1964
Mar. 24
1965
Feb. 22

BETWEEN:

KILLARNEY PROPERTIES LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Revenue—Income—Income tax—Purchase and subsequent sale of land by taxpayer—Construction and sale of shopping centre—Intention of taxpayer in purchasing land—Dual or alternative intention of taxpayer —Secondary alternative intent becoming preferred alternative—Promotional and profit-making scheme—Adventure in the nature of trade—Speculative nature of enterprise—Admission by taxpayer of alternative intent to sell—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

This is an appeal against the reassessment of the taxable income of the appellant for the taxation year 1961 by the inclusion therein of the sum of $10,957 25, being the profit realized on the sale early in 1961 of a shopping centre erected by the appellant on certain lands in Edmonton, Alberta acquired by the appellant in 1959.

The appellant was incorporated in June 1959 and on June 30, 1959 it purchased the land in question from Kisbey Properties Limited which became the largest shareholder of the appellant and its largest creditor. Construction of the shopping centre commenced in September 1959 and was not completely finished until February 1960. An interim construction mortgage was obtained in September 1959 but the appellant never did succeed in replacing it with a conventional mortgage from a life insurance company despite its efforts to do so. This appears to be the main reason put forward by the appellant for selling the shopping centre.

The appellant received offers to purchase the shopping centre on August 6, 1959, on June 1, 1960, on December 20, 1960 and on January 17, 1961, which last offer was accepted. In its letter of refusal of this offer dated August 6, 1959 the appellant stated there was no possibility of a sale "at the price and on the conditions mentioned". The evidence established that as early as August 9, 1959, before construction had commenced, the directors of the appellant were considering the conditions under which the property might be sold. The minutes of the meeting of the directors of the appellant on April 4, 1960 included the declaration "Future plans of the Company in connection with the shopping centre revolved around selling the property. A price of $160,000 would be acceptable, the Board felt".

Held: That there is in the evidence abundant proof that those who directed the affairs of the appellant had a dual or alternative intention.

2. That the evidence establishes that what might previously have been regarded as a secondary alternative intent to sell the property had become a preferred alternative by April 1960.

3. That the financial set-up of the appellant had the earmarks of a promotional and profit-making scheme.

4. That the acquisition, development and sale of the property in question was an adventure in the nature of trade, the President of the Company

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

acknowledging that because of the district in which the shopping centre was to be located, and since, at the beginning they were not sure of obtaining tenants for the various units of the shopping centre, the project was a speculative one and this was not the first time that the prime movers in the enterprise ever engaged in a similar project.

5. That the appellant has failed to adduce any convincing evidence in support of its allegation that it was because it was impossible to procure a conventional mortgage that the appellant found it necessary to sell the shopping centre and there is cogent evidence to the contrary.

6. That the only logical conclusion to be drawn from the evidence is that the directors and shareholders of the appellant, far from intending to keep the shopping centre as an investment, were anxious to sell it and thus realize over a 33 per cent profit on their investment.

7. That this case is exceptional because it is one of the very rare cases wherein there is an admission by the taxpayer of an alternative intent to sell.

8. That the appeal is dismissed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Kearney at Edmonton.

G. Edward Trott for appellant.

Howard L. Irving and *G. F. Jones* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (February 22, 1965) delivered the following judgment:

This action concerns a profit of $10,957.25 realized by the appellant in its taxation year 1961 on the sale, early in 1961, of a shopping centre which it had caused to be erected on a site consisting of two adjacent parcels of land situated on 97th Street and 129B Avenue in the City of Edmonton, which it had acquired in 1959.

It is submitted on behalf of the appellant that the aforesaid profit was not taxable income but a capital gain, since the site was acquired for the purpose of building a shopping centre which the appellant intended to retain as an investment from which good revenue could be derived. It was only when it became evident that a conventional mortgage loan could not be acquired to replace the then existing construction mortgage and after it discovered that excessive maintenance costs would be encountered due to faulty construction that it was decided to accept an offer of sale.

According to the respondent, the appellant acquired the said land in the course of business, or as a trading venture, with a view to turning it to account at a profit. The acquisition of the site, the construction of the shopping centre thereon and its subsequent sale resulted in a profit of $10,957.25, which was income from such business or an adventure in the nature of trade within the meaning of ss. 3, 4 and paragraph (*e*) of s-s. (1) of s. 139 of the *Income Tax Act*, R.S.C. 1952, c. 148.

The parties agreed that the amount in issue and the facts leading up to the realization of the aforesaid $10,957.25 are not in dispute.

The only witness heard was Mr. William J. Martenson, who was called on behalf of the appellant. Counsel for the respondent, apart from his cross-examination of the witness, also examined the witness for discovery and read into the record certain questions and answers from the discovery proceeding. In his examination in chief, Mr. Martenson testified that he was a land developer, that he held a degree in Mechanical Engineering and that in 1959, when he became President of the appellant company, he also held the position of Sales Manager for Imperial Real Estate Limited. Prior to entering into the aforesaid business he had been engaged in oil field work with Schlumberger of Canada.

He was successful in having thirteen friends and associates join him in acquiring the aforesaid site with the intention of constructing thereon a shopping centre as an investment. On June 9, 1959, the appellant company was incorporated under the laws of the Province of Alberta.

On June 30, 1959, Killarney Properties Limited (hereinafter called Killarney Ltd.) acquired, for the sum of $1 and other good and valuable consideration, from Kisbey Properties Limited (hereinafter called Kisbey Ltd.), with the exception of the westerly thirty-one feet throughout Lots Twenty-one (21) to Twenty-four (24), inclusive, in Block Twenty-four (24), in the City of Edmonton (Ex. 2), but, according to an affidavit of G. Edward Trott, agent, for Killarney Ltd., attached to the deed, the true consideration paid by the transferee amounted to $20,000. Kisbey Ltd. had acquired the said property from the City of Edmonton.

On September 4, 1959, as appears by Exhibit 3, the City of Edmonton, in consideration of $3,500 paid to it by

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

Kearney J.

Kisbey Ltd. and Killarney Ltd. (the said Kisbey Ltd. having assigned its interest to the said Killarney Ltd. by assignment dated July 16, 1959), transferred to Killarney Ltd. an adjoining piece of property described as Lot 20 of Block 24. Attached to the deed is an affidavit of the aforesaid agent of Killarney Ltd. in which he declares that the present value of the land, in his opinion, amounted to $10,000. Asked how did Killarney Ltd. happen to be receiving transfer of Lot 20 from the City of Edmonton, he replied: "Lot 20 was adjacent to the other lands and so Killarney undertook to buy."

The witness filed as Exhibit 4 a list giving the names and occupations of his friends and associates who became shareholders of the Company, together with their respective shareholdings; it showed 110 shares. The first name on the list is his own. He owned three shares and his loan to the Company amounted to $600. The last name on the list is Kisbey Ltd.; the latter held twenty shares.

Kisbey Ltd. was not only the largest shareholder but also the largest lender, and its loan amounted to $11,798.

The witness stated that before Kisbey Ltd. sold the land to Killarney Ltd. it had not taken any steps toward construction of a shopping centre, nor had it arranged for any leases, but it had consulted architects.

Q. Who arranged for these shareholders of Killarney to put money into the company?

A. Myself.

Q. What was done with this money?

A. It was used to pay for the land.

The anticipated yield, based on the net return on the project before depreciation and on the cash invested, which amounted to $30,000, would rise to 56 per cent when the mortgage had been retired, which, it was estimated, would be in ten years time. In the opinion of the witness, such return was much higher than normally found in most revenue properties due, to a large extent, to the increase in the value of the land as a result of development. After selling the property in 1961 for $150,000—of which $133,000 was paid in cash and $17,000 in the form of a second mortgage—, a cash balance of close to $30,000 remained in the treasury and the Company, the witness said, re-invested it in an office-and-retail-type development of a larger size, in Edmonton, being handled by the group

of which Killarney was a part. Returning to the history of the shopping centre, Mr. Martenson stated that the building contract was given to the lowest bidder, Prince Construction Company Limited, for an amount of $78,000 (Ex. 5).

Construction began in September 1959 and it was anticipated that the building would be completed in six or eight weeks, which would be in late October or November, but it was near Christmas when the tenants were able to move in and the shopping centre was not completely finished until February 1960. The work was carried out much more slowly than most contracts of the same nature. The contractor, without the consent of the Company, made many changes at the request of tenants with respect to leasehold improvements. This led to difficulty in negotiating a settlement with the tenants, but, finally, under threat of legal action against them, "the contractor settled rather than face this thing in Court."

The shopping centre was completely leased in March 1960.

Messrs. Walden and Gourlay, both directors of Killarney Ltd., were in receipt of modest salaries for looking after collection of rents and dealings with the tenants.

No mortgage money had been arranged for until after the construction contract had been allotted. Unsuccessful efforts had been made to secure a loan from regular life insurance companies at interest rates of 7 to 7½ per cent with no bonus, and an interim construction type of mortgage was obtained on September 11, 1959 from First Investors Corporation Limited for $90,000 at 7 per cent and a $10,000 bonus, the due date of which was November 1, 1961 (Ex. 6).

The witness stated that the following offers to purchase were received. On August 6, 1959, Vergil Chambers, of Edmonton, offered, through his solicitors, to purchase the shopping centre for $130,000, payable $40,000 cash and a mortgage for $90,000, amortized over ten years, with interest at 7 per cent (Ex. 7). The Company, by letter, refused the offer and informed the purchaser that, at the price and on the conditions mentioned, there was no possibility of a sale. The letter went on to say: "The only thing we could suggest is that Mr. Chambers offer to purchase all the outstanding shares in Killarney Properties Ltd. for

1965

KILLARNEY PROPERTIES LTD. v. NATIONAL MINISTER OF REVENUE

Kearney J.

$40,000. If all the shareholders agree to this he would then take over the company as is." (Ex. 8).

Mr. Martenson stated that the property was never listed for sale with any real estate agent and added that he was interested, from an agent's point of view, in having the property for sale and earning a commission, but that his request to obtain the listing was rejected by the directors as a whole.

On June 1, 1960, an offer was received from Nielsen Investment Ltd. for $155,000, payable $15,000 cash, plus an equity in a certain piece of property, and the balance, amounting to $98,000, payable $1,000 per month, with interest at 7 per cent (Ex. 9). The aforesaid offer was rejected.

On December 20, 1960, an offer was received from George Mah, which, the witness said, resulted in the ultimate sale of the property. The price was $137,500, payable $4,000 cash, an additional $45,000 payable on the possession date, $84,000 by way of mortgage—to be arranged by the purchaser—and $4,500 by a second mortgage to Killarney Ltd. as vendor (Ex. 10). The offer was refused, but on January 17, 1961, Mr. Mah, through his attorneys, made a second offer (Ex. 11) amounting to $150,000, payable $133,000 in cash and $17,000 by way of second mortgages payable over a period of ten years at seven and one-half per cent interest. The offer contained the following condition:

> This offer is subject to the confirmation by North American Life that they will grant a mortgage to Mr. Mah on the above referred property in the sum of $85,000. All adjustments will be as at the date of possession and the date of possession is set at February 1st, 1961.

The offer was accepted.

The Company paid to the agent, Melton Real Estate Co., which handled the transaction, $1,000 as commission. The regular tariff, the witness said, would amount to $6,500. Mr. Martenson stated that, at the date of purchase, the First Investors mortgage was not discharged because the Company was unable to obtain, to repay it, a conventional mortgage from another source. Mr. Mah arranged a new mortgage and retired the existing mortgage. Asked what considerations influenced the directors in deciding to sell, the witness replied:

> They were concerned by that time that they had been unable to arrange a mortgage to pay this First Investors mortgage which was due

that same year. This was a large debt which was about to mature, and many attempts had been made to obtain a long-term mortgage through a conventional company at conventional rates of 7 or 7½ per cent, and we had been unsuccessful, so this was a consideration from the point of view of servicing this debt. There was also the consideration that the tenants still were fairly unhappy, and we had not solved all our problems with them by this time, and this was a frustrating thing for the property manager, and the directors. A third factor was also that the building was not well built and there were a series of problems, none really large in themselves, but many in number and quite irritating, things like doors not closing properly, sidewalks in front falling away from the building and that type of thing, so this was a consideration also that there might be extensive maintenance problems in the future that would not only cost money but further create tenant and landlord problems. And I think a fourth factor is that this was the first building or development ever undertaken by this group and they were quite inexperienced, and most problems probably loomed much larger than they would appear to a developer who was experienced in this sort of thing, and this was definitely another factor in influencing the directors to accept this offer.

The witness stated that, in the fall of 1960, he contacted at least five mortgage companies and that other directors contacted at least another five. None of the companies showed any interest except North American Life Assurance Co. John Klink, the manager of that firm, agreed in principle to the idea but he had exhausted his quota of funds and could give no assurance that the Company would get any conventional mortgage funds in the future through his firm. The witness added that, in fact, North American Life Assurance Company eventually did grant a mortgage.

In cross-examination, counsel for the respondent elicited the following information from Mr. Martenson. This was not the first business venture that he and a number of associates had entered into. He and a number of them, in 1959, bought substantial acreage, sold enough to pay back the cost and held the balance.

About 105 shares of the Company were issued and the price paid was one cent a share. Apart from Kisbey, which was the original owner of the property, the amounts advanced as loans by other shareholders amounted to about $17,000, and, together with the price of their equity stock, their investment in the Company totalled about $18,000.

The witness was asked to file a copy of minutes of a directors' meeting of the Company dated July 6, 1959 (Ex. A), which sets out the Memorandum of Association; I shall comment upon it later.

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

Kearney J.

The witness agreed that the construction was started in September 1959 and that prior to this the Company had already received the Vergil Chambers offer of August 9. The witness was asked to file as Exhibit B an extract from the minutes of the meeting which considered the said offer; this extract reads in part as follows:

On motion duly made and unanimously passed it was resolved that solicitors for the company should write to solicitors for Vergil Chambers and advise him that the only offer we can consider at the present time is one to acquire all the shares in Killarney Properties Ltd. with the understanding that the leasing commissions have been paid in full and the architects fees will be paid in full. All other benefits, rights and obligations would be assumed by Mr. Chambers. (I will not read the last two paragraphs, my Lord.)

The witness was asked

Q. So that the directors on this 9th day of August, 1959 are already giving consideration to under what conditions that the property might be sold?

A. Yes.

The witness agreed that construction was started in September 1959 and that, prior to this, the Company had already received the Vergil Chambers offer of August 9. In reference to the construction mortgage the Company received only $80,000 in mortgage money because of having to pay a $10,000 bonus. The witness agreed that the ordinary mortgage company which grants a conventional mortgage does not require a bonus of this type. The witness was asked to produce a copy of a meeting of directors of April 4, 1960, held following the completion of the building (Ex. C), an extract from which reads thus:

2. Mr. Martenson reported that except for some minor deficiencies the building was complete. One unit remains unleased but three applications are in hand from prospective tenants. The building will be fully leased by May 1, 1960.

3. Mr. Walden reported that all tenants had paid their rents according to schedule and that all bills had been paid, except those relating to the balance of construction. $3,750 has been paid on the mortgage.

4. A letter from Prince Construction Company Ltd. re final settlement was studied. The final price is to be $95,000. Alternatives of financing were discussed by the Board and it was decided to approach the mortgagor to obtain additional funds to pay the contractor. Mr. Walden to attend to the details.

5. It was decided that a sign would not be erected on the building at this time.

* * *

7. Future plans of the company in connection with the shopping centre revolved around selling the property. A price of $160,000 would be acceptable, the Board felt.

The witness agreed that once the leases were completed the Company planned to apply for what is called "a conventional mortgage", as it then would be in a position to show a mortgage company the rental income that could be obtained.

Mr. Martenson declared that, in the latter part of 1960, he contacted, among five others, Mr. Klink of North American Life Assurance Company, who informed him that the shopping centre was a development on which the Insurance Company conceivably would grant a mortgage but that his allotment, at that time, had been expended.

After reminding the witness that the last paragraph of Mr. Mah's offer of January 17, 1961, states:

> This offer is subject to the confirmation by North American Life that they will grant a mortgage to Mr. Mah on the above reference to property in the sum of $85,000.

counsel for the respondent asked the following questions and received these answers:

Q. And with this offer you knew that the offer was contingent upon North American Life loaning the money? The company knew that?

A. Yes.

Q. And did the company then, in looking for mortgage money, go to North American Life or Mr. Klink and say—"Now, you have some money, will you loan it to us?"

A. No.

Q. You didn't?

A. No.

Q. Nor after January 17th, 1961, did the company approach any other mortgage institution in order to borrow money for this purpose?

A. No.

Q. Now, Mr. Martenson, the offer to purchase from Mr. Mah, the first one which I think was Exhibit No. 10, that is Mah's earlier offer dated December 20th, 1960, and this offer came to you through Melton's Real Estate?

A. Yes.

Q. And by a man called Pat Turner?

A. Yes.

Q. You were at this time the commercial manager of Imperial Realtors?

A. Yes.

An offer for the property in the amount of $155,000, dated June 1, 1960, whereof $42,000 was to be paid by a transfer of the purchaser's equity in another property, was declined. The Company likewise declined an offer of $137,000, dated December 20, 1960, by George Mah who,

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

Kearney J.

on January 17, 1961, made a new offer of $150,000, of which $133,000 was payable in cash, and which the Company accepted.

Q. And Mr. Turner had a similar position with Meltons?

A. Yes.

Q. And you were close friends?

A. Yes.

Q. Your office buildings were for all practical purposes next door?

A. Yes.

Q. And you visited and had coffee together and you discussed various things intimately over all the time we are concerned with?

A. We discussed things, yes.

Q. And the letter and the offer from Mah of December 20th came as no surprise to you. Pat Turner, the Melton man, talked to you about it prior to the offer being made, did he not?

A. Yes.

Q. And in between the first offer that Mr. Mah made of December 20th, 1960 and the second offer of January 17th, 1961, you and Pat Turner negotiated further in respect of this?

A. We said merely what we wanted. We didn't make a counter-offer.

Q. In other words you and Turner discussed this matter over quite sometime?

A. We did discuss it, yes.

On re-examination by his own counsel, he was asked who, among the members of the Company, including the witness, were interested in land development companies prior to 1959. The witness replied:

Some of the members were with me in Kisbey Properties Limited and some were with me in the development of a Golf and Country club.

Q. Who were they?

A. I probably can't tell you without referring to the shareholder list. Those that had shares in each were myself, Mr. Walden, Mr. Sawatzky, Mr. Gillmore, and I believe that is all.

Q. Was Mr. Black in Kisbey?

A. Yes.

After indicating to the witness that the cost of the shopping centre was $95,000, which is $17,000 in excess of the contract price, counsel for the appellant put the following question:

How did the company obtain the funds on which to pay the contract?

A. These funds were obtained primarily from the mortgage we received and the balance from the bank loan.

(I might here observe that reference to the bank-loan appears on Exhibit 1, where a caveat which was placed on the property by the Bank of Nova Scotia is shown.)

Q. Now, Mr. Martenson, for the period with which we are concerned, Mr. Martenson, you were President of Killarney Properties Limited and also a real estate salesman?

A. Yes.

Q. Now, which were you during the discussions with Mr. Turner that you spoke about to my learned friend?

A. I was both. I was wearing two hats at the time in that I represented both a real estate agency and the company that owned the property.

The following is an extract from the questions and answers given by Mr. Martenson on examination for discovery read into the record by counsel for the respondent:

117. Q. Was the amount of the bonus partly because of the location of the shopping centre in that perhaps it was somewhat of a speculative investment in comparison to perhaps others?

A. Partly because it is speculative, yes, in that all the leases were not acquired at that time and partly because of the shorter duration their overhead or handling costs, or what have you, have to be amortized over a shorter period of time.

273. Q. Now I notice, sir, that in the paragraph immediately above the adjournment paragraph that last sentence reads, "The directors felt the company is best suited to invest in real estate and that the company should try to increase its assets by fifty percent per year."

A. Yes.

274. Q. And the increase in assets at fifty per cent per year would be by carrying on business?

A. Yes.

275. Q. And I presume that this would involve buying and selling?

A. It would, it could involve buying and selling or straight development work.

277. Q. So that it was then the company's view that in order to achieve a fifty per cent increase in assets per year the best way to do it was by development of real estate?

A. Yes.

278. Q. And the real estate, upon development would either be retained by the appellant company or sold, whichever seemed more favourable?

A. Yes.

279. Q. And this, I presume, has at all times been the intention, if a company has an intention, of the appellant.

A. What would be the intention?

280. Q. Of attempting to increase its assets as fast as possible in the way we have described?

A. Yes.

In support of the appellant's claim, his counsel submitted that, in the early days of the Company, there was no intent on the part of its directors and shareholders to sell the property and that the compelling reason which led them

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

Kearney J.

to do so, instead of retaining it as an investment, was because they encountered what he described as a "big stumbling block". The said obstacle rested on the allegation that the Company, despite repeated efforts by its directors, was unable to obtain a conventional mortgage to replace the $90,000 construction mortgage negotiated with First Investors Corporation Limited and which fell due on November 1, 1961.

In my opinion, there is to be found, in the evidence previously referred to, abundant proof that those who directed the affairs of the Company had a dual or alternative intention.

As appears by questions and answers Nos. 173, 277 and 278 *supra,* Martenson, on discovery, testified that the Company, by real estate development, would try to increase its assets by 50 per cent per annum, and, thereupon, to either retain the project so developed or sell it—whichever seemed more favourable.

The Company, it may be recalled, was incorporated in June 1959 and the first offer for the property of $130,000 was made by Mr. Chambers on August 6, 1959 (Ex. 7), whereupon the Company, on August 10 (Ex. 8), while declaring that the offer was unacceptable, showed its interest in selling the property by informing the intended purchaser that, subject to ratification by the shareholders, it would be interested, if the said purchaser would make an offer, to buy all the outstanding shares in "Killarney Properties Limited for $40,000".

The above occurrence took place less than a month after the Company had signed the building contract (Ex. 5) and a month before any construction had commenced or the construction mortgage with First Investors Corporation Ltd. had been signed (Ex. 6). Mr. Martenson's testimony discloses that, in February 1960, the shopping centre was nominally completed and lessees were in occupation.

The minutes of the director's meeting of the Company held on April 4, 1960 (Ex. D) provide another piece of revealing evidence of intent to sell. The said meeting began with a most encouraging statement made by the Secretary, Mr. Walden, who reported that the one remaining vacant unit in the shopping centre would be occupied by May 1; that all tenants had paid their rents on schedule; that all bills, except those relating to the balance of construction

cost, had been paid; and that the final price for construction was to be $95,000. After discussing alternative methods of financing, it was decided to approach The First Investors Corporation Ltd. to obtain additional funds to pay the contractor, and Mr. Walden was instructed to attend to the details. The evidence does not disclose whether such approach had been made.

The meeting concluded with the following declaration of intent:

> Future plans of the Company in connection with the shopping centre revolved around selling the property. A price of $160,000 would be acceptable, the Board felt.

The foregoing evidence, in my opinion, establishes that what might, previously, have been regarded as a secondary alternative intent to sell the property had now become a preferred alternative. Indeed it would hardly be overstatement to say that the intent to sell had become a determination to do so.

The financial set-up of the Company, in my opinion, had the earmarks of a promotional and profit-making scheme entered into more particularly by Mr. Martenson and three or four close associates, who through Kisbey Ltd., in which they were shareholders, held a controlling interest in Killarney Properties Ltd. The capital-stock of the Company consisted of 30,000 n.p.v. shares, which could be issued for such consideration as the directors might determine, but not to exceed $1 a share. All the issued shares of the Company were acquired by its original shareholders for 1 cent a share and they were entitled to obtain further shares, at the same price, up to some 11,000 shares, to be apportioned among the shareholders according to the amount of money they lent to the Company, which totalled approximately $30,000. In other words, the shareholders practically received their equity-holdings in the Company as a bonus for the money which they loaned to the Company.

Before passing on to consideration of the main items of defence, I might here comment on the speculative nature of the undertaking and the background of the prime movers of the venture.

The president of the Company acknowledged that because of the district in which the shopping centre was to be located, and since, at the beginning, they were not sure

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

Kearney J.

of obtaining tenants for the various units of the shopping centre, the project was a speculative one. We are not here dealing with a case in which it was the first time that the prime movers of the enterprise ever engaged in a similar project. They had previously organized and developed Kisbey Ltd. from which the instant property had been purchased and an unnamed golf club.

In my opinion, the acquisition, development and sale of the instant property was a further adventure in the nature of trade.

Now, with respect to the main defence, viz., that it was because it was impossible to procure a conventional mortgage that the Company was left with little or no alternative but to dispose of the shopping centre, in my opinion, the appellant has failed to adduce any convincing evidence in support of this submission and there is cogent proof in the record to the contrary. It was only in November 1960 that the president and some of his associates endeavoured, without success, to obtain a conventional mortgage, and, at this time, the president was informed that, for the fact that North American Life Insurance Co. had used up their quota for the year, they would have been prepared to grant a mortgage. After the turn of the year, the president of the Company admitted that he had not approached the aforesaid Insurance Company notwithstanding that he was well aware that Mr. Mah was negotiating with the same Insurance Company for an $85,000 construction loan and that the latter's offer to purchase the property in issue for $150,000, dated January 17, 1961, was made conditional upon the Insurance Company granting the said loan.

I consider that the only logical conclusion to be drawn from the aforesaid evidence is that the directors and the shareholders of the Company, far from intending to keep the shopping centre as an investment, were anxious to sell it and thus realize over a 33 per cent profit on their investment.

Counsel for the appellant raised other arguments, such as: trouble of an irritating nature with tenants; some evidence of defective workmanship; doors not closing properly; and the like. Mr. Martenson, in his evidence, said that such troubles, although they would appear large to some inexperienced shareholders, to a man like himself they did not

mean much, but that they were, however, a factor in influencing the directors to accept Mr. Mah's offer. However, I regard these irritations as being of minor importance and as having little probative value.

Mention of the fact was made that the very first object of the Company, as inscribed in its Memorandum of Association, was to acquire the site in issue to construct a shopping centre thereon and to lease the stores contained therein.

I place little stock in the above described point, because also included in the said objects were, *inter alia:*

> (*c*) To carry on business as investors, brokers and agents and to undertake and carry on and execute all kinds of financial, commercial, trading and other operations which may seem to be capable of being conveniently carried on or in connection with any of these objects or calculated directly or indirectly to enhance the value of or facilitate the realization of or render profitable any of the Company's property or rights.
>
> (*k*) To establish, promote and otherwise assist any company or companies for the purpose of furthering any of the objects of this Company.
>
> (*m*) To sell or dispose of the undertaking of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures, or securities of any other Company wheresoever incorporated having objects altogether or in part similar to those of this Company and to distribute any of the property of the Company among the members in specie.

It was alleged that the Company did not hire a real estate agent nor advertise the property for sale. The president was himself a real estate agent who was anxious to earn a fee upon the sale of the Company, which fee, it was said, would have amounted to over $6,000, but instead of paying anything to Martenson, the Company paid $1,000 to Mr. P. Turner, who was supposed to be the agent of the purchaser, Mr. Mah. I am unable to accept the submission of counsel for the appellant that, although, perhaps, not important in themselves, the cumulative effects of the above-mentioned occurrences are sufficient to establish that the appellant was not engaged in any adventure in the nature of trade and did not intend to turn the property to account but to retain it as an investment.

The present instance was not the first occasion that he had entered into an undertaking of a similar nature and the evidence disclosed that Mr. Martenson and three or four others, at his instigation, had joined him as associates on at

1965

KILLARNEY PROPERTIES LTD. v. MINISTER OF NATIONAL REVENUE

Kearney J.

least two other occasions in undertakings similar to the instant one, and there is no evidence whether or not the same can be said with regard to other shareholders of the Company.

I consider that the present case is exceptional because it is one of the very rare cases—see also the judgment of Noël J. in *The Minister of National Revenue v. Clifton Lane*[1]—wherein there is an admission by the taxpayer of an alternative intent to sell. Such direct evidence does not appear in *Regal Heights Ltd. v. Minister of National Revenue*[2]; nevertheless, as noted by counsel for the respondent, the taxpayer was found liable and the Court inferred from the surrounding circumstances that sensible businessmen, if they were unable to develop the property as they hoped to do, could and would re-sell it at some gain to themselves.

Counsel for the appellant placed a great deal of reliance on *Dorwin Shopping Centre v. Minister of National Revenue*[3], a judgment of Cattanach J. in which it was held that the taxpayer was not liable for tax. In my opinion, the *Dorwin* case is readily distinguishable upon its particular facts. The preponderance of evidence confirmed the sworn statements (albeit self-serving) of the directors that the Company did not intend to turn the property to account by re-sale, and, unlike in the instant case, there was no admission of a preferred or alternative intention to do so.

Furthermore, in contrast to the case at bar, wherein it is clear that the directors knew where a conventional mortgage could have been had but refused or neglected to obtain it, the directors of the Dorwin Co. had reasonable expectations of obtaining from an Insurance Company sufficient mortgage money to complete their building project, but despite their best efforts they were unsuccessful in obtaining it, with the result that the Company's plans were frustrated.

For the foregoing reasons, I consider that the present appeal must be dismissed with taxable costs in favour of the respondent.

[1] [1964] Ex. C.R. 866; [1964] C.T.C. 81 at 87.
[2] [1960] S.C.R. 907.
[3] [1964] Ex. C.R. 234.