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GEMEX DEVELOPMENTS CORP.

v.

ASSESSOR OF AREA 12 - COQUITLAM

Supreme Court of British Columbia (A923452) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE KIRKPATRICK (in chambers)

Vancouver, January 11, 1993

Mr. T. Spraggs for the Appellant
Mr. J.E.D. Savage for the Respondent

Reasons for Judgment (Oral) January 11, 1993

THE COURT: This matter comes forward by way of a case stated by the Assessment Appeal Board under s. 74(2) of the Assessment Act, R.S.B.C. (1960) ch. 21. The Respondent, Assessor of Area 12 - Coquitlam, raises the preliminary objection that this court has no jurisdiction to hear the Stated Case by reason of the Appellant failing to comply with s. 74(5) of the Act.

S. 74(5) reads,

> "Where a case is stated, the secretary of the board shall promptly file the case, together with a certified copy of the evidence dealing with the question of law taken during the appeal, in the Supreme Court Registry and it shall be brought on for hearing before the judge in chambers within one month from the date on which the stated case is filed."

The facts briefly are these.

The Assessment Appeal Board provided the Appellant with a copy of the Stated Case on September 9, 1992. On September 22, 1992 counsel for the Appellant requested photocopies of the exhibits filed. On October 7, 1992 counsel for the Appellant attempted to file a Notice of Hearing of the Stated Case. It was rejected by the registry for the following reasons. Those reasons are set out at paragraph 5 of the affidavit of Michelle Larsen, who is the legal secretary for counsel for the Appellant in the affidavit filed November 24, 1992. The reasons were: Since the matter could not be disposed of in two hours, it should be placed on the trial list. The registry would not file the same, given the number of days between filing and the date of hearing. Those reasons are supported by the notation on exhibit "B" of Ms. Larsen's affidavit, where it appears from the file copy that the agent from Fraser Rudelier Title Search Ltd. made the following notation, "Trial - notices of hearings of stated case must either be filed 2 clear days before the application date or must be by consent of the other side."

On October 7, 1992, counsel for the Appellant confirmed with the Assessment Appeal Board that it refused to provide the requested exhibits and that it was the Assessment Appeal Board's decision that it was the Appellant's responsibility to set the matter down for hearing.

Exhibit "F" to Ms. Larsen's affidavit is a letter dated October 8, 1992 from Crease and Company, counsel for the Respondent to Mr. Spraggs, counsel for the Appellant. In that letter, Mr. Savage states,

> "Since you are the appellant, it is our position that you have conduct of the appeal and it was your obligation to bring the case on for hearing on a timely basis. Accordingly, we intend to object to the jurisdiction of the court to hear the stated case."

In the affidavit filed January 11, of Diane Schiavon, there is attached as exhibit "A", a memorandum to file by Ms. Schiavon which states as follows,

> "On receipt of the stated case I spoke with Mr. Spraggs' secretary and explained to her that the usual procedure in setting down a stated case for hearing would be to set a date for hearing within 30 days of receipt of filed stated case because same must be spoken to within this time period and adjourn it by consent to a later date.
>
> She advised that she was unfamiliar with stated cases and I advised her that she should speak with Mr. Spraggs about this matter and perhaps have him call me. I also advised her that her next step would be to obtain a date and prepare a notice of hearing of stated case."

The issue is this, does the court lack jurisdiction to hear the stated case by reason of the Appellant's failure to set the matter down for hearing within the 30 days provided for in s. 74(5)?

Mr. Spraggs contends that it was always the Appellant's intention to have the matter heard and that the technical hurdles of having the Notice of Hearing filed should not prevent the matter from proceeding today. Mr. Spraggs argues that if the matter could have been set down for hearing, it could then have been adjourned generally to a date convenient to counsel and to a time when the court could hear the matter.

Mr. Savage has provided the court with a brief of authorities which sets out the law in respect of this issue. The first decision which I propose to refer to is that of the British Columbia Court of Appeal in Re Merry v. City of Trail, it is reported at 34 D.L.R. (2d) 594. At p. 595 of those reasons Mr. Justice Davies stated as follows,

> "The appellants moved in proper time to quash the bylaw, but because a judge of the Supreme Court of British Columbia would not be available at Trail to hear the application within the two months stipulated by s. 240, appellants' counsel with the consent of respondents' counsel set the application down for hearing at Trail on October 23, 1961 when a judge would be available."

That date was more than two months after the passage of the bylaw. When the matter came on for hearing at that date, McInnes, J. questioned whether the consent of the Respondent could give him jurisdiction to hear the application in view of s. 240, which reads as follows,

> "No order shall be made under s. 238 unless the application is heard within two months after the date of the adoption of the bylaw."

After reserving judgment the learned judge concluded that s. 240 is imperative and cannot be waived and consequently he was without jurisdiction to hear the application and to make an order quashing the bylaw. At p. 599 of that same decision, Mr. Justice Norris said as follows,

> "In view of the fact that counsel had agreed that reliance would not be placed on a failure to comply with s. 240 of The Municipal Act, I have come to this conclusion with regret, but the

> question is one of jurisdiction. The right to apply to quash the bylaw is purely statutory and the jurisdiction of the court to hear the applicant was contingent upon strict compliance by the appellant with the statutory provisions which create the right."

Later in that decision, p. 600, Mr. Justice Norris says,

> "Section 239 is a procedural section. In my opinion s. 240 constitutes a limitation on the power of the court given by s. 238. Its language is perfectly clear, it prohibits the court from making an order unless the application is heard within the time specified. It seems to me to be directed, not to the parties, but to the court and to the power of the court."

I note that the appeal provisions before me are, of course, under s. 74(5) of the Assessment Act and are also purely statutory. The British Columbia Court of Appeal in Anchor Ventures Inc. v. Assessor of Area 04 - Nanaimo/Cowichan considered s. 74(5). At p. 1519 the Court of Appeal said,

> "In view of the fact that the time requirement of s. 74(5) could be and, indeed was, performed by the respondent assessor who was the appellant in the stated case and a person directly in control of the matter, I consider this particular time requirement to be mandatory within the contemplation of the principle as set out in Regina v. Bourassa (1972) 1 W.W.R. 285. In that case, Branka, J.A. said at p. 287,
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> > 'It will be noted that when one applies for stated case he is powerless to compel the court to state the case unless, under the provisions of s. 738 of the Code, the summary convictions court refuses to state the case.'
>
> In the instant case there was no refusal on the part of the summary convictions court and, therefore, the appellant was powerless to compel the summary convictions court to state the case in compliance with the statutory conditions. So that, in effect, if the learned trial judge was correct, an appellant who has impeccably discharged all conditions imposed by law and within his power to discharge becomes chargeable with a default if some other functionary over whom he has no control fails to conform with conditions which only such a functionary can discharge and which will in turn completely defeat his purpose."

Branka, J.A. went on to state at p. 289,

> "The series of cases, starting with Ritoholz, above referred to, and Moore v. Hewitt in my judgment correctly state the law and consequently the section in question is mandatory in the sense that it contains conditions precedent to the vesting of jurisdiction only insofar as acts to be done by the appellant are concerned. However, where the acts are to be performed are not discharged in accordance with the statutory requirements due to the sole fault of others, the terms of the section are directory only and not imperative, in which event the Supreme Court is free to hear the appeal by way of a stated case despite the fault involved."

In that case the Court of Appeal found that failure to comply resulted in a loss of jurisdiction. That decision was applied in the decision of C.H. Cates & Sons Ltd. which is, again, referred to at Tab 3 of Mr. Savage's brief of authorities.

The Appellant here argues that it was powerless to comply with the provisions of the section by reason of the registry's refusal to accept the Notice of Hearing. With respect, I believe that there were means which counsel for the Appellant could have employed to allow the Notice of Hearing to be set down. The Appellant could have brought on an ex-parte application to have the Notice of Motion heard on short leave so that the technical impediments posed by the three hour time estimate and the requirement of the Vancouver registry for filing of chambers' briefs could be

dealt with. The court is always vigilant to control its own process and would, in my respectful opinion, have entertained any reasonable request of the Appellant in light of the time restraints imposed by the Act. Alternatively, counsel for the Appellant could have spoken to Trial Division who, I expect, if unable to accommodate the request of counsel would have directed counsel to seek the permission from the Chief Justice to have the matter at least given a preliminary hearing to deal with the requirements of lengthy chambers' applications and to allow the matter to be at least given a preliminary hearing within the time constraints imposed by s. 74(5).

But that was not done. Instead, the Appellant chose to set the matter down today, notwithstanding the stated objections of Mr. Savage. Although I sympathize with counsel for the Appellant in the failure to navigate the technical roadblocks put in the way of having the matter set down for hearing, I am of the view that remedies existed at the time. I am also of the view that those remedies would have been successful. Even if unsuccessful, at least then the Appellant would have been in a position to proffer those attempts as an explanation for the failure to comply and perhaps bring it within the exemptions referred to in the decision of Regina v. Bourassa. In light of the authorities cited to me, and the facts as I have found them, I am of the view that the failure to comply with s. 74(5) rests with the Appellant and results in a loss of jurisdiction. The appeal, therefore, is dismissed.

(DISCUSSION)

THE COURT: I certainly sympathize, Mr. Spraggs, but I think your friend is correct and that costs usually do follow the event. I think, however, in the circumstances of this case, given the exigencies with which you were faced, the appropriate scale should be Scale 2.