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**ASSESSOR OF AREA 14 - SURREY-WHITE ROCK**

**v.**

**ORCHARDSON FOREST PRODUCTS LTD.**

Supreme Court of British Columbia (A870142) Vancouver Registry

Before: MR. JUSTICE MEREDITH (In Chambers)

Vancouver, March 6, 1987

J.K. Greenwood for the Appellant
S.B. Armstrong for the Respondent

***I***

**Reasons for Judgment** March 12, 1987

This is a case stated by the Assessment Appeal Board pursuant to s. 74 (2) of the *Assessment Act*.

The questions posed and the answers that I give are as follows:

1. Is the finding of the board that the dry kilns in question are "machinery" incompatible in law with a finding that they are also "buildings"?

*Answer:* I hold that it is unnecessary to consider the question of incompatibility. I conclude that the Assessment Appeal Board held that the dry kilns in question were not buildings but machinery.

2. Did the Board misunderstand or misapply the definition of improvements on failing to find that the dry kilns were "buildings," within the meaning of the word in the definition?

*Answer:* No.

3. Did the Assessment Appeal Board err in law in holding that the dry kilns were removable, as between landlord and tenant, by the tenant?

*Answer:* No.

4. In considering the issue of removability as between landlord and tenant, did the Board err in equating evidence of physical movability with the test of legal removability and thereby err in law?

*Answer:* No.

The question to be decided by the Board was whether the dry kilns were improvements as defined by the *Assessment Act*. That definition reads in part as follows:

'improvements' for general municipal and Provincial taxation purposes. . .includes

> (a) all buildings, fixtures, machinery, structures and similar things erected in, on, under or affixed to land or to a building. . . but does not include those fixtures, machinery and similar things, other than buildings and storage tanks as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property;"

One submission on behalf of the appellant is that the Board should have first asked itself whether the dry kilns were buildings and thus not excluded under the exception. I conclude that the Board did consider whether the structures were buildings and decided they were not. Thus the question of whether machinery might as well be a building or vice-versa is not the issue. The Board did not decide that because the dry kilns were machinery they were not buildings.

The finding that the structures were not buildings is implicit firstly in the statement by the Board of the argument made before the Board by Mr. Greenwood as follows:

> "Mr. Greenwood argued that these structures are to all intents and purposes 'buildings' and as such fall within the exception to the exclusion clause of the 1st definition of improvements as contained in the *Assessment Act*. That being so - the Board need go no further according to him. They are assessable under the 1st definition."

Further in its decision the Board said:

> "Mr. Greenwood, would ask us to find that the dry kilns at issue are 'buildings,' and if we were to do so there would be no problem (according to him) as to the definition between structures, machinery or fixtures."

But the Board holds that although the dry kilns may look like buildings, they are not buildings. They are machinery. And even if I were to disagree with that finding (which I do not) I conceive that I would not have jurisdiction to substitute my finding of fact for that of the Board.

As to the matters raised in Questions 3 and 4, the Board had this to say:

> "That being so they fall within the exclusionary clause of the 1st definition of improvements in the *Assessment Act*. The question now arises - are they fixtures, machinery and similar things as 'if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property'?
>
> Since the owner of the land also owns the structure, for the purposes of this definition 'improvements' in section 1 of the *Assessment Act*, one must hypothesize that the owner of the structure is a tenant. According to Mr. Justice Lambert in the Chevron appeal (supra) one must act on the further hypothesis that the structure was erected or affixed by a tenant on a bare lease that says nothing of fixtures.
>
> The question now before the Board is - could a tenant, renting on the basis of a bare lease that says nothing about fixtures, have the right to remove the structure (if it is movable)?
>
> The second question, of course, is - is the structure constructed in such a way that it is in fact movable?
>
> Whether these kilns are removable was answered unequivocally by Mr. Franke and by Mr. Shackleford, the witnesses for the Appellant, in this appeal. Mr. Franke states that his company purchased two used dry kilns and moved them intact to their present site. Mr. Shackleford gave evidence of two used dry kilns at Prince George which were sold and dismantled and moved to a new site.

> Mr. Shackleford stated that the kilns belonging to the Appellant were a package. They could be disassembled and removed with little evidence remaining of their ever being there.
>
> The Board, therefore, finds that as between landlord and tenant, this machinery erected by the tenant would be removable by him as personal property under bare lease."

I find no legal error in this reasoning. The passages from *Williams' Canadian Law of Landlord and Tenant*, 5th edition, cited for the respondent, confirm that the proper test to establish whether or not as between landlord and tenant the dry kilns would be removable by the tenant as personal property, was properly applied. As it relates to dry kilns, the test is whether they were removable and whether they could be removed without serious injury to the freehold. The Board properly held that they could.

The questions will be answered accordingly.