118603 CANADA LTD.

v.

ASSESSOR OF AREA 9 VANCOUVER

Supreme Court of British Columbia (A882574) Vancouver Registry

Before THE HONOURABLE MR. JUSTICE COWAN

Vancouver, B.C., December 5, 1988

S. BRADLEY ARMSTRONG for the Appellant
JOHN E. D. SAVAGE for the Respondent

Reasons for Judgment December 7, 1988

This is an appeal by way of stated case pursuant to S. 74 (2) of the Assessment Act R.S.B.C. 1979 c. 21 (the Act), from the decision of the Assessment Appeal Board (the Board) wherein the Board confirmed the decision of the Court of Revision as to the "actual value" of certain real property owned by the appellant.

The property comprises a ten storey, reinforced concrete, ninety-four unit, strata title residential building of superior quality built in 1984. The building has been rented since that time. The questions posed by the Board for the opinion of the court in the stated case were the following:

1. Did the Board err in law by failing to value the subject property as a "going concern" as required by s. 26 (3.1) of the Assessment Act?

2. Did the Board err in law by failing to value the property on a basis which 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" as required by s. 69 (1) (e) and other provisions of the Assessment Act?

3. Is the Board's decision so patently unreasonable that it constitutes an error of law when considered in the light of the evidence and of previous Board's decisions?

On the hearing of the appeal the respondent conceded that questions 2 and 3 in the stated case involved questions of mixed fact and law, and, accordingly were not properly before the court in that s. 74 of the Act stipulates that only questions of law may be put before the court for it's opinion.

The appeal was therefore argued solely on the basis of the issue raised by question 1, which, to reiterate was: "Did the Board err in law by failing to value the subject property as a "going concern" as required by s. 26 (3.1) of the Assessment Act?"

In it's reasons the Board outlined the position of the parties as follows:

". . . the appellant argues that the subject should be valued as a rental apartment, whereas the respondent argues that it should be viewed as many individual residential strata units which happen to be rented."

At p. 2 of its reasons the Board, after referring to an appraisal filed by the appellant which was limited to the income approach to valuation, and, an appraisal filed by the respondent which "applied all three traditional methods of appraisal" they being the cost approach, the income approach and the market approach concluded as follows: "The board finds on all the evidence that there was a market for individual strata suites in the subject at the valuation date, and consequently places most reliance on the Market Approach in determining value. The Board chooses this approach to value following an analysis of the facts, such as the type of building and the market for individual suites, and rejects the proposition that the Income Approach must be used simply because of occupancy type."

The appellant submits that in adopting that approach the Board erred in that it failed to have regard for the requirements of s. 26 (3.1) of the Act. S. 26 of the Act reads in part as follows:

"26. (2) The assessor shall determine the actual value of land and improvements and shall enter the actual value of the land and improvements in the assessment roll. (3) In determining actual value, the assessor may, except where this Act has a different requirement, give consideration to present use, location, original cost, replacement cost, revenue of rental value, market value of the land and improvements and comparable land and improvements, economic and functional obsolescence and any other circumstances affecting the value of the land and improvements. (3.1) Without limiting the application of subsections (1) to (3), where an industrial or commercial undertaking, a business or a public utility enterprise is carried on, the land and improvements used by it shall be valued as the property of a going concern." While s. 26 (3.1) of the Act requires that where, as here, there is a "business" or "commercial undertaking" carried on that is a rental apartment undertaking the same shall be valued as a "going concern", it is important to have regard for the opening words of that subsection viz. "without limiting the application of subsections (1) to (3). These words require that subsection 3.1 be read subject to subsections (1) to (3). It will be noted that subsection 2 requires the assessor to determine the "actual value of land and improvements".

S. 63 of the Condominium Act provides:

"For the purposes of assessment and taxation, each strata lot, together with the share of its owner in the common property, common facilities and other taxable assets shall be deemed to be a separate parcel of land and improvements."

Accordingly, while that section does not give the assessor any guidance or direction as to how each parcel is to be valued, it does require that an assessed value be assigned to each strata unit, that is, it obligates the assessor to determine pursuant to s. 26 (2) of the Act the "actual value of land and improvements" comprising each strata parcel.

It is clear from the authorities that "actual value" can be equated to market value, for example, in the case of Sun Life v. City of Montreal (1950) S.C.R. 220 at p. 246, Rand J. discussed article 375 of the Montreal Charter which provided that the assessment roll shall contain "3. the actual value of the immovables". He stated:

"For property designed for business or ordinary private purposes, it is, I think settled, that, as stated by Duff C. J. in Montreal Island Power v. Laval des Rapides (1935 S.C.R. 304) "actual value" in article 375 of the Charter of Montreal means exchange value, the value actually or

theoretically ascertained by the test of competition between a free and willing purchaser and a like vendor."

The appellant submits that by valuing the individual strata lots by the market approach, as it did, the Board, in effect, arrived at value on a break-up basis and not on the basis of a "going concern".

I am unable to agree that the Board did not view the matter from the "going concern" perspective. The Board had before it the income approach put forward by the appellant and also contained in the appraisal submitted by the respondent. That approach represented the "going concern" value of the property. The Board rejected that approach since, on the evidence it had before it, it considered that such value did not represent the "market" or "actual value" of the strata lots in question.

In the case of Re Assessment Equalization Act: Canadian Pacific Railway Company v. City of Vancouver (1965) 50 W.W.R. 302 Macfarlane J. (as he then was) considered the meaning of the words "valued as the property of a going concern" and the qualifying phrase "without limiting the generality of the foregoing". In that case he was considering the provisions of s. 37 (1) of the Assessment Equalization Act R.S.B.C. 1960 c. 18 which provided:

"37. (1) The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any 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."

After quoting that section Macfarlane J. went on to state at p. 307:

"Its provisions have been considered by this court and by the court of appeal on several occasions. The first sentences impose upon the assessor what may be described as the primary and basic duty of determining actual value. The second sentence provides guidance and direction to the assessor in determining that value. By the first part of that sentence he is permitted to consider a number of factors. The second part is mandatory in the circumstances to which it applies, namely: "where any industry, commercial undertaking, public utility enterprise, or other operation is carried on," subject to the effect of the phrase: "without limiting the application of the foregoing considerations." The effect of this phrase was considered by the court of appeal in Re Assessment Equalization Act: Alkali Lake Ranch Ltd. v. Prov. Assessors, Quesnel Forks (1964) 48 W.W.R. 120, affirming (1964) 46 W.W.R. 528, a case which involved lands on which a commercial undertaking or "other operation" was carried on. It was held that although the assessor must value such lands as the property of a going concern, he need not necessarily determine that such value is actual value. Norris, J. A., delivering the judgment of the court, said at p. 124: '. . . there is ample indication in the proceedings to show that the assessor obeyed the mandatory language of sec. 37 (1) and did value the land and improvements as the property of a going concern, and arrived at their actual value as farmlands by app lying such further permissible considerations as he deemed necessary in the circumstances.'

In the present case there is also in my view, as I have indicated, ample evidence that the Board did value the subject property as a "going concern" and arrived at the actual value of the individual strata lots by applying the market approach based on the evidence before it pertaining to the existence of a market for such lots.

Question 1 is therefore answered in the negative.

The respondent is entitled to its costs.