MARGARET A. ANDREWS

v.

ASSESSOR OF AREA 09 - VANCOUVER

SUPREME COURT OF BRITISH COLUMBIA (A913408) Vancouver Registry

Before the HONOURABLE MR. JUSTICE DROST (in chambers)

Vancouver, October 28, 1991

Brian J. Wallace for the Appellant
John H. Shevchuk for the Respondent

Reasons for Judgment December 24, 1991

Introduction

This is an appeal by way of Stated Case from a decision of the Assessment Appeal Board. The subject matter of the appeal (the "property") is a strata-lot residence located at 1355 West Broadway, Vancouver, British Columbia.

The Facts

As at July 1, 1990 (the "valuation date"), the actual value of the property, for tax assessment purposes, was determined to be $410,000. In arriving at that figure, the Assessor made no allowance for the fact that, on the valuation date, construction of a 13 storey high-rise office tower on an adjacent lot was imminent, or had just begun. In fact, there was nothing in the Assessor's records to indicate whether the appraiser, who was no longer employed by the Vancouver Assessment Office, had even considered the possible effect of the neighbouring development.

The Appellant's husband, an experienced appraiser and real estate broker, testified before the Assessment Appeal Board that, in his opinion, the market value of the property had been adversely affected by the pending construction and that it would be appropriate to reduce the assessed value of the property from $410,000 to $385,000, a decrease of approximately 6 per cent. The Deputy Assessor informed the Board that neither he nor Mr. Andrews had any evidence to show that the pending new building had effected the market value of the property, or to support the proposed 6 per cent reduction. He stated that he could not make an "arbitrary allowance".

While the Board apparently found Mr. Andrews qualified to give expert opinion evidence as to the value of the property, they agreed with the Deputy Assessor, and in written reasons signed by the Chairman on August 15, 1991, stated that:

> To make an allowance of the type requested by Mr. Andrews would fly in the face of at least two higher court rulings which the Board adopts
>
> Sun Life Assurance Co. of Canada v. The City of Montreal, Supreme Court of Canada (1950) where at page 224 Rinfret, C.J. said:

> "In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment."

Pacific Logging Company Limited v. The Assessor for the Province of British Columbia (B.C. Assessment Authority Stated Cases - Case 99) McIntyre, J. said at page 492:

> "When I use the word 'arbitrary' I mean - and from the context in which the word is used in the case I conclude the assessor meant - a decision made at discretion in the absence of specific evidence and based upon opinion or preference (see Shorter Oxford English Dictionary). The resulting assessment is then made without regard for the statutory provisions and uncontrolled by them."

Mr. Andrews' suggested reduction, if accepted by the Board, would result in an arbitrary allowance, independent of rule, and not supported in the real estate market. There was no factual evidence that the potential neighbouring building would affect the value of the appealed dwelling.

The Board recognizes with respect, Mr. Andrews' educated concerns, but finds, based on the quoted law, that his appeal must fail. The findings of the 1991 Court of Revision are hereby confirmed.

The Stated Case

The questions submitted to this Court are:

> 1. Did the Board err in law when it failed to accept the unrefuted evidence of the expert witness as to the appropriate allowance to be deducted from the Assessor's value?
>
> 2. Did the Board err in law when it failed to take into proper account the requirement of section 26(3) of the Assessment Act of British Columbia wherein it is required that in determining a proper actual value for the subject property, that at the date of valuation, July 1st, 1990, the Assessor may give consideration to any other circumstances affecting value of the land and improvements?

Preliminary Objection

Mr. Shevchuk submits that neither of the questions stated is a "question of law" within the meaning of s. 74 of the Assessment Act, R.S.B.C. 1979, c. 21, and that, consequently, no appeal lies from the decision of the Board. The first question, he says, relates to the sufficiency of evidence and the second to the circumstances to be considered by the Board, neither of which are subject to review.

Statutory Provisions

Section 74 of the Act provides in part that:

> 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.
>
> (2) A person affected by a decision of the board on appeal, including a municipal corporation on the resolution of its council, the Minister of Finance, the commissioner, or an assessor acting with the consent of the commissioner, may require the board to submit a case for the opinion of the Supreme Court *on a question of law only* by ...
>
> (emphasis added)

Section 23 of the Act states, in part, that:

> In determining actual value, the assessor may ... give consideration to ... market value of the land and improvements ... and any other circumstances affecting the value of the land and improvements.

The jurisdiction given to this Court by the Act was succinctly stated by Southin, J., as she then was, in Crown Forest Industries Ltd. v. Assessor of Area 6 - Courtenay, (August 1985) B.C.A.A. Stated Cases No. 210, in the following words:

> Under the British Columbia statute, this Court has no power to substitute its opinion on questions of fact for those of the Board.
>
> So long as the Assessment Appeal Board which must, in deciding appeals to it, apply the Act, does not:
>
> 1. Misinterpret or misapply the section ...
>
> 2. Misapply any applicable principle of general law ... or
>
> 3. Act without any evidence or upon a view of the facts which could not reasonably be entertained
>
> this Court has no power to intervene.
>
> That statement of the law was affirmed by our Court of Appeal in Westcoast Transmission Company Limited v. Assessor of Area 09 - Vancouver, (May 1987) B.C.A.A. Stated Cases No. 235. Later, in Canadian National Railway Company v. Assessor of Area 9 - Vancouver, (February 1990) B.C.A.A. Stated Cases No. 273, the Court of Appeal also affirmed the opinion of the Chambers Judge, Lander J., that:
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> As to the evidentiary issues, this Court has no power to intervene unless the Board is found to have (1) acted without any evidence, or (2) upon a view of the facts which could not reasonably be entertained ... Under the first condition, the Board cannot base its decision on its own opinions, unsupported by evidence. However, only where there is no evidence will an error of law lie; where there is sufficient evidence is a question of fact and cannot be stated ...
>
> The issue of sufficient evidence may be stated as an alleged arbitrary finding ...
>
> Challenges which merely question the relative weight accorded to certain evidence by the Board will not warrant interference by the Court ... Consequently, the extent to which this Court will review evidence to determine whether the conclusions of the Board disclose faulty

> reasoning is limited to situations where 'no evidence' is alleged, or where the Board's interpretation was unreasonable.
>
> Although the patently unreasonable test has not been expressly adopted by Courts reviewing Assessment Appeal Board findings of fact, such a standard has been practically applied ... Where evidence is adduced which establishes a range of options, the Board has considerable discretion as an expert tribunal in adjudicating from conflicting evidence - it may weigh various approaches and evidence and arrive at a value different from any of them.

Discussion

A. The First Question

The Appellant submits that the Board erred in law in finding that:

> There was no factual evidence that the potential neighbouring building would affect the value of the appealed dwelling.

She says that there was "factual evidence" before the Board in the form of Mr. Andrews' opinion and that, there being no contrary evidence, the Board's finding was patently unreasonable.

The Respondent submits that there was no error of law. This is not, he says, a case of "unrefuted evidence" or "no evidence". Rather, he submits, it is a case in which the Board did what it is entitled to do, that is, reject the opinion given on behalf of the Appellant because there was no evidence to support it.

While the Board found Mr. Andrews to be a person qualified to give an expert opinion as to the value of the property, absent any evidence to the contrary, was the Board bound to accept that opinion? I think not. Its obligation was to consider the weight, if any, to be given to the opinion. The question is, did it do so, or did it simply reject the opinion out of hand?

An opinion of this nature may be based on hearsay. In The City of Saint John v. Irving Oil Limited [1966] S.C.R. 581, Ritchie J., for the Court, stated that:

> To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.
>
> The nature of the source upon which such an opinion is based cannot, in my view, have any effect upon the admissibility of the opinion itself. *Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion* ...
>
> (emphasis added)

But, even the opinion of a qualified appraiser must be supported by some evidence as to its basis. The "educated concerns" to which the Board referred are not sufficient. Expert evidence is not evidence of knowledge, it is evidence of opinion, and the weight to be given to an opinion must depend upon the facts on which it is based. In the absence of evidence as to those facts, the statement of opinion is mere conjecture, or guesswork, not something that can be taken as proof.

Looking at the phrase "factual evidence" in the context in which it appears, it is apparent that the Board was referring to the absence of any kind of evidence which would support Mr. Andrews' opinion, and that it rejected Mr. Andrews' opinion, not out of hand, but for that reason.

In my view, the correct interpretation of the Board's finding is that acceptance of the reduction suggested by Mr. Andrews would result in an "arbitrary allowance" within the meaning given to the word "arbitrary" by Mr. Justice McIntyre in Pacific Logging Company Limited v. The Assessor for the Province of British Columbia (supra).

Therefore, I find that when it rejected Mr. Andrews' opinion, the Board did not err in law.

B. The Second Question

The Appellant submits that the Board misconstrued the evidence before it and did not appreciate that Mr. Andrews was expressing an opinion regarding the value of the property as at the valuation date, not at some future time. She argues that because she would be obliged to tell a potential purchaser about the proposed office tower, although it had not yet been built, Mr. Andrews' opinion as to the effect that information would have on the value of the property is a "circumstance" going to its present value that the Board ought to have considered.

I see nothing in the Board's decision to suggest any such misapprehension.

Moreover, in City of Vancouver v. The Corporation of the Township of Richmond, B.C.A.A. Stated Cases No. 14, the Court of Appeal held that while the construction of s. 37(1) of the Assessment Equalization Act, 1953, which provided that:

> Land and improvements shall be assessed at their actual value. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; ...

was a matter of law:

> On the other hand, although the section permits consideration being given to certain items specifically mentioned and "any other circumstances affecting the value," those "other circumstances affecting the value" are not designated by Statute, nor can the Court know judicially, as by taking judicial notice, what the circumstances may be. *Therefore, the question "What are those circumstances?" cannot be a matter of law, but must be a question of fact to be determined by the Assessor and others concerned in reviewing the assessment on the facts*.
>
> (emphasis added)

In my view, that decision is equally applicable to s. 26(3) of the Act. Accordingly, I find that the second question which requires consideration of "other circumstances" rather than specified factors, raises an issue of fact, not law, a matter that is not open to review by this Court.

Costs shall follow the event.