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CAROL K. LEIREN

v.

ASSESSOR OF AREA 09 - VANCOUVER

Supreme Court of British Columbia (A900340) Vancouver Registry

Before MADAM JUSTICE ROWLES Vancouver,

March 16, 1990 and March 19, 1990

John R. Lakes for Carol Leiren
Peter W. Klassen for the Assessor

Reasons for Judgment March 30, 1990

The Assessment Appeal Board, under s. 74 (1) of the *Assessment Act*, R.S.B.C. 1979, c. 21, has submitted certain questions for the opinion of the Supreme Court.

Section 74 (1) provides:

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.

The stated case is a follows:

1. The subject matter of this Stated Case is a two-storey wood-frame apartment building (and lot) containing nineteen suites, located in the Oakridge/Cambie neighbourhood of the City of Vancouver.

2. This property was placed upon the 1989 Assessment Roll by the Assessor at a value of $1,803,500.

3. Both parties to the appeal employed the "Income Approach to Value" in arriving at values for this property for the appeal before the Board.

4. The Appraiser for the Appellant arrived at a value of $1,265,000. For reasons given in its decision the Board rejected this value.

5. The actual values the Assessor had determined for the comparable properties for the 1989 Assessment Roll resulted in 1989 roll values of these properties being an average 73% of the value for which they were sold.

6. The Board concluded, on the evidence before it, that the actual value (that is the amount which the subject property would have fetched if put up for sale on the open market) was $1,950,000 on the valuation date for the 1989 Assessment Roll.

7. While section 26 (2) requires the Assessor to determine the actual value of the subject land and improvements and to enter them at their actual value on the 1989 Assessment Roll the Board was concerned that if it accepted the value of the $1,950,000 an inequity would be created between the subject property and other similar properties within the same general neighbourhood.

8. Section 69 (1) of the *Assessment Act* gives the Board the power to determine whether or not the value of the subject property would bear a just and fair relation to the value at which similar land and improvements are assessed in the municipality in which it is situated.

9. It is the view of the Board that if the assessments appearing upon the three comparable apartment buildings, situated in the same general area of Vancouver, is correct, to arrive at a fair and just relation for the value of the subject property, it would have to be placed on the 1989 Assessment Roll at a value of $1,423,500 (being 73% of its market value of $1,950,000).

10. A copy of the decision of the Board dated the 12th day of January, 1990 is attached hereto and marked Schedule "A" and a copy of order dated the 19th day of January, 1990 is attached hereto marked Schedule "B".

The questions which the Board submitted for the opinion of the Supreme Court are as follows:

1. In considering the value at which a property should be assessed, is the Board required by section 26 of the *Assessment Act* to maintain actual (market) value, when faced with evidence that, by doing so, the value arrived at will not bear a fair and just relation to the value at which similar lands and improvements are assessed, by the same Assessor, in the same municipality?

2. If the Board accepts the evidence of the Assessor as being a better measure of actual value, is the Board empowered by section 69 (1) (e) of the *Assessment Act* to determine an assessed value for the individual parcel under consideration which will bear a fair and just relation to the value at which similar lands and improvements are assessed in the municipality in which it is situated?

3. If the Board considers itself obliged to value the subject lands and improvements at an actual value which would not be equitable in comparison to similar lands and improvements, would the Board err as a result by requiring the Assessor to increase the assessments on the three comparables presented as evidence to the Board to bring those properties to a comparable value with the value applied by the Board to the subject property, albeit the comparables were not appealed?

4. If the Board decided that the comparables referred to in evidence had been assessed at less than what the Board considered to be actual value, would the Board be in error in requiring the Commissioner to reassess all the residential apartment buildings situate in the affected neighbourhood for the 1989 Assessment Roll?

The question which the Assessor requests be placed before the Supreme Court for its opinion is:

5. Is the Board required to find the actual value of the subject property, when other similar properties in the municipality are assessed at less than their actual value?

The question which the Appellant requests be placed before the Supreme Court for its opinion is:

6. Would the Board be in error if it accepted the evidence of the Assessor resulting in a valuation of $1,950,000 when there is no evidence that the assessments on similar properties in Vancouver were assessed at which the Assessor is alleging to be actual value and the evidence establishes that in order to have a fair and just relation the assessment on the subject property would have to be reduced to a value of $1,423,500?

SUBMISSIONS ON THE CASE AS STATED

Counsel appearing on behalf of the Assessor made two preliminary submissions with respect to the case as stated by the Board. Firstly, Mr. Klassen submitted that the stated case should be remitted to the Board pursuant to s. 74 (6) of the Act in order to ascertain whether or not the Board found that the assessed value of the three comparable apartments is in error, that is, assessed at something other than actual value. Section 74 (6) provides: (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.

Mr. Klassen submitted that clarification of whether or not the Board had found that the assessed value of the three comparables is in error is relevant to questions 1, 2, 5 and 6.

Secondly, Mr. Klassen submitted that the Board's action in stating the case pursuant to s. 74 (1) of the Act is premature in that it had insufficient evidence before it to make a determination as to whether or not, if the subject property was valued at its actual value, that such value would bear an unfair and unjust relationship to other similar properties in the City of Vancouver. Specifically he argued that it appeared that the Board did not seek evidence as to whether or not all or substantially all similar properties in the City of Vancouver were assessed as something less than their actual or market value, and that this was critical since section 69 (1) (e) of the Act cannot be interpreted as meaning there must be a fair and just relationship to the value of only some similar lands, but rather that s. 69 (1) (e) must mean that there must be a fair and just relationship of the subject property to all or substantially all similar lands and improvements in a municipality.

If the Board had a concern as to equity, Mr. Klassen submitted, the Board should have advised the parties of its concern, and reconvened the hearing, with the object of eliciting further evidence as to whether or not all or substantially all other similar properties in the City of Vancouver were assessed at below their actual or market value. There are, Mr. Klassen said, in excess of 2,000 similar properties in the City of Vancouver.

On behalf of the appellant, Mr. Lakes urged me to hear the full submissions of counsel with respect to the questions on which the Board seeks the opinion of the Court, rather than considering first the preliminary matters raised by Mr. Klassen. I acceded to Mr. Lakes' request, but having heard counsels' arguments, I have concluded that the preliminary submissions must be addressed, and that the matter must be remitted to the Board.

Before giving my reasons for remitting the case to the Board, I will deal with questions 3 and 4.

Question 3

In respect to question 3, counsel were in agreement that the Board has no jurisdiction to order an increase in the assessed value of the three comparable properties. I agree. The Board is limited to making a decision with reference to the property that has been appealed.

Question 4

In respect to question 4, counsel were also in agreement that the Board has no jurisdiction to require the Commissioner to make the reassessment contemplated by the question. Again, I agree. Under s. 69 (1) the Board's jurisdiction is confined to the property which is the subject matter of the appeal and under s. 69 (2) the Board can only order the Commissioner to reassess properties in the municipality if it determines "that the assessed value of land and improvements in a municipality or rural area is in excess of assessed value as determined under s. 26." In this instance the Board has made no such determination. The Case as Stated

From the stated case, to which the Board's decision is annexed, I note the following:

1. The Board has made a finding as to the actual value of the subject property. Paragraph 6 of the facts as stated reads:

"The Board concluded, on the evidence before it, that the actual value (that is, the amount which the subject property would have fetched if put up for sale on the open market) was $1,950,000 on the valuation date for the 1988 assessment."

2. The Board made the finding as to actual value on the basis of the evidence which the Board stated it preferred. On page 4 of the Board's decision the following appears:

"The Board, having carefully considered the evidence presented by both parties, gives most weight to that of the Respondent and finds the correct value to be $1,950,000 as at July 1, 1988."

And at p. 5 the Board stated:

"Upon the evidence adduced, the Board is satisfied that the subject property could have been sold for $1,950,000 on July 1, 1988 (the valuation date) i.e. that was the actual value for assessment purposes (section 26 - *Assessment Act*).

3. Having concluded that the actual value of the subject property was $1,950,000, the Board expressed the following concern, which appears at p. 11 of the Board's reasons:

"Section 69 (1) (e) of the *Assessment Act* grants to the Board the power to place a value on a property that results in 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.

The Board is concerned, however, that if it is required to place the value of $1,950,000 upon the subject land and improvements, there will be no fair and just relation between the assessed value on the subject property and the assessed values placed on the Assessor's comparable properties. The burden of tax will not be fairly distributed."

From the Board's decision annexed to the stated case it is apparent that the Board had evidence, given by the appraiser for the Assessor, of three properties which were comparable to the property under appeal. It is also apparent that the three comparables had been sold, and sold for an amount greater than the assessed value. At p. 3 of its decision, the Board noted that "Evidence indicated to the Board that rents and apartment building selling prices were escalating steadily and rapidly throughout the valuation period."

Commencing at p. 5 of the Board's decision the following appears under the heading "The Issue of Equity":

Mr. Dean [the appraiser for the taxpayer] argued that, if the Board was to find the actual value to be placed on the 1989 Roll as $1,950,000, a serious inequity would be created between the subject property and similar residential apartment buildings in this area of Vancouver. Mr. Dean estimated that the Appellant would have to be able to sell this property for $3,000,000 to compare with the price to assessment ratios indicated from the three comparables used by the Assessor to value the subject property. According to him, if the actual value of $1,950,000 was correct, the subject property would be at 100% of market price, or an Assessment to Sales Ratio (A.S.R.) of 100%.

Upon his questioning of Mr. Cheung, Mr. Dean established that the Assessment to Sales Ratio (A.S.R.) of comparable 'A' used by Mr. Cheung to value the subject property was 65.6%, i.e. it was sold for $1,800,000 in July 1988, but appears on the 1989 Assessment Roll at $1,180,900. The A.S.R. of comparable 'B' was 82.2%, and of comparable 'C' was 71.5%. The average of these three is 73%.

And at p. 12 of the Board's decision, under the heading "Decision of the Board" the following appears:

If the Board adopts the 'equity' view, it would have to place this property on the 1989 Roll at a value less than $1,950,000, the potential selling price, as it would be assessed at too high an amount compared to the assessments placed on properties in the neighbourhood for the same Assessment Roll. The assessed value of the subject would then be 73% of $1,950,000, that is $1,423,500.

4. The passage from p. 12 of the Board's decision, quoted immediately above, and questions 1, 2, 5 and 6 all contain a built-in assumption, i.e. that the assessments on the three comparables used by Mr. Leung are an accurate reflection of assessments generally for similar properties in the municipality. There is no indication in the stated case, including the Board's decision which was annexed, that the issue was specifically addressed or determined.

The Relevance of Whether or not the Assessed Value on the Three Comparables is in Error

In respect to Mr. Klassen's submissions, firstly I agree that whether or not the Board found that the assessed value of the three other comparables is in error is relevant to Questions 1, 2, 5 and 6. From a reading of the Board's decision it appears that the Board may well have reached the conclusion that the other properties were erroneously under assessed, but I note that the Board did not include that "fact" in the stated case, although Mr. Klassen had requested that the Board do so. As a result, I am unable to assume that fact.

That fact is relevant, because it is essential to the interpretation to be placed on the questions the Board has posed.

In *British Columbia Assessment Authority and Surrey-White Rock Assessment District* v. *Simpsons-Sears Ltd.* (1981), 27 B.C.L.R. 77 (B.C.C.A.), Lambert, J.A., at p. 82, made reference to the fact that the questions posed in that case were susceptible to different interpretations. That is also the case with Questions 1, 2, 5 and 6 in the stated case before me. In the Simpsons-Sears case, supra, the first question was: 1. Did the Assessment Appeal Board err in law by confirming the assessment on the Appellant's land at a higher "actual value" than the similar land adjoining the Appellant's land?

Mr Justice Lambert noted that there were three possible interpretations to that question. At p. 82 he said:

The first would ask whether there was an error in arriving at an assessment for land that was higher than the assessment for land that was arrived at for the mall that immediately adjoined Simpsons-Sears store, or that was arrived at for the Hudson Bay store that formed a part of the same shopping centre. .

In respect to that interpretation, Lambert, J.A. said, at p. 83:

In my opinion, there was no such error on the part of the Assessment Appeal Board. In this case the Assessment Appeal Board specifically dealt with that question. They said that it would have been appropriate for all three properties to be assessed at the same value for land, but they were required, as a prime and absolute requirement, to assess the land under appeal in this case on the basis of actual value and they had concluded, on the basis of the evidence before them, that the actual value was $4.25 per square foot. They said that the error, if there was one, lay in underassessment of the land of the two adjoining properties. (Emphasis added)

For reference, I will repeat Question 1 in the stated case before me: 1. In considering the value at which a property should be assessed, is the Board required by section 26 of the *Assessment Act* to maintain actual (market) value, when faced with evidence that, by doing so, the value arrived at will not bear a fair and just relation to the value at which similar lands and improvements are assessed, by the same Assessor, in the same municipality?

The first question in the Simpsons-Sears case is very similar to the one here stated. If the question is whether or not the Board is required to maintain actual value, in the face of evidence that three comparable properties have been assessed at less than their actual value, that is, in error, the answer is "yes". To say otherwise would not ensure accuracy of assessment, but would instead secure uniform inaccuracy, in respect to four properties - the three comparables and the subject property. As Lambert, J.A. made clear in Simpsons-Sears, the prime requirement is to assess the property under appeal on the basis of actual value.

If the Board concludes that the assessments on the three comparables are not in error, Question 1 could be interpreted as follows: Would it be an error in law to use the assessed actual value of the three comparables to arrive at the figures for the assessed actual value of the property under appeal?

Paragraph 9 of the stated case reads: 9. It is the view of the Board that if the assessments appearing upon the three comparable apartment buildings, situated in the same general area of Vancouver, is correct, to arrive at a fair and just relation for the value of the subject property, it would have to be placed on the 1989 Assessment Roll at a value of $1,423,500 (being 73% of its market value of $1,950,000). (Emphasis added)

If the Board concludes that the other three assessments are correct, the intended question may be whether those assessments can be used as evidence in the determination of the actual value of the property under appeal. I have some doubt as to whether that is the question because the Board, from its decision, appears to have already reached the conclusion, on the evidence it preferred, that the actual value of the subject property for assessment purposes was $1,950,000. (See pages 4 and 5 of the Board's decision quoted above). Should that be the question intended, however, some assistance may be derived from Simpsons-Sears, although it must be noted that the evidence before the Board in this case appears to differ substantially from the evidence which had been before the Board in the Simpsons-Sears case.

In Simpsons-Sears, the evidence put before the Board to determine the actual values of the property under appeal consisted primarily, if not entirely, of assessed actual values of other lands. Mr. Justice Lambert, at p. 83, said:

The second interpretation of the first question [which I have quoted above] was that it asks whether there was an error in law in using the assessed actual value of the land in the K-Mart, the Eaton's and the Woodward's stores in arriving at the figure for the assessed actual value of the land under appeal.

That was the question that was considered by Mr. Justice Dryer. He decided, in essence, that there was an error and that it lay in the fact that the actual value of the land under appeal was not being determined by that method.

As it was put by counsel for the respondent, the assessed actual values of land elsewhere in the municipality were being dumped on the land in appeal here. We were referred to a number of authorities by counsel for the respondent that supported the proposition that there would have been an error in law and an improper mode of assessment if, indeed, that dumping process had taken place.

But those cases, primarily, and most directly, deal with the question of making a change in a land value because of a desire to reach a fair, just and equitable result and so to move away from the prime requirement of determining actual value. But, if the prime requirement is kept in mind and the determination is being made of actual value of the land precisely in question, but that actual value is being determined on the basis of evidence that consists wholly, or in part, of evidence of the assessed actual values of comparable land, then, in my opinion, there is no error in law. That evidence may not be the best evidence of the actual value of the land in question, but it is some evidence. It was the type of evidence led by both the appellant and the respondent in this case before the Assessment Appeal Board. Perhaps better evidence could be contemplated, but it was up to the Assessment Appeal Board to do its best with the evidence before it and, in my opinion, in reaching the conclusion that they did on the actual value of the land in this case through the method that they did, there was no error in law. (emphasis added)

Unlike the Simpsons-Sears case, the Board in this instance has evidence of more than the assessed values of other properties. One appraiser used the "Income Approach to Value" (paragraph 3 of the stated case) and the other appraiser used both the Income Approach and the Direct Sales method, although preferring the latter approach (page 3 of the Board's decision).

Question 1 also presents another difficulty, to which I have referred earlier, that is, a conclusion has been assumed without the Board's having specifically addressed the factual issue. The Board has apparently assumed that the assessed value of the three comparables is representative of assessed values of substantially all other similar properties in the municipality. Unless there is some evidentiary basis for such a conclusion, which has not been stated by the Board, the assumption is unwarranted.

Questions 2, 5 and 6 have the same built-in assumption.

CONCLUSION Questions 1, 2, 5 and 6

I do not propose to speculate further on what question or questions the Board intended in this case, based on a series of assumed facts which the Board may or may not find. The questions are ambiguous, and it is difficult to discern the particular point or points of law on which the Board seeks an opinion.

The matter is remitted to the Board under s. 74 (6). The Board must determine, if it has not already been determined, whether or not the assessments on the three comparables are in error.

If the Board's conclusion is that the assessments on the three comparables are in error, I have already answered the following question in the affirmative:

"Is the Board required to maintain actual value, in the face of evidence that three comparable properties have been erroneously under-assessed?

If the Board's conclusion is that the assessed value of the three comparables is correct, that conclusion must be stated, and the Board must specify the point or points of law on which it seeks the opinion of the Court.

From questions 1, 2, 5 and 6, and paragraph 9 of the stated case, a conclusion is implicit, that is, that the assessments on three comparables are an accurate reflection of assessments for all or substantially all similar land and improvements in the municipality. That conclusion or assumption has not been found as a fact by the Board, and there is no indication in the stated case to suggest that there was evidence before the Board on which such a determination could have been reached in any event. Mr. Klassen submitted that the Court should remit the stated case to the Board with a direction that it hear further evidence as to the assessed value of all or substantially all similar properties in the City of Vancouver, before the Board seeks the opinion of the Court. I agree that 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 in which the property under appeal is situated must be determined on the basis of evidence before the Board. Therefore, the parties must be permitted to address the Board, and present evidence directed to that issue.

Finally, I wish to make this observation. The Board, from some comments which it made in its decision, appears to have placed the requirement to assess the property under appeal on the basis of actual value on the same footing as reaching a fair and equitable result. The decision of the Court of Appeal in Simpsons-Sears made clear that the Board, as its prime requirement, is required to assess the land under appeal on the basis of actual value.

The case is remitted to the Board.

Vancouver, British Columbia
March 30, 1990