



NEGLIGENT VALUATIONS... YOU STAND TO LOSE!

Tiffany Castillo & Melissa Inglefield



The risk of negligent valuations presents discomfort for financial institutions and investors who wish to utilize such valuations in making investment decisions. This discomfort is exacerbated by the unsatisfactory relief recently offered by UK Courts to an investor who suffered economic loss resulting from one such negligent valuation.

While legal action provides a means of redress, such pursuits of justice will necessitate retaining legal counsel, experts and obtaining an independent valuation - both costly and timely exercises that often fail to meet a claimant's expectations. This case commentary summarizes the High Court judgment of Capita Alternative Fund Services (Guernsey) Limited and anor v. Drivers Jonas [2011] EWHC 2336 (Comm) granted in favour of an investor against a valuator and explores the commercial viability of the protection afforded by the Courts.

In this recent case, the Commercial Court held that Drivers Jonas, a firm of chartered surveyors and property consultants, was liable in damages to Capita, a Claimant, for providing a negligent valuation of a large factory outlet shopping centre in the UK.

The Court noted that "the process of valuing real property had strong subjective elements..." and, even in light of this, there was a "permissible margin of error" offering protection to valutors. Nevertheless, to be found liable of professional negligence, a valuator must have fallen below the standards expected of a 'reasonably competent professional'.

The Court ruled that the valutors lacked the expertise necessary to value the property, specifically in relation

to factory outlet centres which possessed workings and characteristics vastly different to any regular commercial centre. In addition, the valutors did not rely on independent advice (because they relied on information sought from the developer's agents) and their own advice did not fall close to the permissible margin of error. The Court noted that the valutors should have either declined the engagement or commissioned expertise from those competent in the field.

The Decision

Judgment was in favour of the investor, the Claimant, for the sum of £18.05 million and the Valuator was held liable for damages resulting from professional negligence. In deciding the award to the Claimant, the Court considered that such sum was the difference between the amounts that the Claimant paid for the acquisition of the property versus the amount they would have paid had the valuation provided by Drivers Jonas been correct.

Won the battle but lost the war...

The value of the Claimant's original claim was for almost £64 million based on the fact that the valutors advised as to the commercial viability of the transaction itself, rather

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FORGING AHEAD WITH ELECTRONIC TRANSACTIONS

Kevin Nurse



Trinidad and Tobago has lagged behind the developing world having failed to enact legislation to permit the entry into electronic transactions. Meanwhile, e-commerce has forged ahead – with contracts being executed via email exchanges, licences being granted online by clicking the “Accept” button, purchases being conducted directly from websites, and persons signing electronically generated documents without so much as putting pen to paper. Determining the validity of such transactions has required the application of common law principles of contract law. The recent enactment of the Electronic Transactions Act, 2011 (the “Act”) is a welcome development that addresses the recognition, formation and authentication of electronic transactions. The Act was passed in April 2011, however, it has not yet been proclaimed by the President.

This article is the first in a three-part series in which we examine the provisions of the Act. This initial article considers the legal recognition of electronic transactions. The second will address the means by which electronic contracts may be formed; and the final article will consider the basis on which electronic signatures may be used and authenticated.

Purpose and application of the Act

The stated purpose of the Act includes:

- The facilitation of electronic transactions and commerce and electronic filing of documents with public bodies,
- promotion of public confidence in the integrity and reliability of electronic records and electronic commerce, and
- fostering the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.

The Act makes clear that it will have no effect on certain written laws which in specific circumstances require writing, signatures or original documents. These include laws relating to wills or testamentary instruments; the conveyance of real or personal property or the transfer of any interest in such; trusts, indentures or powers of attorney; documentation for immigration, citizenship or passport matters; or the recognition or endorsement of negotiable instruments. Having noted the exceptional

circumstances in which the Act will not apply, the provisions of the Act which afford the legal recognition of electronic transactions will now be addressed.

Enforceability of Electronic Transactions

Under the Act an electronic record of information will not be denied legal effect, admissibility or enforceability merely because it is in electronic form. Part II of the Act references certain instances where the law, prior to this enactment, requires that transactions be in writing. The laws referred to are those which require that information, messages or records (collectively referred to herein as “Information”) are to be:

- in written form,
- sent in writing,
- in a specific non-electronic form, or
- presented in original form.

All of these requirements may now be satisfied by records or data in electronic form.

By way of example, the Mercantile Law Act, Chap. 82:02 of the revised laws of Trinidad and Tobago, provides that no agreement, the performance of which will be for a period of one year or more, may be enforced unless it is in writing, and it is signed by the parties.

In light of the requirements of the Mercantile Law Act, on the face of it, an electronic message would be insufficient if not printed or reduced to writing and signed by the parties. With the introduction, however, of the Electronic Transactions Act, agreements entered into via electronic messages will not be denied enforceability on that basis.

Some of the criteria for permitting such electronic Information include that the electronic form of the Information must:

- be accessible and retainable in a way that it can be used for subsequent reference,
- be capable of being retained by the recipient, and
- contain substantially the same information as the written or printed form.

Additionally, there must be reliable assurance as to the integrity of such Information.

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than a valuation of the market value of the factory outlet shopping centre. The claim was therefore aimed at recovering all the losses the Claimant suffered as a result of acquiring and owning the factory outlet shopping centre. If such claim were successful, a supporting judgment would likely have aimed to put the investor in a position to recover all losses experienced by the Claimant by virtue of investing in the project.

It is surprising that the investor was not afforded a veil of protection, in light of the fact that Drivers Jonas was retained substantially for the purpose of giving both commercial investment and valuation advice, a fact supported by the Defendant's invoice.

The Court, in determining damages, considered the extent of the valuator's duty of care owed to the investor. Hence, it considered only the advice which the valuator had a duty to provide, i.e. the valuation evidence rather than the ancillary investment advice offered. The effect was to make the valuator liable only for the loss arising out of the negligent advice, the overstated valuation, and not for *all other losses* arising from such advice; a decision which produced a net loss to the Claimant.

A note to financial institutions and investors

Prevention is always better than cure, so financial institutions and investors are urged to:

- Conduct the necessary due diligence and select a valuator who has the requisite skill, expertise, experience and knowledge to assess the value of all the various aspects of a commercial project; and

- Require an express written retainer from the valuator which should highlight the full scope of the project the valuator has agreed to undertake.

The Capita case echoes the well-founded principle that professionals owe a duty of care for the advice they provide. A breach of that duty, coupled with reliance on such advice and consequential loss, would pronounce a finding of professional negligence against the professional and an award of damages granted in favour of the investor. The UK Courts have reaffirmed that valuers owe such a duty to their clients when providing valuations. They therefore must ensure that they and their agents have the requisite skill and expertise to provide a valuation for a particular job or property, especially where the job or property is unique or unusual in nature.

Nevertheless, *caveat emptor* reminds financial institutions and investors that Courts will not be quick to provide redress for any and all losses that stream from a negligent valuation (as confirmed in the Capita case), but only those which resulted from the provision of inaccurate information. Thus, investors and financial institutions must take extra care in selecting valuers. Even when a favourable judgment is obtained by an investor, other much more significant costs (resulting from an inaccurate valuation) could make an investor the real loser, thus reinforcing the ever-true *caveat emptor*, or in this case, *investor beware!*

**At the time of writing this Article, an application to appeal the Capita case has been sought.*

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Where there is a legal requirement that certain Information be retained, the Act allows that this may be done in electronic form. Similarly, a legal requirement that one or more copies of Information are to be provided to a single addressee at the same time can be met by providing a single copy in electronic form. The Act also provides that an electronically signed data message is valid, enforceable and effective.

Electronic Signatures

With regard to signatures, the Act provides that an electronically signed data message is as valid, enforceable and effective as a non-electronic signature. This aspect will be further developed in the third article in this series.

Electronic Records as Evidence

The Act indicates the evidential weight that applies to an electronic record by providing that it will not be deemed inadmissible as evidence solely on the ground that it is in electronic form, or on the ground that it is not in the original non-electronic form, if it is the best evidence.

This provision addresses a concern that has been raised in a number of jurisdictions which have sought to introduce legislation relating to electronic documents, and can be the subject of a separate article in its own right. The best evidence rule prohibits the introduction into evidence of secondary evidence unless it is shown that the original document has been lost or destroyed, or is beyond the

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THE INFORMATION FREEWAY: IS YOUR COMPANY EXPOSED?

Aisha Peters

The international scandals caused by WikiLeaks in 2010 highlighted the limitations of various governments and companies around the world to control transmission of information to the public about their internal operations and commercial interests. Part I of this article considers the impact of the Freedom of Information Act, 1999 (as amended) (FOIA) on the ability of private individuals or corporate entities in Trinidad and Tobago to access valuable information from the State and whether corporate bodies are themselves subject to the provisions of the Act. It also briefly addresses how FOIA requests can be made, which documents are exempt from requests, and circumstances in which exempt documents will be disclosed. Part II of this article will provide a review of the Data Protection Act, which is yet to be proclaimed.

A General Right of Access—When can a company be treated as a Public Authority

The FOIA gives members of the public a general right (with some exceptions) to access official documents of public authorities. A public authority pursuant to Section 4 of the Act includes: Parliament, including a Joint Select Committee or a Committee of either House of Parliament; Cabinet; Ministries and Departments; Statutory Bodies; Municipal Corporations; Service Commissions; The Tobago House of Assembly; and State Enterprises

A body corporate or unincorporated entity can be defined as a ‘public authority’ under Section 4 of the FOIA based on the following:

- Any function which it exercises on behalf of the State;
- If it is established by virtue of the President’s prerogative, by a Ministry of Government or other public authority; or
- If it is supported directly or indirectly by Government funds and over which the Government is in a position to exercise control.

In Magdalene Samaroo v Telecommunications Services of Trinidad and Tobago H.C 817/2006 CV 2006-00817, the Court held that TSTT was a public authority because it was under the fiscal supervision of the State’s Public Accounts (Enterprises) Committee.

It was not disputed that the Trinidad and Tobago Postal Corporation (TTPost) was a public authority in the matter of Carib Info Access Limited v The Honourable Minister of Public Utilities and the Trinidad and Tobago Postal Corporation H.C 2579/2002.

The Courts have also held that even where the organisation is an independent body, and not answerable to any Minister of Government or reliant on State funding it is a public authority if its functions are conferred by Parliament for the benefit of citizens.

In Bernard Mohamdally v The Medical Board of Trinidad and Tobago and The Minister of Health H.C 1082/2007, the Medical Board of Trinidad & Tobago was declared a public authority as its functions were conferred by Parliament for the benefit of citizens. Therefore it was required to respond to FOIA requests.

Public and Private Partnership (PPP) - Is your Company moving from private to public authority?

Based on the Court’s wide interpretation of ‘public authority’ under Section 4 of the FOIA, Companies should consider whether their participation in the PPP initiative, announced in the 2012 Budget Statement, may bring them within the ambit of the FOIA. This would depend on the national importance of the infrastructure project to be undertaken and the degree of Government control over the partnering company by the PPP Unit in the Ministry of Finance in collaboration with the Ministry of Trade and Industry.

Public Authorities Not Subject to the FOIA

Public bodies not subject to the FOIA include: The President of the Republic of Trinidad and Tobago; a Commission of Enquiry; and Public Authorities subject to an Exemption Order by the President.

Procedure—How To Access Information

Anyone seeking to access a copy of an official document must make the request by completing the appropriate forms available at the office of any of the public authorities. The request should provide sufficient information to enable the public authority to identify the requested documents.

A reply indicating refusal or approval to disclose the information must be given within thirty (30) days. A statement by the public authority that the document cannot be located or an inordinate delay in granting approval

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constitutes a refusal. If the request is refused, the applicant can make a complaint to the Ombudsman and if this is unsuccessful, thereafter make an application to the High Court for Judicial Review of the public authority's decision. The request for information may be deferred under Section 19 if the document requested is awaiting presentation to Parliament or release to the Media.

Any document which is not exempt, not already in the public domain and is in the possession of a public authority can be accessed under the FOIA.

Exempt Documents—Do they really exist based on the Public Interest?

Exempt documents under Part IV of the FOIA include Cabinet Documents Defence and Security; Law Enforcement; International Relations; those affecting personal privacy; documents affecting legal proceedings or subject to Legal Professional Privilege; and documents relating to Trade secrets, among others.

Notwithstanding the classification of the above documents as exempt, they can be disclosed by an order of the Court if disclosure of the document is in the public interest. This will arise where there is significant evidence of;

- Abuse of authority or neglect in the performance of official duty;
- Injustice to an individual;
- Danger to the health or safety of an individual or the public;
- Unauthorised use of public funds.

Examples of exempt documents which the Courts have allowed to be disclosed in the public interest include:

- Academic qualifications, certificates and diplomas of successful candidates who were promoted - Darren Baptiste v Police Service Commission and the Commissioner of Police H.C 3288/2007.
- Interview scores compiled for all persons interviewed - Carl Bridglal v The Commissioner of Police H.C 525/2009.

- Minutes of meetings (with appropriate deletions) - Ashford Sankar v Public Service Commission H.C 37/2006.

In each case cited above, the Court considered the impact failure to disclose the requested document would have on the applicant's rights. Therefore, it is not in all instances that orders for similar disclosures will be granted.

Conclusion

Companies and other organizations should be mindful that their involvement with the State may on occasion unintentionally bring them within the ambit of the Act. The FOIA can be a powerful tool to access information from State agencies, which may be crucial to the success of one's commercial enterprise. In our next issue, we will explore the importance of the Data Protection Act.

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jurisdiction of the Court without the fault of the party offering the document. Suffice it to say, the Act as formulated, seeks to remove this prohibition by permitting such Information to be considered "best evidence".

Conclusion

The Act, which is awaiting proclamation, seeks to facilitate electronic transactions and to promote confidence in the reliability and authenticity of electronic documents and commerce. Save for a number of specified

documents which remain beyond its purview, the Act proposes to afford legal recognition to electronic transactions once certain specified criteria are satisfied.

In the next two issues, we will consider the provisions under the Act relating to the formation of electronic contracts, and the use and authentication.

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