CITATION: Merivale-Gilmour Manor Ltd. v. Municipal Property Assessment Corporation Region No. 3 et al, 2021 ONSC 6240
COURT FILE NO.: DC-21-2645
DATE: 20210921

SUPERIOR COURT OF JUSTICE – ONTARIO
(DIVISIONAL COURT)

RE: Merivale-Gilmour Manor Ltd., Applicant

AND:

Municipal Property Assessment Corporation Region No. 3, Respondent

AND:

The City of Ottawa, Respondent

BEFORE: Muszynski J.

COUNSEL: Eric Sherkin, for the Applicant

Donald G. Mitchell, for the Respondent, Municipal Property Assessment Corporation Region No. 3

Lindsay Hinch, for the Respondent, The City of Ottawa

HEARD: August 18, 2021

DECISION ON MOTION FOR LEAVE TO APPEAL

[1] Merivale-Gilmour Manor Ltd. ("Merivale") seeks leave of this court to appeal a decision of the Assessment Review Board (the "Board"). The Board dismissed Merivale's request to review an earlier decision of the Board which denied Merivale's request to withdraw municipal property tax appeals.

[2] The responding parties, Municipal Property Assessment Corporation Region No. 3 ("MPAC") and the City of Ottawa ("Ottawa"), oppose Merivale's motion and ask that leave to appeal be denied.

ISSUE

[3] Should Merivale be granted leave to appeal?

RESULT

[4] For the reasons that follow, Merivale's motion for leave to appeal is dismissed.

BACKGROUND

[5] The property in question is known municipally as 1220 Merivale Road, Ottawa, Ontario. It includes a residential apartment building with 184 units (the "Property"). The current value assessment of the Property was returned at $20,436,000 for the 2017 to 2020 taxation years.

[6] Merivale appealed the 2017 and 2018 tax year assessments of the Property on January 10, 2017 alleging that the assessments were too high. The appeals were commenced in the general proceedings stream as set out in the *Rules of Practice and Procedure of the Assessment Review Board* (the "ARB Rules").

[7] On November 1, 2017, Merivale sold the Property for $30,000,000.00. Merivale's appeals remained live after the Property was sold.

[8] In accordance with the ARB Rules, the commencement date of Merivale's appeals was deemed to be May 15, 2018.

[9] In accordance with the prescribed schedule for property assessment appeals, on October 9, 2018 Merivale served a mandatory "statement of issues" taking the position that the correct value of the Property was not $20,436,000 but, rather, $9,487,000. There is no mention in Merivale's statement of issues of the $30,000,000 sale.

[10] In their mandatory "statements of response", which were served in accordance with the prescribed timeframe on March 26, 2019 and March 27, 2019, Ottawa and MPAC respectively notified Merivale that they were seeking an increase in the property assessments from $20,436,000 to $30,000,000 based on the November 2017 sale of the Property.

[11] On April 2, 2019, MPAC served and formally filed a separate "notice of higher assessment" form with the Board confirming its intention to seek a higher assessment of the Property.

[12] On May 7, 2019, Merivale sent letters to the Board, copied to MPAC and Ottawa, seeking to withdraw its appeals of the 2017 and 2018 assessments. MPAC and Ottawa responded immediately advising that they opposed the withdrawal request as they were seeking higher assessments. The same day, the Board responded to Merivale advising that the withdrawal would not be processed as there was a notice of higher assessment on the Property.

[13] Merivale then filed a motion with the Board on May 30, 2019 requesting that the appeal be withdrawn. MPAC and Ottawa filed responding materials opposing Merivale's motion.

[14] On August 13, 2019, the Board issued its decision denying Merivale's motion to withdraw its appeal (the "Motion Decision"): *Merivale-Gilmour Manor Ltd. v. Municipal Property Assessment Corporation, Region 03,* 2019 CanLII 77526 (ON ARB).

[15] Merivale filed a request for review of the Motion Decision with the Board on September 12, 2019.

[16] On April 20, 2020, the Board issued its decision arising from Merivale's request for review of the Board's Motion Decision, wherein the request for review was dismissed (the "Review Decision"): *Merivale-Gilmour Manor Ltd. v. Municipal Property Assessment Corporation, Region 03*, 2020 CanLII 28326 (ON ARB).

[17] Merivale served a notice of motion for leave to appeal the Review Decision on October 9, 2020. The motion was ultimately heard on August 18, 2021.

ANALYSIS

[18] An appeal of a decision of the Board lies to the Divisional Court, with leave on questions of law: *Assessment Act*, R.S.O. 1990, c. A.31, s. 43.1(1) [*Assessment Act*].

Preliminary Issue: Is the motion premature?

[19] While ultimately, I have determined that Merivale's motion for leave to appeal cannot succeed, I nonetheless wish to address an argument raised by MPAC and Ottawa.

[20] MPAC and Ottawa submit that the decisions of the Board to deny Merivale the ability to withdraw its property assessment appeals are interlocutory. On that basis, it is argued that it would be inappropriate for this Court to hear this motion as it would fragment the proceedings.

[21] In my view, this is one of the rare circumstances where it is appropriate for the Divisional Court to hear a motion for leave to appeal of an interlocutory decision of an administrative tribunal. Hearing the leave to appeal motion as a preliminary issue makes sense in these circumstances as the outcome has the potential to dispose of the appeal before the Board. Specifically, if leave to appeal were to be granted and an appeal ultimately allowed, it could render the entire property assessment appeal moot. This is consistent with the approach taken in *The City of Toronto v. Home Depot Holdings Inc*., 2010 ONSC 6071, 272 O.A.C. 81, at paras. 27-28.

[22] I find that Merivale's motion for leave to appeal is not premature.

Leave to Appeal

[23] In granting leave to appeal, the Court must be satisfied that:

a. There is reason to doubt the legal correctness of the Board's decision; and

b. The question is an important question of law: *Dryden (City) v. Municipal Property Assessment Corp.*, 2016 ONSC 478, 49 M.P.L.R. (5th) 104, at para. 2.

a. Reason to doubt the legal correctness of the Board's decision

[24] There is reason to doubt the correctness of a decision if it is "open to very serious debate": *Exchange Tower Ltd. v. Municipal Property Assessment Corp. Region No. 9*, 2012 ONSC 415, 97 M.P.L.R. (4th) 200, at paras 17-18.

[25] Merivale submits that the Review Decision of the Board contains errors of law, which include: the decision ignores the purpose of the Board's Rules; granting overly broad cross-appeal rights; failing to consider Merivale's argument that Merivale could withdraw its appeal as of right; and failing to find the Board's Rules to be ambiguous. I reject each of Merivale's arguments.

[26] The authority of the Board is derived from the *Assessment Act*. The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "SPPA") gives administrative tribunals, including the Board, the authority to make rules governing its practice and procedures so long as those rules are consistent with both the SPPA and the other statutes to which they relate. The Board's practice and procedures are governed by the ARB Rules.

[27] A request to review a decision of the Board will not be granted unless the Board is satisfied:

a. The Board acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;

b. The Board made a significant error of law or fact such that the Board would likely have reached a different decision;

c. The Board heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result;

d. There is new evidence that could not have reasonably been obtained earlier and would have affected the result; or

e. Any of the situations in Rule 122 exist: see ARB Rule 121.

[28] ARB Rule 72 provides that an appellant may withdraw an appeal unless another person has given notice, pursuant to the ARB Rules, of its intention to request a higher assessment. If such notice is provided, an appellant may bring a motion to withdraw its appeal pursuant to ARB Rule 73.

[29] In this case, MPAC filed a "notice of higher assessment" document pursuant to Rule 40. Merivale takes the position that ARB Rule 40 applies to summary proceedings only, which this is not. I agree with Merivale that the notice provisions contained in ARB Rule 40 do not apply to this proceeding, which is in the general proceedings stream. However, there is no dispute that MPAC and Ottawa gave notice of their intention to request a higher assessment in their statements of response. The ARB Rules do not define the precise form in which such notice must be provided in general proceedings. The Board determined that the notice provided by MPAC and Ottawa in their statements of response was sufficient

for the purpose of ARB Rule 72. I have no reason to doubt the correctness of the Board's decision in this regard.

[30] Although there is no mention of cross-appeals in the ARB Rules, Merivale submits that the ARB Rules create *de facto* cross-appeal rights, by way of providing notice of higher assessment in a statement of issue or response, which can be served well after the appeal process is underway. Merivale further argues that this is inconsistent with cross-appeal rules contained in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the *Assessment Act*, and the SPPA. Merivale submits that an appellant should be permitted to withdraw their property assessment appeal as of right, but with the risk of negative cost consequences. I note the ARB Rules do not provide for cost consequences of this nature.

[31] The ARB Rules create a procedure for appeals of municipal property assessments and withdrawing those appeals. Once notice was provided by MPAC and Ottawa of their intention to seek a higher assessment, Merivale required leave of the Board to withdraw its appeal. Merivale could not withdraw its appeal "as of right" in those circumstances. The Board acted in accordance with the procedure set out in the ARB Rules when it denied Merivale's request to withdraw their appeal due to the notice provided by MPAC and Ottawa to seek a higher assessment: see ARB Rules 72-73. I have no reason to doubt the correctness of the process the Board followed, which was, I find, consistent with the ARB Rules, the *Assessment Act*, and the SPPA.

[32] I further find that the ARB Rules are not ambiguous. ARB Rule 38 provides that statements of issues and responses must contain, if the issue is a higher assessment, the basis on which a higher assessment is sought and the facts, legal grounds, and documents that the party relies on in support of its position. MPAC and Ottawa's statements of response each included this information. The Board found that this was sufficient to constitute notice as required by s. 72 of the *Assessment Act*. I have no reason to doubt the correctness of the Board's decision in this regard.

[33] Merivale finally advances the overarching argument that the regime involving withdrawal of property assessment appeals is procedurally unfair and results in prejudice to property owners. As noted by Hackland J. in *Municipal Property Assessment Corporation v. TKS Holdings Inc.*, 2016 ONSC 5525, 93 O.M.B.R. 1: "It has been observed in many cases that a proper determination on the merits of the assessed value of property cannot constitute 'prejudice'": see para. 11.

[34] When advancing the argument about prejudice, the circumstances of this specific case must be considered. In October 2018, Merivale took the position that the appropriate current value assessment of the Property for 2017 and 2018 was $9,487,000, as opposed to the $20,436,000 as assessed by MPAC. However, in November of 2017, Merivale sold the Property for $30,000,000.00. Merivale opened the door and now wants to slam it shut despite the existence of evidence that supports a higher assessment. The *Assessment Act* requires all property owners to pay their fair share of taxes based on the current value assessment of the property: see *Municipal Property Assessment Corporation v.*

Zarichansky, 2020 ONSC 1124, at para. 42. In this case the prejudice, if any, would not lie with Merivale.

[35] I find there is no reason to doubt the correctness of the Board's Review Decision, nor, the Board's Motion Decision, which was also indirectly challenged.

b. The importance of the legal issue

[36] The test for leave to appeal requires that a moving party demonstrate both a reason to doubt the correctness of the impugned decision **and** the importance of the legal issue. I have already determined that there is no reason to doubt the Board's decisions in this case and, accordingly, the motion for leave to appeal is dismissed. Briefly, however, I will comment on Merivale's position that the legal issues have widespread importance worthy of consideration by the Divisional Court.

[37] In support of its position, Merivale essentially re-argues that the current regime creates cross-appeal rights that are inconsistent with the *Assessment Act* and that result in prejudice. As noted previously, I have found that there is no inconsistency between the *Assessment Act* and the ARB Rules concerning withdrawals of appeals and no prejudice to Merivale by allowing the appeal to proceed on its merits. Consequently, I also find the issues raised by Merivale to be of insufficient importance to warrant consideration by the Divisional Court.

CONCLUSION

[38] Merivale's motion for leave to appeal is dismissed.

COSTS

[39] Costs are reserved. If the parties cannot come to an agreement on costs of the motion on or before October 11, 2021, counsel shall file cost outlines in accordance with the following schedule: Merivale shall serve and file its cost outline on or before October 25, 2021; MPAC and Ottawa shall serve and file their cost outlines on or before November 8, 2021; after which time I will determine the issue of costs based on the material filed.

[40] Counsel shall file their respective cost outlines by sending them by email to the Divisional Court motion coordinator in Ottawa assigned to this matter.

Muszynski J.

Date: September 21, 2021