area and "make an order accordingly". Again, the section from the *Assessment Act* (1979) reads:

"69. (1) In an appeal under this Act the board has and may exercise 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,

(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; . . ."

Therefore, while the Court of Revision and the Assessment Appeal Board may reach their own decision as to value, that conclusion must bear a fair and just relation to value of other lands and improvements within the relevant municipality or rural area. Although the Court of Revision and the Assessment Appeal Board are statutorily required to ensure that assessed values have a fair and just relationship to one another, this statutory duty is not imposed upon the assessor himself. No doubt he tries to reach this ideal but the legislation does not compel him to do so.

An examination of the *Assessment Amendment Act, 1984* illustrates the powers and duties of the assessor, the Court of Revision and the Assessment Appeal Board remain unchanged in this area following the 1984 amendments.

For the purpose of these reasons I will assume the assessor complied with my interpretation of s. 26 of the *Assessment Act* (1979) when calculating the complete assessment roll for 1983. In other words, he used the 31 December, 1982 assessment as a base. Then, he took into account subsequent changes in the state and condition of lands and improvements after 31 December, 1982. Finally, he altered the 31 December, 1982 assessment where necessary on the statutory assumption those 1983 changes existed as of 31 December, 1982.

That being the case, it is the duty of the Assessment Appeal Board to ensure the assessed value of the Trizec building bears a fair and just relation to the value of other lands and improvements within the City of Vancouver where they were valued by the assessor in a similar way.

SUMMARY

By way of summary:

(a) The assessed value of the Trizec building for the purposes of the 31 December, 1983 assessment roll is the same as it was on 31 December, 1982 except the assessor must take into account the effect of a 30% vacancy rate presumed to exist on 31 December, 1982.

(b) Neither the Court of Revision nor the Assessment Appeal Board are bound to a mere determination of whether the assessor acted within the scope of authority given to him by s. 26 of the *Assessment Act* (1979). Both s. 44 and s. 69 of the *Assessment Act* (1979) give these tribunals the right to fix values using criteria set out in the statute providing their conclusions bear a fair and just relation to the value of similar lands and improvements within the relevant municipality or rural area.

Answers to Questions

For convenience I will repeat the questions and the answers which naturally flow from this decision.

Q. 1. Was the fact that there was a change in the average vacancy rate for the buildings in Vancouver comparable to the subject from December 31, 1982 to December 31, 1983 a "state and condition" that the Board must take into account in determining the actual value of the subject for the 1984 assessment roll?

A. Yes

Q. 2. Must the Board consider the change in the actual occupancy in the subject from August 31, 1983 to December 31, 1983 as a change in the state and condition of the

subject as those words are used in British Columbia Regulation 440/83 and in the *Assessment Amendment Act 1984*, in determining the actual value of the subject for the 1984 assessment roll?

A. Yes

JUDGMENT

Judgment will be in the form indicated.

No submissions were received with respect to costs. In the circumstances, it seems that Trizec ought to recover its costs from the Respondent but if no agreement can be reached on this matter, I will hear further arguments at the convenience of counsel.