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REDWOODS GOLF COURSE

v.

ASSESSOR OF AREA 15 - LANGLEY/ABBOTSFORD

ASSESSOR OF AREA 06 - COURTENAY

v.

L.J. MANAGEMENT LTD.

Supreme Court of British Columbia (A972054/A972055) Vancouver Registry

Before the HONOURABLE MR. JUSTICE CLANCY

Vancouver, December 10, 1997

B.J. Wallace, Q.C. for Redwoods Golf Course
J.D. Houston for Assessor of Area 15 - Langley/Abbotsford and Assessor of Area 06 – Courtenay
A.R.M. Johnston for L.J. Management Ltd.
M. Frey for Intervenor Assessment Appeal Board in A972055

Reasons for Judgment January 5, 1998

In Action No. A972054 Redwoods Golf Course requested that the Assessment Appeal Board submit the following Stated Case for the opinion of the court:

1. Did the Board err in concluding that it did not have the jurisdiction to award costs *inter partes*?

In the same action the Assessor of Area 15 - Langley/Abbotsford requested that the Board submit the following Stated Case for the opinion of the court:

1. If the Board does have jurisdiction to award costs *inter partes*, did the Assessment Appeal Board retain jurisdiction to award costs in the circumstances of this appeal?

In Action No. A972055 the Assessor of Area 06 - Courtenay requested the Board to submit the following Stated Case for the opinion of the court:

1. Did the Assessment Appeal Board err in law by misinterpreting s. 72 of the *Assessment Act* in determining that the Assessment Appeal Board is without jurisdiction to award costs to a party to an appeal before it?

Although the factual basis for the questions in the two appeals which relate to the jurisdiction of the Board to award costs are different, the question of law to be resolved is the same in each question. The two appeals on that issue may conveniently be considered together. The question raised by the Assessor of Area 15 is specific to Action No. A972054 and will be considered separately.

FACTS

The Assessment Appeal Board is established by the Lieutenant Governor in Council pursuant to the provisions of the *Assessment Act*, R.S.B.C. 1996, c. 20 to hear assessment appeals from Courts of Revision.

The Appellant Redwoods appealed a decision of the 1994 Court of Revision to the Board. The issue to be determined was the value of a golf course. During the appeal Redwoods applied for costs. In its decision of December 22, 1995, as amended January 26, 1996, the Board ordered the Assessor to amend the 1994 Roll for the Redwoods Golf Course. The Board did not deal with the question of costs.

Some months later on August 12, 1996, counsel for Redwoods wrote to the Board advising that Redwoods had been endeavouring to resolve a number of matters with the Assessor without success. The letter went on to request that the Board have the panel which made the decision receive submissions with respect to costs. In its reply of August 28, 1996, the Board stated that, since the amended decision was rendered in January 1996 and the request to reconvene the panel was not received until August 12, 1996, it would normally be assumed that the Board had concluded the appeal and was *functus*. The reply went on to request a rationale for making the request. The Board then advised that it had recently given an opinion that the *Act* did not confer jurisdiction to award costs *inter partes* but only to order costs paid to the Board. Ms. M.J. Taylor, Chair of the Board, further advised that the question of costs would be the subject of argument in another case and that, if the application of Redwoods for costs did go to a hearing, the Board would wish to address the issue raised in the other case first.

In his response of August 29, 1996, counsel for Redwoods repeated his request for a hearing and offered to participate in the other case. The Board referred Redwoods' application for costs to Ms. Swedahl, the panel chair. There was a delay, but on February 5, 1997 Ms. Swedahl advised that the Board was currently hearing submissions on the question of jurisdiction to award costs *inter partes* and that a ruling was anticipated in the near future. She then said that since there was an application for costs during the hearing, Redwoods should have an opportunity to speak to costs if it was determined that the Board had jurisdiction to award *inter partes* costs.

On June 17, 1997 the Board chair advised counsel that the Board had decided in the other case that it did not have jurisdiction to award costs *inter partes*. She advised that unless further submissions were received within three weeks, Redwoods' application for costs would be dismissed. These proceedings were brought on August 1, 1997.

The other case in which the Board decided that it did not have jurisdiction to award costs *inter partes* is the subject of the second of these appeals. L.J. Management Ltd. appealed the 1994 Court of Revision decision to the Board. On June 6, 1995 the Board dismissed the appeal when L.J. Management Ltd. failed to appear for the Board hearing. The Assessor Appellant applied for costs to be paid by L.J. Management Ltd. The process by which the matter came on for hearing is unusual but counsel have agreed that I should answer the Stated Case as submitted without concern for possible procedural irregularities.

On June 17, 1997 Robert Fraser, sitting as a single-member panel of the Board, decided that the Board did not have legislative authority to award *inter partes* costs. On August 1, 1997 the Assessor brought these proceedings.

A. THE JURISDICTION OF THE BOARD TO AWARD COSTS TO PARTIES APPEARING BEFORE IT

The Assessment Appeal Board has no inherent jurisdiction. Its authority for awarding costs must be found in the enabling statute. The section of the *Assessment Act* in force at the relevant time was s. 72. With minor changes, it has been replaced by s. 61. Since both Stated Cases are framed in the past tense, I will deal with s. 72. Section 72 reads:

Subject to the regulations, the board may order that the costs of a proceeding before the board shall be paid by or apportioned between the persons affected by the appeal in the manner it thinks fit.

Section 80(1)(c.2) provides:

(1) The Lieutenant Governor in Council may make regulations, including regulations,

(c.2) prescribing the circumstances and the manner in which the board may award costs under section 72.

No regulations have been passed.

In reaching his decision that the Board did not have jurisdiction to award *inter partes* costs, Mr. Fraser found that, on a plain reading of s. 72, the words "costs of a proceeding before the Board" referred to costs of the Board. He found support for that interpretation in the provision that costs could be ordered against "persons affected". He reasoned that the fact that the Board could order a non-party to share in the costs was indicative that something other than the standard provisions relating to *inter partes* costs was contemplated. He found that the fact that there is no provision in the *Act* for enforcing an order for costs leads to the conclusion that party and party costs were not contemplated since other statutes do provide for collection proceedings. Mr. Fraser found that references to analogies involving civil and criminal courts were not helpful. He held that since the Board is a tribunal established by legislation, it must look to its own legislation for its authority.

While the language employed in the legislation must govern the question of costs, it is wrong to say that only the legislative provisions will be taken into account by a Board in reaching its decision. Mr. Fraser made no reference to decisions of the courts which he was obliged to consider. It may be that the relevant authorities were not provided to him. Had he considered those authorities, it is my opinion that he would have reached a different conclusion.

The authorities must be read with care since the language of the various *Acts* considered in the decisions varies widely. There are nevertheless general principles of interpretation which emerge.

I take it as a given, as suggested by counsel, that while the Board has a broad discretion in carrying out its statutory mandate, it is not entitled, in its decisions, to be wrong in law.

In *Bell Canada* v. *Consumers' Association of Canada et al* (1986), 26 D.L.R. (4th) 573 (S.C.C.) the court considered s. 73 of the *National Transportation Act* which left in the discretion of the Commission the "costs of and incidental to any proceedings before the Commission". There are other qualifying provisions which no doubt assisted the court to find that costs in that context referred to legal costs, but that does not detract from the general principle adopted by the court that the word "costs" meant legal costs and not something quite different, "such as an obligation to contribute to the administrative costs of a tribunal". See also: *Roberts* v. *College of Dental Surgeons of British Columbia*, [1997] B.C.J. No. 1126, Vancouver A950735, May 13, 1997.

In the Stated Cases I am required to answer, the question of whether the Board has jurisdiction to award itself costs is not raised and I will not deal with that issue other than to note that the courts in *Bell Canada* and *Roberts* held to the contrary when interpreting the legislative provisions

considered by them. I rely on the *Bell Canada* decision as authority for the proposition that the word "costs" means legal costs.

Similarly, in *Ridley Terminals Inc.* v. *Minette Bay Ship Docking et al* (1990), 70 D.L.R. (4th) 148 (B.C.C.A.) the court considered a provision in the *Commercial Arbitration Act* which provided that the "costs of an arbitration shall be in the discretion of the arbitrator". Hinkson J.A., speaking for the court, held:

Costs in s. 11 of the Act are not defined. However, costs in British Columbia have a traditional meaning unless qualified by statute or by agreement of the parties. That traditional meaning is governed by the provisions of Rule 57 of the Supreme Court Rules.

In civil litigation, Rule 57 recognizes only party-and-party costs or solicitor-and-client costs. (p. 153)

Wilson J., in *Encal Energy Ltd.* v. *Viens*, [1996] B.C.J. No. 326, Dawson Creek No. 10780, February 6, 1996 considered a provision of the *Petroleum and Natural Gas Act* which provided that the Board "may award costs of or incidental to any proceedings before the Board". He referred to *Ridley Terminals, supra*, and adopted that decision as the controlling authority on the topic. He went on to hold that costs were to be fixed in accordance with Appendix B of the *Rules of Court*.

I conclude that it was an error of law for Mr. Fraser to fail to apply those authorities in reaching his decision. The courts have decided that, in the absence of further definition, costs or costs of proceedings should be construed to mean legal costs. In the absence of a consideration of the authorities, it may have been reasonable for Mr. Fraser to reach his conclusions but when they are considered, his decision cannot stand.

Having reached that conclusion, I should add that I do not find reference to the lack of enforcement provisions in the *Act* and consideration of what is meant by the reference to "persons affected" to be helpful. Once "costs" are defined as legal costs, neither matter has relevance to the question of entitlement to costs.

Nor do I agree with Mr. Johnston and Mr. Frey that the court should consider the imbalance of resources available to the parties. It may be true that the Assessment Authority, in most instances, has greater resources than a citizen bringing the appeal and that the Authority is funded by the property tax payers, however, while the Board may consider such matters in deciding whether to award costs and in what amount, those cannot be reasons for interpreting the statute in such a way as to deprive the Authority of any right to costs.

Mr. Johnston also submitted that the previous decision of the Board in *Edapho Consultants* v. *Assessors of Areas No. 01*, *No. 11, No. 12, No. 14 and No. 19*, July 12, 1995 (A.A.B.) was incorrect in relying on the decision of the British Columbia Court of Appeal in *Assessor of Area 26 - Prince George* v. *Cal Investments Ltd.*, [1994] B.C.J. No. 927, Vancouver CA016789, March 23, 1994 as authority for finding that it had jurisdiction to award costs. It follows, he contended, that the Board was correct in reviewing its previous decision and correcting its error. That submission is of no assistance since my conclusions concerning jurisdiction are not based on the decision in *Cal Investments*.

Finally, I reject the suggestion that because no regulations were passed which provide for costs to parties, the Board has no power to award costs. As Mr. Wallace submitted, the Board cannot be said to have deprived itself of jurisdiction by refusing to make rules: *French et al* v. *Canada Post Corp.* (1987), 14 F.T.R. 40 (affirmed by Federal Court of Appeal (1988), 87 N.R. 233).

CONCLUSION

Section 72 of the *Assessment Act* should be interpreted to provide jurisdiction for the Assessment Appeal Board to award costs *inter partes*. The Stated Cases relating to jurisdiction in both appeals are answered in the affirmative.

B. THE JURISDICTION OF THE ASSESSMENT APPEAL BOARD TO AWARD COSTS TO REDWOODS GOLF COURSE

The position of the Assessor of Area 15 in the Redwoods appeal is that, despite a finding that the Board has jurisdiction to award costs *inter partes*, in the particular circumstances pertaining to Redwoods, the Board lost jurisdiction. That is so because the Board failed to deal with the question of costs when it gave its decision on the substantive aspects of the appeal and Redwoods failed to appeal within the 21 day appeal period provided for in the *Act*. Redwoods also applied under a "slip rule" provision for variation of the order of the Board and again failed to have the Board address the question of costs. The Assessor submits that, although there was an application for costs during the original hearing, the failure of Redwoods to bring its application before the Board for many months after the Board gave its decision deprived the Board of jurisdiction. The Assessor's position is that if the Board was to consider the question of costs at so late a date and after the 21 day time period for the bringing of an appeal under the *Act* had expired, this would be, in effect, a prohibited re-opening of the Board's decision.

The Assessor relies on *Chandler* v. *Association of Architects (Alta.)* (1989), 62 D.L.R. (4th) 577 (S.C.C.). *Chandler* provides that administrative agencies have the authority to reopen a decision:

a. when there is a legislative authority to do so, which may be found:

i) in an express legislative power to reconsider,

ii) to be implied by other provisions or from the overall structure of the legislation, or

iii) to be implied by the nature of the decision-making power in question;

b. when it is necessary to correct a clerical error, an accidental error or omission, or an ambiguity in the decision;

c. when the decision mandated by statute has not yet been made, or the decision made is void or voidable for lack of jurisdiction (including breaches of the principles of natural justice or fairness), or there remains an issue outstanding.

It is unnecessary for me to deal with the power of the Board to correct a clerical error. It does not seem to me that the failure of the Board to address a matter put before it is an accidental slip or omission. Redwoods, in any event, does not rely on the correction of a clerical error. They say instead that there remains an issue outstanding.

In *Chandler*, *supra*, Sopinka J. held:

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. (p. 596)

Relying on *Severud* v. *Canada (Employment & Immigration Commission)*, [1991] 2 F.C. 318 (C.A.) Sara Blake, the author of *Administrative Law in Canada*, Second Edition, (Butterworths, Markham, Ont.: 1997) reached this conclusion:

If the tribunal failed to deal with an issue it should have decided or issued an ambiguous decision, the hearing may be re-opened to address the issue or clarify the ambiguity. (p. 109)

While it is no doubt true that at some point the power of a tribunal could be limited by effluxion of time, I do not think it appropriate to impose the 21 day time limitation for bringing of appeals in these circumstances. Redwoods had raised the issue during the hearing. Subsequent to the hearing, the Assessor and Redwoods were attempting to negotiate a settlement of issues. When those settlement negotiations broke down, Redwoods brought the question back to the Board. The 21 day limitation period applies to the time within which a request must be made to the Board to state a case on a question of law. That time limitation has no application to when the Board must decide issues before it.

CONCLUSION

In the particular circumstances pertaining to Redwoods, I find that the Assessment Appeal Board did retain jurisdiction to award costs. The case stated is answered in the affirmative.

COSTS

If the parties wish to make submissions on the question of costs, they are at liberty to do so. In the absence of submissions, there will be no order as to costs. It does not seem appropriate to have L.J. Management bear the costs burden of establishing the jurisdiction of the Board. Similarly, the Assessor should not absorb the costs. Both the Assessor and Redwoods endeavored to set aside the decision of the Board. The Board is not a party and no order for costs against it should be made.