Date: 19991215
Docket: C.A. 156018

NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia (Assessment) v. Brett Pontiac Buick GMC Ltd., 1999 NSCA 158]

Freeman, Bateman and Cromwell, JJ.A.

BETWEEN:

THE DIRECTOR OF ASSESSMENT	)	Randall Duplak, Q.C.,
	)	Gwendolyn M. Fountain
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
BRETT PONTIAC BUICK GMC LIMITED, GRANBURY DEVELOPMENT LIMITED, BRETT MOTORS LIMITED, and BRUCE R. BRETT, and HALIFAX REGIONAL MUNICIPALITY	)	Peter A. McInroy
	)	for the respondents
Respondents	)	
	)	
- and -	)	
	)	
BRETT PONTIAC BUICK GMC LIMITED, GRANBURY DEVELOPMENT LIMITED, BRETT MOTORS LIMITED, and BRUCE R. BRETT	)	
Cross-Appellants	)	
	)	Appeal Heard:
- and -	)	November 30, 1999
	)	
THE DIRECTOR OF ASSESSMENT and HALIFAX REGIONAL MUNICIPALITY	)	Judgment Delivered:
	)	December 15, 1999
Cross-Respondents	)	

THE COURT: Appeal and Cross-Appeal dismissed as per reasons for judgment of Freeman, J.A., Bateman and Cromwell, JJ.A., concurring.

Freeman, J.A.:

[1] When the respondent, Bruce R. Brett, and companies he controls (Brett) built three condominium projects containing 368 units in the late 1980's and early 1990's, 222 units found a market and the Brett interests retained and rented the remaining 146 units which did not sell. Brett bought back three additional units which it also rents.

[2] The Director of Assessment appealed the 1994 assessment of the rented units fixed by the Regional Assessment Appeal Court at $10,939,200 to the Nova Scotia Utility and Review Board; Brett cross-appealed. (The 1995 assessments of the three additional units were included). The Board allowed both the appeal and cross-appeal in part in determining a valuation of $10,722,155, consisting of values higher than some and lower than other assessments of individual units. This figure was arrived at by applying a 15 per cent discount to the $12,614,300 assessment urged by the Director on the basis of a report by Mark Peck, who testified as an expert appraiser for the Director. Brett's appraiser, Eric Piccott, estimated market value at $8,474,300.

[3] The Director has appealed the Board's decision to this court urging adoption of Mr. Peck's evaluation, and Brett has cross-appealed urging Mr. Piccott's.

[4] Valuation of property for assessment purposes in Nova Scotia is governed by s. 42 of the **Assessment Act**, R.S.N.S., 1989, c. 23, as amended:

> 42 (1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that taxation

> falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the municipality.
>
> **Base date for valuation**
>
> (2) The Director may from time to time prescribe a past date as a base for the determination of the market value of a property for the purposes of subsection (1).
>
> **Date for state of property**
>
> (3) Notwithstanding subsections (1) and (2), the assessment of a property shall reflect its state as of the date referred to in subsection (2) of Section 52.
>
> ...

[5] In the present appeal the base date for determining market value is January 1, 1988. The state date for determining the physical state or condition of the property is January 1, 1994. The evaluations were complicated by the need for forward projections from the base date because, while many of the units were complete at that time, none were offered on the market until after the base date.

[6] The scheme for valuation under the **Assessment Act** was discussed by this court in **Director of Assessment v. Wandlyn Inns Ltd. and Dartmouth (City)** (1996), 150 N.S.R. (2d) 177 and **Director of Assessment v. Canada Trustco Mortgage Co. and Halifax Regional Municipality** (1997), 158 N.S.R. (2d) 290.

[7] The parties argued in some detail before the Board as to whether the 149 units in question were rental units which should be valued by the income approach or individual owner-occupied properties which should be valued by the sales comparison approach. While a practice has developed among provincial assessors as to which

approach is appropriate in various circumstances, the concepts are not part of the rationale under s. 42. The assessor's duty is to ensure that taxation falls in a uniform manner upon all residential and resource property in the municipality. No distinction is made between residential properties that are owner-occupied and those that are rented. Both the direct comparison and the income methods were recognized in the Privy Council decision in **Montreal v. Sun Life Assurance Co. of Canada**, [1952] 2 D.L.R. 81.

[8] It has become customary to assess rental properties by the income method and owner-occupied units by the direct comparison method, presumably because of the relative availability of evidence. Within the municipality, therefore, some residential properties are assessed by one method and some by the other. Given ample evidence, the results should be similar. Under s. 42 the duty remains on the assessor to "ensure that taxation falls in a uniform manner upon all residential and resource property" in the municipality.

[9] In the present case there was both ample sales data and ample income data. The difference in results achieved by Mr. Peck using the direct comparison method and Mr. Piccott using the income approach suggests that either or both were using flawed methodology.

[10] The Board critically analyzed the methodology of both experts and found problems, in particular, with the capitalization rate applied by Mr. Piccott. It concluded:

> . . . [T]he Board finds that it is not satisfied that it can rely on the results obtained by the Respondent's appraiser from his application of the income approach. Furthermore, for the reasons given above, it is of the opinion that it is neither necessary nor appropriate to use the income approach to value the units for assessment purposes. Accordingly, the Board gives no weight to the Respondent's estimated market values obtained by using the income approach.

[11] This was a reasonable conclusion well within the Board's jurisdiction based on the materials before it. Its remarks as to the appropriateness of the income approach are, of course, limited to the facts before it which include identified problems with the methodology of the appraiser using that approach.

[12] With respect to Mr. Peck's appraisal, the Board accepted Mr. Piccott's opinion that Brett had constructed condominium units "well in excess of demand."

> ...The Board agrees with Mr. Piccott's judgment that an exposure time of three to nine months would have been reasonable in 1988. Yet the units failed to sell at the prices found by Mr. Peck to represent their market value within that period of time or indeed at all in the following months and years. The Board is satisfied that it was Brett's original intention to sell the units under appeal and that this intention continued for a period of time at least as long as it is material to these appeals. The Board finds that the inability of the market to absorb the condominium units within a reasonable exposure time can only be explained by concluding that the prices being asked for the units and accepted by Mr. Peck as representing the market value of the units were too high given the actual state of the market at the base date.

[13] The Board concluded, after reviewing all of the evidence, that the market value for assessment purposes determined by Mr. Peck should be reduced by 15 per cent. The Board found that the resulting values reflect the market value for assessment purposes of the units under appeal at base date January 1, 1988.

[14] While this may have left the units which had been sold assessed above their

market value, that is not an issue in this appeal.

[15] There is a right of appeal from the Board to this court on questions of law and jurisdiction but its decisions on matters of fact are protected by a privative clause and therefore are reviewable only for patent unreasonableness. Decisions of an administrative board on questions of fact within its core area of jurisdiction in any event, call for a high degree of deference best expressed by that standard, which is tantamount to error of law or jurisdiction. In the present appeal the conclusions of the Board are supported by evidence and I have not been persuaded that it arrived at a patently unreasonable, or irrational, result.

[16] The appellant also submitted, as its first ground of appeal, that it had not been permitted to fully cross-examine a witness from a management company called to identify a document entered as Exhibit 21, and to state it had not been used in the appeal with her permission. When she mentioned she was aware of differences in the assessments of owner-occupied and rental units, the appellant sought to have her produce extensive documentation relating to all 1500 condominium units under her company's management and return with it the next day for further cross-examination. In particular, the Director sought information as to which of the units were rented and which were owner-occupied, asserting such information was not in its possession.

[17] Assessors are under a duty to make diligent inquiry in the course of assessing properties, and enjoy enabling rights of entry and of demanding information

under ss. 18 to 23 of the **Assessment Act**. There seems no good reason for the Director to lack simple factual data as to ownership and occupancy of units it had assessed. If there was, it was open to the Director to attempt to subpoena the evidence sought from the witness. This was not done. The Board has jurisdiction to control its own process; it did not err in law or jurisdiction in refusing to order the witness to produce the material.

[18] I would dismiss the appeal and the cross-appeal without costs.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.