Privy Council Appeal No. 31 of 1950

The City of Montreal - - - - - - - - - *Appellant*

v.

Sun Life Assurance Co. of Canada - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 5TH NOVEMBER, 1951

Present at the Hearing:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD PORTER]

This case is concerned with a dispute as to the sum at which the head office of the respondent Company is to be assessed for the municipal purposes of the City of Montreal.

The ascertainment of the correct figure has given rise to a great diversity of opinion between the various bodies which are entrusted with the task of assessment both as to the real value of the property and as to the correct method to be employed.

The Assessor reached one figure : the Board of Revision reached another and larger one but thought it right to temper justice with mercy and therefore retained that at which the Assessor had arrived.

The Judge of the Superior Court to whom an appeal was taken from the Board of Revision considerably reduced the sum which either of those bodies would have inserted on the City's Roll, but was overruled by the Court of Kings Bench which by a majority restored the decision of the Board of Revision. This result was again altered by the Supreme Court of Canada which unanimously allowed the appeal and restored the judgment of MacKinnon, J., the Judge of the Superior Court.

At one time a question arose as to the valuation to be placed upon the building, housing the plant which the respondents used for heating their main building, but it is now decided that the assessment of the plant and main building must be combined with that of the rest of the property. The assessment in respect of Business and Water Tax is no longer in issue though it was in controversy during the hearings in Canada.

Their Lordships are therefore required only to determine the sum at which the Sun Life building should be assessed and such principles as it is requisite to consider for that purpose.

So far as the building itself is concerned it is enough to say that it is an imposing erection, built largely without regard to cost and planned originally to house the whole of the Company's staff. Temporarily no doubt it was intended to let portions until the whole was required by the Company itself and parts of the building which were not immediately required by the respondents were in fact let to tenants as they were completed and made ready for occupation.

As time went on, however, it was found more convenient to decentralize the management of the Company with the result that so far from increasing the space to be utilized by its staff it diminished the area for its own use and enlarged that let to others. At the relevant time, roughly about 60 per cent. was occupied by the respondents and about 40 per cent. let to tenants. According to the Company's witnesses this change in occupation was likely to become greater as time went on so that there would be a diminution in the ratio of space in use by its employees as compared with that let to tenants.

The building was erected in three periods, the first portion between the years 1913 and 1918, the second from 1922 to 1925 and the third in the period beginning in May, 1927, and ending at the end of December, 1930.

Certain small additions were made between April and December, 1941, but without these additions the figure of actual cost was stated by the respondents to have been $22,371,692.26. This figure included the Power House $709,251.14, $730,600 for the land, which is separately assessed and as to which there is no dispute, and three figures, amounting in all to $1,519,498.38, which represent in the main increased cost, due to the erection of the building in three portions at different times, and changes and demolitions required in order to harmonise the various portions. These expenses, therefore, have been subtracted from the total, as indeed they should be.

Their Lordships will at a later stage deal with the figures which have been put forward on behalf of the parties but before considering them it is necessary to state the method by which the assessment has been made.

The statutory provisions are contained in the Charter of the City of Montreal but only those which are essential to the solution of the present problem need be set out.

By section 361 " All immoveable property situate within the limits of the city shall be liable to taxation and assessment . . ."

The property now in question is admittedly immoveable property so that no discussion need take place as to the definition contained in the Act.

The ascertainment of the amount of the assessment is entrusted to assessors and sections 373 and 374 of the Charter contain provisions as to their appointment and constitution. The statement of their duties begins with section 375 which enacts :—

> " (*a*) Every three years, the assessors shall draw up in duplicate for each ward of the city a new valuation roll for all the immoveables in such ward. Such roll shall be completed and deposited on or before the first of December after having been signed by the Chief Assessor. This roll shall contain . . . (3) The actual value of the immoveables."

The French text uses the phrase " valeur réelle " but it is common ground that both expressions bear the same meaning.

The intention of the City was to supersede for the purpose of assessment in respect of the year 1941 the rolls previously deposited and accordingly, in order to enable materials for making the new assessment to be collected, subsection 7 of section 375 provided for the continuance in force, whilst this was being done, of the 1937 roll during the years 1938, 1939 and 1940 with the addition in each case of the cost of any fresh construction taking place in those years.

The present matter for consideration is what under the new system is the proper figure at which to assess the Sun Life building in the 1941 roll.

The previous assessments were made for one year. That provision has now been altered to three years.

In either case the duty of assessment was cast primarily on the assessors three in number of whom two formed a quorum.

In the present instance that duty was performed by a Mr. Vernot alone his colleague Mr. Lynch apparently having confidence in his judgment and thinking it unnecessary to interfere. No complaint is made that Mr. Vernot was in effect the sole assessor and his figures will have to be analysed later. Admittedly the Board of Revision was properly constituted, though one of its members, Mr. Munn, took no part in its deliberations because he had been in some way concerned with the assessment.

That body may be described as a tribunal of appeal from the decisions of the assessors. It was created by section 382 of the Charter and is composed of three members approved by the Council but only dismissable by the vote of a two-thirds majority. Moreover the Charter contains careful restrictions against the appointment of municipal or governmental employees, but no particular qualification is otherwise required. They hear the witnesses, see the documents and can call for any information and documents calculated to enlighten them. They are also entitled (section 382 subsection 14) to "determine the manner in which the assessors shall proceed with their work, prepare the forms, documents, and books which they shall use, prescribe the data and information that the assessors shall obtain and enter in their books or in the said documents, and give their instruction, accordingly, to the chief assessor" (1 Geo. VI. c. 103 s. 51).

They may also summon before them the assessor or assessors in order to know in what manner and according to what principles they have proceeded to establish their valuations generally or in a particular case, or on what bases such valuations are founded. Finally they may, whenever they deem it proper after having heard the interested assessors, determine themselves or with the assistance of experts the valuation in question.

In this case an Appeal was made by both parties to this body which affirmed the assessment of the Assessor though in certain matters they differed from him and as has been said in fact reached a higher figure.

From the decision of the Board of Revision an appeal lies under section 384 of the City's Charter to a Judge of the Superior Court, who may order that a copy of the record and of the attached documents and of the proceedings of the Board as well as the complaint itself be transmitted to him and after having heard the "parties . . . but without enquiry must proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain."

In the present instance the respondents appealed from the decision of the Board to a Judge of the Superior Court who considerably reduced the assessment.

The Charter gives a further appeal by section 384 to the Court of King's Bench and from it an Appeal lies to the Supreme Court.

As already indicated, the Court of King's Bench allowed the Appeal and restored the decision of the Board of Revision, but were in their turn reversed by the Supreme Court who agreed with and affirmed the judgment of the Superior Court.

In these circumstances it becomes imperative for their Lordships to criticise and evaluate the decision of the Board and the judgment of the Superior Court and, applying the relevant law to them, to determine whether the one or the other can be supported and if not whether the case should be sent back with their Lordships' comments upon the disputed points in order that an assessment may be made in accordance with the principles applicable.

As Mr. Vernot's assessment was confirmed by the King's Bench the figures adopted by that gentleman and his method of arriving at the resultant computation must be examined, but before this is done his method of approach must first be considered.

In 1940 the assessors of the City prepared and adopted a Memorandum establishing a system for the assessment of large properties such as office buildings, apartment houses, departmental stores, hotels and such like.

According to the Memorandum these properties fall into four main categories which determine to a large extent the relative importance of the different factors to be used in arriving at their valuation.

(1) Properties that are developed and operated on a commercial basis as investment propositions ;

(2) Properties that are completely occupied by their owners ;

(3) Properties that are partly occupied by their owners and partly rented ;

(4) Properties of an exceptional class such as hotels and theatres.

The recommendations of this document as to the method of valuation of these buildings is, as was pointed out on behalf of the City, not actually binding upon the Assessor or Board of Revision but they are of course certain to have very great influence upon the members of both bodies and as will appear later were accepted by the Assessor and are referred to by the latter as " directing " them to follow a particular course.

As regards the first category the Memorandum states that rents are apt to fluctuate according to the law of supply and demand and therefore in order to obtain a stable basis for assessment the factors of replacement cost should be combined with those of commercial value and that equal weight should be given to the two factors in valuing these properties.

In the case of the second class it is said that such properties would seem always to be worth to their owner the current cost of replacement less depreciation since, if the owner had not already acquired such a property, but wished to provide himself with suitable premises, he would have to pay current prices to secure suitable accommodation.

The third is that to which the Sun Life building belongs and of this it is observed :—

> " It must be remembered that properties of this class have been constructed or acquired as a permanent home for the enterprise in question and that frequently the building is laid out for future development, the tenant situation being considered only temporary or incidental. In other cases, the space rented is provided to help carry the cost of the land, or to increase the size of the building, thereby adding to the prestige of the owner and giving what might be called advertising value to the project. In these cases the owner is enjoying the full utility only of the space occupied by himself, and is dependent on current rental conditions for the carrying charges on the balance of the building. It would seem that some consideration should be given to the rental value in these cases, so that the replacement factor should be weighted somewhere between 50 and 100 per cent., and the commercial value factor make up the difference between 50 per cent. and zero. No hard and fast rule can be given for the division of weight in these factors, as it will depend on the proportion owner-occupied, the extent to which the commercial features of the building have been sacrificed to the main design with a view to the future complete use of the building by the owner, or the enhanced prestige of an elaborate and expensive construction. Each property will have to be considered on its merits within the limits outlined above."

About the same time as the Memorandum was compiled the City had a Manual prepared, to guide their officials, containing what was considered to be the correct approach to the making of an assessment.

This Manual condescends to a great deal of detail to assist in the assessing of buildings but its general tenor may best be exemplified by quoting the last paragraph in its introductory observations prepared by Mr. Honoré Parent, K.C., the director of municipal departments.

After discarding a valuation based upon replacement value alone as neither sound nor practicable and that arrived at by taking account of the revenue and nothing more as unacceptable he ends " Whatever be the angle from which this problem is considered, there is only one solution possible—that the property tax rolls should have current value for their sole basis: that is to say, the value should be based upon the price which a person who is not obliged to sell could obtain from a buyer who is not obliged to buy."

This observation is none the less true though it is almost a commonplace and is to be found repeated again and again in both French and English in the relevant cases. Two examples only need be given.

In *Lord Advocate* v. *Earl of Home* (1891) 28 Sc. L.R. 289 at p. 293 Lord MacLaren said: "It means exchangeable value—the price which the subject will bring when exposed to the test of competition."

This method of approach is often referred to as the "willing buyer and willing seller" principle and is accurately expressed in the text of *Compagnie d'Approvisionnement d'Eau de Montmagny* 24 K.B. (1913) 416 in the words:—

> La valeur réelle est le prix qu'un vendeur qui n'est pas obligé de vendre, et qui n'est pas dépossédé malgre lui, mais qui désire vendre, réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter."

This is the ideal approach but is difficult to apply where the building to be assessed is of a unique or exceptional kind, erected for a particular purpose and not very suitable for sale or letting.

This difficulty exists in the present case.

The building was primarily adapted to house the staff of the Sun Life and it was originally intended to occupy the whole for that purpose. The result was that the floor space suitable for letting was diminished and the rooms were larger in size and therefore less adequately lighted and less convenient for occupation by tenants than would have been the case in a building erected for that purpose. When therefore the respondents changed the use to which it was to be put, by diminishing instead of increasing the number of their employees, and sought to let additional portions, the rents obtainable were considerably less than it would have been possible to charge had the aim of its construction been to provide for the requirements of tenants.

The appellants however maintain that its value should not be regarded from that angle but mainly as an owner-occupied building as to which the important factor was its replacement value.

The respondents on the other hand argued that it was a commercial building, that it was in fact lettable and that its functions should be so regarded or at any rate that aspect of its use should constitute the more important element in assessing its value, but they acknowledged that some consideration should be given to its replacement value provided a sufficient additional allowance for depreciation was made owing to the unsuitability of the construction for either selling or letting. One of the respondents' witnesses indeed said that he had no difficulty in envisaging a purchaser such as another Insurance Company or large store who would be prepared to acquire the building at a suitable price, but of course there would be a limited number of such potential purchasers.

Though the Judge of the Superior Court and the Judges of the Supreme Court all regarded the price which a willing buyer would give and a willing seller would take as being the essential matters to be regarded in assessing the value, they differed somewhat in the method by which they reached their result.

The Judge of the Superior Court states five ways by which the true figure can be reached:—

(*a*) A recent free sale of the property itself where neither the conditions of the property nor the market have since changed;

(*b*) Recent free sales of identical properties in the same neighbourhood and market;

(*c*) Recent free sales of comparable properties;

(*d*) The price which the revenue producing possibilities of the property will command;

(*e*) the depreciated replacement cost.

None of the Judges in Canada so far as their Lordships can ascertain seem to quarrel with this statement and all say that the first three methods are inapplicable to the present case and therefore the last two are the factors from which the true result is to be derived.

On behalf of the City however it is contended that those two elements alone are to be taken into account and that in exceptional buildings such as the Sun Life, which, it is maintained, the respondents built for their own use and would be unwilling to replace or to sell, no question of willing buyer or seller arises. This view is best expressed in the decision of the Board of Revision where after quoting the stereotyped formula as to willing buyer and seller they say that it "does not constitute a complete definition of the real value but is merely a qualification of one of the numerous elements which may help in determining same. It does not mean that real value is only that. Furthermore it has its application to ordinary and current cases of immoveables which can easily be put on the market but cannot be applied rigorously to a property like the Sun Life which is definitely an unusual one." This contention has the support of a number of decisions in the Canadian Courts and with the qualifications contained in such cases as *Grampian Realities Coy* v. *Montreal East* (1932) 1 D.L.R. 705 and *Bishop of Victoria* v. *City of Victoria* (1933) 4 D.L.R. 524 need not be objected to. Indeed it means no more than that every relevant factor must be taken into consideration.

Their Lordships would agree that where no sale is contemplated and indeed any sale would be difficult what has been called the higgling of the market is not an element of much if any consequence, but nevertheless the ultimate aim is to find the exchange value of the property i.e. the price at which the property is saleable. In reaching their result the appointed Tribunal must take into account not only the amount which a buyer would give but also the sum at which the owner would sell. What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles:—i.e. what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed.

As their Lordships have said however the Board of Revision and the Court of King's Bench in Canada did not aim at finding the market value of the property. They declared that its ascertainment was impossible and followed the course recommended in the Memorandum.

On the other hand though the Superior Judge and the Supreme Court have followed the principle of willing buyer and seller, they have reached their conclusion by combining the replacement and revenue test but with a large deduction for unsuitability in the former and a ratio between the two different from that adopted either by the Assessor or Board of Revision.

Replacement value may be arrived at in more than one way. In the first place the actual cost may be taken from which must be deducted a certain percentage for physical depreciation: something additional may be struck off for excessive cost due either to change of plan or expenditure incurred because the building has been erected in stages with the consequence that some temporary work has to be destroyed or replaced, and some further deduction may also be made because the type of building to be assessed is unsuitable for letting or selling. The permissibility of this last deduction however is a matter of dispute between the parties—the City maintaining that it is sufficiently allowed for when the figures of replacement and revenue are combined in the proper proportions, whereas the respondents say that there are cases in which the replacement value should have little or no weight.

Secondly replacement value may be calculated by an appraisal of the materials employed in and the cost of work required to erect the building in which case a more accurate ascertainment of what the building ought

to have cost is possible than where the actual cost, which may be inflated or deflated by accidental circumstances, is taken.

Thirdly a more rough and ready result is obtained by multiplying the cubic content of the building by its price per cubic foot estimated according to the material and method of construction employed.

The first course was that which was adopted in the case of the Sun Life, and has formed the basis upon which replacement value was calculated in all the proceedings in Canada.

If however a building has been erected over a number of years and its value has to be ascertained at a particular point of time allowance must be made for an increase or decrease in the cost of construction at the times at which it was built as compared with the cost which would have been incurred if it had been erected at the point of time as at which the value is to be ascertained, and this factor admittedly must also be taken into account.

Revenue can readily be determined by taking the actual rent received for the portions let, adding to this figure the rent attributed by the Company to its own occupation (a sum which in fact is calculated at a higher ratio than that charged to tenants) and, finally, adding to or subtracting from this figure a requisite allowance for voids and expenses. In the present case their Lordships need not elaborate their views as to the correct method of ascertaining the resultant capital sum which a calculation upon a revenue basis would justify. Both parties are now agreed that the correct figure is $7,028,623.

Throughout the proceedings the method of finding the real value of the Sun Life building by the Board of Revision and by the Courts in Canada, whether they supported its findings or rejected them was in the first instance to take the actual cost less certain incidental and unproductive expenditure, then to use some index figure in order to find the change in cost which would have been incurred if the building had been erected in 1941, next to make some allowance for physical depreciation, and finally to use the figure of replacement and revenue value in such ratios, the one to the other, as the particular tribunal which was dealing with the case thought should represent the weight to be attributed to each. The Judge of the Superior Court gave a further allowance for unsuitability and was supported in his view by the Judges of the Supreme Court except Estey J. who reached his result upon a revenue basis and paid no regard to replacement value.

It is at this point that it is desirable to consider the figures used by the assessor and the Board of Revision to obtain the replacement value and the proportion in which they combined it with that which a value based upon revenue would show.

Both start at the figure of cost supplied to them by the respondents, viz. $22,377,769.26 and from that figure deduct extra costs incurred for a side walk and the additional expense necessitated by constructing the building in parts, which admittedly did not add to the value of the building in 1941.

The Board having before them the figure (which had not been available to the assessor) of additional expenditure between April and December, 1941, added a small sum to the assessor's figures but in the case of so large an assessment the change in amount may be neglected.

Both again allowed a deduction of 5 per cent. on the figures which they respectively had reached for the assumed extra cost of erection in three units and then arrived at the first serious difference between them. The assessor purported to adjust the cost actually incurred to that which would have been incurred had the building been erected in 1941, but in doing so he did not take the sum expended year by year and adjust the figures accordingly. The most important part of the building had, as he knew, been erected in the years 1927 to 1930 inclusive and he took the average index number of those years in order to calculate what cost had actually been incurred over and above the expense which would have been necessary to erect the building in 1941.

On this basis he found that the cost in 1941 would have been 7.7 per cent. less than the average cost in those four years and accordingly

reduced the replacement value of the building by nearly one and a half million dollars.

The Board of Revision on the other hand took the change in cost year by year, starting in 1913 until the completion of the building, and found that the diminished cost of erection in 1941 would have amounted to less than 1 per cent. They accordingly reduced the figure by less than $200,000 instead of nearly $1,500,000.

As this is an important difference and was one of three main disputes before their Lordships, it will have to be determined which of the two methods is the right one and to what extent it should influence the result.

On the two earlier buildings erected between 1913 and 1925 the assessor allowed 25 per cent. for physical depreciation on the earlier and 18 per cent. on the later of the two.

The Board on the other hand thought 14 per cent. for the whole building to be sufficient and arrived at a figure nearly $2,500,000 in excess of that reached by the assessor.

The diminution of the sum allowed for physical depreciation from 25 per cent. in respect of the earlier buildings and 18 per cent. in respect of the later to a general figure of 14 per cent. was not seriously argued before the Board but an acute controversy arose as to a further and additional allowance given by the Judge of the Superior Court in respect of the unadaptability of the building for general use. In his view the building was in essence a commercial building and therefore should have been valued at a smaller figure in so far as it was less valuable as such to let or to sell. The City on the other hand maintained that that factor was sufficiently allowed for when a proper proportion of weight was given to the revenue value.

Here again their Lordships must determine the extent to which each contention is right and its effect upon the whole.

It will be noted that in these observations their Lordships have not condescended to exact figures but have treated the dispute upon a broad basis. They agree with the Chief Justice of Canada when he says, "I do not think it is the function of this Court acting as third Appeal Court to proceed to a detailed calculation of what the valuation should be", and would add that this his observation applies with even greater force to a decision of their Lordships' Board.

The first question then which their Lordships have to determine is how the intrinsic value of the Sun Life building is to be ascertained and what is the ultimate criterion of its worth.

As they have said, the Board accepts the view that the true test is what a willing buyer would give and a willing seller take.

In many, perhaps in most cases, this figure is not difficult to discover—the first three methods mentioned by the Judge of the Superior Court point out the way. But in a limited number of cases none of these sources of information is available and what such a buyer would give or a seller would take can only be ascertained by indirect means. As has been said those means are to be found by relying upon the replacement value however that term may be interpreted or upon the revenue value, or by a mixture of the two.

But even the determination of the replacement value gives rise to considerable difficulty.

Of the three methods mentioned above the most accurate is undoubtedly to appraise the cost of the building since in that way it is possible to discover within limits what the building ought to have cost and to avoid a calculation based upon an expenditure which may be excessive for the work done either because the price paid was too high or the execution indifferently carried out. But in saying this their Lordships must not be taken to disparage a regard for and in some cases an acceptance of the sum actually paid as a partial or possibly in appropriate cases as a complete guide to the proper amount of the assessment, provided that an adequate deduction is made by way of depreciation. That sum may

represent the true figure and is always a useful check upon the value derived by other means. Moreover it does lead to simple and straightforward calculation upon which much of the work of the City officials must be based.

In the case now in question the expense actually incurred was, as has been stated, accepted by both parties during the various hearings in Canada as the ground work upon which the replacement value was to be based.

In these circumstances as their Lordships indicated in the course of the hearing, it was not open to the respondents to discard the actual cost incurred and rely upon the appraised value, although an argument founded upon the appraisal value was admissible as a means of determining what allowance should be made for depreciation in the case of the particular building under discussion.

An allowance of 14 per cent. has been made by the Board of Revision for physical depreciation and this figure has been accepted by all the Courts of Canada and before their Lordships' Board. The matter in controversy therefore is not to decide what allowance should be made for physical deterioration, but the more difficult problem of determining what if anything should be allowed because the building is unsuitable in some respects for and unadaptable to use as a commercial building. Even as the central home of a large and important Insurance Company, the Judge of the Superior Court regarded it as over elaborate and overdecorated, and constructed of unduly expensive materials.

For this reason he allowed an additional 14 per cent. He did not however make this allowance by any general exercise of his discretion but by reducing the value attributable to individual items which he regarded as not enhancing the value of the building, e.g. the employment of granite instead of limestone, bronze instead of steel sash for the windows, marble for the walls and floors and matters of that kind. Their Lordships are not prepared to approve or disapprove the reduction in value attributed by the learned Judge to the particular items but subject to what is said hereafter as to whether this excessive expenditure is sufficiently offset by giving due weight to revenue as opposed to replacement value, they think that the Court was justified in its discretion in making an allowance for the lessening of the value of the building because it was built of unnecessarily expensive materials, with an excess of decoration and without regard to its letting value.

They cannot accept the statement in the second heading of the Memorandum that "it would seem that properties which are wholly occupied by their owners whether constructed for that purpose or acquired with that object in view are always worth to their owners the current cost of replacement less depreciation, since, if the owner had not already acquired such a property, but wished to provide himself with suitable premises at the present time he would have to pay current prices to secure suitable accommodation," even though that statement is said to be subject to the presumption that the building is of a type suitable to the location. The fact is that no such proposition is universally true. For example, in the present case the grandiloquence of the original design has become less suitable to the purpose with which the building was erected when the original intention of owner occupation has been modified by a change of the intended use and it is found desirable to let more and more of the building rather than to increase its owners' personal occupation.

The ultimate object being to find the amount which a willing buyer and seller would agree upon it by no means follows that the owner, even if regarded as a potential buyer, would pay the price originally expended or, to take another line of approach, that if he had to re-erect the building at the time of the assessment, he would erect one of the same form or incur the same expenditure.

All these matters and among them any change of circumstances must be taken into consideration.

If the Board of Revision had entered upon its task with such matters as these in mind their Lordships would have had greater difficulty in differing from its decision but it came to its conclusion not by a free

exercise of its discretion but by following the wording of the Memorandum. In these circumstances their Lordships' Board do not feel themselves fettered by the conclusion at which that body arrived.

The decision of the King's Bench was in substance reached as the result of a view that the conclusion of the assessors and still more that of the Board of Revision should not be interfered with unless some serious injustice had been done or some wrong legal principle adopted. To that court the valuation to be placed upon a property by the members of the Board was a matter of fact which should not normally, at any rate, be altered. In their view the members of the Board were experts and more likely to be right than a judicial officer.

The King's Bench did not accept the view that the Sun Life was a commercial building ; to them it was a building of an exceptional character erected to house the company's staff and glorify its position and importance.

As to the first consideration, their Lordships would not quarrel with the contention that an assessment whether made by assessors or the Board of Revision should not be interfered with unless it is plainly wrong in fact or is based upon some wrong principle of law. The appellants have the support of a number of Canadian authorities of which *Lynch-Staunton* v. *City of Montreal* (76 S.C. 286) is an example for this proposition. Whether in the present instance such circumstances exist is one of the matters which their Lordships must determine.

The question, what is a commercial building is more controversial. It will be advisable therefore in the first instance to indicate the sense in which that phrase is employed. By the respondent it is applied to premises used for commercial purposes as undoubtedly the Sun Life is ; by the appellants its meaning is restricted to property which is not occupied by those who own it, but is constructed for letting and in fact is let to others as a money making investment.

If their Lordships had to choose between the two descriptions, they would elect that put forward by the respondents. But the matter is, in their opinion, one of words. The question is not whether this building is correctly described as a commercial building or not ; its value, not its nature is in question. No doubt its value to third parties is not the only matter to be taken into consideration. Its value to the respondents must also be assessed because they are one of a number of possible purchasers. In reaching a conclusion it is also material to take into account the sum for which it would let inasmuch as that is one element which a purchaser might regard as important, but its description as a commercial building or as some other type cannot alter the sum at which it is to be assessed.

In some cases the value of premises is the rent they will fetch, in others they are only of value for occupation by some society, religious, political, social or commercial. In a third type they can be used in more than one capacity. The various considerations applicable and the weight to be applied to each must be left to the judgment of the appropriate bodies, subject to the control of those to whom an appeal is given, always remembering that any interference with the original decision must not be lightly undertaken.

Their Lordships do not dissent from the view that if the Board of Revision has followed a correct method and used its discretion, its finding should not be interfered with unless it is plainly erroneous, but where as here it has followed a rigid formula which has no justification in law they feel free to disregard the finding which has been reached and to accept that of the Judge of the Superior Court.

Whilst however they accept the figures of that learned Judge their Lordships are not prepared to advance by exactly the same route which he followed. They are however of opinion that some reduction for unsuitability or unadaptability arrived at on broad lines is justified and do not feel themselves in a position to qualify or criticize the figure which he reached. They agree that he had at least as wide a power of revision as has a Court of Appeal where a case have been tried by a Judge alone and indeed having regard to the provisions in the Charter that he must " proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain," they consider that he is to some extent less fettered than an appellate Court.

The Board of Revision however found some support for its figures by a reference to the value placed upon the property in the respondents' books viz.: $16,258,050.27. This figure, as has been pointed out, has to be furnished on oath to the City authorities and it is submitted must be taken as authoritative.

It is however plain that the sum so entered is not and is not meant to be an exact appraisal of the value of the property for the purposes of assessment. Quite naturally in preparing its accounts and balance sheet, the Company must use the actual cost of construction and diminish it year by year by means of some percentage of depreciation and thereby reach a rough and ready figure as being the present value of the building.

This course was as their Lordships were informed adopted in this case with the result that the amount arrived at is a conventional sum and its importance must not be pressed too far.

As a counterweight the Company point out that in 1931-32 an assessment of $12,000,000 was put forward on behalf of the City, but reduced to $8,000,000 and inserted in the roll at that figure. Nor was it increased except to take account of the cost of actual work between that date and 1941 when the total sum reached $9,986,200. It was then suddenly increased to $13,755,500 a percentage of increase said to be very much greater than in the case of any other large building—and consequently unjustified and unexplained. As in the case of the argument founded upon the figure marked in the Company's books, their Lordships reject this contention since they have no information as to the matters present to the minds of the assessors in 1931 or the grounds of the reduction and in any case they agree with the submission of the City that each new assessment constitutes a fresh start and a former one has very little value when as in the present instance, the whole circumstances have been reconsidered.

Nor have their Lordships received assistance from a comparison between the assessment of this building with those others, the names and assessments of which appear in the record. Each depends upon its own particular facts and figures and, without a full enquiry (which in any case would be inadmissible) as to the circumstances of the individual case in question, this type of evidence must be neglected. No doubt it is very desirable that the valuation placed upon different premises should be calculated on similar principles and accord one with another. But each assessment is a separate and individual matter, must be supported on its own merits and cannot be upheld merely because it is consistent with some other.

The second main proposition which their Lordships have to deal with is the index figures which should be used in order to correct the cost which was actually incurred to that which would have been incurred had the building been erected in 1941.

The assessor it will be remembered took as representative years for determining the difference in cost, those from 1927 to 1931 inclusive and in this he was supported by the Judge of the Superior Court. The Board of Revision on the other hand took the actual difference year by year from the start of the building to its completion.

As has been said the former resulted in a difference of 7.7 per cent., the latter in something less than 1 per cent.

In this matter their Lordships have no hesitation in deciding that the Board of Revision was right. Its figures are accurate, whereas those of the assessor are at best a very rough estimate.

They will consider at a later stage the monetary difference resulting from an adoption of the Board of Revision's percentage and its effect upon the assessment.

The third serious point of difference between the parties is as to the proportionate weight to be given to replacement and revenue respectively.

Each of the parties admits that these two factors should be taken into consideration—though the Board of Revision and some at any rate of the Judges of the King's Bench appear to have thought that the respondents were contending that revenue alone should be considered. They

certainly did not so contend before their Lordships' Board, though they were strongly critical of the weight which the assessor and the Board had attributed to the replacement value. The assessor had put the ratio at 90 per cent. for replacement and 10 per cent. for revenue: a result at which he arrived in the following way. The portions of the building in use by the respondents and those let to others bore, he said, a relationship of about 60 per cent. to 40 per cent. Normally therefore one would give a weight of 60 for replacement as against 40 for revenue, but, he added, the Memorandum directs that the utmost weight which should be given to revenue was 50 per cent. and that only when the whole of the premises were let. Therefore, inasmuch as in a case where the whole is let, 50 per cent. only is to be attributed to revenue, in a case where only 40 per cent. is let a weight of half that figure, viz. 20 per cent. should normally be given to revenue. Since, however, in the present case the respondents in his view occupied the more valuable portion of the premises he would give 10 per cent. only to revenue leaving 90 per cent. to replacement.

The Board of Revision on its part found the ratio of all occupied space to that let to be 64.61 to 35.39 and regarded its members " directed ", as its award says, in the case of all large properties " to give a weight of between 50 per cent. and 100 per cent. to the replacement factor proportionately to the proprietors' declared occupied value, i.e. each 1 per cent. of the rental value charged to the proprietor should be multiplied by 0.5 plus 50 in order to obtain the rate of appreciation of this part in the net replacement cost. Thus 64.61 per cent. above-mentioned multiplied by .5 plus 50 will give 82.3 per cent. which is the ratio of importance to be given to the net replacement cost ".

It follows that the ratio of revenue value must be 17.7 per cent.

This conclusion suffers from the same general vice as that of the assessor in that it accepts the suggestion of the Memorandum that in no case is the revenue value to receive a greater weight than 50 per cent. and follows that principle so rigidly as to apportion that 50 per cent. to the replacement and the revenue value in the ratio which the space occupied by the respondents bears to that which they have let.

Their Lordships see no justification for this course. Even if the Board of Revision had felt itself free to adopt any proportion which in its discretion it thought right, their Lordships would still be of opinion that the ratio adopted was unjustified. Either figure in their view gives far too little weight to the revenue approach in the case of such a building. But in the present instance the result arrived at is vitiated by following a rigid regulation and is not obtained by a free and unfettered judgment.

No doubt the question of the weight to be attributed to these respective factors must to some extent be influenced by the amount of depreciation allowed for unsuitability or unadaptability of the premises but even if an additional allowance for such depreciation is made the proportion of weight attributed by the Board of Revision to revenue is inadequate and, inasmuch as no such additional allowance has been made either by the assessor or by the Board of Revision, that proportion is still more inadequate. Their Lordships see no reason for differing from the Judge of the Superior Court in this matter and would only add that if he had allowed no additional depreciation they would have considered that the proportion of weight given to revenue should be increased still more.

It will be observed that their Lordships have attached no weight to the allegation that the law was altered in 1937 and again in 1940—in the former case with the result of increasing the importance of the replacement factor in making an assessment and in the latter so as to restore the principles formerly applicable. In their opinion the memorandum is plainly wrong and it matters not that at some earlier date, if such be the case, its terms were justified.

Nor has any account been taken of the suggestion that the figures put forward on behalf of the City were increased from time to time in the course of the calculations made in order to determine the 1941 assessment. The Board does not draw any adverse inference from the evidence which is suggested to lead to that conclusion and has reached its result apart from any such considerations.

In arriving at their decision their Lordships are not conscious of finding themselves in conflict with any of the authorities cited to them in argument. There must always be a number of exceptional cases, to which the ordinary rules cannot be applied. In some e.g. *In re Withycombe Estate, A. G. of Alberta* v. *Royal Trust Co.* (1945) S.C.R. 267 revenue was allowed to be the deciding factor ; in others as in *Canada Cement Coy* v. *City of Montreal* 35 K.B. 410 for lack of other evidence replacement value (calculated on the cubing method) was taken: in one at any rate, viz., *Montreal Island Power Co.* v. *Town of Laval Des Rapides* (1935) S.C.R. 304 the Court reduced the valuation by one half as a rough method of ending the controversy.

A theatre, a church, even a railway or land used as a water undertaking may give rise to peculiar difficulties and must be dealt with as best they can, but no such difficulties arise here ; the ordinary principle must apply and any mere rule of thumb must be discarded.

One case strongly relied upon on behalf of the City may perhaps be referred to although it is not a Canadian case ; but a decision of the United States District Court of Minnesota, viz., *State of Minnesota* v. *Federal Reserve Bank of Minneapolis*. That case dealt with the value of the building which housed a Reserve Bank and the Court refused to accede to an argument that the only factor to be considered was its earning capacity. It was pointed out that the edifice was a single purpose building constructed to serve the bank's activities, that there was a severe monetary depression and that reliance upon the rent obtainable from the premises (which was said to be " nil ") was not a true criterion of its assessable value. Other circumstances such as its costs of construction, its usefulness as a bank and the fact that it was still being used as a bank and was ill-adapted for any other use must be kept in mind.

Their Lordships are not adverse to such an approach. All matters must be taken into account, and the wide range of the considerations which the assessor kept in view in that case is clearly expressed in the judgment. There was no question of letting or the possibility of letting the premises and therefore that aspect was ruled out. In default of any other means of assessment therefore, the cost or replacement value was taken. But in doing so the assessor, whose view was supported by the court, was careful to make every allowance for physical depreciation and for excessive decoration and unadaptability: for each he allowed a deduction of 25 per cent., making a decrease in value of 50 per cent. in all. The methods of arriving at a true conclusion are manifold and where the cost of construction is reduced by 50 per cent. in a case in which the assessed property is still in use solely for the purpose for which it was constructed, a fair result may well have been arrived at.

In these observations their Lordships are in no way acceding to a suggestion that the subjective value to the owner of the premises is to be regarded. Cases such as *Great Central Railway* v. *Banbury Union* [1909] A.C. 78 show that such a consideration is inadmissible. It is the objective not the subjective value which has to be determined though, as has been said, the owner is to be regarded as one of a possible number of buyers, and subject to careful criticism and a sufficient qualification of price, the cost which he chose to incur is a relevant factor.

One method of implementing these views would be to send the case back for the Assessor to reassess the value of the building in the light of the opinion expressed in this judgment, but, as both parties recognized it would be lamentable if the matter were to start all over again with a possible sequence of Appeals and re-Appeals to their Lordships' Board. The parties, therefore, asked their Lordships to lay down the principles applicable, to state their views as to the Memorandum and to determine the figures if possible.

Their Lordships have already expressed their general view as to the law applicable and as to the Memorandum and it only remains for them to decide whether it is possible to give some indication of the figure which best represents the value of the property for the purpose of the 1941 Assessment.

Three courses are possible : (1) to adopt the assessment of the Board of Revision, (2) to take that of the Judge of the Superior Court, or (3) to put forward some intermediate figure.

Considering as they do that there are no sufficient grounds for rejecting the additional allowance given by the Judge in respect of unsuitability or unadaptability and agreeing with him that if that allowance is made a ratio of 50 per cent. to 50 per cent. represents the respective weight to be attributed to replacement and revenue, they have only to consider what, if any, change should be made as a result of their view that the appropriate index figure is 1 per cent. as adopted by the Board of Revision rather than the 7.7 per cent. which the Assessor and the learned Judge preferred.

The Assessor allowed a sum of $1,471,344 in respect of the change in cost of erection as between the cost actually incurred and the sum which would have been expended in 1941 as against $181,503.32 allowed by the Board of Revision, a nominal difference of $1,289,840.68. But their Lordships have been furnished with a table by the respondents showing that when all the elements in dispute have been taken into consideration—i.e. when the Company has had the benefit of the additional 14 per cent. of depreciation and the ratio of revenue to depreciation has been applied in a proportion of 50 per cent. to 50 per cent., the actual difference is not more than $432,672.39. The accuracy of this table was not challenged and their Lordships are confronted only with the question of the effect to be given to it.

In an assessment amounting to $10,207,877.40 their Lordships do not think the increase in amount to be of sufficient importance to demand an addition to be made to the learned Judge's figures. They therefore confirm the assessment which he made and which the Supreme Court affirmed of $10,207,877.40.

They would only add that whilst the principles which they have set out are those which should guide any future assessment, the detailed application of them to such assessments is a matter for the discretion of the bodies concerned.

So far as concerns costs they consider that the proper order in the circumstances is that the costs incurred in Canada should remain as determined by the Supreme Court, but that each party should pay its own cost of the proceedings before their Lordships' Board.

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In the Privy Council

THE CITY OF MONTREAL

v.

SUN LIFE ASSURANCE CO. OF CANADA

DELIVERED BY LORD PORTER

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