TORONTO-DOMINION BANK

v.

ASSESSOR OF AREA 09 - VANCOUVER

Supreme Court of British Columbia (A973381) Vancouver Registry

Before THE HONOURABLE MR. JUSTICE GIBBS

Vancouver, June 17, 1988

A. B. Gomery for the appellant
R. S. Gill for the respondent

Reasons for Judgment August 3, 1988

This is a case stated for the opinion of the court on a question of law, pursuant to s. 74 (2) of the Assessment Act, R.S.B.C. 1979, chap. 21. The Assessment Appeal Board decision giving rise to the stated case was delivered on October 7, 1987 following a hearing in Vancouver on September 22 and 23, 1987.

At issue before the Board was the actual value, for assessment roll purposes, of a 10 storey commercial plus office building at the southeast corner of Burrard and Davie Streets in Vancouver. The net rental area is approximately 70,000 square feet. There is a bank, and a restaurant, on the ground floor. The remaining floors are subdivided into office spaces.

On the "income approach to value" method, the appellant bank put forward two sets of calculations: the first put the actual value at $4,367,274 based upon a vacancy rate of 17% and a capitalization rate (cap rate) of 9.5%; the second fixed actual value at $4,605,213 utilizing a vacancy rate of 10% and a cap rate of 10%. Employing the same method, the assessor concluded actual value to be $6,373,045 on a vacancy rate of 10% and a cap rate of 9.5%. The substantial difference between the appellant's second actual value calculation and the assessor's actual value calculation is attributable to a difference in the net income figure. The appellant used $599,180, and the assessor $747,456.

The evidence as to actual value was led by each of the parties through witnesses who were qualified to give opinion evidence. During the course of the hearing the parties agreed that the appropriate cap rate was 9.5%. Towards the end of the hearing the Board produced a graph (marked Exhibit A) for comment. On the graph, at a vacancy rate of 17%, the resultant cap rate is about 7%.

In the result, in its decision, the Board held actual value to be $7,382,500 based upon net income of $747,456, a vacancy rate of 17%, and a cap rate of 7.1%.

The substantive issue on this appeal is whether the Board committed reversible error when it developed a cap rate substantially lower than that put forward by either of the parties through the expert opinions, with the result that actual value was set at approximately $1,000,000 higher than the highest figure put in evidence on the income approach to value method.

After deletion of those abandoned at the commencement of argument, these are the questions stated for the opinion of the court:

1. Did the Board err in law in determining actual value on a capitalized income approach by rejecting the opinions of the expert witnesses for both the Appellant and the Respondent and substituting their own opinion in respect to:

(a) the appropriate capitalization rate;

(b) . . . ?

2. Were the Board's conclusions that:

(a) the appropriate capitalization rate was 7.1%

(b) . . . conclusions that could not reasonably be entertained on the whole of the evidence?

3. Did the Board err in law in arriving at an actual value for the subject property that was substantially in excess of the actual value arrived at by the only experts who gave evidence before the Board?

4. Was the Board's conclusion that the actual value of the subject property was $7,382,500.00, a conclusion that could not reasonably be entertained on the whole of the evidence?

As the actual value on the income approach to value method is merely the number that falls out of a formula which starts with income, reduces income by a vacancy allowance (calculated by applying a vacancy rate), further reduces income by other allowances, and multiplies the result by a cap rate, the answers to questions 3 and 4 will follow from the answers to questions 1 and 2. The answers to questions 1 and 2, in turn, depend upon whether there was evidence at the hearing from which the Bank (sic) could reasonably conclude that the appropriate cap rate was 7.1%.

The Board adopted and followed the judgment of Mr. Justice Cumming in Westcoast Transmission Limited v. Assessor of Area 9 -- Vancouver (1987) Vancouver Registry A870297, in a four step sequence. As a starting point, the assessor's income figure of $747,456 was accepted. Then the Board applied the appellant's vacancy rate of 17% for downtown Vancouver, and deducted other expenses. The cap rate was then developed in relation to the vacancy rate, the relationship being derived from comparable sales data included in an appraisal report marked Exhibit 2. The graph introduced by the Board as Exhibit A for discussion purposes is a visual representation of the vacancy rate/cap rate relationship shown by the comparable sales data.

All of the facts from which the 7.1% cap rate was derived were, therefore, in evidence before the Board. Although that rate is substantially lower than the 9.5% opinion of the appraisers, it is supported by evidence on the record. The question is: does the fact that the Board's opinion differs from the expert opinions of the appraisers constitute an error in law?

There is case authority for the proposition that members of tribunals such as this are presumed to have been selected because of knowledge or experience in the field in which they are to operate:

Caswell v. Alexandra Petroleums Ltd. (1972) 3 WWR 706 (Alta. C.A.). There is also case authority to the effect that they may call upon their own knowledge and experience in deciding matters which come before them: Lazar v. Association of Professional Engineers (1971) 5 WWR 614 (Man. C.A.), and Re Golomb and College of Physicians and Surgeons (1976) 68 DLR (3d) 25 (Ont. H.C.). That appears to be what the Board did here. Although they must make their decision on the basis of the factual evidence, they are not bound to accept the opinions of witnesses as gospel on matters which are the essence of the decision they are charged with making, for example, on the capitalization rate which market forces would apply. That is a matter of judgment which, provided it is not patently unreasonable, will not be interfered with by the court. It has not been shown that the Board's conclusion here was unreasonable or based upon a misapprehension of the facts.

Furthermore, so as to determine whether the end result of $7,382,500 was within a reasonable range, the Board undertook a verification exercise, so far as it was able to on the evidence before it. This is what they found when they undertook that exercise:

The Board has also considered the Direct Sales Comparable Approach to value and finds that this value is close to the adjusted sale of the subject when land is added and when inducements were also necessary. It also follows that this estimate is close to the Gross Leasable Area value to be found on page 16 of Exhibit No. 2 and the adjusted value for the subject. It is well within the range for the other sales to be found on page 16. This estimate is significantly lower than the Cost Approach to be found on page 15 of Exhibit No. 2.

The Appellant did not submit estimates by means of the Cost Approach nor the Comparative Approach so the Board is unable to check the above estimate against other approaches submitted by the Appellant.

The Board finds that the value developed by the Income Approach is well within the range of other approaches which were submitted in evidence.

On the basis of the foregoing, there are no grounds for interfering with the decision of the Board. However, there is one other aspect which merits attention. The appellant charges that when the Board produced Exhibit A (the graph of the data on a table in Exhibit 2) it introduced new evidence upon which there was no opportunity to cross-examine, and in respect of which there was no opportunity to rebut. If that were the case there would, indeed, be grave error, but upon a fair reading of the transcript and of the exhibits the accusation does not stand up. It is clear from the transcript that overnight Board member Cullis converted certain of the data on the table into graph form for purposes of obtaining comments on an apparent conclusion which might be drawn. This is what was said when the graph was introduced:

THE CHAIRMAN: Did you have a question?

MR. CULLIS: Yes. I wanted to ask Mr. Austin some questions concerning cap rates.

THE CHAIRMAN: Okay, yes.

MR. CULLIS: On page 22 of Exhibit 2. And --

MR. AUSTIN: Of which exhibit?

MR. CULLIS: Exhibit 2, page 22.

MR. AUSTIN: Okay.

MR. CULLIS: And what I have is I've changed sale 3 to indicate a 9% over all cap rate, because I think this was guaranteed.

MR. AUSTIN: That's correct.

MR. CULLIS: And I plotted it on a graph. And maybe the, Mr. Lee would like to look at that. Now, if we're using a 10% vacancy and collection loss, which the Respondent did in his Exhibit 2, the cap rate, according to this, would be a cap rate of 8.1. And using 17, which was one of yours and also the average vacancy is circled in there and it showed a cap rate of 7. Why should we not use those cap rates if we are using those vacancies? Is the page 22 so wrong?

There follow several pages of discussion between Board member Cullis and Mr. Austin, who was there, apparently, in the dual role of witness and advocate.

In following the course he did, the Board member was engaging in a perfectly normal course of enquiry to clarify and understand the evidence, and in doing so he used what he believed to be a visual representation of the evidence which was concerning him -- not new evidence, but existing evidence in a different form. Providing the enquiry does not become converted into an adversarial exchange, there is nothing wrong with seeking explanations or putting forward tentative propositions for comment. That is standard procedure in the discharge of the judicial function, particularly when the subject matter is complex or technical. It is a technique which has proven to be helpful to the parties and to the decision maker. The exercise of the technique in this case does not merit criticism.

For all the above reasons, in the opinion of the court, the answer to each of the questions posed in the stated case is no.