

CANADA / JUDGMENT

Millennium Southeast False Creek Properties Ltd. v. British Columbia

2010 BCSC 1156

COURT

Supreme Court of British Columbia

DECIDED

16 August 2010

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2010 BCSC 1156 Millennium Southeast False Creek Properties Ltd. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Millennium Southeast False Creek Properties Ltd. v. British Columbia,

2010 BCSC 1156

Date: 20100816

Docket: S103654

Registry: Vancouver

Between:

Millennium Southeast False Creek Properties Ltd.

Petitioner

And

Her Majesty the Queen in the Right of the Province of British Columbia and

The Administrator of the Property Transfer Act

Respondent

Before: The Honourable Madam Justice Kloegman

Reasons for Judgment

Counsel for the Petitioner:

J. A. Nitikman

M. N. Moriartey

Counsel for the Respondent:

A. H. Dalmyn

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 28 and July 15, 2010

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2010

- [1] In 2006, Millennium Southeast False Creek Properties Ltd. ("Millennium") entered into an agreement to lease (the "Lease") some bare land (the "Land") from the City of Vancouver (the "City") and agreed to build, at its own expense, certain buildings on it (the "Buildings"). Under the Lease, the City owns the Land and Millennium owns the Buildings.
- [2] Millennium is now poised to buy the Land from the City. The Land will have the Buildings on it, but Millennium is not paying for the Buildings because it has already paid for them to be built and the Lease states that ownership of the Buildings is vested in Millennium.
- [3] Millennium seeks a Declaration that, on a proper construction of the Property Transfer Tax Act, R.S.B.C. 1996, c. 378 (the "PTTA"), it will not have to pay Property Transfer Tax ("PTT") on the Buildings.
- [4] The Crown makes a preliminary objection that the present proceeding is premature in that there has not yet been a conveyance or transfer to trigger the provisions of the PTТА, nor has there been a decision resulting from the exercise of any statutory power. Millennium will have an adequate remedy against any assessment and determination of fair market value by statutory appeal. This proceeding will confuse and fragment the process of assessment and statutory appeal.
- [5] Further, the Crown submits that at common law and under the Land Title Act, R.S.B.C. 1996, c. 250 (the "LTA"), and the PTТА, buildings are fixtures and part of the estate in fee simple. When Millennium registers its transfer of estate in fee simple in the Land Title Office, the Buildings will be considered part of the Land for the purpose of evaluation and taxation under the PTТА.

Preliminary Objection

- [6] The Crown objects to the manner in which Millennium has proceeded on this Petition. In essence, the Crown says that Millennium is attempting to short circuit the legislative regime in place under the PTTA by appealing to this court before any assessment decision has been made.
- [7] The Crown submits that it would be inappropriate for the court to address the determination of fair market value until there has been an assessment decision. The Administrator has the right to assess and weigh the evidence and determine whether the statutory conditions for an assessment have been met. Her determination of value will be valid and binding under s. 18(7) of the PTTA unless varied on appeal. Under s. 19 and s. 21 of the PTTA, the Administrator's decision is subject to an appeal on the merits. Pre-emptive declaratory judicial review is inappropriate.
- [8] The Crown submits further, in view of Millennium's arguments about the operation of the Land Title Office, certificates of title and transfers, it is not prudent to consider Millennium's argument without giving notice to the Land Title Office and considering submissions on the point. Millennium's arguments go to the heart of the land titles system because Millennium says that a transfer of land does not pass title to existing buildings.
- [9] Millennium submits in response that this is not an application for judicial review; it is an application to construe the word "land" as it is used in the definition of "fair market value" in s. 1(1)(a) of the PTTA. Millennium argues that this is a question of law that is entirely appropriate for this court to decide summarily. Millennium relies on a number of Ontario cases in which the courts have made declarations under tax legislation: *Sunnybrook and Women's College Health Sciences Centre v. Ontario (Minister of Finance)*, [2003] O.J. No. 1168 (C.A.); *Toronto Blue Jays Baseball Club v. Ontario (Minister of Finance)*, 2005 D.T.C. 5356 (Ont. S.C.J.), rev'd (2005), 250 D.L.R. (4th) 63; *Bell Canada v. Ontario (Minister of Finance)* (2005), 79 O.R. (3d) 143 (S.C.J.), aff'd [2006] O.J. No. 1101 (Ont. S.C.D.C.).
- [10] I note that since those cases were decided, Ontario has amended its tax statutes to prohibit tax payers from seeking court declarations by way of petitions.
- [11] In *Inco Ltd. v. Ontario (Minister of Finance)* (2002), 61 O.R. (3d) 561 (S.C.J.), the court drew the distinction between determining the law applicable to a tax case, which was appropriate for court declaration, and the actual handling of a specific transaction, which was not an area into which the courts should venture. In my view, this is the key distinction to apply to the case at bar.
- [12] Millennium maintains that all I have to do is construe the meaning of a particular word in a particular statute, but this is not consistent with its Petition which seeks a ruling from me pertaining to a specific transaction. Indeed, a significant part of Millennium's argument is that the transaction between the City and Millennium is unique and therefore its legal effect should be distinguished from the other cases that say regardless of what the parties have

agreed to, a transfer of an estate in fee simple triggers PTT on a fair market value that includes the Land and all improvements thereon: *Woodspan Construction Ltd. v. British Columbia (Minister of Finance & Corporate Relations)* (1991), 60 B.C.L.R. (2d) 378 (S.C.); *Allen v. British Columbia*, [1994] B.C.J. No. 2387 (S.C.); and *Fording Coal Ltd. v. British Columbia* (1995), 6 B.C.L.R. (3d) 594 (S.C.), *aff'd* (1996), 22 B.C.L.R. (3d) 178 (C.A.).

- [13] In essence, Millennium seeks a Declaration that would interfere with the Administrator's assessment of PTT on this transaction, by dictating the manner in which fair market value is to be determined.
- [14] I agree with the Crown that when an administrative scheme such as that set out under the PTТА exists, it should be followed. To circumvent this procedure is to negate the efficacy that supports the rationale for existence of administrative tribunals in the first place. The role of the courts is to review decisions made by statutory decision makers to ensure the decisions are made according to law, not to pre-empt the decision maker's authority to make the decision. The right of appeal in the PTТА ensures that those specializing in tax assessments will deal with matters at the early stages, but allows a clear route to appeal to a judicial tribunal, and ultimately to the Court of Appeal, under ss. 19 and 21 of the PTТА.
- [15] Accordingly, I accede to the Crown's preliminary objection and would dismiss the Petition on that basis.
- [16] However, in the event that I am incorrect in my finding that Millennium is not entitled to avoid the procedure of the PTТА and seek advance declaratory relief from this court, I shall go on to consider the merits of the Petition.

Does the word "land" in the definition of fair market value in paragraph 1(1)(a) of the PTТА include the Buildings?

[17] Section 2(1) of the PTТА provides:

...on application for registration of a taxable transaction at a land title office, the transferee must

- (a) Pay tax to the government in accordance with section 3 or 38, and
- (b) File a return, in the prescribed manner, whether or not the taxable transaction is exempt under this Act.

...

[18] Section 3 provides:

- (1) The tax payable under this Act is
 - (a) 1% of the first \$200 000 of the fair market value of the taxable transaction, and
 - (b) 2% of the remaining fair market value of the taxable transaction.

...

[19] Section 1(1) provides:

"taxable transaction" means a transaction

- (a) purporting to transfer or grant, by any method including a disposition, an order of a court, including an order absolute of foreclosure, or by the operation of any enactment or law,
- (i) an estate in fee simple referred to in section 23 (2) of the Land Title Act,

...

[20] Section 1(1) also provides:

"fair market value" means

- (a) for a transaction referred to in paragraph (a) (i) of the definition of "taxable transaction", the amount that would have been paid for the fee simple interest in the land had it been sold at the date of registration of the taxable transaction in the open market by a willing seller to a willing purchaser free of any trust and unencumbered by
- (i) a mortgage, debenture, trust deed, hypothecation agreement or any other financial instrument...

...

[21] Section 23(2) of the LTA referred to in the definition of taxable transaction states:

- (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

...

- (9) a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title;

[22] Millennium submits that the terms of the commercial lease between it and the City create a charge under s. 23(2) of the LTA, and are thereby an exception to the indefeasible title.

Millennium also relies on s. 29 of the Interpretation Act, R.S.B.C. 1996, c. 238, that states:

In an enactment:

...

"land" includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning;

- [23] Millennium submits that the words in s. 23(2)(g) of the LTA which are incorporated in the definition of taxable transaction in the PTTA, restrict the meaning of the word land in that section. Millennium submits that the charge here in question, being the Lease, contains a provision whereby the parties agreed that title to and ownership of the Buildings on the land would at all times during the term of the Lease be vested in Millennium. Millennium submits that this is the contrary intention to which s. 2(1) of the Interpretation Act applies:

Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

- [24] Therefore, Millennium submits that for the purposes of the PTTA, the estate in fee simple in the Land which is subject to tax, does not include the matters reserved under the Lease, that is, the Buildings. The Buildings are not part of the City's estate in fee simple and are not part of the land which must be valued under the definition of fair market value.

- [25] To accede to this submission of Millennium is to ignore the preponderance of case authority in British Columbia that would say otherwise.

- [26] Woodspan Construction (supra) is very similar on its facts to the case at bar. A vendor entered into a contract of purchase and sale with a contractor for vacant land. The contractor took possession of the land and constructed a building on it. The contractor then entered into a contract of purchase and sale of the land and building to a third party. Both the transfer from the original vendor to the contractor, and the transfer from the contractor to the third party were registered in the Land Title Office on the same day. The issue was whether the amount of tax payable by the contractor ought to be calculated on the amount paid by the contractor to the vendor for the vacant land, or on the value of the developed land with the building on it.

- [27] Scarth, J. found that the words used in s. 2 of the Property Purchase Tax Act, S.B.C. 1987, c.15 (now the PTTA) were plain and unambiguous and led to the clear conclusion that the tax payable by the contractor had to be calculated on the fair market value of the property as at the date of registration of the transfer, which included the value of the building. He found that the interest to be transferred under the taxable transaction did not fall within any of the exemptions under s. 23(2) of the LTA. He considered s. 29 of the Interpretation Act, which defines land to include all buildings and houses unless the enactment uses words to exclude them, and concluded that no such exclusion existed in the Property Purchase Tax Act. He stated that whatever the private understanding between the vendor and the contractor may have been, it did not affect the fee simple nature of the interest that was being transferred.

- [28] In Allen (supra) the petitioners erected substantial improvements on land they occupied by way of license from the Crown. They then opted to purchase the land. They, too, argued that their beneficial ownership in the improvements that pre-existed transfer of title should operate to exclude the value of the improvements from any tax assessment, and that PTT should be calculated on the fair market value of the bare land. The court was sympathetic to the fact that the petitioners had expended time, cost and energy in constructing the

improvements, but found--at para. 10--that there was no ambiguity in the wording of the statute, and that the situation was indistinguishable from Woodspan Construction:

... In essence [Woodspan Construction] states that in determining the fair market value of land, buildings or other structures affixed to the land on the date of the transfer are to be taken into account, no matter how, or by whom, or in what matter such buildings or other structures become part of the "land"...

[29] Finally, the Court of Appeal in Fording Coal, stated that the fair market value of the taxable transaction included the value of the coal processing plant, storage and shipment site constructed by Fording on lands leased from the Crown, and later purchased from the Crown. In doing so, the Court of Appeal upheld the trial judge's reasoning found at para. 8-9 of the trial judgment:

This definition of fair market value imposes tax on the fair market value of the fee simple even if the transfer involves an estate which is less than the fee simple.

Here the parties agreed on a purchase price with reference to an appraisal of the value of the land as if vacant without improvements. The Crown sold its reversionary interest in both the land and the improvements. But inasmuch as Fording's leasehold interest had been unregistered, Fording obtained a registered interest in both land and improvements for the first time by registering the Crown grant. On the face of the register, the Crown grant transferred the whole fee simple interest in both land and improvements, even though Fording had been in possession of both with a legal right of occupation and use by reason of its leasehold interest. Thus the fair market value of Fording's improvements must be included for tax purposes even though Fording had the prior unregistered right of occupation and use of those improvements.

[30] In the case at bar, Millennium argues that because it registered its lease against the Land, which lease recognizes ownership of the Buildings by Millennium, it somehow secured a position that allows it to avoid the result of the rulings in the above cases. In my view, I am bound to follow the principles in the precedential cases set out above. This means that registration of this four year lease, which expires in September 2010, does not operate to exclude the value of the Buildings when assessing the fair market value of the taxable transaction for the purposes of the PTTA.

[31] Therefore, I would dismiss the Petition on its merits also.

[32] As Millennium has been unsuccessful on both issues, the Crown is entitled to costs on a scale B.

"Kloegman J."

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