Federal Court of Appeal  Cour d'appel fédérale

Date: 20190325

Docket: A-409-16

Citation: 2019 FCA 54

CORAM: **PELLETIER J.A.**
STRATAS J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

JOANNE SCHNURR ON HER OWN BEHALF AND AS A REPRESENTATIVE PLAINTIFF

Respondent

and

SAKIMAY FIRST NATION

Intervener

Heard at Regina, Saskatchewan, on November 29 and 30, 2017.

Judgment delivered at Ottawa, Ontario, on March 25, 2019.

REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A.
DISSENTING REASONS BY:	STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the decision of the Federal Court in *Schnurr v. Canada*, 2016 FC 1079 (Reasons).

[2] These reasons are the complement to the reasons in the companion appeal, *Her Majesty the Queen in Right of Canada and David Piot on his own behalf and as a representative plaintiff, and Sakimay First Nation*, cited as 2019 FCA 53, which are being released at the same time. The difference between the two cases is the form of lease used by the Sakimay First Nation to lease recreational lots on its two reserves on Crooked Lake in the Qu'Appelle Valley in south-eastern Saskatchewan.

[3] The lease in the *Piot* appeal is referred to as the 1991 lease while the lease in this appeal is called the 1980 lease. The two leases are substantially the same except for the rent review clause. The 1991 lease provides that the rent shall be based on the "fair market value" of the land while the lease in this case provides that the rent shall be fixed by the Minister in an amount that represents "the fair market rental value of the land for the purpose herein permitted", excluding improvements erected by the lessee during the term of the lease.

[4] Notwithstanding the differences in the leases, the approach used by Mr. Thair, the appraiser whose evidence the Federal Court preferred, was essentially the same in both cases. Mr. Thair submitted a single report for both cases and came to the same conclusion in both cases as to the calculation of rent for the renewal period.

[5] The Federal Court's approach to the evidence was essentially the same in both cases. In this case it accepted Mr. Thair's evidence for the same reasons given in the *Piot* case: Reasons at para. 58. As a result, my criticism of that approach in the *Piot* case applies to this case.

[6] Since the grounds of appeal are largely the same, except for the references to the particular leases, my treatment of the grounds of appeal in *Piot* applies in this case. There is however one argument specific to this case.

[7] The Crown submits that the interpretation of the 1980 lease is a question of law subject to review on the standard of correctness, relying on the decision of the Supreme Court of Canada in *Ledcor Construction Ltd. v. Northridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 24, 46, [2016] 2 S.C.R. 23 (*Ledcor*). In that case, the Supreme Court drew a distinction between the interpretation of standard form contracts (contracts of adhesion) and the interpretation of contracts generally, as laid out in its earlier decision, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (*Sattva*). In *Sattva*, the Supreme Court held that the interpretation of contracts raises a question of mixed fact and law and is therefore subject to review on a deferential standard.

[8] The Supreme Court's decision in *Ledcor* is based on two factors absent in *Sattva*: the precedential value of the court's construction of a contract of adhesion for others bound by the same contract and the absence of a meaningful factual matrix specific to the parties.

[9] The Federal Court found that the 1980 leases were a standard form lease, drafted by the Crown, without negotiation with lessees who were presented the lease for execution on a "take it or leave it" basis: Reasons at para. 16. This would satisfy both conditions stipulated in *Ledcor*. In response, Ms. Schnurr argues that the Federal Court dealt with the factual matrix "when [it] interpreted provisions within the lease agreements": Memorandum of Fact and Law at para. 30. I have not been able to identify where the Federal Court interpreted the terms of the 1980 lease. I

will proceed on the basis that, in this case, the standard of review is correctness. This is not a finding that all leases, or all recreational leases, entered into by the Crown are subject to review on the correctness standard. In each case, the standard of review is to be determined according to the criteria set out in *Ledcor* and *Sattva*.

[10] The material portions of the rent review clause provides as follows:

> 2.01 […]The annual rent for the ensuing five (5) year period commencing on the first day of January, 1985, shall be fixed and determined by the Minister in an amount which, in the opinion of the Minister, represents the fair market rental value of the land for the purpose herein permitted as at the date of such review, but excepting thereout and therefrom the value of any permanent improvements erected by the Tenant on the land during the term.

[11] The phrase used in the lease "the fair market rental value of the land" raises the question as to whether this phrase is meaningfully different from the phrase "fair market value of the land" used in the 1991 lease and in *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633 (*Musqueam*).

[12] The Crown takes the position that the 1980 lease requires that the leases be valued as freehold. In its Memorandum of Fact and Law, the Crown relies upon *NRI Manufacturing Inc. v. Gross*, 1998 CarswellOnt 2741 (Ont. Ct. J., Gen. Div.) (*NRI*) as authority for the proposition that the use of the word "rental" as opposed to the term "market" in the phrase "fair […] value" does not require that the terms of the lease be taken into account in the valuation exercise. The lease in *NRI* was a lease of commercial property and the debate was whether the rent was to be determined according to the "subjective" or "objective" approach. Following a review of certain texts and authorities, the Court concluded that the objective approach was to be preferred and

that the insertion of the word "rental" should not alter the reasonable interpretation to be placed on the rent review clause.

[13] The Crown also relies on an article by Cynthia Kuehl and Rivka Birkan-Bradley, "Arbitrating 'Rent' – A Case Study of the Arbitration Process and Contract Interpretation" in Justice Todd L. Archibald & Justice Randall Scott Echlin, *Annual Review of Civil Litigation 2015*, 15th ed (Toronto: Carswell Thomson Reuters, 2015). The Crown quotes the authors as saying that if a lease uses "the language of 'unencumbered'", the inclusion of the word "rent" in the rent review clause is irrelevant and the rent review analysis is based on a freehold interest.

[14] The Crown also says at paragraph 43 of its Memorandum of Fact and Law:

> The 1980 lease in this case also requires the land to be valued without reference to "the value of any permanent improvements erected by the Tenant on the land during the term." This too indicates that the rent is to be determined with reference to the freehold rather than the leasehold value of the land. Kuehl and Birkan-Bradley state that language such as "vacant" "unencumbered" and "unimproved" suggests that rent is to be based on a freehold rather than leasehold valuation "even in the presence of language of fair market rental."

[15] The Crown's submissions ignore the critical difference between the lease in this case and the lease in *Musqueam*. In *Musqueam*, the lease stipulated that the rent in successive rent review periods was to be a "fair rent" which was defined in clause 2(4) of the lease as a rent which represented six percent of the current land value. Thus the lease required that the rent be calculated on the basis of a given rate of return (6%) applied to a capital amount (the current land value). The debate between the various levels of court was the nature of that capital amount.

[16] The lease in this case contains no such provision. It simply provides that the Minister must fix the rent in an amount which, in the Minister's opinion, represents "the fair market rental value of the land for the purpose herein permitted…" There is no requirement that the rent be calculated in any particular way. The Minister can fix the rent according to any method which, in his or her opinion, results in an amount which represents the fair market rental value of the land. As a result, there is no need or requirement to establish a notional capital amount to which a rate of return can be applied. In other words, the question of freehold versus leasehold does not arise in the way proposed by the Crown, given the terms of the lease.

[17] The Crown also argues that the Federal Court erred in accepting a valuation based on its use as residential leasehold property. This argument fails for two reasons. First, the lease requires that "fair market rental value of the land" be determined in relation to "the purpose herein permitted". The permitted use of the land, as set out in section 10.01, is as a single family dwelling. It is not an error to determine the fair market rental value of the land on that basis.

[18] Secondly, as noted at paragraphs 110-111 of my decision in the *Piot* appeal, Mr. Thair found that the highest and best use of the land in question was for single family dwellings. It cannot be an error to appraise land at its highest and best value.

[19] I would therefore allow this appeal with costs for the reasons given in the *Piot* appeal which I incorporate by reference into these reasons.

[20] At pages 35-36 of his report (Appeal Book at pp. 690-691), Mr. Thair sets out his methodology for the 1980 leases based largely on the direct comparison approach. Thereafter,

Mr. Thair does not distinguish between the 1980 and 1991 leases in his calculations until he is summing up his conclusions. At page 182 of his report (Appeal Book at p. 837), he writes:

> The rates that were selected for the 1980 leases were the same as those for the 1991 leases after application of the rate of return.

[21] As a result, even though the 1980 and 1991 leases stipulate different bases for the rent determination, those methods converge into the same rates which are to be used under both leases. To simplify the Federal Court's task in setting the rates, I would return this matter to it with the direction that the methodology established with respect to the 1991 leases be applied to the 1980 leases.

[22] I would therefore return the matter to the Federal Court with the direction that the rents under the 1980 leases be calculated on the basis of the following methodology:

a) the value of the hypothetical fee simple is $1,800 per frontage foot for lakefront lots;

b) the value of the hypothetical fee simple is $700 per frontage foot for backrow lots;

c) there is no reserve factor adjustment to the hypothetical fee simple values;

d) the rate of return to be used in the calculation of the rent is 1.92% per year;

e) the lakefront to backrow ratio where a calculation is required is 2.7 to 1.0; and

f) any other adjustments shall be as calculated as in Mr. Thair's report except where such a calculation would be inconsistent with the values set out above.

"J.D. Denis Pelletier"

"I agree

de Montigny J.A.” J

.A.

STRATAS J.A. (Dissenting Reasons)

[23] I concur with my colleague's reasoning up until his consideration of remedy. For the reasons I expressed in *Piot*, I would remit the matter to the Federal Court for redetermination in accordance with the principles set out in my colleague's reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONORABLE JUSTICE PHELAN, J. OF THE FEDERAL COURT, DATED SEPTEMBER 23, 2016, REPORTED AS 2016 FC 1079

DOCKET:	A-409-16
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. JOANNE SCHNURR ON HER OWN BEHALF AND AS A REPRESENTATIVE, PLAINTIFF and SAKIMAY FIRST NATION
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 29, 2017, NOVEMBER 30, 2017
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	MARCH 25, 2019

APPEARANCES:

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