ANCHOR VENTURES INC.

v.

ASSESSOR OF AREA 4 - NANAIMO-COWICHAN

BRITISH COLUMBIA COURT OF APPEAL (CAV00634) VANCOUVER REGISTRY

Before MR. JUSTICE CARROTHERS
MR. JUSTICE CRAIG
MR. JUSTICE MACFARLANE

Victoria, June 15, 1988

D. R. Wilson for the appellant
C. Considine for the respondent

Reasons for Judgment June 15, 1988

CARROTHERS, J. A.: Anchor Ventures Inc. appeals the dismissal of its preliminary objection that failure of the parties to comply strictly with the time requirements of s. 74 (5) of the Assessment Act, R.S.B.C. 1979, c. 21 that a stated case be brought on in the Supreme Court for hearing within one month from the date on which the stated case is filed results in loss of jurisdiction. The entire time table for bringing to the Supreme Court for hearing and disposition of a stated case is established by s. 74 of that statute, and while we are immediately concerned with time limits of s. 74 (5) it is useful to examine the various time limits of the entire procedure on appeal to the Supreme Court. Section 74 reads as follows:

> 74. (1) At any stage of the proceedings before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may submit, in the form of a stated case for the opinion of the Supreme Court, a question of law arising in the appeal, and shall suspend the proceedings and reserve its decision until the opinion of the final court of appeal has been given and then the board shall decide the appeal in accordance with the opinion.
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> (2) A person affected by a decision of the board on appeal, including a municipal corporation on the resolution of its council, the Minister of Finance, the commissioner, or an assessor acting with the consent of the commissioner, may require the board to submit a case for the opinion of the Supreme Court on a question of law only by:
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> (a) delivering to the board, within 21 days after his receipt of the decision, a written request to state a case; and
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> (b) delivering, with 21 days after his receipt of the decision, to all persons affected by the decision, a written notice of his request to the board to state a case to the Supreme Court.

(3) The board shall, with [sic] 21 days after receiving the notice under subsection (2), submit the case in writing to the Supreme Court.

(4) The costs of and incidental to a stated case shall be at the discretion of the Supreme Court.

(5) Where a case is stated, the secretary of the board shall promptly file the case, together with a certified copy of the evidence dealing with the question of law taken during the appeal, in the Supreme Court Registry, and it shall be brought on for hearing before the judge in Chambers within one month from the date on which the stated case is filed.

(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, but the court may send a case back to the board for amendment, in which event the board shall amend and return the case accordingly for the opinion of the court.

(7) An appeal on a question of law lies from a decision of the court to the Court of Appeal with leave of a justice of the Court of Appeal.

In this case at the requirement of the respondent a case stated by the Assessment Appeal Board for the opinion of the Supreme Court respecting the valuation for assessment purposes of the appellant's marina was filed in the Supreme Court Registry on July 27, 1987. On September 1, 1987 the respondent assessor as appellant by way of stated case filed a notice of motion to bring the stated case on for hearing on October 20, 1987. This notice was served on September 21, 1987. On October 20, 1987 the appellant unsuccessfully raised his preliminary objection that the Supreme court had lost its jurisdiction because the matter had not been set for hearing within the one month time limit from the date on which the stated case was filed, as required by s. 74 (5). The appellant appeals this dismissal of its preliminary objection. Apparently the merits of the stated case were not dealt with at that time.

The failure to bring the stated case on for hearing before the judge in chambers within one month from the date on which the stated case was filed is attributable to the respondent Assessor. The Appellant argues that the finding of lost jurisdiction in *Ghirardosi* v. *City of Trail*, Stated Case 65, June 11, 1969, which had a more stringent time restraint than now subsists under the *Assessment Act* is correct and should be applied in this case. Dryer J. in *Ghirardosi* said at p. 322:

Counsel for the respondent refers to s. 51 (5) of the *Assessment Equalization Act*, c. 18, R.S.B.C. 1960 and says that in view of its R.S.B.C. 1960 [sic] and says that in view of its provisions the Court has no jurisdiction to dispose of the Stated Case. This contention is, I hold, sound. See *Re Merry and City of Trail*, (1962) 34 D.L.R. (2d) 594. In this case the provisions of the subsection were not waived. The Stated Case was filed on December 30, 1968. For this reason also therefore the appeal must fail.

I agree with the result in the *Ghirardosi* case, but that case does not enunciate the principle upon which the appellant rests its case, namely whether the time limitation in question is mandatory or imperative or merely directory.

In view of the fact that the time requirement of s. 74 (5) could be and indeed was performed by the respondent Assessor, who was the appellant in the stated case, and a person directly in control of the matter, I consider this particular time requirement to be mandatory within the contemplation of the principle as set out in *Regina* v. *Bourassa*. [1972] 1 W.W.R. 285. In that case Branca J. A. said at p. 287:

> It will be noted that when one applies for a stated case he is powerless to compel the Court to state the case unless, under the provisions of s. 738 of the Code, the summary convictions court refuses to state the case. In the instant case there was no refusal on the part of the summary convictions court and therefore the applicant was powerless to compel the summary convictions court to state the case in compliance with the statutory conditions.
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> So that, in effect, if the learned trial Judge was correct, an appellant who has impeccably discharged all conditions imposed by law and within his power to discharge becomes chargeable with a default if some other functionary over whom he has no control fails to conform with conditions which only such functionary can discharge and which will in turn completely defeat his purpose.

Branca J. A. went on to state at p. 289:

> The series of cases starting with *Ritholz*, above referred to, and *Moore* v. *Hewitt*, in my judgment correctly state the law, and consequently the section in question is mandatory in the sense that it contains conditions precedent to the vesting of jurisdiction only insofar as acts to be done by the appellant are concerned. However, where the acts to be performed are not discharged in accordance with the statutory requirements due to the sole fault of others, the terms of the section are directory only and not imperative, in which event the Supreme Court is free to hear the appeal by way of a stated case despite the fault involved.

Thus, failure to comply in the present case results in a loss of jurisdiction. I would not adopt the interpretation of Meredith J. in *Calona Wines Ltd.* v. *Assessor of Area 19 – Kelowna*, Stated Case 121, September 30, 1985, nor do I find helpful the other cases cited to us dealing with limitation provisions other than the one which we have under consideration here as those limitation provisions are of a different character or nature than the one at issue here.

For these reasons I would allow the appeal.

CRAIG, J. A.: I agree.
MACFARLANE, J. A.: I agree.
CARROTHERS, J. A.: The appeal is allowed.