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**BRAMALEA LIMITED (TRIZEC EQUITIES LIMITED)**

**v.**

**ASSESSOR OF AREA 09 - VANCOUVER**

Supreme Court of British Columbia (A890239) Vancouver Registry

Before the HONOURABLE MR. JUSTICE MEREDITH

Vancouver, March 17, 1989

John R. Lakes for the appellant
Peter W. Klassen for the respondent

**Reasons for Judgment** April 26, 1989

This is an appeal by way of stated case from a decision of the Assessment Appeal Board under the provisions of the Assessment Act.

The decision fixes the value of the Hyatt Regency Hotel in Vancouver as at July 1, 1986, for the purposes of the assessment roll for the years 1987 - 1988.

The questions posed in the stated case challenge the decision of the Board in three main areas:

> (a) That the Board did not consider whether the application of the capitalization rate of 9.5% in respect of net income resulted in an assessment of value that bore a "fair and just" relationship to the value of similar hotels in Vancouver (This is characterized in one question as "discriminatory");
>
> (b) that the Board acted "unreasonably" by applying a room rate in excess of the room rate actually charged in 1985; and
>
> (c) that the Board was in error in its determination of net income for valuation purposes in that it combined actual and average expense, in that it calculated expenses as a percentage or room rate not based on specific evidence, and in making an allowance for taxes when the amount "was still at issue".

I find that the complaint in (a) above is well-founded and that the matter should be remitted to the Board to hear further evidence if necessary from the Assessor as to the capitalization rates applied to similar hotels valued on the basis of capitalization of net income. But I reject the complaints under (b) and (c), concluding as I do that the determinations there in question were well within the jurisdiction of the Board.

The circumstances are as follows:

The Area Assessor assessed the hotel for the 1988 assessment roll in question at $36,500,000. The assessed value appears to have been based on the assumption that a prospective investor in valuing the hotel would expect a return on investment (that is to say net income) of 12%. (The

higher the expected return, the lower the value). The Appellant asserts that a number of quality hotels like the Hyatt had been valued for assessment purposes by the application of a rate of 12%. The assertion may not have been established in evidence. I take it that the Appellant appealed the assessment of the Assessor to the Court of Revision contending that the value of $36,500,000 was excessive by about $7,000,000 because the calculations of the Assessor in computing net income were in error. The Court of Revision, I take it, rejected the contention of the Appellant and confirmed the assessment.

I take it also that the Appellant was prompted to go before the Court of Revision, given that the Area Assessor explained to it that in arriving at his value, the Assessor applied a capitalization rate of 12%. The Appellant, I expect, was encouraged to believe that whether or not it was successful in its appeal having to do with room rates and expenses, the same capitalization rate would continue to be employed.

The encouragement was probably stimulated by this paragraph of a letter written by the Area Assessor to the Appellant, as follows:

> "The second method is the conventional hotel presentation and is similar to that in the Assessment Appeal Board hearing last year. We used 66.6% for occupancy and followed the same formula for deductions. You will note in this approach that the food and beverage component formed no part of the net income in this method. The net income by this approach was $4,937,900 which we capitalized at 12% yielding $41,149,150. Deducting the chattels of $5,361,800 indicated a value of $35,787,350. The median of these 2 values is $36.5 million which is the value we placed on the hotel for 1987/88."

If the Court of Revision rejected the submissions of the Appellant in regard to the calculations of net income to be capitalized, it had no discretion to do otherwise than apply the 12% capitalization rate just as it probably had done in respect of other hotels of comparable quality to the Hyatt. This conclusion I draw from s. 44. (4) of the Assessment Act as follows:

> "The assessment of property complained against shall not be varied [by the Court of Revision] if the value at which it is assessed bears a fair and just relation to the value at which similar or neighbouring property in the municipality of rural area is assessed."

It seems to me that "fairness" and "justice" mean equality, and that equality between similar operations, if the capitalization of net income "approach" is to be employed, can only be achieved by the employment of the same capitalization rate.

Thus it must have been that the Court of Revision compared, in effect, the capitalization rates applicable to similar hotels, namely 12%, and rejected the Appellant's contentions as to room rates and expenses.

It take it that in appealing to the Assessment Appeal Board under the Act, the Appellant considered that consideration would be given to the correctness of the net income figure, but that the capitalization rate would not be changed. It was wrong.

Section 69. (1) of the Assessment Act confers on the Appeal Board the power of the Court of Revision, but not the obligations, particularly the obligation not to vary if the assessment bears a "fair and just relation" to the value at which similar properties are assessed.

But that section reads in part as follows:

" 69. (1) In an Appeal under this Act the Board has and may exercise with reference to the subject matter of the Appeal, all the powers of the Court of Revision, and without restricting the generality of the foregoing, the Board may determine, and make an order accordingly,

(a) whether or not the land or improvements, or both, have been valued at too high or too low an amount;

. . .

(e) whether or not the value at which an individual parcel under consideration is assessed 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;"

In this case the Board set about determining whether the value was "too high or too low".

But whether land has been assessed "too high or too low" will depend upon whether the assessment bears a "fair and just relation" to the value at which similar land is assessed in the municipality. In this case, the Appellant asserted to the Board that the assessment was too high because the calculation of net income was too high. But the major finding of the Board had less to do with establishment of the net income than the critical matter of the capitalization rate. And the choice of that rate, if different from rates selected to establish values of similar properties, would produce a marked difference in assessed value. In this case that difference would be to the very material disadvantage of the Appellant.

I note that the word "assessment" in the interpretation given to it by the Act means "a valuation of property for taxation purposes". If the purpose of taxation is, as it must be, to tax equally according to value, then the capitalization rates of similar hotels must be compared and equalized so far as is possible.

I emphasize that what might appear to be a slight difference in capitalization rates can result in an enormous difference in value. For example, in the present case, the operating income prophesied by the Board amounted to $4,665,040. In my calculation before deduction is made for the value of chattels (i.e., the amount that the chattels contribute to the income) the difference between a selection of a capitalization rate of 9.5% and 12% results in a difference in value of almost $10 million. Perhaps more if I have erred in the application of the amount to be attributed to chattels.

In the present case the Board, as I have said, did not apply a capitalization rate employed for similar hotels. It determined the capitalization rates that certain investors seemed to have accepted on the purchase of other hotels quite dissimilar to the Hyatt; namely, the Blue Horizon, three hotels comprising the Sheraton chain, and the Holiday Inn Harbourside. In its reasons, the Board had this to say:

"The Blue Horizon sold under Court Order for $12,275,000. Mr. Metcalf calculated a capitalization rate of 9.96% from this sale but admitted during the hearing that it should be lower since he had deducted chattel values. The Board calculates the rate then at 9.7%. The value per room, according to him, was $57,592. He increased this value by 25% to $72,000 because he deemed this hotel to be inferior to the Hyatt Regency in quality and location, older and sold in receivership.

The Sheraton chain sold in 'soft' receivership for a total of $48,500,000 with no adjustment for chattels. From this sale he deducted a capitalization rate of 11.44% using 1984 income and a per room value of $61,548. Using a 1985 income resulted in a capitalization rate of 9.61%. This value he increased by 15% because these hotels are inferior to the Hyatt Regency in quality and location.

> The Holiday Inn sold for $27,750,000 exclusive of chattels of $2,863 per room. Adding back the chattels for the 434 rooms, the total value was $28,992,542. Mr. Metcalf had calculated a capitalization rate of 8.8% exclusive of chattels and a per room value of $63,940. The Board in adding back the chattels calculates the capitalization rate at 8%. Mr. Metcalf, in this instance, increased the value by 10% because this hotel is inferior to the Hyatt Regency in quality and location."

I do not presume to pass upon the accuracy of the deductions made by the Board. But I do say that if there had been a sale of a hotel comparable to the Hyatt, the Board might well have used the capitalization rate to establish the value of the Hyatt. But then the same capitalization rate would be applied to all of the other hotels of similar quality. Justice and fairness would then be achieved. The accuracy of those statistics would ensure that the quality hotels were bearing their fair share of taxation.

The importance of the capitalization rate was not lost on the Board. One passage from the decision reads:

> "The final and prime determinate[sic] in the income approach is the capitalization rate."

Another passage reads:

> "The Board does not accept the Appellant's capitalization rate. It is based on inadequate research and insufficient evidence. The Respondent's capitalization rate is the better supported. The Board finds no fault with it and places most weight on it in calculating value."

I repeat my conclusion that capitalization rates applied to similar hotels should be the same, or almost the same, if the burden of tax is to be fairly distributed.

Income Calculations. I conclude that the Board was within its jurisdiction in deciding that the room rental would amount to $86.30. The Appellant held out for less, on the basis that the room rentals would stay the same, not increase. But the Board held that "The statements for the three years indicate a steadily increasing gross income as well as steadily increasing room rates and occupancy." Thus, on the basis of the progression, the Board settled on a figure more than that advocated by the Appellant, but a good deal less than that given as the opinion of the appraiser for the Assessor.

Expense Calculations. The Board found as follows:

> "The Board finds no fault generally with Mr. Geddes' referral to actual operating expenses with the exception that corrections should have been made to the property tax amount for the 1985 year and adjustments to other expenses which were obviously aberrations."

The passage follows:

> "The Board does find fault with Mr. Geddes' use without adjustment of abnormally high experienced 1985 expenses in his income approach. It is obvious to the Board that certain expenses have been incurred in preparation for Expo 86 and cause an aberration which should have been taken into account by Mr. Geddes. He did not investigate the abnormally high expenses other than to compare total expense ratios to an average supplied to him of unidentified major Vancouver hotels for the same year in which these abnormally high expenses occurred, i.e. 1985, and ignored the fact that these other hotels also were no doubt preparing for Expo 86 and thus experiencing similar abnormal expenses."

And then this passage follows:

> "The Board accepts management fees as being a legitimate expense in this hotel. Major hotels not owned by a chain that supplies its own management[sic], employ management organizations such as Hyatt to guide them and supply at least a modicum of management. If this expense were not met, the hotel would of necessity, employ staff and systems of its own which would show as expense items in their statements. In the Hyatt Regency case, it is not paying a management fee to itself, i.e. to the Head Office of the corporation which owns it."

Using this rationale, the Board chose figures in respect of which I conclude there can be no quarrel.

In the result, the answers to the central questions posed are as follows:

> "2. Did the Board err in law by applying the capitalization rate of 9.5% for this assessment when the said capitalization rate was not applied in determining the assessments of any other of the comparable major hotels in Vancouver?
>
> Answer: Yes."

For this reason, the decision must be referred back to the Board for reconsideration.

> "4. Did the Assessment Appeal Board err in law and act unreasonably by applying a room rate of $86.30 to this assessment although the actual rate for 1985 was $83.10 and the Board did apply actual figures for 1985 concerning all other income to calculate the assessment and the 1985 income and expenses in determining values of the other comparable major hotels?
>
> Answer: No."

. . .

The answers to questions following Question No. 4 having to do with expenses will be answered in the negative.

There will be an order accordingly.