[2023] JMCC Comm 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2021CD00237

BETWEEN	**BENEDETTO PERSICHILLI**	**CLAIMANT**
AND	**LEO TADDEO**	**1ST DEFENDANT**
	NEW ERA HOMES 2000 LIMITED	**2nd DEFENDANT**

Settlement Agreement – Consent Order – Agreed expert required to do several valuations - Whether valuations can be set aside - Whether new expert to be appointed - Whether fraud or collusion alleged or proved - Whether failure to follow material instructions alleged or proved - Whether error or negligence a sufficient basis to set aside valuation unilaterally - Admissibility of expert evidence- Rules 32.12 and 32.13 (2) (a) – Whether an expert's failure to comply with procedural requirements necessarily renders reports inadmissible in evidence.

Nerine Small and Sheneil Francis for Claimant

Kemar Robinson and Jordine Wood-Robinson for the 1st Defendant

Deandre Butler instructed by Sandra Johnson and Co. for Mr. Worrick Bogle the Receiver /Manager of the 2nd Defendant

Heard: 20th & 21st April; 20th, & 21st September; 20th & 22nd November; 2nd, 19th & 21st December 2022 and 14th April, 2023.

IN OPEN COURT

BATTS, J.

INTRODUCTION

[1] On the first morning of hearing Ms Small objected to Mrs. Wood-Robinson appearing for the 1st Defendant. Mrs Wood-Robinson had previously been the in-house counsel for the 2nd Defendant. Mr. Robinson denied there was any conflict of interest as the issues related to the separation of erstwhile partners in the 2nd Defendant company. I agreed with him and, as the 2nd Defendant was now separately represented and had voiced no objection, I permitted the representation to continue. There is, it seems to me, unlikely to be any confidential information in the 2nd Defendant to which both Claimant and 1st Defendant were not already privy.

[2] There are four applications for my consideration. The first is a Notice of Application, filed on the 3rd day of February 2022, on behalf of the 1st Defendant seeking: -

> *"1. An order that the valuations done by Allison Pitter and Company on the properties owned by New Era Homes 2000 Limited be deemed invalid.*
>
> *2. An order that all funds paid to Allison Pitter & Company for the preparation of the Valuation Reports be refunded to New Era Homes 2000 Limited immediately with interest.*
>
> *3. That the Court choose a reputable company to conduct Valuation Reports for the properties owned by New Era Homes 2000 Limited.*
>
> *4. Any other Order this Court deems fit."*

The second application before me is a Further (Amended) Notice of Application, filed on the 25th August 2022 (originally filed 28th March 2022) on behalf of the 1st Defendant, seeking the following orders:

> *"1. A declaration that the Valuation reports prepared by Allison Pitter and Company for properties located at lots number 2,3,4,5,6 and 7 part of Lot 390 Drax Hall Estate in the parish of St. Ann undervalued the said properties.*
>
> *2. A declaration that the Valuation Reports prepared by Allison Pitter and Company for properties located at Lot number 389 Drax Hall Estate in the parish of St. Ann is undervalued.*
>
> *3. That an explanation be provided by Allison Pitter and Company as to how the value for Lot 392 Drax Hall Estate was arrived at.*
>
> *4. A declaration that a new Valuation Report be done for Lot 392 Drax Hall Estate*
>
> *5. A declaration that new Valuation Reports be done for the mentioned lots at paragraphs 1 and 2 aforementioned*
>
> *6. A declaration that Lot 8, Part of Lot 390 Drax Hall Estate, in the parish of St. Ann, be ascribed a value.*
>
> *7. In the alternative to paragraph numbered 8, that new valuations be done for lots 2-7 that reflect the fact that the value of lot 8 is subsumed in each of the seven lots."*

[3] The third application, filed on the 28th March 2022, is also on behalf of the 1st Defendant. It is designed to facilitate the giving of evidence by experts when the other applications are heard. The application, pursuant to Rule 32.6 of the Civil Procedure Rules 2002, is that Dr Tina Beale, Mr Gordon Langford and Mr Magne

Evering be appointed expert witnesses, be permitted to give evidence and, that their expert reports be put in evidence *"on matters touching and concerning this application".*

[4] The fourth application is found in a Notice of Application, filed on the 28th March 2022, by the Claimant. The application seeks to preclude reference to, or reliance on, the expert reports on which the 1st Defendant intends to rely in support of the above stated applications. The Claimant asserts that the reports fail to conform to the requirements of Rule 32 of the Civil Procedure Rules 2002.

[5] These applications are the culmination, if you will, of a series of applications filed since this claim was commenced on the 3rd June 2021. The claim was amended, on the 15th December 2021, pursuant to an order I made on the 9th day of December 2021.The background is important. The Claimant and the 1st Defendant were equal shareholders, and the only directors, in the 2nd Defendant company. The parties decided to go their separate ways. Each was legally represented when they entered a "Separation Agreement" which agreement, among other things, provided a formula for the allocation between themselves of the company's assets and liabilities. Disagreements emerged with respect to the carrying into effect of the agreement. This claim was therefore commenced. On the 14th June 2021 the Hon. Mr. Justice Laing (as he then was) made orders, by and with the consent of the parties, to give effect to the Settlement Agreement. This included the appointment of Allison Pitter & Company to value the assets of the 2nd Defendant. There were also other applications made being injunctive, striking out and, for committal due to alleged breaches of the court's order. These have all been resolved in one way or another.

[6] The applications before me reflect the 1st Defendant's dissatisfaction with some of the valuations prepared, pursuant to the terms of the Settlement Agreement, by the mutually agreed valuator. The 1st Defendant wishes those valuations set aside and to have new valuators appointed to redo the valuations. The Claimant opposed the applications.

LEGAL FRAMEWORK

[7] It is useful at the outset to consider the legal framework within which I embark on the consideration of this matter. A consent order which is in the nature of an agreement between parties (not under disability) is not easily varied. In the absence of agreement, fraud or, misrepresentation the court is unlikely to vary such an order, see ***Causewell v Clacken SCCA129/2002*** **(unreported judgment dated 18th February 2004)** *and* ***Phipps et al v Morrison SCCA*** **86/08 (unreported judgment dated 29th January 2010)**. The position is similar where parties have agreed to be bound by the opinion of an expert. Lord Denning stated:

> *"**It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."***
>
> ***Campbell v Edwards [1976] 1 All ER 785 at 788(d).***

[8] I asked counsel, for the 1st Defendant, if he was aware that mere negligence would not be sufficient to vitiate the expert's finding. I did so prior to commencement of argument and again during the course of the hearing. He affirmed that he intended to prove there were circumstances sufficient to impugn the reports. His closing submissions affirmed the correctness of ***Campbell v Edwards*** (cited above) see paragraph 70 (iii) of 1st Defendant's written submissions filed on the 21st December 2022. Mr. Robinson however has not, in the evidence presented, relied on fraud or collusion. He instead asserts that there is a distinction between an expert, making an error on one hand and, failing to follow his instructions on the other. Failure, submits Mr. Robinson, to follow instructions in a material particular will vitiate the opinion of an expert appointed by consent, see ***Veba Oil Supply and Trading GMBH V Petrotrade Inc. [2001] EWCA Civ. page 1832*** **(judgment**

delivered 6th December 2001). This legal submission was not contested by the Claimant.

[9] The submission represents good sense and good law. As the English court of appeal explains where the expert, by mistake or otherwise, fails to follow instructions in a material particular he has not done that which he was appointed to do. Lord Justice Simon Brown and his colleagues in that case referred to a passage, in the judgment of Dillon LJ, in **Jones v Sherwood Services Limited plc [1922] 1 WLR 277 @287***,*

> *"On principle the first step must be to see what the parties have agreed to remit to the expert this being as Lord Denning MR said in Campbell v Edwards… a matter of contract. Then next step must be to see what the nature of the mistake was if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect –e.g. if he valued shares in the wrong company, or if, as in Jones v Jones … the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do."*

In ***Veba Oil*** *(cited at paragraph 6 above)* the majority stated: *"any departure is material unless it can be characterized as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party."* It was there decided that joint instructions to do a particular type of test were breached in a material particular when the specified test was not used.

This being the law, as it relates to when an expert's opinion obtained by consent can be set aside, I now turn to consider the evidence placed before me.

THE EVIDENCE

[10] The first witness called to give evidence by Mr. Robinson was Mr. Connel Steer. He is a Chartered Valuation Surveyor with over 40 years' experience. He is a partner in the firm Allison Pitter & Co. His firm did reports in a relation to this matter and these were put in evidence as: Exhibit 1(a) Report dated 7th February 2022 (filed 8th February 2022); Exhibit 1 (b) Supplemental Report dated 24th March 2022 (filed 25th March 2022); Exhibit 1 (c) Addendum to Expert Report dated 14th April 2022 (filed 19th April, 2022). Mr. Steer stated he has been a member of the Institute of Chartered Surveyors for over 40 years. The witness stated that he had, in doing the reports, conformed to the rules of the Royal Institute of Chartered Surveyors (RICS).

[11] The witness was asked whether under RICS it was mandatory that terms of engagement for clients be prepared. He said the terms were stated in all the reports. It was suggested to him that he did not present the terms of engagement prior to doing the valuation reports. His response :

> *"I got instructions from Mr. Bogle. There is a term of engagement on all our reports.*
>
> *Q: The Valuator report*
>
> *A: Yes*
>
> *Q: Before valuation report did you provide terms of engagement and give Mr. Bogle*
>
> *A: No, Mr. Robinson"*

[12] At this juncture I ruled that I would permit no further questions in relation to terms of engagement as this was a court ordered valuation and therefore, whether one was prepared prior to the valuation, is largely irrelevant. The parties had an agreement as to what was to be valued and how it was to be valued and this along with the consent order contained the terms of reference relevant to the issues before me.

[13] The witness was asked and stated that the 2nd Defendant company was a construction company that did development of property. The following relevant exchange occurred:

> "Q: *Do you agree important when determining form and content to ensure it contains information relevant to client needs.*
>
> A: *No, we were asked to do market value valuations*
>
> Q: *purpose of valuation would it be important fact that client is a real estate developer*
>
> A: *we were asked to do market values*
>
> Q: *who asked you*
>
> A: *it said valuation reports and I spoke to him and he said we should do market value reports*
>
> Q: *do you agree as client is a real estate developer an investment value approach would have been appropriate*
>
> A: *I cannot agree. If we were so specifically instructed but we were never."*

[14] The witness was asked whether he advised the client about an investment value valuation and he answered in the negative. He was asked whether in relation to Lot 391 an investment valuation was done. He replied;

> "A: *no, it was investment approach. Different thing from investment value."*

The witness admitted, having been shown exhibit 1(a), that an investment approach was used in relation to Lot 391. He however denied that an investment value was provided. The witness admitted he arrived at a valuation of $248 million. The following exchange occurred:

> "Q: *question is if it is that you were instructed to use market value why employ investment approach re the property.*

A:	*when properties that generate income two approaches. Investment approach and market comparison and we used this one.*
Q:	*generate income for whom*
A:	*the owner of the property*
Q:	*are you aware New Era Homes intended to generate income*
A:	*no, it is vacant site valuation. When we reviewed the report we were satisfied it was a vacant site valuation was appropriate.*
Q:	*is it your evidence that a vacant site cannot generate income*
A:	*yes if leases out a vacant site can generate income*
Q:	*you had offered to do investment values on property*
A:	*no, we were never asked but if asked we could."*

[15] Mr. Steer admitted that by letter dated 24th March 2022 he enclosed revised valuations of lots 2-7 and 390. Lot 390 he said was subdivided into 8 lots. Lot 1 has an apartment complex on it. Lot 8 was the largest of the 8 lots in lot 390. There followed another important exchange:

Q:	*Does fact that lot 1 already has an apartment complex have any bearing on the value*
A:	*Market forces will have to decide that*
Q:	*What do you mean*
A:	*An open market whether willing buyer and seller agree that a purchaser willing to pay for it*
Q:	*Did the valuation you did for lots 2-7 take into consideration that lot 1 already developed*

A: Yes sir, it took into account that building and infrastructure nearby. Market value is what similar lots are sold for

…………………...

Q: You made no reference to lot 1 and the apartment complex in your valuation reports for lots 2-7

A: No, lot 2 says that to north is apartment

Q: In relation to value I suggest you made no reference to lot 1 being developed

A: We took into account the common area around it. Lot 1 was on its own

Q: So took into account lot 8

A: Yes common area. We did revised valuation

Q: In valuing lots 2-7 and the value you arrived at in valuation reports for lots 2-7 no reference was made to fact that lot 1 is already developed.

A: lot 1 is separate so there is no need for that. Lot 8 is common area so we made account for that."

[16] This extensive quotation of the evidence demonstrates that the 1st Defendant's counsel is focussed on the manner or technique, if you will, of the valuer. This becomes crystal-clear a few questions later:

Q: you agree it would have been appropriate to add investment value considering nature of this matter

A: No sir don't agree."

[17] The witness was referred to exhibit 1(c) which has a cover letter dated 24 March 2022. The witness recalled a meeting on 20th March, 2022. The witness was again challenged on whether he had an obligation to *"ensure basis [of valuation] adopted was consistent with purpose of the valuation."* This he denied as he was asked to do a market value. There then followed a fairly detailed cross-examination of the witness on the appropriateness of the comparables he used during his valuation, and whether he had taken into account the fact that building

approvals had been granted for lots 2-7 of Lot 390, and whether lots with approvals for multi-family dwellings were to be given a higher value. Specifically, the witness was referred to Exhibit 1 (c) and the valuation for lot 389. It was suggested that the *"highest and best use"* posited was incorrect. The witness said this was revised in Exhibit 1(b) as he was instructed to treat it as one lot so acreage valued was changed. The highest and best use at the time, in the witness' opinion, was as residential lots, similarly for lots 390 (2-7).

[18] The witness admitted that there had been meetings and discussions which resulted in his doing a revised report being exhibit 1(c). The witness was then challenged about whether an appropriate value was placed on lot 8 (of lot 390). The witness explained that lot 8 was the common area which touched the marina but that lots 2-7 did not touch the beach. The witness said the private area on lot 8 included a marina not a beach. The witness was again challenged on the comparables he used. I will not, in this judgment, detail that aspect of the cross-examination. The evidence is largely irrelevant insofar as the law does not permit the setting aside of an agreed expert's opinion merely because there is a disagreement with that opinion. There was no suggestion of fraud in this regard.

[19] On the 20th September 2022 when the matter resumed the examination of Mr. Connel Steer continued. He admitted that the addendum of 19th April 2022 Exhibit 1(c) was the result of further instructions received from Mr. Bogle. He was given a list of properties and a description. The description was "*residential multi-family resort and commercial."* The following exchange occurred:

> *Q: despite being instructed each is multi-family you valued as single family residential lots.*
>
> *A: yes Mr. Robinson*
>
> *Q: to arrive at value for 2-7 you used comparables*
>
> *A: yes*

Q: these comparables were single family lots

A: residential resorts but not sure if single family

Q: the comparables are not resort lots

A: the entire area is zoned for resort residential

Q: is there a reason you value 2-7 as single family residential

A: yes

Q: you agree you were not so instructed

A: I was asked to do market value and in doing so valuer where uses highest and best use at the time. When valuation was done for multi-family, it was showing negative value so highest and best use was single family.

Q: no one told you to do it as single family

A: No"

[20] The witness was then asked about the 'residual value'. This takes account of construction costs. It is, the witness said, an approach to find out market value. To use this approach the opinion of a quantity surveyor was obtained. The approach resulted in a negative valuation and hence was not reflected in his report. In effect, the witness said, in order to value as multiple family, he took into account relevant construction costs and sales price of completed units. Those indicated negative values and so use as multifamily was not the highest and best in his opinion. The witness was referred to a letter dated 13th January 2022 (part of exhibit 1c) in which he explained his adoption of the single family assumption rather differently. I will quote the relevant paragraph of that letter which responds to a letter from the 1st Defendant's attorneys dated 10th January 2022:

> *"We note all your information and all that we are saying is that the apartment "the Angel" was built many years ago and only (ten) 10 of the thirty-two (32) units have been sold to date. Therefore, although the lots could be used for multifamily purposes; we are suggesting that the demand for multifamily accommodation seems very low and currently "highest and best use" might be for those lots to be used for singe family purposes, and there seems to be good demand for vacant residential lots of this size."*

[21] Over counsel's objection I allowed the examiner to explore the valuation done in relation to lot 392. Mr. Steer admitted it was 27.75 acres and ascribed US $450,000 per acre. The questioner again embarked on detailed examination of the comparables used by the expert to arrive at his conclusion. There were questions on whether the witness valued "*the compound*" and whether this should have included the equipment on the land. Ultimately, I refused permission to further examine on comparables used.

[22] Cross examination of Mr. Pitter by Miss Small, representing the Claimant, was more to the point. She established that the witness received verbal and written instructions from Mr. Bogle. The written encompassed a letter dated 27th September 2021, the court order, a list of the properties and, drawings. After refreshing his memory, from Exhibit (1a), the witness also recalled a joint letter of instruction from both the Claimant's and 1st Defendant's attorneys. The witness said:

> *Q: Apart from a list you had verbal instructions*
>
> *A: yes please not 100% clear so I spoke and he said I should do market value for a negotiation*

The witness was asked:

> *Q: how many valuations*
>
> *A: 72 I think more than 70*

Q: how many of these valuations did he object to

A: in beginning four we sorted out two

Q: do you recall how these two were sorted out

A: Yes, at meeting we were told that it was agreed that any improvement should be taken out. Treat as green field. We did not think it was accepted. for comparison we assume it was residential. We did that and it was accepted.

Q: both sides wrote you a letter confirming

A: Yes

Q: this came out of the meeting at Braemar

A: Yes

[23] The witness was asked further questions about what happened at meetings between himself and the parties. The following exchange occurred: -

Q: Lot 390 any complaint in that meeting about failure to follow instructions

A: No

Q: Lot 390 was concerned failure to value lot 8

A: Main concern

Q: Also, that conclusion of highest and best use as single family residential

A: Yes

Q: Bogle list says multifamily

A: Yes

In the course of further answers, the witness explained clearly that land cannot have a negative value. When the residual approach was used to value it as a multi-family residential a negative value emerged. He therefore adopted the highest and best use approach treating it as single family residential. The evidence continued.

"*Q: How determined that*

> A: *One of main pillars guiding valuation. Is it legally permissible? Is it feasible, finally then it would be highest and best values. There is a definition."*

[24] As regards lot 8 the common area the following was elicited:

> *"Q: in your experience have you ever valued common area for a property as a separate piece of land*
>
> *A: no can't*
>
> *Q: valuation as a saleable interest transferable*
>
> *A: all the other lots have interest in lot no. eight not transferable*
>
> *Q: Does answer change because common area is so large*
>
> *A: No unusual for a common area to be so large but I suspect done for aesthetics. Lot 8 does not have a title."*

The witness said that when valuing lots 2 to 7 he took into account each lot's undivided share in lot 8. He indicated that after the last meeting with the parties and further discussions on lot 390 and 389 he did more research on comparables and increased all values.

[25] In the course of cross examination Miss Small put in evidence, by and with the consent of the other side, hard copies of Mr Steer's reports being:

> Exhibit 1(a) (i) Valuation for lot 389 dated November 29th 2021
>
> Exhibit1(a) (ii) Evaluation for Lots 2, 3, 4, 5, 6 and 7. Part of lot 390 dated 29th November 2021
>
> Exhibit1 (a) (iii) valuation for lot 392 Drax Hall dated 29th November 2021

[26] The witness was then asked to define and explain the cost approach and the investment approach to valuation. After doing so he was asked to define market value he said:

> "*A. There are books written. it is price a willing buyer prepared to pay a willing seller on the open market assuming both act knowledgeable and prudently and no constraint or compulsion on either side."*

He was then asked what is equitable value. His answer:

> "*A. New valuation technique within last 5 to 10 years. It is said if you have a property and then negotiating then perhaps prudent to have a higher value, it is not commonly used more theory than practical.*
>
> *Q: is equitable value same as market value*
>
> *A: No, it is not."*

[27] The witness maintained that he was not instructed to do either an investment valuation or an equitable valuation. By consent his workings for the residual approach in relation to lots 2 – 7 of Lot 390, were put in evidence as Exhibit 2. There was also this elicited:

> *"Q: You have a duty of care to your client*
>
> *A: Yes*
>
> *Q: In exercise of that duty of care you met with the parties on at least 3 occasions*
>
> *A: We did*
>
> *Q: you facilitated concerns raised*
>
> *A: We did"*
>
> *…..*
>
> *"Q: Are there laws that say how to do valuations*

A: no, but two standards

Q: Ultimately a valuation is a matter of opinion

A: yes, backed up by facts and data

Q: where no laws and it is opinion you could have an opinion that differs from opinion of another valuator.

A: Yes"

[28] Mr. Robinson was permitted to re-examine the witness. He asked Mr. Steer what was the difference between the investment approach and the investment valuation. He answered:

"A: The investment approach to valuation when you get all the income take out costs and expense associated with income and capitalize it to arrive at it.

Investment value is where example both gentlemen one buying out other you give valuer certain information whether costs, rate of return etc. and come to over value. It should be highest. If one buying out other pay the highest.

Q: does investment approach arrive at investment value

A: Four basic approach. We use market comparison, investment approach, cost approach, and residual approach.

Q: does investment approach arrive at investment value

A: Investment approach no, it arrives at market value"

He was asked about exhibit 2 being the workings for the residual approach.

"Q: This residual you presented today when did you get it

A: several on the computer

Q: The one today

A: I printed it this morning

Q: Exhibit 2 is it specific to New Era Homes 2000 Limited

A: It is a general one

Q: Residual varies from company to company

A: Not really. Basic construction costs should be similar within a reasonable band

Q: Some developers cut costs

A: That would be investment basis.

Q: Some developers can cut costs significantly

A: I can't speak to that"

[29] Dr. Tina Beale was the next witness called by the 1st Defendant. She lectures in Real Estate and Planning at the University of Technology. Her credentials included work for the World Bank and for the Royal Institute of Chartered Surveyors (RICS). Her academic qualifications were equally impressive. She is not a licensed appraiser in Jamaica but has taught valuations for 12 years. In keeping within this background her evidence was detailed and intellectually appealing. Dr. Beale defined "Terms of Engagement", and indicated why they were necessary. She defined "Residual Valuation." She explained that in preparing her report using residual value she obtained information that New Era Homes could significantly reduce construction costs. As regards Lot 8 (the common area) it had to be valued separately. Interestingly she said,

"Q: Lot 8 can it be valued independently of the other lots

A: It has to be valued independently

Q: Why

A: Being the common property all other lots, the remaining 7 lots, are being afforded an amenity as a result of lot 8. So for that reason the value of lot 8 is subsumed in value of lots 1-7. That has to be reflected in the valuation for lots 1-7 part of lot 390."

[30] The witness also explained the comparable approach to valuations she thereafter critiqued the comparable used in the Allison Pitter report. She had done a report and it was admitted into evidence as Exhibit 3 and is dated 4th November, 2021. The witness indicated that if comparables were unavailable then a residual approach, or the "contractor's method," was available. She was asked:

> *"Q: What result where single family used as comparable for multifamily.*
>
> *A: Risk of under value but let me clarify. So in determining market value valuation theory indicates that the market value must be highest and best use of the land. In case of lot 390 while the calculations for residual approach would indicate that a negative value will be arrived at when one assesses whether multi-family use is the highest and best use one also has to bear in mind the principles underpinning the conceptual framework of market value. Market value presumes that both parties to an exchange are the typical everyday buyer and seller. In doing my report I gave consideration to the nature and characteristics of the individual doing the transaction and am of the view that to use market value in strict sense of the term would give rise to an inequity because in this instance the parties are not typical everyday buyer and seller. I noted that Allison Pitter indicated that the basis of the valuation was market value for the purpose of negotiations.*
>
> *There is no such basis of valuation but the use of the phrase implies that market value is the starting point of the negotiation process."*

[31] The witness was also asked about the investment approach to valuation. She said:

> *"Q: What is it*
>
> *A: It is used to determine value of a property based on the income it generates. May I add also that investment value is different between investment method.*
>
> *Q: No correlation*
>
> *A: there can be if property is an income producing property."*

The witness explained in detail why she would have adopted the investment or residual approach rather than the market value.

[32] The witness also gave evidence about the meaning of market value and explained in detail why she would have adopted either investment or residual approach rather than the market value. The witness further critiqued Mr. Steer's report in relation to matters such as the value of lot 8 and an apparent failure to take the proximity of the beach into account. She described visiting the property and her observations.

[33] When cross-examined by Ms. Small Dr. Beale admitted that she would have done an investment value approach for all the other properties. She admitted also that Mr. Steer was an external examiner when she was a student. The following exchange occurred:

> *"Q: valuations are matters of opinion*
>
> *A: opinion backed by evidence*
>
> *Q: in Jamaica is there any law that stipulates how valuations are to be done*
>
> *A: there is none but that is an anomaly, but there ought to be."*

[34] The witness admitted she had done no valuations. This exchange is important:

> *"Q: how many valuations have you done*

A: I am not a licensed valuer but I teach valuations

Q: how many have you done

A: This is first case I am doing as an expert witness

Q: how many

A: None as practicing valuer.

……………………..

Q: are you registered with the Real Estate Board

A: no

……………..

Q: so in your report you provided values but it's not a valuation

A: yes that is correct

Q: It is not a valuation because you did not do actual physical inspection geospatial and all things listed above

A: yes, you said what I but it is what a practicing valuer is expected to do

Q: what you explain about your role here is to provide an academic perspective for the court

A: yes

Q: Here you seen the separation agreement and scheme of reconstruction the parties executed January 2021

A: no."

[35] Dr. Beale admitted that she was unaware the valuations were requested to be market value. There followed:

"Q: Aware prior to your involvement no party requested an investment valuation.

A: no not aware of that

Q: your evidence is that even if parties desire market value based valuations

A: yes”

[36] The witness was referenced to another valuation and expressed the view he too should have used an investment approach. As regards Mr. Everett’s report, she also criticised the way he used comparables. It emerged that Dr. Beale concluded the two parties were investors and this was the reason she performed the investment basis. This was based on their interest in New Era Homes Ltd. The following evidence:

Q: So every valuer in this matter who did not notify client about an investment value valuation would have been wrong

A: provided they received same instructions as Allison Pitter. I saw the reports but can’t say what were the instructions.”

She admitted her analysis was only in relation to lot 390. She also agreed that in assessing the valuer should adopt the highest and best use of the land. The witness was cross-examined in detail about the lower costs when using the investment approach. Given my conclusion below I do not consider that evidence terribly relevant.

[37] Dr. Beale admitted that as regards lot 8, it is the practice to value the common area as part of undivided share in lots 1-7.

“Q: The practice is for licensed valuers to value common areas separate from the lots

A: No not a common feature in practice. But that is a function of the request made. Oftentimes it is condominium properties not land strata as with this property.

Q: the appropriate approach is cost items in common area than add them

A: One way but not only way

Q: That way don’t need to take into account of cost

A: use cost replacement approach

Q: so not to do so wrong

A: no because can use comparable approach

Q: that is different from replacement approach.

A: yes.”

[38] The witness stated that she visited the property after she had done her report. It was not a “physical inspection.” An interesting exchange:

Q: Put to you no beach on lot 1-8

A: it’s a beach front property

Q: did you not see marina

A: yes, marina and beach

Q: marina where boats dock

A: yes

Q: is marina the same as beach

A: I would say so yes. I was basically walking on the sand

Q: so because walking on sand it is a beach’

A: yes, walk from sand to water.”

[39] The re-examination of Dr. Beale was unremarkable.

[40] Mr. Gordon Langford was the next witness. He is a chartered valuation surveyor with 40 years’ experience. He is a partner in NAI Jamaica Langford and Brown. He was very familiar with the Drax Hall Estate. He was familiar with lots 389,390 and 392 in particular. He had taken an aerial photograph of the area which was blown

up and put in evidence as exhibit 4. Much of his evidence was about the approach or techniques if you will of valuers. He spoke of the distinction between single and multi-family use of land. He gave a report which criticised the Allison Pitter report. Mr. Langford's report is Lt 7 to the affidavit of Leo Taddeo dated 12th July 2022. It was admitted into evidence as exhibit 5. He was asked for his opinion on current market demand for Drax Hall properties and said:

> *"If one goes by market demand for other parcels for development land along the coast it could be described as very strong. New developments continue to start for properties. Apartments US$400,000 up to houses at US$2 million plus. Everybody is developing. There is a development at eastern side of Drax Hall being developed into villas."*

[41] With regard to lot 390 he explained it was subdivided into lots 1 to 8. Lot eight being the common area for the other seven. He was asked.

> *"Q: Lot 8, in your expert opinion what is approach to value lot 8*
>
> *A: If Lot 8 were to be sold on its own it would have a certain value however in this case lot 8 cannot be sold because otherwise lots 1-7 would firstly not have access to main road and secondly no common area.*
>
> *Q: so if instructed to value lot 8 what would be your approach*
>
> *A: it became a part of the value of the other 7 lots. When, you put a separate value on a lot implication is you could realize that value by selling but you could not sell lot 8 on its own*
>
> *Q: In a report how account for value of lot #8*
>
> *A: Well in valuing up lot 390 you value the lots and then lot 8 would have a value as it is part of the development because it could not be built on*
>
> *Q: How account for it in valuation report*

> *A:* *Well firstly make note that although a value on lot 8 it would not be realized.*
>
> *Q:* *Would value of lot 8 affect value of other lots*
>
> *A:* *The other way. The value of other lots affects value of lot 8.*

[42] The witness had seen only the Allison Pitter report dated 29th November 2021 exhibit 1. He gave a critique of the comparables used in the report. He said in part:

> *"so the valuation of these lots was really nonsense."*

As regards lot 389 specifically he expressed the view it was best suited as a shopping center. He felt Allison Pitter had undervalued it.

[43] When cross examined he admitted that his reports had not addressed lot 392. He was unaware of the Separation Agreement. He states that his valuation was a market valuation. He had also done a valuation report dated 20th March 2022. This was put in as exhibit 6. He admitted that he had used no market comparables when valuing lot 390. There was however, in exhibit 5, reference to properties in Kingston. These he agreed were not sales comparisons. He had not done a residual valuation. The following exchange:

> *"Q:* *so if given instruction as you say to do a market valuation would you do an Investment value valuation*
>
> *A:* *no, I would not do an investment valuation*
>
> *Q:* *do you agree valuations are a matter of opinion*
>
> *A:* *can be or like an accountant you can use data. If you have everything just put it together. So not always matter of opinion."*
>
> *Q:* *when a matter of opinion*
>
> *A:* *when have to adjust comparables."*

The witness was asked whether he had seen other valuations of the same properties and he had seen valuations by C.D. Alexander, Cohen and Allison Pitter. These he acknowledged were all different from each other and his own.

[44] When re-examined he said the "*general tone*" of the other valuations were higher than the Allison Pitter valuation. In answer to the court the answer is noteworthy.

> *"J: Valuations seem to be more an art than a science*
>
> *A: People say that. AIC view it as a science but in many cases particularly during comparables you need to know about the market but within each comparable look behind that. Estate sales for example will be low"*

[45] The next witness called was Magne Evering. He is a real estate dealer and qualifying director/broker at C.D. Alexander Realty Company Limited. He has been a real estate dealer since 2003. Ten (10) years ago he had done One Thousand (1,000) valuations. Typically, he does thirteen (13) to Fifteen (15) monthly. He was familiar with the Drax Hall Estate and had done valuations there for lots 389 and 390.

[46] The witness had seen valuations done by Allison Pitter & Co, Keith Alexander and Langford & Brown for lot 390. He did an expert report dated 25th March, 2022 in relation to the Allison Pitter report. This was admitted into evidence as exhibit 7. The report opined that Mr. Steer of Allison Pitter had not used comparables which were best suited in relation to lots 2-8. He was asked to explain and said,

> *"A: Section 5 (2) Valuation rational says (in Allison Pitter report for lots 2-7) the valuation being done for vacant single family residential lots. The subject is not vacant single family residential property.*
>
> *Q: Why say that?*

> *A: Based on the building permit and zoning approval for Drax Hall Estate speaks to high rise multi-family development.*
>
> *Q: Have you seen building permits for the lots?*
>
> *A: Yes.*
>
> *Q: Are they expired*
>
> *A: Not to my knowledge."*

[47] The witness also criticized the Allison Pitter report for omitting reference to the common area (lot 8). On the question of the beach lot and marina the witness was shown exhibit 3 (the enlarged print of an aerial photograph of the area) and said,

> *"Q: Show beach front?*
>
> *A: Beach front is by the coastline where there is sand. There is no sand so it's a cliff. On the side dredging allows for docking of vessels.*
>
> *Q: Any reference to Marina/beachfront.in Allison Pitter report?*
>
> *A: Not to my recollection lot 390 common areas are all omitted."*

[48] This witness was also asked about the residual approach to land valuation. Having defined it the exchange continued:

> *Q: In Allison Pitter report was the residual approach used?*
>
> *A: No it speaks to three (3) others.*
>
> *Q: Could residual approach be used for lot 390?*
>
> *A: Yes, developers would have to speak with appraiser to give the operating costs. This is not a typical development it is unique in nature. The developer don't operate at market rate so economies of scale different for them. To apply percentages would be off without*

speaking to them. To get construction costs especially if they go to source for material.

Q: Explain unique nature?

A: Property being exposed to the marina sets it above and apart from most properties in Jamaica. Fact that it is slated for high rise multi-family development and resort residential makes it hard to find others of similar nature.

Q: Why?

A: One valuation process is sales comparison. This gives good determination of what market values are. So to find another in Jamaica high rise multi-family with marina is slim to none.

Q: What is your opinion of comparables used by Allison Pitter?

A: It is not like for like.

Q: When unable to find like for like what is valuers approach?

Object: It is his opinion.

Q: Your approach, what is?

A: I follow the book which is we extrapolate as best as possible and make adjustments to comparable found. For extrapolation ideal comparable is within the area. When not possible find something that closely fits with similar attributes and economic factors from another area. Like for like. We have to adjust as no two properties are the same. We have to adjust so maybe within same location. Adjustments made for superior and inferior nature of the properties being compared. If sold for five (5) Million and property you are valuing, then adjust upwards.

Q: What would influence an upward adjustment?

A: The subjects are multi-family high rise and comparable was single family.

Q: Your report is re Allison Pitter report dated 4th November 2021?

A: Yes.

Q: Have you seen any other valuation report by Allison Pitter in relation to the said lots?

A: Yes

Q: Any difference between the subsequent reports and one you gave opinion on?

Objection: Is this a specific one?

A: They had new sale comparable inserted.

Q: What is your opinion on new comparable inserted?

A: Not the best. Beach front with limiting factors making them far inferior to subject. From the Bengal area."

[49] The witness then expounded on his report as it related to zoning of the area for development. He also expressed the view that as a developer the client had lower construction costs since for example they had an onsite prefabrication plant. He expressed the opinion that Allison Pitter erred by selecting single family as highest and best use because the existing development was not a failed development. The witness proceeded to indicate that the purpose of the apartments on lot 1 were luxury apartments which *"based on advertisements"* was to enhance the area with future development of hotel, golf course etc. and used for Air BNB. This information he received at a briefing meeting.

[50] Exhibit 8, being Mr. Evering's appraisal report for lots 2-8, was admitted in evidence. He admitted using comparables in his report. He was asked:

Q: How arrived at value of lots 2-8?

A: Sale comparison report as main guide. Lots 2-8 are vacant parcels and for guidance residual approach was used. Not having any permanent structures these two methods are the foremost.

Q: In your report what value ascribed?

A: US1.3 million each lot 2-7 and US$709,677 lot 8.

Q: Why lot 8 valued less?

A: It is common area. Not receive as much infrastructural work as lots 2-7.

The witness was then asked to and did critique the comparables used and the adjustments made by Allison Pitter in their valuation of lot 392 (exhibit 1 (a) iii).

[51] When cross-examined, by Miss Small the witness admitted he was not privy to the Separation Agreement entered into between the Claimant and First Defendant. He also admitted he was unaware of what parties intended to do with the properties. Witness admitted he was shown valuations for other properties done by Allison Pitter, other than ones for 389, 390 and 392. He was taken to his valuation of lot 390 (exhibit 7) and admitted that he had used comparables. The following exchange:

Q: So you say Allison Pitter was wrong to use single family property but okay for you to use them?

A: That's not what I said. They were not the best comparables that is what I said. The unique nature of subject property you have to make adjustments so try find as close like for like."

[52] Later there followed a curious exchange:

Q: In reviewing all the reports you see anything to suggest bias?

A: The omission of lot 8 stands out.

Q: As bias?

A: Not being an accurate representation of value of property therefore it would be bias. Omission of lot 8 makes that biased.

Witness admitted lot 8 had no individual title and was subsumed in lots 1-7.

[53] The witness was asked and admitted that construction on lot 1 was completed some ten (10) years ago. He explained that although construction halted he said development was "*ongoing*" because there is evidence it will continue as there is

excavation of lots 2 and 3. The witness indicated he was unaware that Dr. Tina Beale had also concluded that the highest and best use was single family residential. He admitted that the residual approach of both Dr. Beale and Allison Pitter had negative value results while his was positive. There followed the following:

> *"Q: If the residual was negative it would suggest project not feasible financially?*
>
> *A: That's indication.*
>
> *Q: In relation to highest and best use would you still expect a finding of multi-family residential if a negative result as residual?*
>
> *A: Yes can be.*
>
> *Q: But can also not be?*
>
> *A: Yes.*
>
> *Q: When use RICS standard provides that under most bases of valuation the valuer must consider the highest and best use?*
>
> *A: Yes.*
>
> *Q: This may differ from its current use?*
>
> *A: Yes."*

[54] In cross-examination the witness doubled down on his opinion there was bias as he said the failure to value lot 8, and the use of highest and best use as residential single family, constituted misrepresentations. However, when reminded that both Dr. Beale and Allison Pitter had done so, he said:

> *Q: Suggest each valuer may find highest and best use?*
>
> *A: Correct, the highest and best use after exercising four (4) principles the other points mentioned using single family residential on ½ acre properties what happens*

is higher density than single family use. More units per acre greater return.

The witness admitted he had not done an investment valuation as '*he did not see the need'.* He had done residual as "back up". When told that Dr. Beale had said that an investment valuation should have been done the following exchange occurred:

"*Q: If she said so would you agree with her?*

A: To nature of development they could have.

Q: So why didn't you?

A: Did not see need to.

Q: So you don't agree with Dr. Beale?

A: Not that they should have but they could have."

[56] The witness was also asked about the classification of lot 389. He classified as single family residential. He was unaware Langford &. Brown had classified it as commercial. The following exchange.

"*Q: Do you think it is commercial?*

A: Yes, can be

Q: But you said it was multi-family?

A: Can't recall have to review report."

Eventually Mr. Evering said:

"Q: Are valuations based on opinions of values?

A: Yes.

Q: Is it possible for several valuers to have divergent opinions?

A: Yes.

Q: Dr. T. Beale, Langford and yourself are your conclusions the same?

A: They are opinions so no".

[57] Re-examination saw the witness asked to state distinguishing features between the other reports and Allison Pitter's. These he listed as: (a) Allison Pitter had a glaring omission, (b) Allison changed the highest and best use and (c) Allison Pitter spoke to limiting reports. He was then asked:

> *Q: Why wasn't residual in your report?*
>
> *A: Because unique nature of property we did not believe developers operating at standard approach. Answered before.*

[58] The 1st Defendant thereafter closed its case. The Claimant (Respondent to the applications) called no evidence. Both parties submitted extensive written submissions which referenced extensively the affidavits filed although no affiant gave evidence from the witness box. This indicates that the parties treated the affidavits filed as evidence before me. I will accept this to be so even though, as the hearing was in open court, affiants would have been expected to put their affidavits in evidence from the witness box. As there can be no unfairness, because neither side adopted that course of action and each treated the affidavits and their exhibits as being before me, I considered the affidavit evidence. Oral submissions were heard on the 21st December 2022 and the parties were allotted 30 minutes each. I will not repeat those submissions here as I do not find it necessary. The parties are to rest assured I have read all submissions and reviewed my notes and all affidavits filed.

[59] In this judgment I have set out in some detail the oral evidence proffered. It is clear that there is no evidence to support an assertion of fraud or misrepresentation by or against Allison Pitter. The sole issue, given the limited bases for impugning an agreed expert's report, is whether the expert failed to follow material instructions and if so whether such failure should result in the setting aside of his report. Before deciding that question however I must first consider the Claimant's

preliminary point relating to the admissibility of the several expert reports relied on by the 1st Defendant.

DECISION ON PRELIMINARY POINT

[60] The 1st Defendant's Notice of Application filed on the 28th March 2022 (see paragraph 3 above) is in the nature of a point in limine. I defered my ruling until I had heard all the evidence. I did so because this is not the trial of the matter. This is an interlocutory application by the 1st Defendant. It is interlocutory because it relates to the carrying into effect of the Separation Agreement in accordance with a consent order of this court. That order is intended to make the further litigation of this matter unnecessary but it is not a final order. Also I am best able to assess the justice of excluding evidence on technical grounds after I have examined that evidence. Having done so it is my view that to uphold such objections at this stage would be unjust, uneconomic and, not in keeping with the overall objective of the civil procedural rules. The rules, we must remember, are not rules of evidence or substantive law to be applied with rigidity, that is why rule 26.9 exists. The Rules are intended to facilitate the practice of litigation and enhance the court's efficiency.

[61] In this regard it is well to recall that the 1st Defendant's applications seek to impugn the report/opinion of a jointly agreed expert. The reports of other experts are placed before me to assist in that determination. The maker of each report attended and gave evidence in chief and was cross-examined. The reports took the form of critiques of the agreed expert's impugned reports. The only issue I am charged to determine is whether, for the purpose of carrying the Settlement Agreement into effect, the reports are to be set aside and a new expert substituted to do new reports. Reports which, it is well to emphasise, are not for use in court but to carry out the Separation Agreement. In these circumstances it is my decision that to insist that the reports of Mr Langford, Dr Beale and Mr Evering conform with the formalities of the Civil Procedure Rules would be unjust. It would have meant either striking out the 1st Defendant's application or granting an adjournment to allow the reports to be redone so as to conform with the rules. The rules are designed

primarily to enhance credibility of the reports by ensuring the expert acknowledges his or her duty to the court. It seems to me, given the entire history of this matter as well as the interlocutory nature of the proceeding. it would be wasteful of resources and unjust to exclude the reports. It would be doubly ironic because the substantive report or any report to replace it , not being evidence in court, is not required to satisfy those formalities. I therefore hold that the reports are admissible evidence before me on this application and order, in accordance with power contained in rule 26(9) as well as the court's inherent power to control its proceedings, that the reports as filed will stand.

DECISION ON SUBSTANTIVE ISSUE

[62] On the substantive question before me, and having considered the several reports as well as the oral and documentary evidence, I find that there is no basis to set aside the reports of Allison Pitter & Co. There is no suggestion of fraud or dishonesty. Mr. Evering's suggestion, that "bias" is demonstrated by Mr Connel Steer is unsupported by the evidence and was not asserted by the 1st Defendant in his application. I certainly reject the assertion as being speculative.

[63] The allegation, that Messrs Allison Pitter & Co. failed to follow instructions, requires careful examination. This contention was rather late in coming. It was not asserted, in any of the letters of complaint issued prior to the meeting between the expert and all parties at Braemar Avenue, that he had ignored instructions. The allegation was not particularised until the Further Amended Notice of Application was filed in September 2022, see para. 2 above.

[64] The instruction, which it is alleged Mr. Steer ignored, was that for the purpose of the valuation the lots were to be treated as multi-family residential. This is based on words contained in the list of properties to be valued which was supplied by the interim manager, see exhibit CS2 to Exhibit 1(c). The list is a schedule of the properties and contains three columns. The column to the far left is headed *"zone/purpose*". There is no evidence of any written or oral instruction, joint or otherwise, that the properties must be valued as they are described in that column.

I find as a fact that there were no such instructions. This is not surprising as in many instances the listed zone/purpose is contradictory, see for example the entry beside Vineyards Lot n413 *"residential/church"*. In relation to lot 390 it says "*Residential Multifamily Resort and Commercial (see Attached Drawing)"*. There is no indication how the varying descriptions are to be divided between or among the lots 2 to 7. I am sure the parties would have been astounded if the valuer reported a negative value for any of the lots. A negative value resulted when Mr Steer valued the lots as multifamily residences. In this his evidence is supported by Dr Beale (the 1st Defendant's witness). The experts all agreed that where a negative value results from one approach then another approach utilising the highest and the best use is appropriate. Furthermore, at the Braemar meetings the evidence is that a specific instruction was given to Mr Steer in relation to lot 389 and he redid that valuation accordingly. No similarly specific instruction was given in relation to the lot 390. It is important to note that in their letters of the 10th January and 10th March 2022 (attached to Exhibit 1(b) and 1(c)) the 1st Defendants attorneys make no complaint about any breach of instructions. I hold therefore that the description of the properties contained in the list was intended, and at all material times regarded by the parties, as a means of identifying the properties to be valued but was not otherwise a material instruction to the valuer.

[65] I accept the evidence of Mr Steer that he was instructed to do market value valuations on all the lots. This is supported by Article II (2) of the Settlement Agreement, made on 1st January 2021, see Exhibit BPG1 to the affidavit of the Claimant filed on 8th April 2022. It is also supported by the joint letter of instruction to Allison Pitter & Company dated 23rd July 2021 which expressly references the Settlement Agreement, see Exhibit BPG1 to the Claimant's affidavit filed on 8th April 2022. I also accept the evidence that property does not have a negative value. Therefore, when Mr Steer assessed the lots as multifamily and got a negative result, in accordance with accepted practice, he resorted to an analysis of the "highest and best use". This approach was endorsed by at least two of the three other experts who gave evidence. They however differed in their conclusions, that is, in their respective opinions as to the highest and best use. Interestingly Mr

Langford was of the opinion that the highest and best use was multifamily and that adjusted comparables gave a positive result, Dr Beale disagreed. She felt, as did Mr Steer, that valuing the lots as multifamily gave a negative result, see her report 25th March 2022, Exhibit 3, at page 9. Dr. Beale opined that an investment approach to the valuation should be undertaken. This gave a somewhat different value to all others. Mr Evering's position was that valuing as multifamily by comparables was the way to go. Mr Steer has a different opinion. I accept his evidence that, when he applied the residual approach to the property as multi-family residential, it resulted in negative values. This conclusion is supported by Dr Beale, see page 9 of her report (exhibit 3). Mr Steer therefore concluded that single family residential was the most profitable and therefore the highest and best use of the lots. In his opinion there was a market for such types of dwellings and the comparables suggested meaningful valuations.

[66] It is clear the issue is a matter of differing expert opinions as both Messrs. Langford and Evering, using other comparables, were of opinion that the best use was as multi-family residential. On the other hand Dr Beale and Mr Steer felt the highest and best use was single family residential. It is not within the remit of this court to determine which of the experts is right or wrong. This is because the mistake of a jointly agreed expert, no matter whether due to negligence or incompetence, is not a basis for unilateral rejection. The parties remain bound by the result.

[67] I am fortified in the view I take of this question because all experts agreed that negative values for land are never given. It is agreed that where empty lots are to be ascribed a market value one does so based on its determined highest and best use. If the use, indicated by the client or permitted by the authorities, results in a negative value the valuer is to determine the value by considering its highest and best use. Dr Beale agreed, but felt an investment value approach was preferable and, that if that was contrary to instructions then one should go back to the client and recommend that that other basis for the valuation be adopted. In this case Mr Steer was told to do market value valuations. There was no particular instruction

as to any assumptions to be made with respect to each lot for the purpose of the valuation. In other words, the valuer was to use his skill and acumen to determine a "fair market value" in the best way he knew how. This I find is exactly what Mr Steer has set out to do in the best way he could. He did not depart from the instructions given in any material way or indeed at all.

CONCLUSION

[68] The Claimant's Notice of Application is dismissed and the 1st Defendant is permitted to rely on the expert reports. The 1st Defendant's applications, for all the reasons stated above, are dismissed. Costs will go to the Claimant, against the 1st Defendant to be taxed if not agreed, because there was no separate hearing of the preliminary application on which the Claimant failed. It is therefore impossible to disaggregate the costs. The Claimant, having been successful on the substantive issue, is therefore entitled to costs of the hearing. The filing costs, related to the unsuccessful preliminary point, are of course not recoverable.

David Batts
Puisne Judge.