

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELLEN SMITH

Plaintiff

- and -

INCO LIMITED

Defendant

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P R O C E E D I N G S   A T   T R I A L

(RULING - PROPOSED EVIDENCE OF ROBERT MAUGHAN)

BEFORE THE HONOURABLE JUSTICE J. R.  
HENDERSON on Thursday, October 22, 2009, at  
WELLAND, Ontario.

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APPEARANCES:

B. Gillespie

Counsel for the plaintiff

K. Baert

C. Poltak

A. Lenczner

Counsel for the defendant

L. Lowenstein

L. Eric

**T A B L E O F C O N T E N T S**

**S U P E R I O R C O U R T O F J U S T I C E**

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THURSDAY, OCTOBER 22, 2009

R U L I N G

HENDERSON, J. (Orally):

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This is my ruling with respect to the plaintiffs' request to introduce certain documents and calculations through its own expert witness, Robert Maughan. Mr. Maughan is on the witness stand in direct examination at present. He has been qualified as an expert in several fields; collectively I will call those fields the analysis of real property sales data and valuation methods.

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In essence, he is providing opinion evidence regarding the changes in the values of real properties in Port Colborne, Welland and Fort Erie. In my view, this evidence directly affects the plaintiffs' quantum of damages in this case.

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Mr. Maughan provided one written report in February 2008. Thereafter, he made some corrections to his calculations, provided some updated charts in November 2008 and then provided a second report in June, 2009.

Now the plaintiff wishes to introduce what the plaintiff calls an updated calculation by Mr. Maughan that was initially served on the defendant's counsel on September 25th, 2009. I understand that the initial documents were subsequently changed. In any

event, all of the documentation in issue were received by the defendant by about October 8th, 2009.

The plaintiff says that the new documents are simply updates to Mr. Maughan's earlier calculations set out in his report, in order to bring the calculations up to date to October 2009. The defendant says that there is a lot more to the calculations than that and the defendant, at least, requires an adjournment to explore with Mr. Maughan the reasons for some apparent changes in the calculations.

JUDICIAL DISCRETION

The Rules of Civil Procedure, if read in their entirety, essentially leave the decisions with respect to the admissibility of evidence to the discretion of the trial judge.

In exercising my discretion, there are two broad principles that I must keep in mind. Number one, the trial judge should receive all evidence that is relevant to the issues in the case, if at all possible. Number two, in admitting relevant evidence, the trial judge must attempt to be fair to all parties.

In this case, the proposed evidence is relevant to an issue; therefore, this court should receive it on some terms, if at all possible. The issue here is the fairness to the defendant.

ANALYSTS

Now that I have had an opportunity to read the proposed evidence, I observe that on the surface the evidence seems to be something more than a mere update of the previous calculations. I note that in prior reports Mr. Maughan did calculations based on the ASP method for 1997 to 2002, and based on the AVM method for 2003 to 2007. He has testified that this change in methodology, in his opinion, was the best way to calculate the changes in property values. However, in the proposed evidence, Mr. Maughan has not only updated the AVM calculation to 2009 but he has updated the ASP calculation from 2003 to 2009. Therefore, he now seems to be adding the ASP calculation for a six year period, as an alternative way of calculating the property value changes.

Further, I note that the ASP calculation from 2003 to 2009 seems on the surface to be done in a different manner than the ASP calculation that was done for the period 1997 to 2002. It does appear that many sales in the relevant areas have been left out of Mr. Maughan's most recent calculations. There may be a very valid reason for that but by simply looking at the documentation, that reason is not obvious.

Lastly I note that the plaintiff did not deliver a written report from Mr. Maughan along with the written calculations. A written report is required by the Rules and, in my view, probably would have dealt with the first two concerns that I laid out.

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Ruling - Henderson, J.

Given those observations, I have several options to consider. The first option is to simply rule that this proposed evidence is not admissible. I am not going to do that because I firmly believe that it is relevant. The second option is to declare a mistrial, let the plaintiff serve a proper expert's report and start the trial again. In my view, that would be an injustice to everyone if we had to start over again. I am not going to declare a mistrial, on this issue in any event. The third option is to stop the trial to allow the defendant to conduct an examination for discovery of Mr. Maughan on the proposed new evidence. The fourth option is to simply continue the trial, allow the evidence to be admitted in direct examination of Mr. Maughan and then permit the defendant to deal with the new evidence by way of cross examination.

In my view, I must decide between the last two options.

I note that these types of problems, arising from last minute exchanges of documents, are quite common in large, complex trials. Therefore, I do not find that the conduct of any party or any counsel is inappropriate in this case. It is a fact of litigation work that a great flurry of papers often is exchanged at the last minute.

That being said, the new evidence in this case, on its surface, seems to be something that changes the

expected evidence of Mr. Maughan and adds significantly to what would have been expected from him. Therefore, in my view, counsel for the defendant should be given the opportunity to know how and why these changes were made, in advance of hearing Mr. Maughan's testimony on the point.

Another factor that I have taken into consideration is the fact that prior to coming to trial, this case was case managed. By agreement, as part of the case management, the parties agreed that there would be examinations for discovery of all experts and that was done. Therefore, in my view, if there are significant changes to Mr. Maughan's expert evidence, it should be natural to permit a further examination of Mr. Maughan on the changes.

Further, I note that we are going to take a break of one week from this trial, next week, and therefore there is time to conduct an examination of Mr. Maughan without unduly delaying the trial.

As a final consideration, in my view I observe that the defendant probably needs to ask Mr. Maughan some questions about the changes and then take Mr. Maughan's answers to its own experts, before the defendant can cross examine Mr. Maughan.

Therefore, even if I were to permit the direct examination to continue today and then continue into cross examination there will, in my view, be the inevitable delay caused by the defendant's need to

