CITATION: BCE Place Limited v. Municipal Property Assessment Corporation, 2010 ONCA 672
DATE: 20101015
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COURT OF APPEAL FOR ONTARIO

Rosenberg, Armstrong and Juriansz JJ.A.

BETWEEN:

BCE Place Limited, 1225209 Ontario Limited, National Trust Company, Scotia Realty Limited, First Place Tower Inc., Toronto Dominion Centre, 200 Bay Holding Inc.

Appellants

and

Municipal Property Assessment Corporation and City of Toronto

Respondents

and

Atikokan, Brank, Ear Falls, Goderich, Lambton, Lincoln, Ottawa, Quinte West, Red Lake, Sarnia, South Bruce Peninsula and Windsor

Intervenors

Richard Poole and David G. Fleet, for the appellants BCE Place Limited, 1225209 Ontario Limited, National Trust Company, Scotia Realty Limited and First Place Tower Inc.

Jeff G. Cowan, for the appellant Toronto Dominion Centre

Phillip L. Sanford and Tara L. Piurko, for the appellant 200 Bay Holding Inc.

Susan L. Ungar, Terry Denison and Rodney Gill, for the respondent City of Toronto

Carl B. Davis and Donald G. Mitchell, for the respondent Municipal Property Assessment Corporation

John L. O'Kane, for the Intervenor Municipalities

Heard: June 7, 2010

On appeal from the Order of the Divisional Court (Carnwath, Jennings and Pardu JJ.) dated August 11, 2009, with reasons reported at (2009), 98 O.R. (3d) 581.

Rosenberg J.A.:

[1] This appeal concerns the proper interpretation of a phrase in the definition of "current value" in the *Assessment Act,* R.S.O. 1990, c. A. 31 as applied to several large bank towers in downtown Toronto. In an interim decision, the Assessment Review Board held that the phrase, "fee simple, if unencumbered", required that the bank towers be valued as if they were vacant at the date of assessment. The Divisional Court disagreed with that interpretation, holding that it was wrong in law. I agree with the Divisional Court's interpretation of the legislation. Accordingly, I would dismiss the appeal by the owners of the bank towers.

THE ISSUE

[2] The issue in this case is the proper manner of assessing for municipal tax purposes the bank tower properties. The respondent Municipal Property Assessment Corporation ("MPAC") assessed the combined current value of the bank towers at approximately $5 billion for the taxation years 2001 and 2002, based on a valuation date of June 30, 1999. The owners of the bank towers challenged these assessments before the Board.

[3] All of the parties agreed that the proper method of assessing the bank towers was the so-called "income approach," but they offered radically different views as to the assumptions to be made in applying this approach. The different approaches were driven by different understandings of how to determine the "current value" of the properties as that term is defined in the *Assessment Act*.

[4] Following over 60 days of hearings, the Board issued an interim decision in which it endorsed the owners' interpretation of "current value" as it applied to the subject properties. The Board instructed the parties to attempt to determine new assessment figures based upon its ruling. MPAC and the City of Toronto appealed the interim decision, with leave, to the Divisional Court. A coalition of 11 municipalities intervened to support the appellants' position.

THE LEGISLATION

[5] For the purposes of this appeal, the legislative scheme in the *Assessment Act* may be described as follows. Subject to some exceptions that are not relevant in this case, all real property in Ontario is liable to assessment and taxation. Land is assessed against the owner based on its current value. "Current value" is defined in s. 1(1) of the Act as follows:

> "current value" means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer.

[6] The term "land" is broadly defined in the same section and includes "all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land".

THE INTERIM DECISION OF THE BOARD

[7] The Board gave extensive reasons for its interpretation of the phrase "fee simple, if unencumbered". It looked at the legislative history, decisions of this court and the Divisional Court, dictionary definitions of the terms, and definitions in legal texts on property and real estate appraisal. The Board also compared valuation under the *Assessment Act* with the approach taken under the *Expropriations Act*, R.S.O. 1990, c. E. 26. In the end, the Board came to the conclusion that the "fee simple, if unencumbered" required that the only interests to be valued were those of the owners and that, for example, all leases in place at the time of the valuation had to be disregarded because they were encumbrances.

[8] However, since the bank towers are income-producing properties, the Board further found that the current value had to take into account that the willing buyer was buying a building that would generate an income stream. This in turn required a determination of market rent income, the deduction of various expenses to obtain that income, an allowance to reflect a stabilized vacancy over the economic life of the property, and the application of an overall capitalization rate to produce a value. In effect, the assessment was to be based on the theory of a sale on the valuation date where

the owner was giving vacant possession and then allowing for a notional two-year period during which the building would be leased up at market rents.

[9] In the result, the Board accepted the capitalization rate used by the owners' expert of 8 per cent. The Board rejected the approach taken by the respondents' experts who used a capitalization rate of 8.75 per cent. The difference in capitalization rates resulted in significantly different assessments. As an illustration, MPAC valued the Toronto-Dominion Centre at $1.439 billion, and the owners valued the same property at $1.014 billion, a difference of over $400 million.

DECISION OF THE DIVISIONAL COURT

[10] The Divisional Court held that standard of review of the Board's decision as to the interpretation of the definition of "current value" is correctness. It found that the Board's decision was incorrect. The Court further held that if the more deferential standard of reasonableness applied, the Board's decision was unreasonable.

[11] The Court held that the purpose of the phrase "fee simple, if unencumbered" as applied to income-producing properties was to arrive at a value calculated without reference to leases at other than market value. It was not, however, to be based on the wholly artificial notion that the buildings were vacant at the time of assessment. The Court placed considerable emphasis on the intent of the Legislature in amending the Act in 1997 in response to this court's decision in *Re Regional Assessment Commissioner, Region No. 11 and Nesse Holdings Ltd. et al.* (1986), 54 O.R. (2d) 437. It was the view

of the Court that the 1997 amendments were intended to codify the dissent of Robins J.A. in *Nesse Holdings.* The Court also relied upon this court's recent decision in *Carsons' Camp Ltd. v. Municipal Property Assessment Corporation* (2008), 88 O.R. (3d) 741, in support of its interpretation. The Court accordingly allowed the appeal by MPAC and the City of Toronto and returned the matter to the Board to a differently-constituted panel.

ISSUES

[12] The appellants raise two issues in this court. First, they submit that the proper standard of review is reasonableness, having regard to the Board's expertise in adjudicating complex questions of valuation. Second, they submit that the Divisional Court erred in its interpretation of the phrase "fee simple, if unencumbered" in the definition of "current value" in s. 1 of the Act.

[13] Regardless of our disposition of these issues, the appellants also submit that the Divisional Court erred in directing that the matter be returned to a differently-constituted panel of the Board given the progress that has been made to date.

ANALYSIS

The Standard of Review

[14] As is well-known, in *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, the Supreme Court revisited and refined the approach to judicial review of administrative action. The Court reduced the standards of review to the two of correctness and reasonableness. Although the Court eliminated the highly deferential standard of patent

unreasonableness, that change did not signal the need for a wholesale revisiting of the judicial review framework. Rather, in a post-*Dunsmuir* case, the court should "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question": *Dunsmuir* at para. 62. Only if this first inquiry was unfruitful would it be necessary to proceed to the analysis of the various factors.

[15] If it becomes necessary to proceed to the second stage, the court will look at several factors. The existence of a privative clause is a strong indication that the standard of review is reasonableness. The reasonableness standard will also tend to be applied where the question is one of fact, discretion or policy, or "where the legal and factual issues are intertwined with and cannot be readily separated": *Dunsmuir* at para. 53. Reasonableness will also usually be the standard "where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" or where the tribunal "has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context": *Dunsmuir* at para. 54. On the other hand, the correctness standard will apply where the question of law is of central importance to the legal system and outside the tribunal's specialized area of expertise: *Dunsmuir* at para. 60.

[16] In *Dunsmuir* at para. 64, the Court summarized the second stage analysis as follows:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[17] In my view, the pre-*Dunsmuir* jurisprudence has already determined the standard of review in a satisfactory manner. In a series of cases, the Divisional Court has found that the standard of review on questions of law is correctness, even where the Board is interpreting its home statute. See *Municipal Property Assessment Corp. v. Minto Developments Inc.* (2003), 2 M.P.L.R. (4th) 89, and *1098748 Ontario Ltd. v. Ontario Property Assessment Corp., Region No. 11* (2001), 143 O.A.C. 121. And the Divisional Court reached the same conclusion in the post-*Dunsmuir* decision in *Toronto (City) v. Wolf* (2008), 241 O.A.C. 41. The Divisional Court pointed out in those cases the Board's decisions are not protected by a privative clause and that there is a statutory appeal with leave to the Divisional Court on questions of law (s. 43.1 of the Act).

[18] The Board's own approach to the interpretation issue supports application of a standard of correctness. The Board did not apply any particular specialized expertise, but rather approached the question as would a court. It reviewed and analyzed decisions of this court and the Divisional Court going back to 1907 in an attempt to find the legal meaning of the phrase "fee simple, if unencumbered". I agree with the Divisional Court in this case that the standard of review is correctness.

Nesse Holdings and the 1997 Amendments

[19] At the Board, in the Divisional Court and in argument before this court much attention was paid to this court's decision in *Nesse Holdings* and the effect of the subsequent amendments to the Act. In *Nesse Holdings*, the court was required to consider the meaning of s. 18 of the former Act, which provided that land was to be assessed at its "market value". Section 18(2) defined market value as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer". In *Nesse Holdings,* the majority of the court looked solely at a recent sale of the property as the best evidence of market value, even though the property was subject to a lease with rents substantially below market rates. Robins J.A. dissented. He agreed that ordinarily a recent arm's length sale will be the best evidence of market value, but not always. In particular, "when the evidence establishes, as in this case, that the land is subject to leasehold interests at rentals significantly below current market rentals, the sale price cannot in and of itself establish the value of the land for the purposes of s. 18(2)": *Nesse Holdings* at pp. 441-2. He held that while the sale price is evidence of the market value of the owner's interest, the tenant's interest much be included "in calculating the actual value of the land for assessment purposes": *Nesse Holdings* at p. 442. As Robins J.A. said at p. 442:

> Whether the sales or income method of valuation is employed, *the object of the exercise is to determine the actual or market value of the land for assessment purposes*. It seems to me highly incongruous to require that the tenants' interest be taken into account by basing the value of land on current

> market rents in the case of the income approach and at the same time to disregard the identical interest in the case of the sales approach. In my view, the tenants' interest should be included on either approach where there is a substantial disparity between actual and fair market rents. *It is the totality of the interests in the title to land which is to be valued in order to determine the market value at which the land is to be assessed.* [Emphasis added.]

[20] In reaching this conclusion, Robins J.A. relied upon the earlier decision of this court in *Re Cardinal Plaza Ltd. et al. and Regional Assessment Com'r, Region No. 19 et al.* (1984), 49 O.R. (2d) 161, where Lacourcière J.A. held at p. 163 "that an equitable assessment of multi-residential properties based on the income approach must necessarily use economic rents rather than actual rents".

[21] Interestingly, the majority of the court in *Nesse Holdings* held that if its interpretation of the statute was wrong the Legislature could speedily correct the matter since it "would take very little by way of amendment to extend or clarify the meaning of s. 18(2) if that is the intention": *Nesse Holdings* at p. 440.

[22] The Legislature did indeed amend the *Assessment Act*, albeit perhaps not as expeditiously as the majority contemplated. Among other things, the 1997 amendments removed s. 17, which provided for separate assessments against the owner and tenant and provided a definition of current value. A comparison of the definition of "market value" in the old Act and "current value" in the new Act is instructive:

s. 18(2) of the old Act:

> the market value of the land assessed is the amount that the land might be expected to

> realize if sold in the open market by a willing seller to a willing buyer.

s. 1(1) of the new Act:

> "current value" means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer.

[23] As is apparent, the two definitions are almost identical, but for the inclusion of the phrase "fee simple, if unencumbered" in the new Act. I agree with the Divisional Court that the intent of the 1997 amendments was to clarify that the approach as taken by Robins J.A. in *Nesse Holdings* and Lacourcière J.A. in *Re Cardinal Plaza Ltd. et al. and Regional Assessment Com'r, Region No. 19 et al.* was correct. The simple amendment instructs the assessor to ignore encumbrances, such as leases that are not at market rents. Where the income approach is taken, the assessor is, as held by Lacourcière J.A., to use market rents rather than actual rents. I do not agree that this minor amendment was intended to accomplish the much more radical task of instructing the assessor to assume that an income-producing property was vacant at the date of assessment.

Carsons' Camp

[24] I also agree with the Divisional Court that this court's decision in *Carsons' Camp* supports the view that what is to be assessed is the whole value of the land, including the value of market value leases. In that case, the court held that trailers, owned by other persons, were nevertheless part of the property owner's land and their value had to be included in the "current value" of the land for assessment purposes. The Divisional

Court correctly applied the reasoning from *Carsons' Camp* to the facts of this case at para. 51:

> The same reasoning applies where ownership of interests in the land is divided by leasehold interests granted by the owner. This is supported by a contextual interpretation of the statutory provision. "Current value" is defined "in relation to land". It matters not that portions of the land have been leased; undoubtedly the Bank Towers in issue here and the land upon which they are situate are land, as defined in the *Assessment Act*. The definition connotes a notion of market value in referring to "the amount of money the fee simple . . . would realize if sold at arm's length by a willing seller to a willing buyer". For single family dwellings this will generally approach market value on the valuation date. To value these Bank Towers on the basis that they are vacant, when all agree that that is an entirely hypothetical scenario, is to significantly undervalue them compared to other real property and undermines the purpose of the *Assessment Act,* to fairly divide the burden of real property taxation. *The definition is in relation to "value", and, in our view, "fee simple, if unencumbered" describes a valuation standard and does not limit the nature of the asset to be valued, which is the whole of the land. In the context of income-producing property, "fee simple if unencumbered" means value calculated without reference to leases at other than market value, a long-standing principle governing assessment of income-producing property, and corrects the anomaly referred to by Robins J.A. in ... Nesse Holdings Ltd.* .... [Emphasis added.]

[25] I agree. The office towers are to be assessed in accordance with the income approach using market rents and allowing for only a normal vacancy rate, which I understand from the evidence to be 7 per cent.

ORDER TO BE MADE

[26] I disagree with only one aspect of the Divisional Court's decision. I see no reason for returning the case to a differently-constituted panel of the Board. The Board heard evidence and submissions over a 62-day period. Many of the matters determined in the Interim Decision are unaffected by the legal error concerning the meaning of "fee simple, if unencumbered" and directly engaged the Board's expertise in assessment matters.

[27] Accordingly, I would allow the appeal only to the very limited extent that the matter should be returned to the same panel of the Board. The respondents are entitled to their costs which I would fix at $50,000 inclusive of disbursements and G.S.T. to be divided equally between MPAC and the City of Toronto.

M. Rouleau J.A.

RELEASED: "SR" OCT 15 2010

I agree Robert P. Armstrong J.A.

I agree R.G. Juriansz J.A.