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ASSESSOR OF AREA 23 - KAMLOOPS

v.

TRELCO ENTERPRISES LTD.

Supreme Court of British Columbia (A903821) Vancouver Registry

Before the HONOURABLE MR. JUSTICE MURRAY

Vancouver, March 8, 1991

Christopher M. Considine for the Appellant
Robert C. Hunter for the Respondent

Reasons for Judgment (Oral) March 8, 1991

I have before me a Stated Case pursuant to the terms of the Assessment Act involving a decision of the Assessment Appeal Board rendered in connection with an office building in the City of Kamloops. The Stated Case consists of some eight questions. I have heard argument so far on three of those eight questions. Those three questions are inextricably linked together. I have not yet heard argument on the remaining five questions.

The problem arising out of the three questions that have been set forth in the Stated Case arise out of the fact that there was a lease given by the Appellant to the British Columbia Lottery Corporation which is a Crown corporation. As a term of that lease, although I do not have the precise term before me, it was agreed that the Lottery Corporation would expend some $5,000,000.00 on improvements. It was also a term of the lease that the rent would be the sum of $4.27 per square foot. That was the figure which the Board accepted in valuing the property on an Income Approach.

The specific questions which are put to me insofar as the first three questions are concerned is:

> 1. Did the Assessment Appeal Board err in law by failing to assess any value with respect to the tenant's improvements on the subject property?
>
> 2. Did the Assessment Appeal Board err in law by holding that the principles set out in the decision of West Coast Transmission Company Limited v. Area #09 Vancouver, (1987) Stated Case 235 were applicable to the subject property?
>
> 3. Did the Assessment Appeal Board err in law by finding there was a "covenant" and that they could not value the covenant?

I am confined to answering these questions by the terms of the Assessment Act and counsel are agreed that for me to answer the questions in the affirmative, there must be an error in law as opposed to an error in fact made by the Board.

It is apparent from the facts before me that the Board considered that the tenant's improvements had no value. It is just a matter of common sense that they concluded that when they concluded that the value was the shell rental value of the property. (sic)

The case that comes closest to the facts in the present case are those of an Ontario court's in Merkur and Sons Ltd. v. the Regional Assessment Commissioner, Region #14. That is a case where the matter first proceeded to the Divisional Court in Ontario. A judgment of the Divisional Court was given by Mr. Justice Steele. The decision of the Divisional Court was reversed by the Court of Appeal. The Divisional Court judgment is reported in (1977) 17 O.R. (2d), 339. The decision of the Court of Appeal where the judgment was given orally by Mr. Justice Dubbin, as he then was, is reported at (1978) 21 O.R. (2d), 797.

The reasoning upon which Mr. Considine relies is set forth in the decision of the Divisional Court at page 343 and I quote from a portion of a passage contained in the second paragraph on that page:

> ". . . it is quite obvious that if only the rent that is received by the owner is to be used as the basis of assessment, two buildings identical in construction and finishing could be assessed at different valuations. I use as an example an office building that is built as a shell and then rented by the owner to individual tenants with an obligation upon the tenant to finish the interior thereof, obviously the rent received by the owner would be less than that of a similar office building which the owner constructs, finishes the interior, and thereafter rents. If only rents were considered in the two cases, although the buildings are identical, the assessment of one would be lower than the assessment of the other even though in both cases a fair market rent was charged to the respective tenant. Under a rental agreement by merely casting the burden of cost of repairs and finishing and decorating the building in different directions, the assessment would differ. Although, if the properties were being sold as complete units including the tenant's interests, they would sell at identically the same price. This is the nub of the difference in arguments raised by the Assessment Commissioner and the owner of the property in the present case. I am of the opinion that it is the total property and not its parts that form the basis of assessment."

That reasoning commends itself to me and the question is that whether or not the Court of Appeal has rejected that reasoning, I can find nothing in the decision of the Court of Appeal to say that that reasoning is not sound. It seems to me that the appeal was determined on a different basis entirely and there is nothing in the reasons for judgment of Mr. Justice Dubbin, as he then was, to interfere with the reasoning contained in the one short paragraph or portion of the paragraph that I have read.

In the circumstances I have concluded that the answer to questions 1, 2, and 3 should be in the affirmative.

Earlier today I gave reasons for judgment dealing with the first three grounds in the Stated Case. I have now heard argument upon and will deal with the next three grounds which are numbers 4, 5, and 6, and I quote from the Stated Case.

> 4. Did the Assessment Appeal Board err in law in holding that the sale price in October 1989 was not an indicator of actual value for assessment purposes?
>
> 5. Did the Assessment Appeal Board err in law by failing to consider that the offer to purchase the property by the Mercantile Bank was an indicator of actual value?
>
> 6. Did the assessment Appeal Board err in law by acting upon a view of the facts which could not reasonably be entertained with regard to the evidence of Mr. Joe Gatien, the expended

costs of the Lottery Corporation, the offer to purchase by the Mercantile Bank and the actual purchase by the Lottery Corporation on October 31, 1989?

Reverting now to question four, that arises out of a paragraph in the reasons for judgment of the Board which appear at page 8 of the reasons for judgment of the Board:

> "If it be true that the nature and character of the improvements in the subject are peculiarly for the benefit of the Lottery Corporation's particular use and benefit and not for the use and benefit of the ordinary occupier, then the sale price in October 1989 was not an indicator of actual value for assessment purposes."

I agree with Mr. Hunter when he submits that what the Board did here was to adopt the Income Approach in determining the actual valuation and technically the statement contained at page 8, which I have just read, does not affect that approach at all. Nevertheless, having said that, I am asked a question as to whether or not the statement is correct in law. I am not asked how it affects the decision arrived at by means of the Income Approach, I am simply asked as I have read whether that is a mis-statement of the law and in view of the authorities and particularly what was said by Lord Porter in the Sun Life case, I can arrive at no other conclusion then that it is a mis-statement of the law. The answer to question 4, therefore, must again be in the affirmative and they made an error in law when they said that. What the result of that is something else.

Turning then to question five which concerns the offer made by the Mercantile Bank which Mr. Hunter properly points out should be First Mercantile, the same reasoning does not apply there as it did with respect to question 4, the reason being that the Board, having adopted the Income Approach, simply ignored a bona fide offer made by First Mercantile. But having said that, it seems to me that they were entitled to ignore it because they had decided to approach this on the Income Approach. It may have been useful to compare the two but that is not what they did. They made a decision. I can find nothing wrong in law in their decision to follow this through by the Income Approach.

In the circumstances, the answer to question 5 is in the negative.

It may seem an odd result but I am simply correcting their mis-statement in question 4 and say they did nothing wrong in question 5 by ignoring that.

The answer to question 4 is yes, the answer to question 5 is no, and with respect to question 6, the answer to the whole of question 6, it seems to me it follows from the findings I have made with respect to 4 and 5, that the answer to question 6 must also be no. So that leaves us with questions 7 and 8 which I assume we can deal with after the break.

Questions 7 and 8 were withdrawn by the Appellant.