

IN THE EASTERN CARIBBEAN SUPREME COURT

SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2020/0013

**In the Matter of Section 75 of the Title by
Registration Act, Cap 10.19**

and

**IN THE MATTER of an Application to settle
Articles of Sale of the Respondent's property
comprised in Certificate of Title dated the 13th
day of February, 2013 and registered in Book
M3 Folio 53**

BETWEEN:

ST. KITTS-NEVIS-ANGUILLA NATIONAL BANK

Applicant

and

KHT LAND HOLDINGS LIMITED

Respondent

Appearances:

Mr. Terence Byron for the Applicant

Mr. Frank Walwyn, Ms. Kayla Theeuwien and Ms. Joanne Flemming for the Respondent

2020: November 10
November 13
December 17
2021: March 16

DECISION

- [1] On January 9, 2020, the St. Kitts-Nevis-Anguilla National Bank applied to the court to settle articles of sale of land pursuant to section 75 of the Title by Registration Act, and related matters. By virtue of section 76 of the said Act, the court must (1) settle the articles of sale; (2) fix the upset price upon such information or valuation as may be considered necessary and sufficient, (3) appoint the day of sale; (4) adjust the announcements; and (5) determine the mode of publication thereof, according to the nature and value of the property. Further, section 76 dictates that the day of sale shall be determined by the length of time necessary to publish the announcements in such a manner as shall bring the highest price.

Background facts

- [2] The applicant, the St. Kitts-Nevis-Anguilla National Bank (hereinafter “the Bank”), is a financial institution in St. Kitts and Nevis that is regulated by the Eastern Caribbean Central Bank. The government of St. Kitts and Nevis is its majority shareholder.
- [3] The respondent, KHT Land Holdings Limited (hereinafter “KHT”) is the registered proprietor of 433.456 acres of land situate at Turtle Beach, Salt Pond Estate in the parish of St. George in the South-East Peninsula on the island of St. Kitts (hereinafter “the subject property”). The subject property secured a loan offered to Christophe Harbour Development Company Limited (hereinafter “Christophe Harbour”) by the Bank on February 24, 2014.
- [4] The Bank is exercising its power of sale over the subject property pursuant to the Title by Registration Act, Cap. 10.19. The Bank’s application to settle the articles of sale seeks an order that the upset price for the subject property be fixed at US\$17, 000,000. The subject property was undeveloped land and purchased in 2006 for US\$12,500,000. There has been no development on any part of the subject property. The bank is attempting to effect a forced sale.
- [5] While not filing a response to the application, KHT strenuously objects to this upset price as being inordinately low as it considers the subject property no ordinary property, but a prime development site, boasting pristine sandy beachfront, with views of the island of Nevis.

[6] Before the court are the parties' two competing valuations of the subject property. The valuation of Calvin Esdaille filed by the Bank gives the market value of the subject property as US\$19, 440,000. KHT filed the valuation of Simon Watson with a market value of the subject property as US\$73,000,000. The valuations are over US\$50,000,000 apart. It should be noted that neither valuation before the court is on a forced sale basis.

[7] The COVID-19 pandemic features in this matter.

Issue

[8] The main bone of contention between the parties is the figure the court should determine as the upset price. A conclusion on this issue will guide the other requirements of the court under section 75 of the Title by Registration Act.

The case for the applicant

[9] The Bank submitted that its application has as its objective to force a sale of the subject property. It contended that it is a last resort for the Bank to collect on the money it is owed by Christophe Harbour. The Bank presented 4 witnesses who were cross-examined: (1) Ms. Carolyn Adams, the Bank's Senior Manager, Corporate Lending; (2) Mr. Donald Thompson, Chief Executive Officer of the Bank; (3) Mr. Calvin Esdaille, Commissioned Land Surveyor, Land Development Consultant, Property Evaluator; and (4) Mr. Brian Kassab, realtor.

[10] The evidence established that Christophe Harbour defaulted on its obligation to repay the money owed to the Bank. KHT pledged the subject property to secure the payment of Christophe Harbour's debt. After more than 6 years, the debt stands at almost as much as the amount lent.

[11] The valuation of Mr. Calvin Esdaille ("the Esdaille Report") examined market trends, listed actual sales at the South-East Peninsula over the past 17 years, noting a significant decline in the real estate market, and looked at 2 large tracts of undeveloped land at the peninsula that are in the process of sale.

[12] At the hearing, Mr. Esdaille acknowledged that he made an error in calculating the land value at US\$90,000 per acre, instead of US\$100,000 per acre, for 216 acres. This changed his valuation from US\$19,440,000 to US\$21,600,000. Learned Counsel for the applicant, Mr. Byron, posited that Mr. Esdaille is to be commended for his frankness, which is in keeping with the duty to the court he accepted, namely, that if he could not make an assertion of truth in relation to his report, he would make any necessary qualification.

[13] Mr. Brian Kassab who presently owns the largest real estate office in St. Kitts asserted that it could take decades to sell large tracts of land on the South-East Peninsula.

The respondent's position

[14] KHT submitted that in a flagrant breach of its duty of good faith in exercising its power of sale, the Bank has applied to the court to sell hastily the subject property at a price that will erode the value of KHT's equity of redemption.

[15] It pointed out that the Bank waited nearly half a year to file the application in January 2020, and for months, it did nothing to move the application forward. The first time the parties appeared in court was in July 2020, during a time in which public auctions were suspended by the court registry as a result of the COVID-19 pandemic. Now that the suspension on public auctions has come to an end, KHT proffered, the Bank wants to rush a sale at a low price and during a global pandemic when there are restrictions on international travel.

[16] KHT urged upon the court that the subject property has the potential to be developed into a resort or a high-end residential sub-division once sold on the international market. It observed that the parties' experts agree that marketing the subject property for sale will require the preparation and implementation of a marketing plan over, at least, 6 months to attract international attention. However, it is the valuation of the subject property on which the parties disagree.

[17] KHT asserted that it adduced a credible valuation report prepared by a well-respected and independent chartered surveyor, who has extensive experience in the Caribbean, and whose opinion is that the subject property is worth US\$73,000,000.

[18] On the other hand, it alleged that the Bank adduced an unreliable “valuation report” prepared by a local land surveyor whose opinion is that the subject property is worth US\$21,600,000. It maintained that the Bank’s land surveyor (i) is not sufficiently qualified and (ii) cannot assist the court impartially on account of his previous and existing working relationships with the Bank and its largest shareholder, the government of St. Kitts and Nevis.

[19] In settling the articles of sale, KHT submitted that the court should (i) completely disregard the Bank’s valuation and rely on the valuation filed by KHT, and (ii) not set the date of sale until the appropriate marketing plan has been prepared.

Professional qualifications of Calvin Esdaille

[20] Mr. Calvin Rudolph Esdaille is a land surveyor. He also holds certificates from the University of Toronto in land evaluation. He testified that he is a property evaluator, which is giving an opinion on the value of property. He does not have a degree in land valuation. However, as part of his degree in land surveying, he did a whole year in land valuation and land management. He has had over 40 years’ experience in land valuation in St. Kitts, working for the government in several capacities including Senior Land Surveyor, Chief Technical Officer, Director of the Department of Lands and Surveys, consultant to the government on land management, and as Chief Land Valuation Officer. Over the years, in addition to surveying land, he valued land for the government. He admitted that he is not affiliated with any professional regulatory body but he has his own ethical standards. He does not agree that he is not suitably qualified to do a valuation in this matter.

[21] KHT is adamant that Mr. Esdaille is not a qualified, competent or independent valuator as required by valuation standards issued by the Eastern Caribbean Central Bank. It laid out that Mr. Esdaille may be qualified to measure land, but he is not qualified to value land. It pointed out that he has no professional valuation qualifications, designations or training. Further, he is not a member of any internationally recognised professional valuation body, and accordingly, he is under no professional obligation to adhere to formal ethical standards, complete continuing professional development, or carry professional indemnity insurance.

[22] The Bank relied on the decision of the Privy Council in **Blakes Estate Ltd v The Government of Montserrat**¹ where it was reported that the Board of Assessment preferred certain evidence of a Mr. Burke, a chartered surveyor who was a former Chief Surveyor and Valuation Officer with wide experience in land development in Montserrat, over that of a valuation expert, a Fellow of the Royal Institution of Chartered Surveyors (FRICS), as is Mr. Simon Watson on whose valuation KHT commends to the court. This case concerned the government's acquisition of property to provide housing and amenities to people affected by the devastating volcanic eruption in Montserrat. The Board naturally expected "that Mr. Burke would have a more intimate knowledge of what obtains on the ground in practice". The Bank submitted that the Board preferred experience over qualifications, as it invited the court to do in this case.

[23] KHT countered that the Bank's reliance on this case is entirely misguided and wholly irrelevant to this issue. It made the distinction that in the case at bar, only one valuation prepared by a qualified chartered surveyor is before the court, that of its witness Mr. Simon Watson. Moreover, in **Blakes Estate**, knowledge of the local market was important because the land at issue would be redeveloped for resettlement by residents of Montserrat. The land in issue here will be marketed to and sold on the international market to international purchasers, so that knowledge of the local market is of limited utility in this case.

[24] In relation to the earlier mentioned error made by Mr. Esdaille in his calculation in arriving at a market value, KHT is of the view Mr. Esdaille should not be commended as suggested by the Bank. Instead, it submitted, this US\$2 million error underscores the unreliability of his report and his incompetence as a valuator. KHT also stated that Mr. Esdaille's lack of professional qualifications is evident in the quality of his rudimentary "valuation" in which he used the "market data approach" to evaluate the subject property.

Calvin Esdaille's relationship with the Bank

[25] In the Esdaille Report, Mr. Esdaille declared that he has no present or prospective interest in the subject property and no business relationship with the parties involved in this litigation.

¹ [2005] UKPC 46

[26] KHT contended that this declaration is simply false, and that Mr. Esdaille has existing relationships with both the Bank and its majority shareholder, the government of St. Kitts and Nevis. In his curriculum vitae, he lists the Bank, the government and the Nevis Island Administration as three of his “notable clients”. He also lists the Public Works Department and the Social Security Board, two government departments as notable clients. In addition, he is the chairman of the state-owned Urban Development Corporation.

[27] In cross-examination, Mr. Esdaille denied that he has a business relationship with the Bank. He said he was commissioned by Byron and Byron on behalf of the Bank to do the report. He stated that he retired from the government service close to 10 years ago and that he is not now on the government payroll. He does not agree that he engaged in preparing a report favourable to the Bank, and although he knew that KHT was indebted to the Bank, up to the time of testifying, he did not know the quantum of the debt.

Simon Watson’s qualifications and valuation

[28] KHT’s posture in this matter is that the only reliable report before the court is the valuation report of Mr. Simon Watson (“the Watson Report”). Mr. Watson is a Fellow of the Royal Institution of Chartered Surveyors (FRICS). KHT proffered that he is one of the most qualified and experienced chartered surveyors based in the Caribbean, with over 20 years of experience in this region. Though based in the Cayman Islands, KHT stated that he is routinely engaged by the largest property holding companies in St. Kitts because of the lack of qualified valuation professionals in the Federation. KHT impressed upon the court that Mr. Simon the only witness in this case who has valuation experience on an international level.

[29] In his detailed 41-page report, KHT explained that Mr. Watson valued the subject property using 2 recognised methods of valuation: the comparable method and the residual method. His valuation compared the subject property to recent and actual sales in St. Kitts. He then applied appropriate adjustments to account for similarities or differences between the subject property and comparable properties and their sale prices. As stated earlier, Mr. Watson valued the subject property at US\$73 million.

How is the court to deal with two competing valuations?

[30] Given the difference in the valuations submitted by the parties of over US\$50 million, the court is in a quandary. In the circumstances, before engaging in the hearing of the matter, I was minded to appoint an independent assessor to assist the court in this dilemma. Surprisingly, both parties resisted this suggestion and asked the court to proceed to hear and determine the application. Learned counsel for KHT, Mr. Walwyn, was concerned about the lack of qualified local valuers and, in light of COVID-19 restrictions, the prospect of a valuator from outside. Learned counsel for the Bank, Mr. Byron, sought to assure the court that this is really a simple task. Accordingly, I proceed.

[31] For some guidance, I turn to the case of **Rawle Hannibal v The BVI Health Services Authority**² submitted by the Bank in post-closing submissions invited by the court. That case had nothing to do with competing land valuations but involved conflicting evidence of two medical experts. It summarised the principles to be considered in the resolution of conflicting expert evidence.

[32] At paragraph 26 of the judgment, Baptiste JA stated the appropriate approach as explained in **Barclays Bank PLC v Christie Owen & Davies Limited**,³ that “it is not simply a matter of which expert is preferred. The court is enjoined to make a judgment as to the expert witness, the weight to be placed on different aspects of their evidence and the assistance to be derived from it, and then reach its own conclusion”.

[33] His Lordship went on, at paragraph 27, to endorse the pronouncement of Robson AJA in **Alsco Pty Ltd v Mircevic**⁴ as follows:

“...judges are not to resolve such conflicts by purporting to develop their own expertise and substitute their own opinion for that of the experts. Instead, the judge will find a basis for preferring the evidence of one expert over another such as: which opinion best aligns with the primary facts the judge finds; which opinion appears to be more credible; a comparison of the qualifications, expertise or experience of the competing experts; which expert appeared to be the most objective and the responses of the expert under cross-examination.”

² BVIHCVAP2017/0002

³ [2016] EWHC 2351 (Ch)

⁴ [2013] VSCA 229

[34] Further, at paragraph 28, Baptiste JA stated that Ellis J. (the learned trial judge), was alive to the fact that a pivotal tipping point in the case was the expert testimony, which radically differed on critical points significantly bearing on the issues that concerned the court, and it was the court's duty to resolve the conflicting testimony. Her Ladyship was guided by Bingham LJ in **Eckersley v Binnie**⁵ who stated:

“In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason.”

[35] Baptiste JA concluded, at paragraph 40, that the trial judge was correct not to “simply choose one expert over another”, and instead, carry out “an evaluation process in respect of the competing opinions”.

[36] Applying the principles set out by Baptiste JA in **Rawle Hannibal**, the Bank urged that the court is not obliged to accept evidence because it comes from an illustrious source such as a Fellow of the Royal Institution of Chartered Surveyors as is Mr. Simon Watson. The Bank was of the view that this court can properly find that:

- i. the deliberate non-disclosure of the terms of engagement of Simon Watson, despite a proper request for it pursuant to CPR 28.16 left a gaping evidential lacuna. (I note here that the court dismissed this application by the applicant which was filed on December 4, 2020 after the applicant had closed its case);
- ii. demonstrated partisanship is conspicuous in Simon Watson's evidence in his attempt to pretend that the absence of a physical inspection of the subject property on his part was not necessary because it is undeveloped land;
- iii. lack of objectivity is conspicuous in Simon Watson's insistence that the price of US\$12.5 million for the subject property in 2006 is irrelevant; and
- iv. Simon Watson is guilty of a deliberate attempt to mislead by giving a valuation date of 19th September 2019 in his valuation report dated 18th September 2020.

⁵ [1988] 18 Con LR 1

[37] KHT urged the court to prefer the evidence of Simon Watson over that of the land surveyor tendered by the Bank, Calvin Esdaille, on the basis that:

- a) Mr. Watson is the only objective expert before the court;
- b) Mr. Watson is the only qualified valuator before the court; and
- c) Mr. Watson is the only expert who filed a valuation report that appropriately applied recognised methods of valuation to determine the market value of the subject property.

[38] KHT maintained that it is only the Watson Report that should inform the upset price set by the court in this case.

Analysis and ruling on the Esdaille Report

[39] It is evident that there is a lack of fully qualified land valuers in St. Kitts and Nevis. That being the case, it is understandable that individuals with vast experience and expertise in related areas are commissioned to carry out land valuations, as has been the case with Mr. Esdaille. No one disputes Mr. Esdaille's immeasurable and, I daresay, commendable contribution over his many years of service to the government and other entities. However, this does not take away from the equally undisputed fact that Mr. Esdaille is not a qualified land valuator.

[40] The Eastern Caribbean Central Bank's Valuation Prudential Standards for Licensed Financial Institutions under the Banking Act ("the ECCB Valuation Standards") are instructive. Section 8(1) reads:

- (1) A licensed financial institution shall establish the criteria for the selection, evaluation, and monitoring of the performance of appraisers who shall:*
- (a) be a Registered Member of the Royal Institute of Chartered Surveyors or any other internationally recognised professional designation approved by the Eastern Caribbean Central Bank, and in good standing;*
 - (b) be capable of rendering an unbiased opinion;*
 - (c) be independent and have no direct, indirect, or prospective interest, financial or otherwise, in the property or the transaction or with the party to the real*

estate-related transaction with whom the licensed financial institution is dealing:

- (d) hold the appropriate registration at the time of the assignment;*
- (e) possess the appropriate appraisal or collateral valuation education, expertise, and experience relevant to the type of property being valued;*
- (f) continually update knowledge through a process of continuing education.*

[41] Mr. Watson averred that with no professional qualification and no professional indemnity insurance, Mr. Esdaille would not be approved to be a valuer on the panel of all the major banks in the region. In its submissions, the Bank countered that it is the largest banking institution, indigenous or foreign, in this region.

[42] The fact that the Bank is a notable client of Mr. Esdaille does not take away from its obligation select a valuator with professional qualifications and affiliations as specified in the ECCB Valuation Standards. I would qualify Mr. Watson's statement by saying that with no professional qualification in land valuation, Mr. Esdaille *should* not be approved to be a valuer on the panel of all the major banks in the region.

[43] When dealing with a subject matter involving considerable value of millions of US dollars in the context of "Small Island States", as noted by the Bank in its submissions, the Bank is required to ensure that best practices and the highest standards are maintained. This must be so even if it entails greater expense and inconvenience. An institution of the calibre and reputation of the Bank should not be seen, or appear, to be "cutting corners" in the commissioning of someone not fully qualified to perform a valuation with so much at stake.

[44] The evidence is clear. Mr. Esdaille is a qualified land surveyor and evaluator. He is not a qualified land valuator. He is not a member of any internationally recognised professional valuation organisation.

[45] In light of the foregoing, I am constrained to reject and disregard the Esdaille Report. Whereas his knowledge and experience on the ground in St. Kitts would likely be far superior to that of Mr. Watson and other FRICS, the paper qualifications are required for this task.

Can the court rely on the Watson Report?

[46] The Bank asserted that Simon Watson's valuation is inherently unreliable and inaccurate and should be rejected in its entirety. Leaned counsel for the Bank pointed out that the valuation of US\$73 million is about a 600% increase in the 2006 purchase price. Counsel submitted that to expect that level of capital gain is exploitative and corrupt, and evinces an intention to take advantage of small island states and institutions. The main points of the submissions are as follows:

- 1) Simon Watson has not inspected the subject property.
- 2) Simon Watson's valuation date is abnormal.
- 3) Simon Watson's valuation failed to consider the 2006 purchase price of the subject property.

Simon Watson has not inspected the subject property

[47] In support of an application for an adjournment of this matter which was fixed for July 14, 2020, learned counsel Ms. Kayla Theeuwen swore an affidavit on the said date that Simon Watson advised her and she verily believed "that he will need to conduct a site visit on the Property to complete his valuation, and that he will need approximately fifteen (15) to twenty (20) business days from the completion of his site visit to finalize his valuation of the Property". In Mr. Watson's valuation report, at page 5, he confirmed that he had not yet physically inspected the subject property because of travel restrictions as a result of COVID-19. However, he stated, he was very familiar with the property from previous valuation engagements in St. Kitts and Nevis in his 25-year experience of undertaking property valuations in the Caribbean region. Then, at page 12 of the said report, under the heading, *Highest and Best' Use*, he gave an opinion "Based on our inspection of the property...". At the hearing, under cross-examination, Mr. Watson stated that the valuation he produced was a final valuation, and that it was not necessary to inspect the property because it was undeveloped land.

[48] The Bank used Mr. Watson's exhibit, the ECCB Valuation Standards to turn around his argument on him, that major banks in the region would not accept a valuation carried out by a valuer who admits that he has not physically inspected the property and produced a valuation from a location hundreds of miles away from the subject property. At section 12 of the document, evidence of property inspection is listed as a minimum for evaluation content.

Simon Watson's valuation date

[49] On its cover page the Watson Report is dated 18th September 2020. Its introductory letter also carries that date. The Bank drew to the court's attention that at page 5 of the report, it is stated, "The valuation date would normally be the date of the physical inspection of the subject property..." which is a clear indication that KHT's valuation is, at least, abnormal. The Bank is of the view that Mr. Watson compounded his self-contradiction by stating that he was selecting the same valuation date as the valuation date of Mr. Esdaille's for "consistency". He picked his valuation date as 19th September 2019, although Mr. Esdaille's valuation date is 6th September 2019.

[50] Further, Mr. Watson exhibited Royal Institution of Chartered Surveyors (RICS) Guidance Notes. The Bank considered this another oddity of Simon Watson in that the Guidance Notes are dated as effective from 9th October 2019. His valuation date of 19th September 2019 is earlier than the RICS Guidance Notes he claimed to be guided by. The Bank called this another example of the careless incompetence of Simon Watson.

[51] KHT stated that the Bank is neglecting the fact that Mr. Watson's valuation is dated 18th September 2020.

The Watson Report failed to consider the 2006 purchase price of the subject property

[52] The Bank pointed out that Mr. Watson in his affidavit of September 21, 2020 affirmed that one of his duties to the court is to "consider and include any material fact which could detract from my conclusion", yet he failed to include the 2006 sale price of US\$12.5 million in his valuation although said he knew of it. In court, he said that he did not consider it, stating that it was irrelevant because it was too historic.

[53] The Bank observed that this was Mr. Watson's position despite the fact that his own RICS Guidance Notes, which he produced, state that even historic, out of date data can be useful if combined with knowledge of market trends between the date of the comparable transaction and the valuation date. Mr. Watson stated that he did not know what the market in St. Kitts was in 2006, an admission of inadequate research as seen by the Bank. Again, it used Mr. Simon's exhibit, the ECCB Valuation Standards, to show that he has rejected section 12(g)(ii) that minimum evaluation content shall include property-specific data (such as previous sales data for the subject property). On this issue, KHT accused the Bank of glossing over section 4.6 of the RICS Guidance Notes, which makes it clear that there is hierarchy of evidence, with contemporary, completed transactional evidence typically taking precedence over historic evidence.

Discussion and conclusion on the Watson Report

[54] If Ms. Theeuwen is to be believed (as learned counsel Mr. Byron is asking to court so to do), in my view, a serious inconsistency arises. If Mr. Watson needed to visit the site to complete his valuation, and 15 to 20 business days (3-4 weeks) after the site visit to finalise the valuation, the inference is that not only was the site visit necessary, but also, it would substantially inform the valuation report. That being the case, there appears to be gaping deficiency in the preparation of the Watson Report, resulting in a US\$73 million valuation of the subject property. The subject property was undeveloped when the application for the adjournment was made. Mr. Watson was unable to travel to St. Kitts as planned owing to travel restrictions as a result of the COVID-19 pandemic. Did inconvenience make the inspection unnecessary? Was the inspection unnecessary from the beginning as it appears is being submitted? A concern about credibility arises here.

[55] The issue of the valuation date certainly creates some confusion. If the valuation date is normally the date of the physical inspection of the property, and the property was not physically inspected, can the valuator properly simply select a date that is a year prior to his dated report? The court was not pointed to any guidelines or acceptable practices in relation to this approach taken by Mr. Watson. Therefore, the valuation date of the Watson Report appears to be an oddity.

[56] The court has no issue with Mr. Watson applying section 4.6 of the RICS Guidance Notes to justify the utilisation of contemporary evidence over historic evidence. However, in light of the enormous difference in the 2006 purchase price of US\$12.5 million and Mr. Watson's 2019 or 2020 valuation of the same property at US\$73 million (underdeveloped throughout), to my mind, the omission in the Watson Report to give an explanation as to why the 2006 purchase price is irrelevant, is startling. Mr. Watson must have realised that the 2006 purchase price (which he said he had knowledge of) would be a material fact that could detract from his conclusion. With full appreciation of his reliance on the contemporary data and his testimony that the 2006 purchase price is too historic, it is curious that given the audience the valuation was meant to inform, this is not explained away in the report.

[57] Therefore, taking all these concerns into consideration, particularly the fact that Mr. Watson did physically inspect the subject property but placed a US\$73 million value on it, in the circumstances of this matter, for the reasons I have stated, I find Mr. Watson's valuation to be unreliable.

Can the court come to its own conclusion on the upset price?

[58] The answer to this question is to be found in section 76 of the Title By Registration Act itself. The court is empowered to "fix the upset price **upon such information or valuation as may be considered necessary and sufficient...**". The court must come up with an upset price, not a valuation. Even if the court does not accept the valuations placed before it, there is enough evidence or information before it to enable it to make a determination.

[59] It was not a situation of the court resolving conflicting expert evidence by purporting to develop its own expertise and substituting its own opinion for that of the experts as discussed in **Rawle Hannibal**.⁶ The legislation authorises the court to fix a price on the evidence before it.

[60] I do not intend, by any means, to engage in any exercise that is akin to placing my own value of the subject property. Based on the information before the court, I will do my best to set a price that is just in the circumstances. In doing so, there are several factors that stand out in my mind, including, but not limited to the following:

⁶ BVIHCVAP2017/0002 at paragraph 27

- i. The subject property was purchased in 2006 for US\$12.5 million.
- ii. At the time of purchase, it was undeveloped land.
- iii. To date, it is still undeveloped land.
- iv. It is a prime development site.
- v. It is part of the St. Kitts Peninsula Resort District.
- vi. The Bank is attempting to effect a forced sale of the subject property.
- vii. KHT's equity of redemption should not be eroded.
- viii. The real estate market is in recession.
- ix. The subject property should be properly marketed.
- x. The COVID-19 pandemic has placed severe restrictions on travel.

[61] In light of the foregoing, I fix the upset price at US\$25,000,000.

Marketing the subject property

[62] Both parties presented evidence with regard to what is required to properly market or advertise the sale of the subject property. The parties agree that St. Kitts competes on a global scale and that the subject property, a luxury product, must be marketed internationally. KHT explained that international buyers of large-scale projects such as the subject property would ordinarily travel with the appropriate professionals (architects, engineers, etc.) to inspect the property prior to purchase. The COVID-19 pandemic has resulted in the closure of many borders internationally, including those of St. Kitts and Nevis. In the circumstances, KHT posited that it is a virtual certainty that the subject property will not attract the appropriate price if buyers abroad are unable to travel to the jurisdiction to inspect and investigate this investment opportunity.

[63] The evidence on how to market the subject property appropriately is taken from that of Mr. Brian Kassab, realtor, and Mr. Adam Greenfader, real estate professional, and is as follows:

- (a) A site plan for the subject property must be assembled, with opinions from experts in planning design, engineering and architecture, to determine the highest and best use for the subject property;
- (b) A financial analyst needs to be retained to prepare a detailed estimate of the sale potential of the subject property if built at its highest and best use;

- (c) The subject property must be marketed using local and international real estate agents or firms;
- (d) Preparing marketing materials will require input from professional designers, photographers, videographers and others to prepare high quality brochures with professional photos and aerial drone footage;
- (e) The subject property must be marketed in international media and disseminated on an international scale; and
- (f) International purchasers will not rely solely on digital marketing materials to inform an offer to purchase; rather they will need to be able to fly into the Federation to physically inspect the subject property. Often, multiple visits will be required so that a purchaser's architects, engineers, and others can also inspect the subject property. A mandatory quarantine upon arrival would be a deterrent to potential purchasers.

[64] The process can be lengthy and costly. That being the case, KHT submitted that the court should refrain from setting a date until the marketing material has been finalised and presented to the court. In its post-closing submissions, the Bank proposed that the court should make an order appointing Mr. Brian Kassab to have conduct of the sale on the basis he advocated, that is, to design a creative, inclusive approach with regard to other marketing agents, and that expenses of the sale be reimbursed from the proceeds of sale. The Bank suggested that the advertisement period should not be overly long, perhaps 3-4 months.

[65] Having considered the views of the parties, I agree that a date for sale should not be set until a concrete marketing plan has been presented to the court. According to Mr. Kassab, the largest realtors in St. Kitts are:

1. B. Kassab and Associates
2. St. Kitts & Nevis Island Homes
3. St. Kitts Realty, and
4. Remax.

Since Mr. Kassab's firm is already involved in this process, I shall take on board the Bank's suggestion and appoint B. Kassab and Associates to present to the court a marketing plan in accordance with the requirements listed in paragraph 63 herein.

Order

[66] Based on the foregoing, I make the following orders:

1. The upset price for the subject property is fixed at US\$25,000,000.
2. The real estate firm of B. Kassab and Associates is hereby appointed to conduct the sale, the market plan for which is to be filed on or before 14th May 2021.
3. B. Kassab and Associates shall be reimbursed from the proceeds of sale of the subject property.
4. The matter is to be listed for hearing on 2nd June 2021 for further determination in relation to the other requirements under section 75 of the Title by Registration Act.

Tamara Gill

Master

By the Court

Registrar