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THE ASSESSMENT COMMISSIONER OF BRITISH COLUMBIA

v.

WESTAR TIMBER LTD.

Supreme Court of British Columbia (A882823) Vancouver Registry

Before THE HONOURABLE MR. JUSTICE DAVIES (in chambers) PART I

Vancouver, November 30, 1988

THE HONOURABLE MR. JUSTICE MACDONALD (in chambers) PART II

Vancouver, April 6 and 7, 1989

John E. D. Savage for the appellant
Peter D. Feldberg for the respondent

Reasons for Judgment - Part I December 2, 1988

This is an appeal by stated case of the Assessment Commissioner of British Columbia seeking an opinion on the following question:

Did the former members of the Assessment Appeal Board have jurisdiction to render a decision on April 21st, 1988, when their appointments as members of the Assessment Appeal Board were rescinded February 24th, 1988, by Order-in- Council No. 324?

More questions were asked in the stated case. However, it was agreed that an opinion be obtained on the first question before proceeding with the remainder. The facts with respect to the first question were given as follows.

1. F. David S. Vernon (as senior Chairman), Marvin A. Carpenter (as a member) and Reginald A. Cullis (as a member) were appointed to be members of an Assessment Appeal Board pursuant to Order-in-Council 1822 passed by the Lieutenant Governor in Council the 26th day of September, 1985.

2. Messrs. Vernon, Carpenter and Cullis comprise the members of the Board which commenced hearing the evidence concerning the appeal of Westar Timber Ltd. against the values placed on the land and improvements on the 1985 and 1986 Assessment Rolls by the Assessor of Area 25 _ Northwest/Prince Rupert. The Board so comprised heard the evidence in the appeal until April 30th, 1987. When the hearing recommenced August 6th, 1987 only F. David S. Vernon and Marvin A. Carpenter were present and heard evidence and argument without objection from either party. Neither party had notice of change in composition of the Assessment Appeal Board other than by the Orders-in-Council hereinafter referred to.

3. On or about the 14th day of May, 1987 Order-in-Council 971 was passed rescinding Order-in-Council 1822 and establishing six Assessment Appeal Boards. Messrs. Vernon and Carpenter were members of Appeal Board No. 1 together with Mr. Ian D. Rendle. Mr. Ian D. Rendle did not

hear evidence in Westar's appeal or participate in the decision. The appointments of Mr. Vernon and Mr. Carpenter pursuant to Order-in-Council 971 were set to terminate September 30, 1987.

4. On the 10th day of September 1987, Order-in-Council 1808 was approved and ordered, extending the appointments, inter alia, of Mr. Vernon and Mr. Carpenter to February 29, 1988.

5. Pursuant to Bill 67 of the Legislature of British Columbia, which received Royal Assent on December 17, 1987 the Assessment Appeal Board structure was altered by Section 4 of the Assessment Amendment Act, 1987. This Act did away with the appointment of individual three member boards and established a single board consisting of at least six members made up of a chairman, one or more vice chairmen and other members.

6. On February 24, 1988, section 4 of the Assessment Amendment Act, 1987 was proclaimed by Order-in-Council 323 (which was deposited on February 25, 1988).

7. The office of the senior chairman (then occupied by F. David S. Vernon) was eliminated by the proclamation of Section 4 of the Assessment Amendment Act, 1987 (which did away with that post) and he was not appointed to be a member of the new board which was set up pursuant to the Act.

8. The appointment of Marvin A. Carpenter was expressly terminated by Order-in-Council 324 approved and ordered on February 24, 1988.

9. Section 11 of the Assessment Amendment Act, 1987 proclaimed on February 24, 1988 _ Order-in-Council 323, provides that where a Board established under the former Act has begun hearing or has completed hearing evidence on appeal, it shall complete the appeal and render its decision. 10. F. David S. Vernon and Marvin A. Carpenter appointed under the repealed Act continued their deliberations after February 28, 1988, and rendered a decision on April 21, 1988.

Order-in-Council No. 1822, September 25, 1985, appointed four Assessment Appeal Boards in the following words: "The following Assessment Appeal Boards are established and, having regard to persons who are trained in the law or experienced in real property appraisals, the persons referred to under each Board listed are appointed to the Assessment Appeal Board: Assessment Appeal Board No. 1: Chairman Mr. F. David S. Vernon

(Address given)

Member Mr. Marvin A. Carpenter

(Address given)

Member Mr. Reginald A. Cullis

(Address given)" The remaining three Boards were also named.

Counsel for the appellant argues that Board members obtained their authority by statute and that when that authority was terminated by Order-in-Council they could no longer render an effective decision. He concedes that by section 50 of the Act. Messrs. Vernon and Carpenter were entitled to hear the balance of evidence in August of 1987 as a two-man Board and to continue as members of the Board until February 24, 1988, as that was the date that Mr. Carpenter was expressly terminated by Order-in-Council No. 324.

The Assessment Appeal Board structure was changed by section 4 of the Assessment Amendment Act, 1987, which was brought into force February 24, 1987. Section 4 of the new Act eliminated the appointment of individual three member Boards and established a single Board consisting of six members.

The transitional provisions in the new Act were set in section 11 as follows:

"Section 11 subparagraph 1 Where a Board established under section 48 of the Act as repealed by this Act has begun hearing or has completed hearing evidence on an appeal, it shall complete the appeal and render its decision."

Some Board members under the old Act were reappointed in an Order-in-Council under the new Act February 24, 1988, the same day that section 11 came into force. The appellant argues that section 11, the transitional section "simply allows continuing members of the Board to complete their hearings notwithstanding that the Board of which they were members ceases to exist". In short, that Messrs. Vernon and Carpenter had no jurisdiction as a Board to render their decision April 21, 1988.

I cannot accept the appellant's argument on this question. In my judgment section 11 was included to cover the situation that existed in the case of this appeal. To interpret the section as suggested by the appellant would produce an unreasonable result which should be avoided where there are two possible interpretations. In any event, I find that the intent of the Legislature from the wording of section 11 was to continue the life of the Boards established under section 48 of the old Act until they had rendered their decisions where they had begun hearings or had completed hearing evidence on an appeal. These boards were appointed as Boards; the transitional section provides for the continuation of the Boards until they have completed their work. In my view there is no other reasonable interpretation of section 11.

Therefore, the answer to the first question in the stated case is "yes". There will be judgment accordingly.

W. H. DAVIES, J. Vancouver, B.C. December, 2, 1988

Reasons for Judgment - Part II April 18, 1989

The Assessment Appeal Board (the Board) has submitted a stated case for the opinion of this court at the request of the appellant on several questions arising from its decision on April 21, 1988 to reduce the assessment for taxation purposes of the respondent's pulp mill near Prince Rupert from $292.5 million to $150.2 million, a reduction of almost 50%. Several of the questions posed in the stated case were resolved earlier. This hearing was restricted to three remaining issues:

(a) The admissibility of evidence of the sale of the pulp mill by Westar in July of 1986, some two years after the valuation date (July 1, 1984) in question here, and the question of the reliability of such evidence in the face of the Board's finding that there was an element of duress involved in that sale.

Question 4:

Did the Assessment Appeal Board err in law in admitting evidence of the sale of the Northwest operations in July, 1986 in determining actual value as of July, 1984 in the circumstances of this appeal?

Question 5:

Did the Assessment Appeal Board err in law in finding that the sale of the Northwest operations in July of 1986 was a strong indication that the actual value was less than the amount confirmed by the Court of Revision after it found that there was an element of undue pressure in respect to the sale and the price at which the property actually traded could not be accepted as fair market value?

(b) Was the Board in error in rejecting the cost approach to valuation in this case?

Question 8:

Did the Assessment Appeal Board err in law in favouring an "investment" approach to valuating the subject property over the cost approach because there was the "possibility" of separate error in the estimating of each form of depreciation in the cost approach? (c) Did the Board commit an error in law in selecting parts of the evidence of several witnesses to determine value using the income approach?

Question 7:

Did the Assessment Appeal Board err in law in selecting from the evidence of the witnesses in the manner that it did in determining value on the income approach?

The reliance by the Board on the sale by Westar of the subject pulp mill in July of 1986 for $60 million as evidence "indicating" its fair market value on the valuation date some two years earlier lies at the heart of this appeal. It is evident from the Board's decision that the subsequent sale was a significant factor in its decision to reduce the assessment by almost 50%.

"The Board accepts the evidence of the sale of the subject as a strong indication that the actual value on July [1], 1984 was significantly less than the amount confirmed by the Court of Revision."

The Board reached that conclusion despite the facts that two years had elapsed from the valuation date and that Westar and its parent company were under considerable financial pressure at the time of the sale.

". . . the 1986 sale is tainted by both the duress and retrospection aspects. For these reasons it is not accepted as determinative. Nevertheless, the Board . . . concludes that the sum of these two influences would not result in the disposal of a $292 million plant for $60 million."

Let me say at the outset that I consider these statements by the Board to be both reasonable and logical. They are adequately supported by the evidence. It is inconceivable that a sale on the open market of the very facility being valued could be ignored by the Board, whose members are bound to consider all of the evidence and arrive at their own decision as to the actual value of the mill on the relevant date. POSITION OF THE APPELLANT

Despite the objections of the appellant, the Board heard evidence of the 1986 sale. The appellant argues that while one of the approaches to valuation in assessment cases is to consider "recent free sales of . . . comparable properties" (the "market" approach), the sale in this case was neither recent nor free. (See Sun Life Assurance v. Montreal [1950] S.C.R. 220 at p. 224).

The appellant draws a distinction between assessment and expropriation cases insofar as future "advantages" or potential for the property are concerned. Because expropriation is taking "once

and for all", the value of future advantages must be taken into account; but where the valuation is periodic (every two years) for assessment purposes, there is no "room for hypothesis as regards the future. The assessor['s] . . . valuation must be based on the conditions . . . at the date of the assessment . . ." (See, Re Royalite Oil Ltd. (1975) 11 D.L.R. (2d) 527 (B.C.S.C.) at pp. 533\-534). Where such periodic valuations are made, they will reflect future potential as it is realized.

The appellant submits that even in expropriation cases, where evidence of a subsequent sale would be admitted, that evidence must first be "logically probative" of the fact to be found. Thus, where the general market conditions have not remained the same (both the price of pulp and the outlook for same were different in 1986 from that they had been in 1984) and the sale was not "free in all respects from extraneous factors", the evidence of a subsequent sale should not be admitted. (See Roberts and Bagwell v. The Queen (1957) 6 D.L.R. (2d) 305 (S.C.C.) at p. 313).

In summary, the appellant says that the Board should have ignored the subsequent sale and relied only on the information available at the valuation date; that it reached an opinion as to value based on the subsequent sale and then rejected the cost approach and improperly "tinkered" with the income approach evidence in order to justify a conclusion which it had already reached.

POSITION OF WESTAR

Westar takes issue with the suggestion that the Board reached a conclusion as to value on the basis of the sale alone and then moulded the rest of the evidence to suit. It points to the location and economic obsolescence evidence as the real basis for the Board's conclusion.

Westar submits that the appellant himself has successfully and quite properly introduced evidence of subsequent sales in assessment cases. A sale of the subject property itself only two years after the valuation date cannot be ignored, particularly when such mills are rarely bought and sold. The Board has a duty to consider all relevant evidence. The weight to be given to that evidence, however, is for the Board. Just because an element of duress was present does not mean that no weight can be given to the later sale or that evidence of it is not admissible.

Westar argues that the reasons for the Board preferring the income approach over the cost approach have recently been expressly approved by the Court of Appeal in Shell Canada Resources v. Assessor of Area No. 22 - East Kootenay (not yet reported _ January 17, 1989, C.A. 007653, Vancouver Registry - Reasons on cross-appeal). It submits that there was a logical reason for each choice made by the Board in selecting evidence from one witness or another for use in calculating value by the income approach, or at the very least, evidence in each case on which the Board could base such a choice. DISCUSSION

The duty of the Board is to determine, by trial de novo, the actual value of the subject property at the valuation date. The Board does not merely review the work of the Assessor. It must not ignore relevant evidence of actual value.

An appeal lies to this court on a question of law alone. This court has no power to substitute its opinions on question of fact for those of the Board. So long as the Board does not:

(a) misinterpret or misapply a section of the Assessment Act, R.S.B.C. 1979, c. 21;

(b) misapply any applicable principle of general law; or

(c) act without evidence or upon a view of the facts which could not reasonably be entertained, the court has no power to intervene. 1. The Subsequent Sale

The appellant contends that there is a basic principle of valuation in all but expropriation cases (the once and for all taking) that high sight is inadmissible in reaching valuation conclusions at an earlier point in time. Westar responds that the principle is limited to events which occur after the valuation date which would affect value had they been known on the valuation date (e.g.: the discovery of a new ore vein; the premature death of an annuitant, etc.). The appellant has been unable to point to a reported decision in an assessment case in which evidence of a subsequent sale has been rejected on the sole ground that it occurred after the fact.

It has been suggested that technically it is impossible to estimate "market value" according to the assumptions contained in the standard definition of that term:

"The highest price which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus."

The suggestions of impossibility are based on several reasons which include the fact that parties to a transaction are generally under some degree of compulsion to sell or buy, otherwise they would not be acting at all. Seldom are we blessed with the perfect comparable.

In Assessment Commissioner of B.C. v. Houston [1979] 5 W.W.R. 639 (B.C.S.C.) at p. 644, a question arose as to whether the Board was in error in admitting and considering evidence of a transaction which took place 9 months after the valuation date for assessment purposes. The court concluded that there was ". . . no question that an actual sale on the open market is an important indication of such value" where there was evidence of no significant market change during the interval. That reasoning was followed by my brother Legg in Gyratron Developments v. Assessor of Area 9 _ Vancouver (unreported, June 26, 1986, B.C.S.C. No. A861453 Vancouver Registry _ See BCAA Manual of Stated Cases, Vol. I, Case 41) where it was held that there is no rule of law that assessors cannot use sales on either side of the valuation date. "The question of whether the sale is determinative of actual value is evidence to be weighed. Assessment Commissioner v. Houston [above] is not to be interpreted as laying down a restriction that evidence of a sale after the valuation date can only be used if there is evidence of no significant change in the market."

I accept the submission of Westar, as did the Board, that evidence of a subsequent sale of the very property to be valued was relevant and thus admissible. Once admissible, the question for the Board (but not for this Court) was the weight to be given to that evidence. The Board was conscious of both the retrospective and duress aspects. It had considerable evidence of the state of the market for pulp at both times and of the economic pressures on Westar. While the subsequent sale was not determinative of market value on the valuation date the Board concluded that the $60 million sale in 1986 established that the $292 million assessment in 1984 was too high. It then turned to the income method of valuation to calculate the July 1, 1984 value.

I find no error in the admission into evidence by the Board of the evidence of the subsequent sale. Having admitted such evidence, the Board was bound to consider it and to place upon it such weight as it saw fit.

2. Rejection of Cost Approach

This issue is resolved by the recent decision of the Court of Appeal (on the cross-appeal) in Shell Canada Resources v. Assessor of Area 22 _ East Kootenay (above): "The issue on the cross-appeal [is]:

'Whether the Board was correct to accept the discounted cash-flow and reject the cost approach in arriving at actual value?' I agree with Mr. Justice Spencer that the Board did not make the error

here of rejecting the cost approach without evidence." In this reasons for judgment, Spencer, J. had said: "Whether or not the evidence in this case justified disregarding the replacement cost method entirely and relying solely on the discounted cash flow was, . . . a question of fact and not of law. The selection or rejection of the appropriate valuation technique is a question of fact for the Board . . . . . although the selection . . . is a question of fact, there may be cases where . . . the Board errs in principle . . . for instance . . . if the Board thought that as a matter of law it was bound to choose one valuation method only and to discard all the others . . ." Spencer, J. then goes on to support the decision of the Board in the Shell Canada Resources case which rejected the cost method for reasons which are similar to those given by the Board in this case for preferring the income approach: ". . . the subject property suffers . . . from excessive external obsolescence (depressed international coal prices) and . . . the discounted cash flow method takes better account of all forms of obsolescence than does the replacement cost method."

Here, the necessary adjustment to replacement cost for locational and economic obsolescence was a major one. It is interesting to note that the only witness who attempted that exercise reached a valuation in the neighbourhood of $100 million, considerably below the Board's conclusion based on the income approach. The Board concluded, as I find it was entitled to do, that: ". . . the Cost Approach, despite its traditional use for properties of this type, will . . . be no less susceptible to . . . potential error arising from estimation . . . Due to the inherent capacity of the 'investment' approaches to account for all forms of obsolescence, the Board tends, in the instant circumstances, to favour them over the Cost approach . . ." 3. Selection of Income Approach Evidence

This appeal cannot succeed on this ground. The selection by the Board of those variables affecting revenues and costs which it considered most correct is a question of fact exclusively within the jurisdiction of the Board. Westar went to some lengths in its written brief to justify each choice made by the Board. I have found it unnecessary to analyse each such choice in an effort to determine whether or not I agree. Suffice it to say, I am satisfied that there was evidence to support each such choice.

Tamarack Properties v. Assessor of Area 22 _ East Kootenay (unreported _ April 25, 1980, B.C.S.C. No. A800327, Vancouver Registry; BCAA Manual of Stated Cases, Vol. II, Case 139) is clear authority for the proposition that there is nothing wrong in the Board using figures taken in part from the evidence of one witness and in part from the evidence of another. Just because the Board rejects some of the evidence of a witness does not mean that it must reject all of his evidence. "It is trite law that a fact finding tribunal is entitled to accept part of the evidence of a witness and to reject another part." It has even been suggested that to blindly accept one or the other of two differing valuations without analysing its components and arriving at its own conclusion, could amount to an error in law on the part of the Board.

JUDGMENT

The outstanding questions in the stated case are answered as follows:

Question 4: No.

Question 5: No.

Question 7: No.

Question 8: No.

The appeal by way of stated case is dismissed, with costs to the respondent Westar.

B. D. MACDONALD

J. Vancouver, B.C.

April 18, 1989