ASSESSMENT COMMISSIONER OF BRITISH COLUMBIA & ASSESSOR OF AREA 09 - VANCOUVER

v.

ASSESSMENT APPEAL BOARD OF BRITISH COLUMBIA, MANUFACTURERS LIFE INSURANCE COMPANY & CITY OF VANCOUVER

SUPREME COURT OF BRITISH COLUMBIA (91-2179) Victoria Registry

Before the HONOURABLE MR. JUSTICE HUTCHISON

Victoria, October 16, 1991

T.C.E. Stewart for the Petitioners
B.T. Gibson for the Respondents

Reasons for Judgment (Oral) October 16, 1991

The Assessment Commissioner of British Columbia and the Area Assessor for Area 09 - Vancouver seek a declaration pursuant to the *Judicial Review Procedure Act* that an order of the Assessment Appeal Board made pursuant to s. 75 of the *Assessment Act* is without jurisdiction on the basis that the Board failed to give the Assessor a proper hearing.

The issue arises from a revised assessment made against the Respondent's building for the year 1988, or perhaps '87.

MR. GIBSON: Sorry, you said done in September '87 applicable to the 1988 tax year, My Lord.

THE COURT: Yes, that is for the revised assessment for the 1988 roll based on 1987 valuations.

The Respondents questioned the jurisdiction of the Assessor to make a revised assessment and that matter went before Madame Justice Huddart in Vancouver on December 1st, 1989 and in reasons handed down on January 18th, 1990 she held that the Assessor did lack jurisdiction and that decision was appealed to the Court of Appeal and was heard by that Court in Victoria on the 17th of January, 1991. In reasons delivered March 19th, 1991 the Court of Appeal dismissed the appeal and held that Madame Justice Huddart was correct when she decided that the assessment could not be made pursuant to s. 2(1), 2(b)(i).

MR. GIBSON: My Lord, if I may, I hesitate to interrupt.

(SUBMISSION BY MR. GIBSON)

THE COURT: That's what you get for not spending more time and reading these things before giving reasons.

Simplified, the issue before Madame Justice Huddart was whether or not tenant's improvements not taken into account by the Assessor in his original roll could be classified as new-found

inventory under the relevant section to permit the Assessor to make a revised assessment biannually. She, and the Court of Appeal, said no. As a result of the decision of the Court of Appeal, the Assessment Appeal Board were faced with their obligations under s. 75 of the Assessment Act which reads as follows:

> "After receipt of the decision of the Supreme Court or the Court of Appeal on an appeal or a stated case, the Board shall, if the opinion is at variance with the conclusion at which it had itself arrived, direct the Assessor to make the necessary amendment to the assessment roll in accordance with the decision."

Before doing that, the Board sent to the parties a draft order pursuant to s. 75 and that's attached as Exhibit C to Mr. Gibson's affidavit in these proceedings. Mr. McDannold on behalf of the Assessor asked for a rehearing and made certain submissions. Apparently from oversight, that submission was not sent to Mr. Gibson but came to his attention and he made representations May 8th to the Board and May 22nd the Board handed down its order pursuant to s. 75 of the Act and in which it said,

> "Pursuant to the order of the Court of Appeal of British Columbia made on the 19th day of March, 1991, Victoria Registry No. CAV01153 dismissing the appeal of the Assessor of Area #09 Vancouver, the Board hereby confirms that the Assessor was not entitled to issue a revised assessment roll and orders the Assessor to reinstate the values for the 1987-88 biannual roll for Folio #09-39-200-518, namely land, 8,580,000, improvements 15,500,000, total 24,800,000."

Mr. McDannold then issued a petition that came before me this morning claiming that the Board was without jurisdiction to make that order under s. 75 of the Assessment Act because they had not, put simply, given the Assessor an opportunity to be heard before making the order.

Nothing in the decision of either the Court of Appeal or the Supreme Court suggested that in light of their reasons the Board should be reconvened and hear the parties. The question is whether or not in this particular case they should have heard further submissions. It has been strongly argued before me that they should have and that the failure to give a right of hearing went to the very jurisdiction of the Board and its s. 75 order was null and void and without jurisdiction. Thus, the Judicial Review Procedure Act should be allowed to be used to quash that order.

I am not persuaded that this is an appropriate case in which the Judicial Review Procedure Act should be used because the Assessment Act itself has within its four corners appropriate remedies to be pursued either by the Assessor or the taxpayer. Section 74 of the Assessment Act provides inter alia that at any stage of the proceedings before the Board the Assessor may appeal to the Supreme Court and thereafter to the Court of Appeal by way of Stated Case on error in law. I do not think that the error here alleged to have been made by the Board goes to its jurisdiction. It simply is an alleged error. It would be an error in law which would entitle the Assessor to appeal the decision made pursuant to s. 75 of the Assessment Act. I do not think that s. 74 of the Act is so narrowly constructed that it does not give either the taxpayer or the Assessor the right to appeal a s. 75 order after a Stated Case has gone to the Supreme Court or the Court of Appeal. The opening words of s. 74 are, "At any stage of the proceedings."

In interpreting the holdings of the Supreme Court or the Court of Appeal, the Board might very well fall into error and that error is reviewable once again by the Court. That being so, in my view this is not a case where the Judicial Review Procedure Act should be used. I am comforted in the view which I hold by the decision of my brother McKenzie issued out of this Court June 17th, 1991 in Zullich v. The Corporation of the District of Saanich, Alan Hopper and the British Columbia Assessment Authority, Victoria Registry No. 1421/89. There, Justice McKenzie heard a preliminary objection taken by Mr. McDannold to the Judicial Review Procedure Act being used

by the Zullichs against the Assessment Authority on the basis that the Petitioner's complaints could have been remedied within the internal procedures described by the Assessment Act.

Here, I think clearly the internal procedures prescribed as I have tried to demonstrate can be used by the Assessor and for that reason judicial review does not lie. The written reasons of Mr. Justice McKenzie clearly follow the decided cases in this regard and in particular Crown Forest 2 B.C.L.R. (2d) 397 and Auditor General v. Canada (1989) 94 N.R. 241 and in particular at 289, a decision of Chief Justice Dickson, Supreme Court of Canada.

While I am far from saying the Board's procedure of seeking written submissions prior to making its s. 75 order did not constitute giving the parties a hearing, despite the failure to allow viva voce submissions, I need go no further in this case than to quote the Chief Justice's remarks cited above:

> "Declaratory relief should not be granted when the legislature has seen fit to create a lower tribunal with jurisdiction to dispose of the matter for which the declaratory relief is sought."

In my view those remarks sealed the Petitioner's fate from the very outset of this petition.

The application is dismissed with costs to the Respondents.