533985 BC LTD.

v.

ASSESSOR OF AREA 01 – CAPITAL and PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (09 4809) Victoria Registry

Before the HONOURABLE MR. JUSTICE JOHNSTON
Date and Place of Hearing: March 2, 2010, Victoria, B.C.

R.F.T. MacIsaac for the Appellant
G.E. McDannold for the Respondent, Assessor of Area 01 - Capital

Reasons for Judgment (Oral) March 2, 2010

[1] **THE COURT:** This is an appeal by way of a case stated by the Property Assessment Appeal Board pursuant to s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20. It relates to a piece of property located at 2227 Sooke Road. That piece of property is owned by a numbered company noted as the Appellant on the Stated Case. The property generally is rectangular with an angled frontage, long and narrow. It can be entered from either direction on Sooke Road but one can only turn right leaving the property and one is not, on leaving the property, permitted to drive directly across Sooke Road to access any of the buildings or businesses on the opposite side of the road. There are, as I understand it, two buildings on the property in which there are offices occupied by doctors and lawyers.

[2] Section 65(1) of the *Assessment Act* reads:

> Subject to subsection (2), a person affected by a decision of the board on appeal, including a local government, a taxing treaty first nation, the government or the assessment authority, may require the board to refer the decision to the Supreme Court for appeal on a question of law alone in the form of a stated case.

[3] The Appellant has delivered, as it is required to do under subsection (2), 14 questions that it says are questions of law that have been referred to the court. On the hearing of this appeal, Mr. MacIsaac, the principal of the Appellant company, has demonstrated that he has lost none of his ability as counsel to select his strongest point, in this case question 12, and argue it efficiently. Notwithstanding that apparent and appreciated attempt to shorten my task, I think I must deal with the case as stated by the Board, at least briefly. I do so with some trepidation, because what originally appeared to me on reviewing the material to be relatively straightforward questions, that is, whether the particular questions stated were questions of fact or law, now appear to me to have been rendered less clear or less clearly capable of decision on that relatively narrow basis by the recent decision of the Court of Appeal in *Weyerhaeuser Company Limited v. Assessor of Area #04 - Nanaimo Cowichan.* I say that because my understanding of a Stated Case was that it was confined to questions of law, that questions of fact or mixed fact and law were not amenable to, nor capable of, decision on a Stated Case.

[4] The *Weyerhaeuser* decision seems to treat s. 65(1) as a factor and no more than a factor to be weighed in deciding whether the standard of review under s. 65 is a standard of reasonableness or correctness and concludes, in a case that is similar to the one I have to deal with, that the applicable standard is reasonableness.

[5] In any event, of the questions stated in the Stated Case, I conclude that questions 1, 2, 3, 7, 10, 11 and 14 are pure questions of fact or at least questions of mixed fact and law that I would have dismissed, or declined to answer, as questions of fact or mixed fact and law had I felt able to do so.

[6] As it is, I felt that I should review the decision of the Board to satisfy myself that there was evidence in support of the facts set out in those questions I have just listed, and reserved to do so. I find that there is evidence to support the facts found and that therefore puts them within the range of acceptable outcomes or possible outcomes which are defensible in respect of the facts and the law under *Dunsmuir.*

[7] Question 4 perhaps raises a question of onus. It was not pursued in argument, but in any event, I conclude that the Board's comment at para. 9 of the reasons does not purport to affect the onus or the placement of onus; it simply remarks upon the absence of evidence on a question of alternate uses.

[8] As to question 5, the appraiser appears to have asserted that Mr. MacIsaac had a working relationship of some sort with a party from whom he purchased a quarter-interest in this property in 2008. Mr. MacIsaac denied that he had any such relationship, and there is no apparent evidence supporting the appraiser's assertion of the working relationship. That to my mind is immaterial because, on a review of the Board's decision, the Board notes that dispute in the evidence and says that that is not the question. The issue the Board faced and framed for itself was whether the sale in question fit within the definition of market value and so if this were a question of law, there was no error there, and if it were a question of fact, again, there was evidence considered by the Board and, in fact, no error has been demonstrated, and indeed, it is not -- because it is not the question the Board answered, it does not affect the outcome in this case.

[9] As to question number 6 I conclude that it was entirely within the area of expertise of the Board, as the master of its own process, to adopt the definition of market value that it did adopt. If it were a question of pure law, no error would be shown. If it is a matter of reasonableness, under the test in *Dunsmuir,* then the definition of market value was one which the Board in its expertise was entirely within reason to adopt.

[10] The eighth question was to my mind a question of fact, and that is whether Mr. MacIsaac unilaterally set a price at which he bought an interest in the property. There is a reference there to compulsion that is extracted purely from the definition of market value adopted by the Board earlier. On the way to deciding that the property had not been sufficiently exposed to the open market, the Board decided that it was unable to rely on Mr. MacIsaac's purchase price as evidence attracting sufficient weight of market value to affect the result. That again is not a question of law, in my view, but even on the reasonableness standard, it falls well within the parameters of reasonable and possible outcomes.

[11] The ninth question is one on which I conclude there was some evidence that a portion of one of the buildings was owner-occupied. That evidence is found in the appraiser's report at p. 4. It may well be that that evidence is completely wrong and that there was no owner occupation of a portion of this building, but that is not for me to decide. It is for the Board to decide what evidence it accepts and/or rejects, and, given the fact that this Board as the master of its own processes is not necessarily constrained by the rules of evidence that a court would have to follow, it is not possible for me to say that that is an error in law to have accepted that statement from the appraiser nor that it was unreasonable.

[12] The twelfth question is the one that I think best captures what Mr. MacIsaac in fact argued before me, and I will return to it.

[13] On the thirteenth, I am not persuaded that the Board put an onus upon Mr. MacIsaac in the way he says or that it amounted to a question of law. The fourteenth, in my view, squarely falls within the realm of the area of expertise, that is, the assignment of weight or the amount of weight that should be put upon the problem of egress or configuration of this lot. To some extent that it is rolled into what I consider to be Mr. MacIsaac's point at question 12, that is, I treat questions 12 and 14 together.

[14] Mr. MacIsaac's argument is extracted from a statement of principle found in *Richland Estates Ltd. v. Assessor of Area #24,* and abridging to get to Mr. MacIsaac's point, the principle is this: the court's power

to intervene is limited to where the Appeal Board has acted without any evidence or upon a view of the facts which could not reasonably be entertained.

[15] On this test, Mr. MacIsaac says that the review board, and before that, I suppose, the review panel, could not reasonably entertain a view of the facts that saw his property as comparable to other properties put forward as having comparable value and upon which the appraiser and then the Board relied, bearing in mind that there is no ability to turn left leaving the property, that there is no ability to get across Sooke Road on leaving the property, and that it is a long, narrow property landlocked on either side.

[16] What is or is not a suitable comparable is something that is within the expertise of the Board. There certainly was evidence in the form of the appraisal that put forward comparable properties, at least in the view of the appraiser. That was something which within the expertise of the Board it was entitled to accept and apparently did accept in support of the opinion as to value. It is not possible for me to conclude that to accept as it did the evidence based upon these comparables and, while acknowledging the arguments made by Mr. MacIsaac, to set them aside in concluding that those arguments were not sufficient to depress the value of the property below set out in the appraisal, it is not possible for me to conclude that that was an error in law. Had I felt free to simply treat that question as a pure issue as between a question of law or question of fact, I would have said it is clearly a question of fact. It is a matter of what weight to put on what evidence, and the finding ought not to be disturbed absent some palpable and overriding error or, as Mr. MacIsaac argued, acting without any evidence or upon a view of the evidence which could not reasonably be entertained.

[17] It seems to me that that view of the evidence could be reasonably entertained and given that *Weyerhaeuser* now requires me to consider the question of reasonableness as defined in *Dunsmuir,* that the conclusion reached by the Board in this case was well within the range of possible outcomes which are defensible in respect of the facts and the law.

[18] So the answers to the questions as stated, to the extent that those questions ask whether there was an error in law, are all no. Aside from that, because I think *Weyerhaeuser* may require me to do so, I find that the conclusions reached by the Board were within the range of possible outcomes which are defensible in respect of the facts and the law, and so the appeal by way of Stated Case is dismissed.

[SUBMISSIONS RE COSTS]

[19] **THE COURT:** I have just dismissed an appeal by way of Stated Case on a matter relating to the assessment of property owned by the numbered company Appellant. The Assessor seeks costs under Appendix B at Scale B, saying it is a matter of ordinary difficulty, and a quick notional mental calculation would indicate that of the tariff items sought at $110 it is, I think, per unit, the claim for costs would be around $3,500.

[20] Mr. MacIsaac says not so fast. This is a matter that is of some importance to him as a taxpayer. He has, no doubt, a taxpayer's usual reluctance to pay any more money than he needs to pay to the taxing authority or to those who assess on behalf of the taxing authority.

[21] Section 65(8) provides that the matter of costs are at the discretion of the court. The discretion is conferred generally by the result, that is, the ordinary rule is to the winner of the litigated issue the costs should go. That result simply confers upon the court the discretion to make the order with respect to costs that it considers just in the circumstances, and the only constraint on that discretion is that it must be exercised judicially, that is, on a principled basis.

[22] I have looked briefly at the three authorities proffered: the one decision of the late Mr. Justice Owen-Flood and two brief decisions, one of Madam Justice Dorgan, the other of Mr. Justice Burnyeat. They are, of course, of some assistance, but it seems to me that although the costs should follow the event and will in this case, that the quantum of those costs are dependent on the circumstances of the case, and here, notwithstanding that I have dismissed the appeal and found that most of the reasons for dismissing the appeal have been that the appeal was largely based upon fact, there was a germ of arguable law with

respect to the appeal, and I have some understanding or some sympathy for the fact of the appeal. Had there been any ability to interfere with a decision based upon the facts as found, I might have been sorely tempted to interfere with it, partially on the basis that some of the evidence accepted by the panel and then the Board I considered to be less than solid, and I probably should not go much further than that other than to say that is my principled basis for exercising the discretion in fixing costs at $2,500 plus disbursements.

The Honourable Mr. Justice Johnston