Federal Court of Appeal | Cour d'appel fédérale

Date: 20220704

Docket: A-110-21

Citation: 2022 FCA 124

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
MONAGHAN J.A.

BETWEEN:

CARVEST PROPERTIES LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on June 21, 2022.

Judgment delivered at Ottawa, Ontario, on July 4, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220704

Docket: A-110-21

Citation: 2022 FCA 124

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
MONAGHAN J.A.

BETWEEN:

CARVEST PROPERTIES LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] Prior to legislative amendments in Ontario in 2017, municipalities were permitted to impose real property taxes on apartment buildings at the commercial rate, rather than the residential rate that applied to condominiums. As a result, residential landlord/developers frequently registered buildings they intended to operate as apartment buildings as condominiums under Ontario's *Condominium Act, 1998,* S.O. 1998, c. 19 (*Condominium Act*).

[2] Under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, builders of residential property that rent the property, rather than sell it, are required to self-assess goods and services tax (GST) based on the fair market value of the property. The relevant rules are in section 191 of the *Excise Tax Act*.

[3] Subsection 191(3) applies to a "multiple unit residential complex"—a term that encompasses an apartment building but expressly excludes a "condominium complex". Subsection 191(1) applies to a "residential condominium unit". Each of the terms "multiple unit residential complex", "condominium complex" and "residential condominium unit" is defined in the *Excise Tax Act*: see subsection 123(1). A residential condominium unit includes "a separate unit on a registered condominium or strata lot plan…registered under the laws of a province". A building containing more than one residential condominium unit is a condominium complex.

[4] For the purposes of this appeal, it is sufficient to summarize how section 191 applies to a builder of multi-unit buildings who rents units to individuals as residences.

[5] Where the property is a residential condominium unit, and so subsection 191(1) applies, the builder is deemed to have made and received a taxable supply of the unit by way of sale at the later of substantial completion and the first time an individual is given possession of the unit under a lease (except where possession is given pending sale under a purchase and sale agreement). The builder must determine the fair market value of the residential condominium unit at the time of the deemed supply. Thus, subsection 191(1) requires valuation of individual residential condominium units as they are rented.

[6] Where the building is a multiple unit residential property (and thus not a condominium complex), subsection 191(3) applies, and the builder is deemed to have made and received a taxable supply of the building by way of sale at the later of substantial completion and the first time an individual is given possession of a unit in the building under a lease. In these circumstances, the builder must determine the fair market value of the building at that same time.

[7] The *Excise Tax Act* does not define fair market value (except to say that it is to be determined exclusive of GST and certain provincial taxes) and, while section 191 specifies what is to be valued and when, it does not specify how fair market value is to be determined.

[8] The appellant, Carvest Properties Limited, constructed a 137-unit building in London, Ontario, for purposes of renting the units. Nonetheless, it registered the property under the *Condominium Act*. As required, the appellant self-assessed GST based on a fair market value for the property of approximately $22 million as of December 1, 2008, determined using a method described as cost plus 6%. In 2001, the Canada Revenue Agency (CRA) had accepted that method in settling a dispute with the appellant concerning a different property and reporting periods that were not in issue in this appeal.

[9] The CRA disagreed with the appellant's valuation. The CRA prepared an appraisal and determined the aggregate fair market value of the residential condominium units subject to self-assessment was approximately $33 million and reassessed accordingly. The appellant appealed the reassessment to the Tax Court of Canada.

[10] It should be noted that the appeal to the Tax Court originally involved four buildings and reporting periods between December 1, 2008 and July 31, 2011. However, due to concessions, the appeal was narrowed to one building, to 89 of the 137 units in the building, and to reporting periods between December 1, 2008 and June 30, 2009.

[11] In preparation for litigation, Carvest engaged an independent appraiser to prepare a valuation of the property.

[12] The CRA and the independent appraiser described the three appraisal methods used in the industry:

i. The cost method which involves estimating the current replacement construction cost for the property, deducting depreciation from the total cost, and adding the estimated land value.

ii. The income method which estimates the present value of a property based on capitalization of the future income and benefits from the property.

iii. The direct comparison approach which is based on a comparison of similar properties that have recently sold, identifying appropriate points of comparison, and making relevant adjustments.

[13] The Tax Court (2021 TCC 21, *per* St-Hilaire J.) decided that (i) the relevant property to be valued was the individual units in the building; (ii) the appropriate valuation method was the direct comparison method; and (iii) the relevant market was the sale market for condominium units. Only the CRA appraiser used the direct comparison method. The Tax Court agreed with the fair market value determined in the CRA valuation and dismissed the appeal.

[14] The appellant appeals that decision, asserting several grounds of appeal. However, in my view, they all amount to different versions of the same question: did the Tax Court err in its determination of fair market value because it incorrectly identified the assets to be valued and thus chose the wrong valuation method and the wrong market?

[15] In this appeal, the appellate standard of review applies. Questions of law are to be determined on the correctness standard, and questions of fact and questions of mixed fact and law (excluding extricable questions of law) are to be determined on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[16] For the reasons that follow, I would dismiss the appeal.

[17] The appellant says the Tax Court made an error of law which led to a palpable and overriding error of mixed fact and law. In particular, the Tax Court erred by treating fair market value as a question of law, not fact, and this error is apparent, says the appellant, from the Tax Court's inconsistent factual findings and its conclusion about the property to be valued. Because the units in the building met the definition of "residential condominium unit" in the *Excise Tax*

Act, the Tax Court treated the units as condominiums, rather than as what they were—leased apartments that were registered as condominiums. This error, says the appellant, led the Tax Court to conclude it was bound to use the direct comparison method to determine the fair market value of the units for purposes of subsection 191(1). This, says the appellant, was an error of law.

[18] I disagree.

[19] I see no merit in the appellant's assertion that the Tax Court made inconsistent factual findings. While the Tax Court referred to the units as both leased apartments and condominiums, reading the Tax Court's reasons holistically, there is no doubt the Tax Court understood the relevant facts: (i) that the building was registered as a condominium under the *Condominium Act*; (ii) that the appellant, as it intended from the outset, rented the units and treated the entire property as an apartment building; (iii) that the individual units in the building were leased to individuals as residences; (iv) that those leases were entered into over a period of several months; and (v) that the individual units were not intended to be (and were not) made available for sale as condominiums.

[20] There is no dispute that subsection 191(1) applies, that the units in the appellant's building qualify as "residential condominium units" for purposes of the *Excise Tax Act*, and that what must be determined therefore is the fair market value of the individual units. I am satisfied that any reference in the Tax Court's reasons to the units as condominium units is intended to convey nothing more.

[21] In support of its position that the Tax Court erred, the appellant cites two decisions, *Henderson Estate v. Canada (*Minister of National Revenue – M.N.R.) (1973), [1973] C.T.C. 636, 73 D.T.C. 5471, (F.C.T.D.) and *Canada (Attorney General) v. Nash*, 2005 FCA 386, 344 N.R. 152 (*Nash*). The appellant says these cases teach that determining fair market value is a fact-based exercise that first requires identification of the asset to be valued and then the market in which that asset is normally traded. Thus, says the appellant, the Tax Court should have identified the asset to be valued as an apartment in an apartment building. Had it done so, says the appellant, it would have correctly identified the market in which that asset normally trades as the market for other large multi-unit residential buildings constructed for rental purposes, but registered as condominiums.

[22] I first observe that the Tax Court cited and applied the principles from these same two cases. The Tax Court recognized that subsection 191(1) required it to determine the fair market value of each "residential condominium unit". Thus, consistent with *Nash*, it first identified the property to be valued—the individual units in the building.

[23] Secondly, the Tax Court did not, as the appellant suggests, ignore "evidence that there is a real, existing, functioning market in which the income-producing leased apartment units in apartment buildings registered under condominium plans are normally sold". Rather, the Tax Court observed, there is no "real, functioning, normal market for the sale of individual apartment units in a rental apartment building" (Reasons at para. 88). And, the fair market value of the individual units in the appellant's rental building is what the Tax Court was required to determine.

[24] Moreover, the Tax Court was provided with three valuations. The appellant's valuation used the cost plus 6% method and determined the fair market value of the building as of December 1, 2008 to be approximately $22 million. The independent appraiser engaged by the appellant used the income approach and determined the fair market value of the building as of December 1, 2008 to be approximately $24 million. He allocated that value to the units based on square footage. The CRA appraiser used the direct comparison method, looking at condominium sales as comparables, and arrived at an aggregate fair market value for the units in the building of approximately $33 million.

[25] Significantly, none of the valuations was based on sales of other apartment buildings—the market the appellant says the Tax Court should have considered. The independent expert "explained that he did not use the direct comparison method in determining the [fair market value] of the Richmond property because there were no sales of comparable properties, i.e., high-end purpose-built rental properties in London in 2008" (Reasons at para. 56).

[26] I also disagree with the appellant's assertion that because the Tax Court characterized the property to be valued as condominium units, rather than leased apartments, it considered itself bound to use the direct comparison method and the individual condominium resale market. As I have already noted, the Tax Court understood the units were rented but also qualified as "residential condominium units" for purposes of the *Excise Tax Act*.

[27] Secondly, the Tax Court did not consider itself bound by any valuation method. Rather, it considered each of the valuations before it, and all of the valuation methods, before choosing the

direct comparison method as appropriate in the circumstances of this case and accepting the CRA valuation.

[28] The Tax Court recognized the three approaches to valuing real estate described by the appraisers: the cost method, the income method and the direct comparison method. All of the appraiser witnesses agreed the cost approach was inappropriate and the Tax Court agreed. The Tax Court rejected the appellant's cost plus 6% valuation, observing "none of the witnesses who conducted appraisals … provided testimony on the validity in any circumstances of the cost plus 6% approach" (Reasons at para. 51).

[29] The Tax Court also rejected the independent appraiser's valuation, but not because of the methodology used to prepare it—the income approach. Rather, the Tax Court rejected it both because it valued the wrong property—that is, the entire building—and because the valuation was as of an incorrect date—December 1, 2008. Only eight units were rented at that time.

[30] Having "concluded that the income approach used by [the independent appraiser] and the cost plus 6% approach used by [the appellant] were inappropriate methods of valuation in the circumstances", the Tax Court was left "with one approach, the direct comparison approach, to consider" (Reasons at para. 80).

[31] While only the CRA valuation used the direct comparison method, the Tax Court did not accept it for that reason alone. Rather the Tax Court considered whether the CRA's valuation "applied the [direct comparison] method correctly" and, in particular, whether it "used the

appropriate comparables and made the proper adjustments" (Reasons at para. 98). Concluding that it did, the Tax Court accepted that valuation and dismissed the appeal.

[32] I am satisfied that the Tax Court chose the direct comparison valuation method because it decided it was the appropriate method in this case for the reasons it explained—and "none of the evidence submitted…persuaded [it] otherwise" (Reasons at para. 97). While it found support for that choice in the Tax Court's decision in *27 Cardigan Inc. v. The Queen*, 2004 TCC 448, appeal allowed on a different issue 2005 FCA 100, and in the Appraisal Institute of Canada's book on the appraisal of real estate, I see no suggestion the Tax Court considered itself bound to choose that method. Had it considered itself bound, why would it address the appropriateness of the other valuations and valuation methodologies?

[33] In summary, I see no error of law. The Tax Court, as it was entitled to do, chose the direct comparison approach as "the appropriate valuation approach in the circumstances of this case" (Reasons at para. 97) to determine the fair market value of the units, the property required to be valued by subsection 191(1).

[34] The other grounds advanced by the appellant may be addressed briefly.

[35] The appellant's memorandum of fact and law suggests that the proper approach is to first determine the value of the property and then decide which part of section 191 applies—subsection 191(1) or 191(3)—and that, by reversing the order, the Tax Court erred. Again, I disagree. While the parties had agreed that subsection 191(1) is the applicable provision, even if

the applicable provision were in dispute, the appellant's premise is misplaced. The first step must be the identification of the relevant property because that determines whether subsection 191(1) or (3) applies. While both require a determination of fair market value, the property to be valued is fundamentally different. In the former, it is the individual units; in the latter, it is the building as a whole. Indeed this is consistent with *Nash,* cited by the appellant—the first step is to identify the property to be valued.

[36] Finally, the appellant stated several times before us that the CRA's valuation should not have been accepted because, in cross-examination, the CRA appraiser agreed that his valuation would not be appropriate for financing purposes. This, says the appellant, suggests that the fair market value determined by the CRA is not reflective of fair market value—or, as the appellant also put it, that the respondent considers the fair market value for tax purposes to be something other than fair market value for other purposes. I disagree.

[37] I first observe that the CRA appraiser explained why the valuation he prepared would not be appropriate for financing purposes, including that he was unable to inspect the property and obtain the level of detail that would have been possible and necessary had he been appraising for financing purposes. Moreover, in my view, the appellant is asking us to reweigh the evidence and come to our own conclusions, something we cannot do absent palpable and overriding error by the Tax Court. I see none here.

[38] In conclusion, the appellant has not demonstrated that the Tax Court made an error of law or a palpable and overriding error of fact or mixed fact and law. Accordingly, I would dismiss the appeal with costs.

"K.A. Siobhan Monaghan"
J.A.

“I agree
Yves de Montigny J.A.”

“I agree
George R. Locke J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE GABRIELLE ST-HILAIRE DATED MARCH 18, 2021, DOCKET NO. 2017-345(GST)G

DOCKET:	A-110-21
STYLE OF CAUSE:	CARVEST PROPERTIES LIMITED v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 21, 2022
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	JULY 4, 2022

APPEARANCES:

David Douglas Robertson Brittany Rossler	FOR THE APPELLANT
Martin Beaudry Noemie Vespignani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

EY Law LLP Toronto, Ontario	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT