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CANOE PASS FLOATING VILLAGE LTD.,
HALL, IAN AND BARBARA,
KALICO DEVELOPMENTS LTD.

v.

ASSESSOR OF AREA 11 -- RICHMOND-DELTA

Supreme Court of British Columbia (A873324) Vancouver Registry

Before: MR. JUSTICE SPENCER, in Chambers

Vancouver, March 23, 1988

John R. Lakes for the Appellants
John E.D. Savage for the Respondent

Reasons for Judgment May 12, 1988

This matter comes by way of Stated Case from the decision of the Assessment Appeal Board concerning the assessability of certain lands covered by water. The lands are owned by The Queen in Right of the Province of British Columbia and are leased to the Fraser River Harbour Commission. The Commission has sub-leased them to Canoe Pass Floating Village Ltd., which assigned the sub-lease to a strata corporation. The strata corporation owns land on the river bank and has sold units of that strata development to various purchasers. The strata corporation has sub divided the sub leased land covered by water into 44 lots and has leased each of those subdivided lots back to Canoe Pass. Everyone who purchases an interest in the upland area through the strata corporation become entitled to sub lease one of the lots covered by water. The intent is that the lot covered by water should be used as a berth for the moorage of a floating home and pleasure boat. Of the 44 sub divided lots covered by water, 43 are for berths for floating homes and the 44th is a common area comprising pilings, bulkheads and floats which provide access and services to each of the 43 berths. Only 34 of the 54 lots used, or available for use, as berths are under appeal before me. Thirty one are sub leased by Canoe Pass and the other three have been assigned to tenants.

The nine questions raised by the Stated Case are all directed to putting the same problem to the test, that is, whether Canoe Pass as lessee of thirty one of the lots covered by water, or the assignees of the other three lots covered by water, can be assessed for the value of the land underlying the water at each respective berth, In each case the only use made, or intended to be made, of the sub lease of land covered by water is to position a floating home and pleasure boat in the water without attaching either of them in any way to the land beneath the water.

The Assessment Appeal Board ruled that the land underneath the berth was assessable by distinguishing the decision of the Court of Appeal in *Rivtow industries et al v. The Assessment Commissioner of British Columbia* (1986), 70 B.C.L.R. 194, and by making a finding of fact that in the case at bar each appellant has a substantial occupation, possession and use of the land under the water. Rivtow was a case where the only use made of land under water was the presence of one or two piles, or dolphins, driven into or affixed to the bottom, to moor log booms.

The court found that was to insignificant a use to constitute occupancy of the land for assessment purposes. The Assessment Appeal Board found a substantial occupation, possession and use herby virtue of the pilings, bulkheads and floating walkways situated upon the 44th lot. They attributed that use to the 34 lots under appeal even though none of those improvements were situated on the land beneath the water of those lots. So the Board's finding of the fact of occupancy depended on the questions of whether that attribution is permissible at law.

The Appellant's position was that pursuant to s. 34 of the Assessment Act, where the fee to land remains in the Crown but it is held or occupied by someone else, only that portion which is actually used or possessed is liable to assessment in the hands of that other person. See R. In the *Right of British Columbia et al. v. Newmont Mines Limited* (1982), 27 B.C.L.R. 1. That was a case where the Respondent was found by the Court of Appeal not to be assessable for mineral claims and mineral leases held from the Crown except for those portions of the claims and leases where the surface was in actual use. The appellant before me argued that of the whole area under water sub leased by Canoe Pass Floating Village Ltd. and assigned by it to the strata corporation, and then sub leased back, only Lot 44 where the pilings, bulkheads and float are situation is in actual use and occupation. The remainder including the 34 lots under appeal, has no use or occupation made of the river bottom. The only use made is on the surface of the water as a place to moor floating homes and pleasure boats. Where there are floating homes in place they are moored not the bottom of the river but to the bulkheads and idling situated on Lot 44.

The respondent's argument before me is that since this is a strata development, s. 63 of the Condominium Act requires that a share of the common property, common facilities and other taxable assets shall be included in each strata lot for the purposes of assessment. The appellants object to that argument being raised upon the ground that it was not dealt with before the Assessment Appeal Board. With respect, I think I must deal with it even though it was not raised before the Board. The Court cannot ignore the statute law of the province where it is relevant even if a particular statute was not referred to before the Board. It is enough that the Appellant has an opportunity to deal with the argument I am satisfied that it does not, in any event, assist the respondent's case. I was told by counsel that only the upland was divided into strata titles. The land under water has not been turned into strata titles but instead each owner of an upland strata lot becomes entitled to lease a berth and to use, it in common with other owner lessors, the access and facilities installed on Lot 44 of the land covered by water. Thus the 34 berths are not owned in common. I am not asked to decide any questions with respect to the assessment of improvements on Lot 44 of the land covered by water. The only question is whether, by placing improvements on Lot 44, there is a sufficient occupation of the rest of the land covered by water, including the 34 lots under appeal, to make their lessees assessable with respect to the river bottom beneath each berth.

In my respectful opinion the Assessment Appeal Board erred when it found the land underlying each berth assessable to each sub lessee based upon the use and occupation made of Lot 44. Each informally subdivided lot of the land covered by water is assessed as a separate entity on the roll. The Newmont Mines case is authority for the proposition that only that land held from the Crown which is put to actual use is to be assessed. There is no authority for transferring use and occupation made of one portion of such land to another portion. The presence of the improvements on Lot 44 therefore, as a matter of law, cannot be relied upon to show use and occupation of the other 34 lots which are open water for use as berths.

However, although in my opinion the Assessment Appeal Board erred in the way in which it justified the assessability of the 34 berths, they are none the less assessable as a matter of law. I reach that conclusion based upon a distinction between this case and the Rivtow Industries case (supra). The Rivtow case did not involve a lease of land but only a lease of the surface of the water. Mere use of Crown land, with or without a right to occupy it, is enough to make it assessable, see the Newmont Mines case at p. 6 where Lambert, J.A.... writing for the whole court, said:

The presence of those paragraphs therefore tends to indicate what I think is the correct position, that is, that possession in fact, or occupation in fact, based on an exclusive or on a non exclusive right to possession or occupation or even on no right at all, is sufficient to make the person in possession or occupation subject to assessment taxation."

According to the Rivtow case, the presence of a few pilings or dolphins fixed to the sea bed was not enough to create a sufficient possession of the land under water to attract assessment.

The case at bar is different however. There are no pilings or dolphins or other means by which the land under the water in the 34 berths in question is occupied or used. But there is another way in which it is, in my opinion, occupied and used. Instead of leasing a right to use the surface of the water to moor floating homes the appellants, through various sub leases terminating in a head lease from the Crown to the Fraser River Harbour Commission, rely upon leasehold rights to the river bottom to justify their occupation of the surface of the water. The way in which they would exclude others from mooring on the surface of the water is to rely upon their sub lease of the land beneath the surface. That is quite different from the Rivtow case where the appellant had a right, from the Crown to use the surface without reference to any use of the river or sea bottom. In my opinion, by relying on the right to use the land below the surface to create a right, as against others, to occupy the surface as a moorage, the appellants both hold and occupy the land beneath the water on their particular berths and are assessable with respect to it.

The question whether occupancy by the sublessee can be based upon their right to exclude others for the surface of the water was not originally argued before me, but by memorandum I invited both counsel to make submissions on the point, and they did so. The appellants, in their submission, argued that my function in dealing with a Stated Case was to simply answer the questions of law put to me and not to seek a justification of the Assessment Appeal Board's decision on grounds upon which it did not itself rely. It is true that the Court's function on a Stated Case pursuant to s. 74(6) of the Assessment Act, R.S.B.C. 1979, c. 21, is expressed in these words:

"(6) The court shall hear and determine the question and within 2 months give its opinion and cause it to be remitted to the board...".

That suggests that the Court can only consider those questions actually submitted to is and decide whether the Board was right or wrong within the framework of the questions submitted.

The difficulty with that submission lies in the breadth of the questions submitted to me. The first of the nine questions illustrates the point. It reads:

"Did the Assessment Appeal Board err in law in finding that the Appellants were liable to assessment as "occupiers" of the land covered by water included in the roll numbers appealed?"

It is true that the Board, in my respectful opinion, erred in the way in which it reached its decision by attributing the presence of improvements on Lot 44 to the other sub divided lots, but it is also true, in my respectful opinion, that the Board was correct in finding that the appellants were liable to assessment as occupiers, for the reasons I have expressed. I therefore think that this is a case where the Board reached the right conclusion but did so by erroneous reasoning. Under such circumstances the Court can dismiss the appeal because the ultimate conclusion was correct. *See Arbutus Club v. Assessor of Area 09 - Vancouver* (1980), 24 B.C.L.R., 301. Had the questions before me been limited to the issue of whether or not the Board's decision that the improvements on Lot 44 could be attributed to the other sub divided lots was correct in law, then I think this matter would have been decided differently. But since the question is broadly put, it is my opinion that I have the power to look at the broader question and determine whether it is justified by some reasoning other than that followed by the Board.

Accordingly. I answer the nine questions put to me as follows:

1. Did the Assessment Appeal Board err in law in finding that the Appellants were liable to assessment as "occupiers" of the land covered by water included in the roll numbers appealed?

The answer is "yes", but the land is assessable for the reasons I have given, in any event.

2. Was there any evidence on which the Assessment Appeal Board could properly find that the Appellants were liable to assessment as "occupiers" of the land covered by water included in the roll numbers appealed?

The answer is "Yes".

3. Was the Assessment Appeal Board's finding that the Appellants were liable to assessment as "occupiers" of the land covered by water based on a view of the facts which can not be reasonably entertained?

The answer is "yes", but the land is assessable for the reasons I have given, in any event.

4. did the Assessment Appeal Board err in law by distinguishing the decision of the Court of Appeal in *Rivtow Industries et al v. Assessment Commissioner of British Columbia* to hold that the decision did not apply and therefore that the Appellants were liable to assessment as occupiers of land covered by water concerning the roll numbers appealed?

The answer is "Yes", but that decision is otherwise distinguishable for the reasons I have given.

5. Did the Assessment Appeal Board err in law by finding that the Appellants were assessable for the properties" as occupiers in possession of all the land they are the last lessee of"?

The answer is "No".

6. Was there any evidence upon which the Assessment Appeal Board could properly find that the appellants were liable to assessment as "occupiers in possession" of that land covered by water which is the subject of this appeal?

The answer is "Yes".

7. Was the Assessment Appeal Board's finding that all of the Appellants were liable to assessment on the land covered by water based on a view of the facts which can not be reasonably entertained?

The answer is "yes," but the land is assessable for the reasons I have given, in any event.

8. Did the Assessment Appeal Board err in law and exceed its jurisdiction by finding that all of the appellants or any of them was liable to assessment as occupier or "occupier in possession" of the land covered by water included in the assessment roll numbers under appeal?

The answer is "no", for the reasons I have given.

9. Did the Assessment Appeal Board err in law and exceed its jurisdiction by finding that the Appellants Hall and Kalico Developments Ltd. are liable to assessment on the land covered by water on those roll number upon which the Board held they were "paramount occupiers"?

The answer is "No".

This opinion shall be remitted to the Board, but in the event, no change should be made to the Board's decision that each berth is assessable in the hands of each final lessee for the value of the land beneath it. Since the appellants have succeeded in demonstrating an error of law in the Board's decision but have failed in their attempt to show that the lands were assessable, neither side will have the costs of his Stated Case.