SHERIFF APPEAL COURT

[2023] SAC (Civ) 32
PER-CA24-22

Sheriff Principal A Y Anwar
Sheriff Principal N A Ross
Appeal Sheriff P A Hughes

OPINION OF THE COURT

delivered by APPEAL SHERIFF PATRICK HUGHES

in appeal by

ANGUS COUNCIL

Pursuer and Respondent

against

GUILD HOMES (TAYSIDE) LIMITED

Defender and Appellant

Defender and Appellant: Dean of Faculty (RW Dunlop KC); Burness Paull LLP
Pursuer and Respondent: E Mackenzie KC, Cockburn; Angus Council

24 November 2023

Introduction

[1] This is an appeal against the sheriff's decision on 22 December 2022 to grant the pursuer's motion for summary decree.

[2] The pursuer and respondent (hereafter "the pursuer) is a local authority and the defender and appellant (hereafter "the defender") is a developer. In 2011 the parties concluded an agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 (the "Act"), in terms of which the pursuer granted planning permission for a

development at Friockheim in Angus, and the defender undertook that twenty per cent of the houses constructed in that development would be "affordable housing". If this provision of affordable housing units were to prove unachievable, the defender was to transfer to the pursuer a commuted sum in lieu of these units.

[3] In 2016 parties agreed, in terms of section 75A of the Act, to modify the original agreement so that the commuted sum was to be paid through four instalments, the value of which was to be calculated using the district valuer's assessment of the market value of a housing unit as at the time of each payment.

[4] The provision of the affordable housing units has not been achieved. Consequently, in June 2017 and March 2018 the pursuer issued invoices for the first two instalments of the commuted sum, for £108,000 and £104,000 respectively. These invoices were paid by the defender, although on each occasion it reserved its right to argue that the district valuer's calculations were erroneous and not in accordance with the agreement.

[5] On 31 July 2018 the district valuer reported to the pursuer providing that the value of the commuted sum for a housing unit in the Eastern Housing Market Areas at 30 June 2018 was £25,000. In March 2019 the pursuer sent the defender an invoice for the third instalment sum of £100,000, being the value of four housing units.

[6] The defender refused to pay this invoice, arguing that the district valuer's methodology was unsound and significantly inflated the commuted sum payable. Instead, the defender sought to further modify the agreement, capping the sum payable so that it would amount to a total of £216,000. Given that £212,000 had already been paid, this would effectively eliminate the third and fourth instalments and thereby remove any further role for the district valuer. The pursuer refused this modification, and the defender appealed that refusal to the Scottish Ministers in terms of section 75B of the Act.

[7] The defender's section 75B appeal to the Scottish Ministers raised various issues as to why the section 75 Agreement ought to be amended. These included changes in market circumstances; the lack of a clear and deliverable need for affordable housing; payment of commuted sums failing to meet a planning purpose; and criticisms of the district valuer's methodology.

[8] On 19 April 2021 the reporter appointed by the Scottish Ministers dismissed that appeal. In terms of section 237(1) and 237(3)(ca) of the Act, determinations by the Scottish Ministers "shall not be questioned in any legal proceedings whatsoever".

[9] Following this the pursuer insisted on payment of its invoice for £100,000. The defender continued to refuse to pay, and consequently the pursuer raised the present action. The defender lodged defences, of which the most relevant for the purposes of this appeal is Answer No.8:

> "the agreement as amended requires the commuted sum to be fixed by the District Valuer. According to its proper construction that requires the District Valuer to be instructed by the pursuer to conduct the valuation exercise and to report its conclusions in accordance with recognised professional standards. The Royal Institute of Chartered Surveyors ('RICS') has for many years published detailed professional standards for valuation methodology. Those standards, known collectively and colloquially as 'the Red Book', included a guidance note entitled 'Valuation of land for affordable housing Scotland', published in 2013. A copy is produced and referred to for its whole terms which are held as incorporated herein brevitatis causa. Despite extensive requests and correspondence, including freedom of information requests, made of the pursuer the first defender has been unable to ascertain what comparable transactions the District Valuer considered or what sensitivity analysis was applied. The valuation produced proceeds on the basis that the value of an affordable housing plot is only £1000. That value is apparently derived from information provided by the pursuer to the District Valuer. This is substantially out of step with relevant transactional evidence which suggests values of between £10-15,000. It inflates the value of the commuted sum. The sums demanded by the pursuer are substantially out of step with those demanded by neighbouring authorities for comparable sites. According to a proper construction of the agreement the first defender is only bound to pay sums fixed by the District Valuer in accordance with recognised and widely used valuation methodology, and in a manner able to be verified by those affected by such valuation. The sums

> demanded by the pursuer in the present action have not been fixed by that methodology and cannot be verified."

[10] The pursuer lodged a motion for summary decree in terms of Ordinary Cause Rule 17(2), arguing that the defender's case had no real prospect of success. This motion founded upon the terms of section 237(1) and 237(3)(ca), which excluded challenge. The pursuer submitted that the defences were therefore incompetent and that accordingly there was no real prospect of success.

[11] The sheriff upheld that submission and granted summary decree in favour of the pursuer. He considered that the correctness of the district valuer's assessment had been "put in issue" by the defender's appeal to the Scottish Ministers. The defender's criticisms of that assessment had been expressly rejected in that appeal. Any challenge to the validity of that appeal decision could only have been mounted by an application to the Court of Session under section 239 of the Act. The defender had chosen not to employ that procedure and was now out of time for doing so.

Submissions for the defender

[12] For the defender, the Dean of Faculty submitted that the sheriff was wrong in law to say that the defences were foreclosed by the terms of section 237.

[13] Where parties have agreed that a price should be fixed by a third party, the latter's decision could be contested in the courts, on the basis that the expert had not undertaken the task, or made a manifest error – *Barclays Bank plc v Nylon Capital LLP* [2012] Bus LR 542 at paragraphs 30, 31 and 35; *Eastern Motor Co Ltd* v *Grassick* 2022 SC 100 at paragraphs 38 and 39. To justify such interference with an expert's decision, an applicant would face a high hurdle, but if that hurdle were surmounted, the expert's decision could be found to be

a nullity. Here the sheriff had prevented the defender from even attempting that hurdle, finding that its right to do so had been ousted by the terms of Section 237. For the courts' supervisory jurisdiction to be so ousted, nothing less than the clearest wording would suffice - *Regina (Privacy International)* v *Investigatory Powers Tribunal* [2020] AC 491 at paragraph 99.

[14] It was accepted that a determination in an appeal under section 75B could not be questioned, but that was not what the defender sought to do. The appeal had been against the refusal of further modification of the agreement. That having been refused, the contract stood as originally modified. The defender therefore could not challenge that the price would be as fixed by the district valuer; but it remained entitled to take issue with the price that the district valuer did fix.

[15] At the section 75B appeal, the reporter's decision had been concerned only with whether the planning decision should be modified. He had not been asked to set aside the valuation *ope exceptionis*, or to consider whether the district valuer had departed from his mandate or made a manifest error so as to make the latter's decision a nullity.

Submissions for the pursuer

[16] Senior counsel for the pursuer submitted that the defender's choice to employ section 75B to put in issue the correctness of the district valuer's assessment meant that the Scottish Ministers had made a relevant determination. The exclusionary provisions of section 237 applied. In its defence to the present action, the defender sought to revisit the same criticisms which had been expressly rejected by the Scottish Ministers. This was an attempt to revisit the latter's determination and was barred by the ordinary and natural meaning of the words of the section. In other words, the defence to the action, in substance,

amounted to a questioning of the determination of the Scottish Ministers, similar to the position in *Cosmopolitan Hotels* Ltd v *Renfrewshire Council* (unreported) [2021] CSOH 116. If the defender had considered that that determination were flawed it could have appealed it in terms of section 239, but it had chosen not to do so. Furthermore, policy reasons militated in favour of refusing the appeal. The dispute involved specialist planning and valuation matters which were best considered by specialist decision-makers; the Act provided for certainty and finality, and prevented undue delay.

Decision

[17] Where parties agree to be bound by an expert's decision, that decision is final and binding unless the expert is guilty of fraud or manifest error (*Eastern Motor Co* v *Grassick, supra* per Lord Pentland at paragraph 38; Campbell v *Edwards* [1976] 1 WLR 403 at 407). The expert's decision can also be challenged if it can be shown that he has materially departed from his instructions or has gone beyond the limits of decision-making authority bestowed on him by the agreement (*Eastern Motor Co, ibid*; *Mercury Communications* v *Director General of Telecommunications* [1994] CLC 1125 at 1140, per Lord Hoffman, upheld on appeal [1996] 1 WLR 48). Where an expert answers the right question in the wrong way, his decision is nevertheless binding, but if he answers the wrong question, his decision is a nullity (*Nikko Hotels (UK) Ltd* v *MEPC* [1991] 2 EGLR 103 at 108; *Barclays Bank, supra*, at paragraph 31).

[18] In the present case the defender complains that the sheriff's decision has deprived it of the right to prove *ope exceptionis* ("by force of exception") that the district valuer had manifestly erred or materially departed from his mandate. The defender argues that it is

seeking to challenge the district valuer's decision, not any decision of the Scottish Ministers, so section 237 is not engaged.

[19] It is clear from the terms of the defender's answer 8, cited above, that its challenge to the district valuer's decision is based on the contention that his methodology was flawed. The question which arises is the extent to which the defender's section 75B appeal raised the same issue, so as to produce a determination thereof by the reporter.

[20] In our view, the defence to the present action is struck at, and excluded, by section 237 of the Act. The reporter's Notice of Determination, at paragraph 30 records that the basis for appeal was that:

> "use of or the giving of more weight to comparable valuation evidence would have given rise to a more representative basis on which to determine the respective sums due. Had that been done, the figure suggested in the modification would have been reached."

[21] In considering that position, the reporter had regard to the district valuer's reports, RICS guidance and information provided by the chartered surveyors firm Graham & Sibbald. He noted that according to RICS guidance there are two approaches to the valuation of development land for affordable housing; the "comparison" method and the "residual" method, each offering both advantages and disadvantages. The district valuer had primarily used the residual method, with the comparison method "providing potential value as a '*reality check*'" (Notice, paragraph 33).

[22] This reliance on the residual method was consistent with RICS guidance, which noted the

> "limited usefulness of the comparison method in light of the legislative and planning complexities concerning affordable housing and the risk of variation of values from site to site." (Notice, *ibid*).

[23] The reporter found that the approach of the district valuer was consistent with the underlying purpose and basis of the payment of the commuted sum. He rejected the arguments that the district valuer had erred in failing to make allowance for the characteristics of the site, or by failing to prefer certain comparison sites in a benchmark analysis (Notice, paragraph 35). Although valuation data from Graham & Sibbald had been submitted, which suggested – on the basis of comparable market data – that a lower commuted sum might be available, the reporter considered this data to be of limited value, giving no more than a general indicator of other possible outcomes by using the comparison method, and reliant upon the application of professional judgement (Notice, paragraphs 36-38).

[24] The reporter did not agree that the valuation approach taken by the district valuer in respect of benchmarking failed to align with the Supplementary Guidance (SG) on developer contributions and affordable housing or the section 75 agreement. Rather, the district valuer's approach was consistent with the underlying planning policy intention; had been consistent throughout in the approach taken to benchmarking; and was within the range of reasonable valuation judgements (Notice, paragraphs 39-41).

[25] Ultimately the reporter saw nothing inherently unreasonable in the professional valuation judgement of the district valuer. He did not consider that the district valuer had taken an unreasonable approach to the consideration of comparison sites; nor that there was any basis to conclude that the district valuer's approach to benchmarking was inappropriate or contrary to RICS guidance. There was nothing in respect of the role or approach of the district valuer that supported the appeal; he had applied reasonable professional judgement to the valuations (Notice, paras 44-46).

[26] The foregoing passages from the Notice show that although the district valuer's methodology was only one element of the appeal, the reporter nevertheless had to make a determination upon it in order to decide the appeal. His reasoning, in refusing an appeal which would have eliminated the role of the district valuer, necessitated a determination on the criticisms of the district valuer's methodology. That determination having been made, the terms of section 237 mean that it cannot now be questioned. The substance of what the defender seeks to argue in its defence to this action resurrects the same issues determined by the reporter. The defence is therefore incapable of question before the court, and the sheriff was correct to grant summary decree. There is no real prospect of such a defence succeeding.

Disposal

[27] The appeal is refused. Parties agreed that expenses should follow success, and we therefore award the expenses of the appeal procedure, as taxed, against the defender in favour of the pursuer. We also grant parties' joint motion to sanction the cause as suitable for the employment of senior and junior counsel.