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ASSESSOR OF AREA 08 - NORTH SHORE/SQUAMISH VALLEY

v.

MIR HUCULAK

Supreme Court of British Columbia (A981004) Vancouver Registry

Before the HONOURABLE MR. JUSTICE BRENNER (in chambers)

Vancouver, April 28, 1998

J. Shevchuk for the Appellant
M. Huculak, In Person

Reasons for Judgment (Oral) April 28, 1998

THE COURT: In this application, the Assessor of Area 08 - North Shore/Squamish Valley brings this appeal by way of Stated Case pursuant to s. 63(3) of the *Assessment Act*, R.S.B.C. 1996, c. 20.

The appeal involves the 1997 assessment of a condominium located at 2561 Tricouni Place in the Resort Municipality of Whistler, British Columbia. On July 10, 1997 the Assessment Appeal Board convened to hear the appeal of the Respondent from the decision of the 1997 Court of Revision confirming the Assessor's evaluation of the subject property at $197,500. On February 27, 1998, the Board rendered a written decision in which the Assessor was ordered to reduce the 1997 assessment of the property to $90,000 and to reassess five similar units.

The building in question contains 13 units in total, seven of which are held in fee simple, and six of which, including the subject property, were sold as time-share units.

On this application, the Assessor submits that the Board erred in law because it failed to determine the actual value of the unencumbered fee simple interest of the property, and he seeks an opinion from this Court that the Board erred in law.

The facts of this matter are set out in the Stated Case, prepared by the Board, as follows:

This case stated by the Board, pursuant to Section 63(3) of the *Assessment Act* at the requirement of the appellant Assessor of Area 08 - North Shore/Squamish Valley, seeks the opinion of the Supreme Court on the questions of law set out below in respect of which the following are the material facts:

> 1) The appeal before the Board was from the decision of the 1997 Court of Revision which determined the actual value of the property to be land $90,500, improvements $107,000; total $197,500.
>
> 2) The issue before the Board was the determination of actual value.

3) The property is part of a 13-unit condominium complex at 2561 Tricouni Place, Whistler, which was constructed with the intention of creating time-share investments yielding rights of occupancy for four individual weeks per annum. This was to be achieved through the registration of a one-twelfth interest in the fee simple of each unit, and the lease back of that interest to the Seasons Resorts Limited, which itself holds a 99-year lease from the original owner. The Seasons Resorts Limited sublets the property to the owner of each one-twelfth interest for a specific time-share segment, which includes one week for each of the four seasons of the year. The lease and sublease are in place until February 2079, and no original purchase of time-share could have completed unless a sublease was entered into at the time of purchase.

4) Six of the 13 units were sold on this basis, but the market softened, and the remaining 7 units were sold as normal fee simple strata lot condominiums.

5) The property has 12 owners, each of whom holds a one-twelfth undivided fee simple interest in the unit, and each of whom has a scheduled right of occupancy for four separate weeks a year.

6) The Board found that the effect of the time-share structure has been to reduce the market value of an undivided one-twelfth interest from $18,500 to range between $6,500 and $8,500.

7) The Board found that until 2079 A.D. the undivided one-twelfth fee simple interest is subject to a lease to the Seasons Resorts Limited, and that any right of occupancy is by virtue of the sublease. The Board found that upon sale the sublease may be assigned to the purchaser, but the undivided one-twelfth fee simple interest continued to be impaired by the head lease.

8) The Board found that the market value in 1996 for an impaired undivided one-twelfth fee simple interest lay in the range between $6,500 and $8,500.

9) The Board found that the impairment is not personal to the owners but applies to all original time-share purchasers, and applies and will continue to apply to all subsequent time-share purchasers until the year 2079.

10) The Board found that the purpose of the time-share scheme was not to deliberately reduce either the market value of the fee or the assessment. The Board found that the fee was impaired, however, and the impairment runs with the land until 2079 and should be reflected in the assessment.

11) The Board ordered the Assessor to amend the 1997 roll as follows: land $41,200, improvements $48,800; total $90,000.

12) The Board ordered the Commissioner to reassess the actual value for the 1997 roll, the remaining five time-share properties in the building.

13) Attached hereto as Schedule A is a copy of the Board's decision dated February 27, 1998.

The questions which the Board is required to ask for the opinion of the Supreme Court are:

1) Did the Assessment Appeal Board err in law by not determining the market value of the fee simple interest in the subject lands and improvements?

2) Did the Assessment Appeal Board err in law when it determined that the assessor must, in the determination of actual value take into account the leasing and the subleasing arrangements between the owners of the subject property and the Seasons Resort Limited?

3) Did the Assessment Appeal Board err in law when it held that *Standard Life Assurance Company* v. *Assessor of Area 01 - Capital* (1997), 34 B.C.L.R. (3d) 346 (C.A.), did not apply to the subject property in the surrounding circumstances?

4) Did the Assessment Appeal Board err in law when it held that *Consolidated Shelter Corporation Limited* v. *Rural Municipality of Fort Gary* (1965), 49 D.L.R. (2d) 565 (Man. C.A.), did not apply to the subject property and the surrounding circumstances?

5) Did the Assessment Appeal Board err in law when it relied upon *Assessor of Area 10 - Burnaby/New Westminster* v. *Central Park Citizens Society* (1993), 86 B.C.L.R. (2d) 24 (S.C.)?

The issue in this case, in my view, arises from question number 1; that is, did the Assessment Appeal Board err in law by not determining the market value of the fee simple interest in the subject lands and improvements?

A consideration of that question requires an examination of the applicable provisions of the *Assessment Act*, together with the applicable law.

The position of the Appellant Assessor is that the Board and the Assessor are required under the *Assessment Act* to determine the actual value of the unencumbered fee simple interest in the property. That, says the Appellant, is the direction given by the Court of Appeal in *Standard Life Assurance Company* v. *Assessor of Area 01 - Capital*, *supra*. The Appellant said in coming to its decision the Board failed to do this, and it specifically erred because it valued an encumbered fee simple interest.

The actual value provisions of the *Assessment Act* are contained in section 19, that states as follows:

19. (1) In this section:

"actual value" means the market value of the fee simple interest in land and improvements; ...

(3) In determining actual value, the assessor may, except where this Act has a different requirement, give consideration to the following:

(a) present use;

(b) location;

(c) original cost;

(d) replacement cost;

(e) revenue or rental value;

(f) selling price of the land and improvements and comparable land and improvements;

(g) economic and functional obsolescence;

(h) any other circumstances affecting the value of the land and improvements.

The position of the Respondent on this application is that the Board took into account the provisions of 19(1) and (3) in coming to a determination of the appropriate market value of the time-share interest.

The particular issue that has to be decided is whether the Board's analysis was the correct one, which, in my view, requires a consideration of the decision of the Court of Appeal in *Standard Life*.

Under section 19 the Assessor and the Board are required to determine the actual value of the land and improvements. I note also that actual value is defined by the *Assessment Act* as meaning the market value of the fee simple interest in the land and improvements. The *Assessment Act*, of course, goes on to provide the additional factors that the Assessor and Board may consider when determining actual value, to which I have earlier referred.

In *Standard Life* the issue before the Court was the meaning of the phrase, "the fee simple interest in the land and improvements."

The facts in *Standard Life* were somewhat different from the facts in the case at bar. In *Standard Life* in the Court below the Board was found to have erred in failing to consider a long-term uneconomic lease in the valuation of an office building. The evidence in that case was that the uneconomic lease would reduce the selling price of the property. The lease in question was registered, and it "ran with the land."

Standard Life involved a lease of commercial premises. It also involved an approach to value being the income approach, as opposed to the valuation in the case at bar, which was the direct sales comparison approach.

That said, in *Standard Life* Mr. Justice Hollinrake for the majority in the case stated, at page 352:

> I think the real issue in this case is what is meant by the phrase, "the fee simple interest in land and improvements" in s. 26 [now Section 19] of the *Act*. My conclusion is that the assessor is correct in submitting that the fee simple interest includes all the interests in the land and buildings and not just the owner's interest. In my opinion, the assessor here had to consider not just the owner's interest, as I think the judge below did, but also the tenant's interest. That, for practical purposes, leads to the conclusion that the totality of the interests properly considered should, generally speaking, be the equivalent of the owner's unencumbered interest.

In the case at bar, what we have is a time-share interest valued at some $90,000, whereas unencumbered fee simple interests in the same structure are apparently valued at some $197,000.

The issue before me is whether the ratio of the decision in *Standard Life* is applicable to this case, or whether that decision can be distinguished. In *Standard Life* there was a separate set of concurring reasons written by Mr. Justice Goldie. In his concurring reasons at p. 355, after referring to the issue in the case, and the Board's decision, Goldie J.A. stated that:

At this point, I refer to the following from the Board's decision:

> While it is clear that the uneconomic leases affect the value of the owner's interest in the property, they cannot, for purposes of the Assessment Roll, affect the assessed value of the land and buildings.
>
> Mr. Justice Goldie went on to say at page 355:
>
> If intended as a statement of absolute application, I do not think this is an accurate statement in light of s-s. (3) of s. 26 of the *Act*, which lists the matters the assessor "may give consideration to in determining actual value." If what I have quoted was taken literally, it would purport to fetter the discretion of the assessor given by s-s. (3). I think the legislature in using the phrase "selling price of the land and improvements" in s-s. (3), intended to give the assessor flexibility and the taxpayer the opportunity of placing before the Board any evidence which might demonstrate the selling price or value in the actual market place affected the value required to be placed on the Assessment Roll. While the weight to be given to any evidence and the submissions made on that evidence is for the assessor (and the Board) to determine, I think the taxpayer has a right to present such evidence, and its submission would demonstrate what I have just described.

He went on to point out that in *Standard Life* there was no suggestion before the Court that any evidence beyond the existence of the lease itself could be forthcoming.

In my view, the Court of Appeal has interpreted what is now section 19 of the *Assessment Act* to require that when actual value is being determined the Assessor or Board must determine the market value of the unencumbered fee simple interest. The separate concurring opinion of Mr. Justice Goldie, in my further view, is an opinion which highlights the intention of the legislature to allow to the Assessor and the taxpayer some flexibility having regard to the points set out in subsection 3. However, that flexibility is directed to determining the value of the unencumbered fee simple interest.

In the case at bar, it is clear that the Board chose to value the property having regard to the impairment of the fee simple interest created by the time-share arrangement. While that may, in fact, reflect the market value, it, in my view, does not, or does not necessarily, reflect the market value of the fee simple interest on an unencumbered basis.

In my view, the Court of Appeal has interpreted this provision of the *Assessment Act* and requires an assessment to be made on an unencumbered basis and, accordingly, the Board fell into error in carrying out an evaluation based on the impaired value of the property.

To answer the specific questions posed to the Court in the Stated Case, question no. 1 was as follows: Did the Assessment Appeal Board err in law by not determining the market value of the fee simple interest in the subject lands and improvements?

I would answer that by saying that the Board erred in law by not determining the market value of an unencumbered fee simple interest in the subject lands and improvements.

Question no. 2 is answered in the affirmative; the Board did err in law when it determined the Assessor is required to take into account the encumbrances on the fee simple interest.

Three the answer is, yes. In my view the principle stated in *Standard Life* by the British Columbia Court of Appeal is a principle of general application, and I can see no basis for distinguishing it such that it would not apply to the subject property. Hence, in my view, the Board erred in law.

With respect to questions 4 and 5, I am of the view that *Consolidated Shelter* probably does not apply to the facts of this case, and I, conclude similarly, with respect to the *Central Park* decision, the latter of which, in any event, was limited by the decision of the Court of Appeal in *Standard Life*.

Are there any submissions with respect to costs?

MR. SHEVCHUK: No, My Lord. My instructions are to ask for them, but that's as much as I'm going to say about them.

THE COURT: In the circumstances, having regard to the fact that this is relatively recent law and hasn't been the subject of extensive judicial interpretation, it would be appropriate for each party to bear its own costs.