

**COURT FILE NO.:** 12023/01  
**DATE:** 2009-10-26

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Ellen Smith v. Inco Limited

**BEFORE:** Justice J. R. Henderson

**COUNSEL:** K. Baert, E. Gillespie, C. Poltak, for the Plaintiff

A. Lenczner, L. Lowenstein, L. Fric, for the Defendant

**RULING**  
**(Opinion Evidence of Robert Maughan)**

[1] During the course of the direct examination of Robert Maughan ("Maughan"), an expert witness called by the plaintiff, the defendant objected to a question asked of Maughan. The defendant submitted that the question was objectionable for two reasons; namely, (1) the defendant had not received written notice of the proposed testimony pursuant to the rules, and (2) the question called for an answer that was outside of the scope of Maughan's expertise.

**BACKGROUND**

[2] Maughan is a manager at Teranet who is responsible for some of the Teranet products and services that provide calculations of current property values. Specifically, I found that Maughan was qualified to give opinion evidence in three areas: (1) the land registry system in Ontario, (2) real property sales data analysis, including land registry system data, MLS data, and assessment data, and (3) Automated Valuation Modeling ("AVM") technologies, data, and analysis.

[3] In an earlier ruling I referred to Maughan's area of expertise as the analysis of real property sales data and valuation methods.

[4] Teranet operates and manages the Electronic Land Registry System ("ELRS") for the Province of Ontario. As part of its agreement with the Province, Teranet has the right to use the ELRS database for the development and sale of certain products and services. Some of those products and services involve the calculations of current property values for properties that are registered in the ELRS.

[5] Maughan prepared two written reports for this case, dated February 2008 and June 2009 respectively. As well, he prepared certain charts and calculations that were used on his November 2008 examination for discovery.

[6] In his reports and in his oral testimony at this trial Maughan has provided calculations as to the changes in property values in Port Colborne, Fort Erie and Welland over various periods of time. He has done so using two valuation methods known as the AVM and ASP methods. These calculations were performed using the ELRS database, some additional data obtained from the MLS, and the Teranet software.

[7] Some of Maughan's calculations involved the use of a base year. In his initial report Maughan performed ASP calculations using a base year of 1997. In his charts prepared in November 2008 he did further ASP calculations using base years of 1997, 1998, 1999, and 2000.

[8] After testifying as to these calculations in court Maughan was asked the question, "Now that we have looked at a number of base years, in your opinion, what is the appropriate base year to use?" At that point counsel for the defendant objected on the grounds set out above.

#### **CLARIFICATION OF THE QUESTION**

[9] After I requested clarification, counsel for the plaintiff requested that I make a ruling as to whether Maughan has the ability to express an opinion as to the appropriate base year that should be used for the purpose of calculating the plaintiff's damages. I note that the plaintiff alleges, on behalf of the class members, that the quantum of damages should be measured by the decrease, or lack of increase, in the property values in Port Colborne from September 20, 2000 onward.

[10] I accept that this is a logical way to define the scope of my ruling. Therefore, my ruling will deal with whether Maughan is capable of giving opinion evidence on this topic, as clarified by plaintiff's counsel.

## **LACK OF NOTICE**

[11] It is well known that an expert is not required to set out in his written report a verbatim version of his proposed evidence. Rather, the written report is intended to give the opposing side notice of the expert's opinion, and the basis for the opinion, so that the opposing side will not be taken by surprise by the evidence adduced at trial. In that respect see the case of *Marchand v. Public General Hospital Society of Chatham*, 51 O.R. (3<sup>rd</sup>) 97 at para. 38.

[12] During submissions on this point plaintiff's counsel demonstrated that Maughan had, in his original report, referred to the concept of the selection of the base year. Moreover, an expert retained by the defendant, Integris Real Estate Counsellors ("Integris"), also referred to the concept of the selection of a base year, and Maughan's reply report of June 2009 responded to the comments by Integris about a base year.

[13] Counsel for the defendant conceded that the defendant was not surprised that the concept of the selection of a base year is an issue in this trial. Therefore, the defendant is no longer raising an objection to the proposed testimony on the basis of surprise.

[14] Therefore, I find that the proposed testimony is not objectionable because of lack of notice to the defendant.

## **EXPERTISE OF MAUGHAN**

[15] The defendant takes the position that Maughan does not have the expertise to express an opinion in an area that is properly within the realm of real estate appraisal. The defendant points out that Maughan does not have a degree in economics or statistics; does not have any post-secondary degree at all; and is not a certified real estate appraiser.

[16] The defendant describes Maughan as merely a "data gatherer", and not qualified to give an opinion as to the best way to value a real property.

[17] In my opinion Maughan's expertise goes beyond that of a "data gatherer". It is true that Maughan collects and manages a large database, but Maughan also has experience with the analysis of that data in order to determine present values for real properties using both the ASP and AVM methods.

[18] Maughan does not appraise properties in the traditional sense. That is, he does not go to the property, walk through the property, observe certain physical aspects of the property, research the neighbourhood, and then come up with a value.

[19] Instead, Maughan uses computer software to extract information out of a large database in order to calculate a current value for the property. It is the use of this database and software that is Maughan's area of expertise.

[20] Counsel for the defendant correctly points out that there must be a connection between the selection of a base year and the use of the Teranet software/database before Maughan can be permitted to give this opinion. In that respect I note that in Maughan's June 2008 report at page 54 he writes, "In order to demonstrate the change in the property market values over time ... the property value data ... is shown as the percentage change between the *base period* for each method and subsequent chronological periods." [Emphasis added.]

[21] Therefore, in my opinion, it is an inherent part of the use of Teranet software/database for Maughan to select a base period, or base year, for the purpose of performing his calculations. The court can assume that the base year is not selected at random, but that Maughan must have some expertise in determining the selection of an appropriate base year. Clearly, Maughan uses that expertise to select a base period as part of his analysis of the ELRS data.

[22] Counsel for the defendant also submitted that the plaintiff appears to be asking this court to license a debate between Maughan, who is not a certified real estate appraiser, and the defendant's expert David Atlin of Integris, who is a certified real estate appraiser. I accept that is the case.

[23] However, I find that Maughan and Atlin approach the issue of real estate valuation from different areas of expertise. In my view, this does not mean that one of these experts should not be permitted to give an opinion in court. Rather, this dissonance in the relative expertise goes to the weight that the court will give to the evidence of each of these witnesses.

[24] In conclusion, I find that Maughan is capable of providing opinion evidence with respect to the appropriate base year that should be

used for the purpose of calculating the plaintiff's damages as it relates to the calculations he has done using the Teranet database and software.



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Henderson, J.

**Date:** October 26, 2009