[2023] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE BROWN JA

APPLICATION NO COA2023APP00089

BETWEEN	**LEO TADDEO**	**APPLICANT**
AND	**BENEDETTO PERSICHILLI**	**1ST RESPONDENT**
AND	**NEW ERA HOMES 2000 LIMITED**	**2ND RESPONDENT**

Kemar Robinson and Mrs Judine Wood-Robinson instructed by Robinson and Partners for the applicant

Patrick Foster KC and Mrs Nerine Small instructed by Nerine Small for the 1st respondent

2nd respondent not appearing or being represented

1 and 3 November 2023

Valuer – Valuer appointed by consent of parties – One party disagreeing with valuation report – Whether open to that party to obtain an order to set aside the report prepared by valuer – Whether valuer departed from instructions

Civil Practice and Procedure – Application for permission to appeal – Whether applicant has a real chance of success

ORAL JUDGMENT

BROOKS P

[1] On 14 April 2023, Batts J refused Mr Leo Taddeo's application to set aside a valuation report prepared by Messrs Allison Pitter & Co ('the valuers') and ordered costs against Mr Taddeo. Mr Taddeo is aggrieved by the decision and wishes to appeal against it. Batts J also refused his application for permission to appeal. Mr Taddeo has, therefore,

made a fresh application to this court for permission. The issue for consideration is whether Mr Taddeo's proposed grounds of appeal have a real chance of success.

[2] Mr Taddeo and his business partner, Mr Benedetto Persichilli, are equal shareholders and the only directors of New Era Homes 2000 Limited ('the company'). They entered into a separation agreement, which included among its terms, the division of the company's assets between them. They had disagreements about the implementation of the separation. The disagreements led to litigation and an order of the Supreme Court, made with their consent.

[3] The valuers were appointed under the consent order and instructed to appraise various real estate holdings of the company. They produced a valuation report, but Mr Taddeo is dissatisfied with it. He asserts, among other complaints, that the valuers departed from their instructions. He applied to the Supreme Court for the report to be rejected. Batts J disagreed. He held that the valuers had not materially departed from the instructions or departed from it at all (see para. [67] of Batts J's judgment). The learned judge held that Mr Taddeo was bound by the report.

[4] The major issue between the parties concerns the valuation of lot 390 Drax Hall Estate in the parish of Saint Ann ('lot 390'). Mr Connel Steer, the valuer's representative, said he conducted the valuation of lots two to seven, forming part of lot 390, on the basis that they would be used for single-family private dwellings. These were vacant lots. The restrictive covenant on the titles for those lots stipulated that they were to be used for multi-family construction. Covenant 8 on each of these certificates of title stipulates:

> "No building other than one residential (multi-family) unit shall be erected on the said land."

[5] Covenant 9 on each of the titles for those lots required the multi-family structure to be built on them to conform to plans that the Saint Ann Parish Council (as the Saint Ann Municipal Council was then named) had approved.

[6] Mr Steer said that he did not value those lots according to the usage stipulated on the certificates of title as that would have resulted in a negative value for the properties, which was untenable. He asserted that there was an established principle that valuers should seek to identify the value based on the "highest and best use". His answer, on this point, in cross-examination, was:

> "I was asked to do market value and in doing so valuer [sic] 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]." (Para. [19] of the judgment of Batts J)

[7] Mr Steer accepted that no one had told him to appraise those lots based on usage for single-family dwellings.

[8] At this stage, this court is only charged with determining whether Mr Taddeo has a real chance of success on appeal of overturning the result of Batts J's exercise of his discretion. That chance is based on whether the court, on hearing the appeal, would find that Batts J had:

a. misunderstood or misapplied the law, relevant to the case;
b. misunderstood or misapplied the evidence that was before him;
c. improperly found that facts existed or did not exist; or
d. reached a decision that "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see paras. [19] and [20] of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[9] The crux of the difference between the submissions of Mr Robinson, for Mr Taddeo, and Mr Foster KC, for Mr Persichilli, is whether the learned judge was correct in finding that the aspect of the list of properties to be valued, which dealt with the usage

of the respective properties, formed part of the instructions given to the valuer. Mr Robinson argues that the usage formed part of the instructions, whereas Mr Foster asserts that that information was more descriptive of the properties than instructive.

[10] Both learned counsel agreed that the law concerning setting aside an expert report, secured by their mutual consent, is restrictive. Lord Denning MR stated the basic principle in **Campbell v Edwards** [1976] 1 All ER 785. He said, in part, on page 788d:

> "…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 different. Fraud or collusion unravels everything.
> It may be that, if a valuer gives a speaking valuation—if he gives his reasons or his calculations—and you can show on the face of them that they are wrong, it might be upset."

[11] In **Jones and Others v Sherwood Computer Services PLC** [1992] 1 WLR 277, the English Court of Appeal stated that the principle that the parties are bound by the expert's decision, "cannot be affected by the chance whether the valuation is or is not a 'speaking' valuation" (see the judgment of Balcombe LJ at page 290A). Dillon LJ, in that case, was more expansive. He said, in part, on page 284G:

> "Both *Campbell v. Edwards* and *Baber v. Kenwood Manufacturing Co. Ltd.* [1978] 1 Lloyd's Rep. 175 were cases of non-speaking valuations and it is convenient to say a little at this juncture about **the distinction between speaking and non-speaking valuations or certificates, which to my mind is not a relevant distinction**. Even speaking valuations may say much or little; they may be voluble or taciturn if not wholly dumb. The real question is whether it is possible to say from all the evidence which is properly before the court, and not only from the valuation or certificate itself, what the valuer or certifier has done and why he has done it. The less evidence there is available, the more difficult it will be for a party to mount a challenge to the certificate…." (Italics as in original; emphasis supplied)

[12] If, however, the expert departs from his instructions in a material, that is, not a trivial, way, the parties are not bound by the expert's report (see page 287 of **Jones and Others v Sherwood Computer Services PLC**). At page 287 of the report, Dillon LJ sets out the steps that a court should take in examining a complaint about an expert's report:

1. see what the parties have agreed to remit to the expert;
2. see what the nature of the mistake was, if there is evidence of this; and
3. if the expert departed from his instructions in a material way then either party can say it is not binding because the expert has failed to do what he was appointed to do.

[13] Simon Brown LJ in para. [26] vi) of **Veba Oil Supply & Trading GmbH v Petrotrade Inc** [2001] EWCA Civ 1832 stated the result:

> "Once a material departure from instructions is established, the court is not concerned with its effect on the result. The position is accurately stated in para 98 of Lloyd J's judgment in *Shell UK v Enterprise Oil* ([1999] 2 All ER (Comm) 87 at 108–109): **the determination in those circumstances is simply not binding on the parties**. Given that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure in the first place. Rather I would hold any departure to be material unless it can truly be characterised as trivial or *de minimis* in the sense of it being obvious that it could make no possible difference to either party." (Italics as in original; emphasis supplied)

[14] In the present case, firstly, it does not seem that there was an express agreement that the valuer's report would be final and binding, or words to that effect, but the reasoning of Lord Denning MR in **Campbell v Edwards** does not seem to include that stipulation as being mandatory. Secondly, although the valuers gave reasons for their valuation, **Jones and Others v Sherwood Computer Services PLC** does not allow that fact to permit disputing the valuation. In respect of lot 390, the valuers noted the various restrictive covenants on the certificates of title, noted the zoning, stated the

highest and best use, stated the valuation rationale using the "market comparable approach", identified the values of comparable properties and gave an opinion of the values on those bases.

[15] A brief look at the framework of the instructions shows that the parties intended to use a "fair market value for each of the assets of the Company employing a consistent and appropriate valuation methodology" (Article II para. 2 of their separation agreement). The consent order merely appointed the valuers and authorised the parties to give the instructions to them. The company's interim manager signed the letter of instructions, using the company's letterhead. The letter was dated 27 September 2021 and was addressed to the valuers. The relevant portion of the letter stated:

> "As per Court Order attached, you have been appointed to carry out valuation of properties as per list attached.
> Attached are:
> 1. Court Order
> 2. List of properties with Volume and Folio numbers and addresses
>
> …"

[16] The list of properties that was attached to the letter had the following salutation, headings and relevant information:

"Dear Sirs,

Could you kindly have valuation reports prepared for the following:

DESCRIPTION OF LAND	ZONE/PURPOSE	COMMENTS	TITLE REFERENCE
Lot 389 Drax Hall Estate, St Ann (Land and Compound)	Multi-Family/ Resort		1271/640
Lot 390 Drax Hall Estate, St. Ann (Lots 2, 3, 4, 5, 6, 7, & 8) (aka "The Marina Village")	Residential Multi-family (Resort & Commercial (See Drawing attached)		1477/153 1477/535 1477/536 1477/651 1477/652 1477/653 1477/641

…"

[17] Batts J accepted Mr Steer's explanation for not using the approved zoning for lots two through seven of lot 390. The learned judge found that there was no particular instruction to have regard to the purpose of the lots, hence there was no departure from the instructions to provide a valuation. Batts J said, in part, at para. [64] of his judgment:

> "…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…."

[18] It is noted that the table that Batts J referred to is different from that which is set out above. The difference may not be material in the context of his reasoning. Nonetheless, he went on to say in para. [67] of his judgment:

> "I am fortified in the view I take of this question [of the validity of the valuations] 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. [Another expert witness] 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." (Emphasis supplied)

[19] It is arguable that the valuers were obliged to have regard to the material in the table attached to the letter of instructions. It is also arguable that the use of a valuation that ignores the approved use of the property is a material departure from the valuers' instructions. The fact that Mr Steer would have arrived at a negative figure, using the

approved zoning use, would not necessarily have resulted in prejudice to either of the parties. He could have sought further instructions from them, as Dr Beale, a lecturer in real estate and planning, testified. In that context, there is a real chance that Batts J could be shown to have erred in finding that the valuers did not depart from their instructions in a material way.

[20] On these bases, Mr Taddeo has a real chance of success on appeal, pursuant to rule 1.8(7) of the Court of Appeal Rules. His application should be granted.

SINCLAIR-HAYNES JA

[21] I have read, in draft, the judgment of Brooks P. I agree with his reasoning and conclusion.

BROWN JA

[22] I too have read the draft judgment of Brooks P and agree. I have nothing to add.

BROOKS P

ORDER

1. Leave is hereby granted to the applicant to appeal the decision of Batts J, handed down on 14 April 2023, refusing the orders sought by the applicant and awarding costs against the applicant.
2. The notice of appeal shall be filed and served on or before 17 November 2023.
3. Costs of the application shall be costs in the appeal.