BCH Retail Investment Pte Ltd v Chief Assessor
[2002] SGHC 205

Case Number : OM 8/2000

Decision Date : 02 September 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : David De Souza and Jeanette Lee (De Souza Tay & Goh) for the appellant; Leung Yew Kwong And Liu Hern Kuan (Inland Revenue Authority of Singapore, Law Division) for the respondent

Parties : BCH Retail Investment Pte Ltd — Chief Assessor

Revenue Law – Property tax – Annual value – Concept of rent – Whether tenant's contribution of advertising and promotion fees forms part of shop unitÂ's annual value – Whether such contributions bona fide – Whether expenditure on advertising and promotion activities reasonable – Whether landlord under obligation to use such contributions for such activities – Onus on landlord to satisfy Chief Assessor – ss 2 & 35 Property Tax Act (Cap 254, 1997 Ed)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1 This is an appeal pursuant to s 35 of the Property Tax Act ("the Act") against the decisions of the Valuation Review Board in VRB Appeal Nos 252-255 and 282-304 of 1999. All the decisions turn on the same issue and they have been dealt with collectively by the Board in its Grounds of Decision dated 16 May 2002. They turn on the same facts and I shall also deal with them together.

2 The Appellant is the owner, operator and landlord of the shopping centre known as Parco Bugis Junction ("the Shopping Centre"). It has approximately 203 shop units which are let out to 168 tenants under written leases. The anchor tenants are Seiyu, a department store, and United Artists, a multi-screen cinema complex. The subject matter of the present appeals pertain to 27 of the non-anchor shop units.

3 The Shopping Centre opened for business in 1995. From then until sometime in 1997, the Appellant signed leases with its tenants in a form that I shall term the Old Lease and after 1997, in a new form that I shall call the New Lease. The New Lease comprised a lease agreement (the "Agreement") and a Memorandum of Supplemental Lease Terms (the "Memorandum") which was made applicable to the Agreement by clause 2.2 of the Agreement.

4 The payments by each of the Appellant's tenants under its lease comprise four components, viz.:

(i) "Basic Rent" which is a fixed sum payable monthly computed on a per square metre basis as negotiated and agreed between the Appellant and the tenant.

(ii) "Additional Rent" which is the agreed percentage of the tenant's gross sales from the retail unit and which is negotiated and agreed between the Appellant and the tenant.

(iii) "Tenant's Contribution" being the tenant's contribution towards the expenses for cleaning and maintenance services provided by the Appellant to the common areas of the Shopping Centre. Unlike the Basic Rent and Additional Rent, it is a fixed rate of $16.15 per square metre for all tenants (subject to increase).

(iv) "A&P Contribution", expressed in the lease as ***"the fees payable by the Tenant to the Landlord for advertising and promotion as provided in the Lease"***. Like the Tenant's Contribution it is a fixed rate and is set at $3.23 per square metre (subject to a minimum of $100.00 and subject to increase).

5 The provisions relating to A&P Contributions in both the Old Lease and the New Lease are almost identical. In the Old Lease, these

provisions are set out in Schedule 6. In the Agreement, they are found in clause 6. There are minor differences in the A&P Contribution provisions in the two leases. The principal difference is that 1.1 of Schedule 6 of the Old Lease mentions that the payment of the A&P Contribution is "by way of additional rent" but this statement is not found in clause 6.1 of the Agreement. However, clause 6.5.2 of the Memorandum provides that all monies payable under the New Lease shall be deemed to be rent in law. Nothing turns on the differences.

6 The Chief Assessor's assessments of the Annual Value of each of the 27 shop units were based on the actual rates paid of Basic Rent, Additional Rent and A&P Contribution, and did not include the Tenant's Contribution. The Appellant was dissatisfied with the inclusion of the A&P Contribution, and before the Board submitted that it ought to be excluded. The Board dismissed the appeals and the Appellant now appeals before me.

7 The following facts were disclosed in the Appellant's affidavits which were not challenged by the Chief Assessor:

> (a) The A&P Contribution payments were utilised by the Appellant to help defray its costs in carrying out advertising and promotion ("A&P") activities for the Shopping Centre. For such purposes, the Appellant incurred about $2 million each year. However the total collection in respect of A&P Contributions amounted to approximately $500,000, about a quarter of the actual A&P expenses.
>
> (b) The A&P Contributions were paid by all tenants except the two anchor tenants, Seiyu and United Artists.
>
> (c) The Appellant has an A&P Team who work with an advertising agency. The team's role is to co-ordinate the promotional activities for the benefit of the tenants. These activities included staging events, conducting lucky draws and running media advertisements. As many as five promotional programmes are conducted annually in the Shopping Centre to draw shoppers to it. There are also numerous activities, events and promotions organised throughout the year in the Shopping Centre.

8 The appeal turns on the interpretation of the term "annual value" in the Act. Section 2 thereof defines it as follows:

> "annual value" —
>
> > (a) in relation to a house or building or land or tenement … means the gross amount at which the same can reasonably be expected to be let from year to year, the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax); …

The question is whether the A&P Contribution is a part of the gross amount that a shop unit can reasonably be expected to be let. I turn to consider the relevant authorities on this question.

9 In *Chartered Bank v The City Council of Singapore* (1959) SPTC 1 the High Court dealt with an appeal against assessments made by the City Council of certain premises owned by the bank. The assessment for each unit was based on the gross rent received. The High Court allowed deductions to be made from the gross rent of expenses incurred by the landlord for watchmen, cleaning, lifts, air-conditioning and supervision. In addition the Court allowed a deduction of a 15% loading over those costs, being a reasonable return on the landlord's outlay to provide such services. The Court also allowed the deduction of the depreciation of the lifts, air-conditioner and fire extinguishers. This case is authority for the proposition that the costs of providing services of watching, cleaning, lifts, air-conditioning and supervision are deductible from the gross rent to compute the annual value under the Act. Also deductible is a reasonable return on the landlord's outlay to provide such services.

10 In *Bell Property Trust, Limited v Assessment Committee for the Borough of Hampstead* [1940] 2 KB 543, the landlords of a block of flats let to tenants under agreements providing for payment by the tenants of a comprehensive sum, described as rent, for the occupation of

the flats and the benefit of services and amenities such as hot water, central heating and other services usually provided in high class service flats. The English Court of Appeal held that the cost to the landlords of providing those services was deductible from the gross rent before arriving at the gross value of each flat for insertion in the valuation list. The court also held that such deductions might properly include (i) an allowance for a reasonable profit to the landlords on the provisions of such services, and (ii) the cost of repair to and maintenance of the part of the building not demised to tenants, such as passages, stairs, lifts and staff rooms. The statutory provision considered was s 4 of the Valuation (Metropolis) Act 1869 which is similar in all respects with the corresponding provision in the Act, and which provides as follows:

> The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

11 The judgment of the English Court of Appeal was read by Goddard LJ. After referring to the statutory definition of "gross value" he set out the historical context at p 551:

> Now the difficulty, if difficulty there be, is one which is familiar to every one of experience in rating law. The definition is in substance taken from the Parochial Assessment Act 1836, which in turn gave statutory authority to the method of valuation which had been generally adopted for many years before that Act was passed. When rateable hereditaments consisted only of houses, mills, shops, farms, and such like properties, the ascertainment of annual value was comparatively simple, but changing conditions in industrial and social life brought about many complications, and to apply this definition to railways, sewers, gasworks, and other public utility undertakings was difficult in the extreme. In spite of appeals from the courts, Parliament, however, gave no assistance by clarifying the position by legislation. It preserved the definition in further Acts, such as the one which we are now considering, the Union Assessment Committee Act 1862, and, indeed, in the recent Act of 1925, which, while effecting many great and fundamental changes in rating practice and law, left this matter unaltered. Accordingly, the ingenuity of rating surveyors was directed to devising various methods and formul whereby a notional annual value could be attributed to rateable properties which in fact could have no annual value in the ordinary sense, and, as the courts gave their approval to these methods, which from their nature could only be highly artificial, so they took their place in the law of rating. Thus was evolved, to take only two instances, the contractors' theory, as it is called, and also the profits basis, for public utility corporations with property in more than one parish.

12 Goddard LJ drew a distinction between the rent and remuneration for services and amenities provided to the tenant by the landlord, saying:

> … While it does not follow that the actual rent paid by a tenant is the legal measure of the rent which the hypothetical tenant would pay, no question of this sort arises here, as the surveyors on both sides evidently considered that the actual rents reserved were what a hypothetical tenant would pay, and the questions raised by the special case turn entirely on the issue as to what portion of the gross sums payable by the tenants was actually for rents and how much was remuneration for services, or consideration for services and amenities provided for the tenants by the landlord.

13 The judge drew the analogy of the provision of furniture in a furnished flat, reasoning as follows at p 554:

> … Here we have a gross sum paid by the tenant not only for the occupation of the flat, but also for the various services and amenities provided. We can see no difference in principle between such a case as this and the letting of a furnished flat. In the latter case the law is well settled that you must ascertain how much is paid in respect of the furniture and the things in no way forming part of the rateable premises, such as the rates, which are usually paid by the landlord who lets furnished, and the remainder represents the rent of the house itself, for which it is rateable: *Reg. v Lee*. Exactly to the same effect is Lord Fleming's opinion in *M'Ewan v Glasgow Assessor*, where the question for decision was much the same as in the present case. He said: "The yearly rent or value of a flat ….. was the proportion of the gross rent paid to the owner which could fairly be attributed to the occupation of the heritable subject." Having then pointed out that the gross rent, by which he means the actual sum paid by the tenant, includes various services, he continues: "The tenants periodically pay a lump sum for the personal services and for the use of the heritable subject, and the problem, accordingly, is to ascertain the proportion of the cumulo payment which effeirs to the heritable subject." From these cases, with which we entirely agree, it appears that not only did the rating surveyors and the assessment committee approach the problem correctly, but so did quarter sessions. They set out to find what proportion of the sums reserved by the leases as rent represented the value of the services and amenities provided by the lessors, and deducting that and the rates, the balance left represented the true gross value. The hypothetical tenant, of course, is not concerned with what it costs the landlord to provide these services. He considers only what he can afford to pay for the sum of what he gets - namely, a flat to live in, together with such services and other attractions as may be offered. A man who feels he can pay a rent of about 250, and has been paying that in an old-fashioned flat with open fireplaces, where the water has to be heated in the kitchen, may well feel that he can pay, say, 275 or 300 for one in which he will be provided with domestic hot water and central heating. He will not concern himself with what it costs the landlord to provide those services, but it is none the less true that what he pays for the use of the flat itself is the rent reserved less a proper remuneration to the landlord for providing him with hot water in his taps and in his radiators.

14 From this it can be seen that the concept of rent in respect of annual value concerns the use or occupation of the heritable subject and this is separate from the provision of other services and amenities.

15 Interestingly, the Court of Appeal overruled *Pullen v St Saviour's Union* [1900] 1 QB 138, in which the facts are similar to the present case. There the landlord had collected weekly payments from tenants of about 10 shillings for rent and another sixpence for cleaning and lighting the staircase. The court in *Pullen's case* had held that the sixpence was part of rent. Lord Goddard observed at p 554 of the judgment in *Bell Property Trust*:

> … *Pullen's case* has never been followed, and authors of works on this branch of the law have expressed doubts as to its correctness. Charles J in the court below, said that it appeared to be contrary to what he had always believed to be the law, and we must see exactly what the court in that case decided. The facts were that working-class tenements were let to tenants at rents of 8*s* 6*d* to 10*s* per week. Each tenant, on taking a tenement, was told that he would have to pay 6*d* per week to the landlord's collector, in addition to the rent, and out of these sixpences the collector arranged for the cleaning and the lighting of the staircase. Quarter sessions

> held that the 6*d* ought to be regarded as part of the rent, and the court upheld them. In our opinion, the decision was wrong, and the law is correctly stated in the argument for the appellant, which is clearly and concisely set out in the report. A tenant, knowing that he would have to pay this levy of 6*d* per week, would take that into account when considering what rent he could afford to pay, and we can see no ground for holding that the 6d was part of the rent, and not payment for services. We think that this case should be overruled.

16 In the present case, the Appellant had collected an additional $3.23 per square metre (subject to a minimum of $100) each month for A&P activities. This is known right at the outset by the tenant and he would have done his sums as to whether the Appellant's offer in its entirety was acceptable, including the knowledge that there would be a certain amount of A&P activities that would be carried out and financed in part or in whole by the A&P Contributions. The provision of A&P activities by the landlord is no different from the provision of the other services where the Courts have permitted deductions in the *Chartered Bank case* and the *Bell Property Trust case*.

17 It is well known that in order for a shopping centre to be successful in these times it has to continually maintain or even renew its image and attractions. This is achieved principally through advertising in various media combined with the holding of a variety of promotions. This would implant in the mind of the public an awareness of the shopping centre and attract shoppers to the premises. Such expenditure is usually of a continuing nature, especially in view of the keen competition between shopping centres. The successful implementation of A&P activities could go a long way in attracting custom to the shops in the premises thus raising the profitability of those shops and in turn the rent that the landlord would be able to charge upon the renewal of the leases. Therefore such services are probably as essential to the tenants as the traditional ones such as watching, cleaning and air-conditioning. In my view the principles of valuation should take into account modern developments so as not to stifle business innovation and creativity. The same approach was taken 60 years ago by the English Court of Appeal in the *Bell Property Trust case* and the following comments Goddard LJ (at p 552) are just as applicable today:

> The development of flats as a normal class of dwelling both in London and the provinces brought other problems, and that with which we are now concerned arises from the fact that modern flat dwellers expect, and owners vie with each other in providing, a variety of services and amenities unknown to an earlier generation. Whereas the provision of a lift and the attendance of a porter in uniform may have been all the service that was usually furnished by a flat owner thirty years ago, constant domestic hot water, central heating, a tastefully furnished garden, radio relayed to each flat from a station in the building, and perhaps a swimming-pool, are nowadays among the attractions which may be, and often are, offered to a prospective tenant. In some cases which have come before the courts, usually in connection with service flats, separate agreements, stipulating for separate payments, are made with regard to certain of these amenities, and in others, as in the present case, the tenant pays a gross sum, which includes the rent and the privilege of enjoying the services and amenities provided.

18 The Chief Assessor raised the issue, if the A&P Contributions were allowed to be deducted, of the evidence necessary to show that these were *bona fide* A&P Contributions. But that is a question of fact, not principle. If the owner can satisfy the Chief Assessor, in relation to the A&P Contributions, that: (i) it was reasonable to provide those services; (ii) the tenants had agreed to pay for such services; (iii) the services were in fact provided; and (iv) the costs of providing them were reasonably incurred, then he ought to deduct such sums from the gross rent in arriving at the annual value. It is always open to the Chief Assessor to disallow anything that he deems to be unreasonably incurred. This was done in the *Chartered Bank case* where the landlord made a claim of a loading of 25% on the costs of providing watchmen, cleaning, lifts, air-conditioning, supervision, etc. The High Court held that it was proper and reasonable for the landlord to provide those services and want a return on his outlay, but ruled that the claim of 25% was too high and allowed a loading of 15%.

19 The Chief Assessor also argued that the Appellant had no obligation under the leases to use the A&P Contributions for A&P activities only. The Board had agreed with him and had said this in 25 of its Grounds of Decision:

> 25 The greatest flaw of the Appellant's case, however, was that there was no legal obligation of the Appellant to provide any A&P services. It was entirely up to the Appellant what they wanted to do with the A&P Contribution collected. Even if there was an expectation by the tenants that the Appellant would engage in the activities, there remained no legal obligation for them to do so under the agreements. The tenants had no recourse against the Appellant under the agreements if he (sic) did not do so. This distinguished the present case from the [*Chartered Bank case* and the *Bell Property Trust case*].

20 The Board did not elaborate on the basis upon which it arrived at this conclusion. The Chief Assessor had submitted to the Board that 1.2 of Schedule 6 of the Old Lease gives the Landlord the sole discretion in the use of the A&P Contributions. Presumably the Board had agreed with this submission. That provision of the Old Lease (viz. Schedule 6, 1.2) states as follows:

> The Landlord shall be entitled at its sole discretion to utilise the A & P Contributions collected from all tenants for the advertising and promotion of the Retail Area in such manner as the Landlord may determine.

In the Agreement, a virtually identical provision is found in clause 6.2 which states as follows:

> The Landlord shall be entitled at its sole discretion to utilise the A & P Contribution towards the costs of advertising and promotion of the Retail Area in such manner as the Landlord may determine.

21 With respect to the Board, this would be a misinterpretation of those provisions. On a close scrutiny, it is clear that they give the Landlord the discretion to apply, in such manner as he may determine, the A&P Contributions towards the costs of A&P. Those provisions do not empower him to apply those funds towards the costs of anything else. Read with the definition of "A&P Contribution" as *"the fees payable by the Tenant to the Landlord for advertising and promotion as provided in the Lease"*, it is clear that there is an obligation on the part of the Landlord to use those funds for A&P activities. But he is vested with the sole discretion to apply it for those activities in such manner as he deems fit; no doubt a very important discretion to have in view of the fact that there are more than a hundred tenants.

22 Finally I turn to the question whether the sum of about $500,000 claimed by the Appellant is reasonable. The Chief Assessor did not challenge the Appellant's contention that it spent about $2 million on A&P activities, a much greater sum than the total of the A&P Contributions. The tenants had agreed to pay these sums to the Appellant for such services, which were provided to them in the form of the A&P activities at a cost about four times the collection. In the circumstances, I would hold that the Appellant has proved that the A&P Contributions were reasonably incurred.

23 I therefore allow the appeals and hold that the A&P Contributions collected by the Appellant ought not to be included for the purposes of the determination of annual values of the properties the subject of the present appeals. Pursuant to s 35(5) of the Act, I direct that the Valuation List be amended by deducting the corresponding A&P Contributions in respect of those properties. The parties have advised me that the Appellant has paid the Property Tax based on original assessments. It follows that there shall be an order to the Chief Assessor to refund the differences and to pay the Appellant the statutory interest under s 33(1)(4) of the Act at the rate of 6% per annum on those sums.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER