CA on appeal from Chancery Division (Mr Justice Ratee) before Rober Hutchison LJ; Robert Walker LJ; Tuckey LJ. 3rd December 1998.

**JUDGMENT : Lord Justice Robert Walker:**

1. Sawston is a village about seven miles south of Cambridge. It has spread out towards Cambridge, with extensive new housing estates and a small business park on the northern perimeter of the village. Beyond these is an area of undeveloped land known as the Deal Grove Estate. That is a misleadingly impressive name for about 14 hectares of undeveloped and uncultivated land, partly wooded and partly used as a rubbish tip, and I shall call it the Grove land. This appeal is concerned with the valuation of a roadway leading to the Grove land. It was valued by a surveyor, acting as an expert and not as an arbitrator, following on the exercise by Morgan Sindall plc (Morgan Sindall) of an option to purchase it from Sawston Farms (Cambs) Ltd (Farms).

2. The option was granted by a written agreement dated 11 February 1991 between Farms and William Sindalls plc (as Morgan Sindall was then called). It was exercised by Morgan Sindall by a written notice dated 25 January 1996. An independent surveyor, Mr A.P.Harris FRICS, was appointed (under provisions to which I will refer shortly) to determine the option price. On 15 October 1996 he issued a written determination fixing the option price at £130,000. It was a "non-speaking" valuation. Morgan Sindall and its advisers expressed surprise at the level of the valuation and asked for some explanation but Mr Harris (no doubt prudently) declined to go into the matter further.

3. Then on 28 November 1996 the solicitors acting for Farms disclosed a copy of a deed of grant of a right of way dated 29 May 1975. This disclosure led Morgan Sindall to issue on 13 March 1997 an originating summons, to which Farms was the only defendant, seeking a declaration that Mr Harris's determination was a nullity and of no effect. On 11 July 1997 Rattee J dismissed the originating summons, and Morgan Sindall appeals to this court.

4. That is the case in bare outline. I must fill in a good deal of detail in order to show how the issues arise.

5. Some further description of the situation and surroundings of the Grove land is necessary in order to understand the issues. The Grove land is very roughly triangular (although with various irregularities), the apex of the triangle pointing northwards. The eastern side of the triangle is marked by a disused railway track, with farmland beyond. The western side of the triangle faces towards (but is not contiguous to) the road from the centre of Sawston to Cambridge, which now carries less traffic because there is a bypass. Between the western side of the triangle and the Cambridge road is Deal Farm.

6. The base of the triangle adjoins housing development at its western end. At its eastern end it adjoins the Dales Manor Business Park. Here the greatest irregularity of boundaries occurs, as the Marley Tile factory juts out into the Grove land, while the Grove land in turn has two tongues (one on either side of the factory) projecting into the business park. A private road (about 640m long and 13 metres wide) runs from the end of the outer tongue (the easternmost point of the Grove land), following a serpentine course (with one spur) through the business park, until it joins the public highway at or near Babraham Road, Sawston. This private road, which I will call the roadway, is the subject-matter of the valuation dispute. The best plan is that prepared by Bidwells at page 108 of the appeal bundle, except that it does not show the Cambridge road or Deal Farm.

7. The roadway has in the past been used for access to six separate units on the business park, and also for access to North Farm, on the other side of the old railway line. The owners of these properties (either for freehold or long leasehold interests) have rights of way over the roadway. So had Morgan Sindall, until its easement came to an end as a result of its purchase of the servient tenement. Its rights stemmed from the deed of grant of 29 May 1975, by which Farms granted in fee simple to Ventress Property Development Ltd (Morgan Sindall's predecessor in title to the Grove land, referred to in the deed as "the second land") the right *"at all times hereafter by day or night to pass and repass over and along the roadway ... with or without vehicles of any description with or without animals for all purposes connected with the use and enjoyment of the second land."*

8. The consideration for the grant was £1 (coupled with a covenant to contribute a fair proportion of the cost of repairs).

9. At the heart of Morgan Sindall's complaint is the fact that it learned of this express grant only after the option had been exercised and the option price determined. Its case is that it believed that it had rights of way over the roadway but only "for the current and previous uses" (the wording is that used in the written counter-representations of Mr Richard Main FRICS, the surveyor acting for Morgan Sindall). Later it discovered that it had all the time possessed an unlimited right of way. That is said to be a crucial mistake and one of the two grounds on which Mr Harris's determination should be set aside.

10. Quite apart from the grounds on which the case was decided by Rattee J, I have difficulty with the submissions which Mr Michael Burton QC (for Morgan Sindall) made on this point. A cursory reference to paragraphs 54 and 55 of the article in Halsbury's Laws of England (4th edition, volume 14) on easements indicates that even an express grant in wide terms of a easement of way has to some extent to be construed by reference to the condition of the dominant tenement at the time of the grant; and that an easement of way created under s. 62(1) of the Law of Property Act 1925 (a more likely origin than prescription for the right of way which Morgan Sindall supposed itself to have) operates as if it were an express grant. I am therefore rather sceptical about the very sharp distinction, urged on behalf of Morgan Sindall, between a limited and an unlimited right of way.

Nevertheless that seems to have been the approach adopted at first instance, so far as the point was explored at all, and so I do not think it right to explore it further in this court.

11. The main argument in this court, as before the Judge, was concerned with the limited circumstances (Mr Burton vividly described them as the eye of a needle) in which the court will interfere with a valuation (and especially a non-speaking valuation) made by an expert to whom the parties have agreed to refer a decision as to valuation. There are several well-known cases stating the principles, most of which were cited to the court. The best summary is perhaps in the judgment of Dillon LJ in ***Jones v Sherwood Computer Services*** [1992] 1 WLR 277. The Judge cited two passages from the judgment of Dillon LJ, which bear repetition. At page 284 Dillon LJ said, *"The cases have been fully analysed by Sir David Cairns in **Baber v Kenwood Manufacturing Co.Ltd** [1978] 1 Lloyd's Rep.175, 181 - 183, and by Nourse J in **Burgess v Purchase & Sons (Farms) Ltd.** [1983] Ch.216. The starting point for the modern statement of the law is, in my judgment, the decision in **Campbell v Edwards** [1976] 1 W.L.R. 403 and in particular the passage in the judgment of Lord Denning M.R. at page 407, "It is simply the law of contract. If two persons agree that the price of the property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."*

That statement was, as a matter of principle and disregarding the earlier authorities, endorsed by Megaw LJ in ***Baber's case*** [1978] 1 Lloyd's Rep. 175, 179, and concurred in by the other members of this court in ***Baber's case***. It is in line with the passage, cited by Sir David Cairns in ***Baber's case***, at page 181, from the judgment of Sir John Strange M.R. in ***Belchier v Reynolds*** (1754) 3 Keny. 87, 91: *"Whatever be the real value is not now to be considered, for the parties made Harris their judge on that point; they thought proper to confide in his judgment and skill and must abide by it, unless they could have made it plainly appear that he had been guilty of some gross fraud or partiality."*

Geoffrey Lane LJ in ***Campbell v Edwards*** [1976] 1 W.L.R. 403, 408 followed and applied an earlier statement by Lord Denning M.R. to the same effect in ***Arenson v Arenson*** *[1973] Ch. 346, 363.*

*Both **Campbell v Edwards** and **Baber v Kenwood Manufacturing Co.Ltd** [1978] 1 Lloyd's Rep. 175 were cases of non-speaking valuations and it is convenient to say a little at this juncture about the distinction between speaking and non-speaking valuations or certificates, which to my mind is not a relevant distinction. Even speaking valuations may say much or little; they may be voluble or taciturn if not wholly dumb. The real question is whether it is possible to say from all the evidence which is properly before the court, and not only from the valuation or certificate itself, what the valuer or certifier has done and why he has done it. The less evidence there is available, the more difficult it will be for a party to mount a challenge to the certificate. "*

At page 287 he said, *"On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in **Campbell v Edwards** [1976] 1 W.L.R. 404, 407G, a matter of contract. The next step must be to see what the nature the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect - e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in **Jones (M) v. Jones (R.R .)** [1971] 1 W.L.R. 840, the expert had valued machinery himself whereas his instructions were to an employ an expert valuer of his choice to do that - either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do."*

12. In order to see what the parties agreed to ask the expert to do in this case it is necessary to look more closely at the option agreement dated 11 February 1991. For the consideration of £1 Farms granted Morgan Sindall the option to purchase 'the Property' (as defined) at 'the Option Price' (as defined), the option being exercisable by notice during the next five years. The all-important definitions were as follows. The Property was defined in the schedule as

*"ALL THAT strip of land forming or intended to form an access road to Sindalls Deal Grove Estate shown on the plan annexed and coloured green except and reserving to [Farms] and all others authorised by [Farms] at all such times as the land may not form part of the highway adopted under the Highways Act a right of way at all times and for all purposes for use in connection with the adjoining or adjacent property of [Farms]."*

13. The Option Price was defined in clause 5.2 as *"such sum as represents a fair and reasonable price for the Property at the date of the Option Notice assuming that the Property was offered on the open market for sale by a willing seller to a willing purchaser."*

14. If (after service of notice exercising the option) the parties could not agree on the amount of the option price the matter was to be referred to a valuer nominated by the President of the Royal Institution of Chartered Surveyors, to act as an expert and not as an arbitrator. The parties could not agree and Mr Harris was appointed.

15. Both parties' surveyors (Mr Main for Morgan Sindall and Mr Keith Moore FRICS for Farms) then submitted to Mr Harris written representations (and in Mr Main's case counter-representations) with voluminous annexes covering town and country planning, comparables and so on. All that material was put in evidence before the Judge (not by Morgan Sindall, which relied on a commendably brief affidavit by Mr Keith Conway of Titmuss Sainer Dechert, but, to my mind rather surprisingly, by Farms).

16. In his representations Mr Main submitted that the roadway was worth a peppercorn, or alternatively had a negative value of £10,000. He said in paragraph 31 of his counter-representations (to which I have already made passing reference),

17. "If Deal Grove was redeveloped in the long term however, it is clear that access would have to be via a relief road which will require the acquisition of the adjoining Deal Farm owned by Mr R D January to give access to Cambridge Road. Deal Grove would not be developed with access via the Property and it is therefore irrelevant whether rights of way over the Property exist in its favour over the Property or not. For the avoidance of doubt however, the Purchaser considers that rights do exist for the current and previous uses."

18. Mr Moore submitted that the roadway should be valued at £772,000. He reached that remarkable total as the aggregate of

(A) the area of the roadway (2.229 acres) at £390,075

£175,000 per acre

(B) an assumed value of the roadway as a piece of engineering, calculated by reference to assumed cost £161,880

(C) 50 per cent of the discounted development value of £2.712m assumed to be realised in 10 years £219,712

say £772,000

19. Mr Moore had sought to justify element (C) above by reference to the prospect of development of all or part of the Grove land. He referred in paragraph 31 of his representations to "a potential 'ransom strip' situation". That was what Mr Main was replying to in paragraph 31 of his counter-representations.

20. Mr Harris's determination was, as I have already noted, a non-speaking valuation. But Mr Burton sought to explain Mr Harris's oracular pronouncement. He referred the court to the well-known decision of the Lands Tribunal in ***Stokes v Cambridge Corporation*** (1961) 13 P & CR 77 in which one-third of the development value was taken (as a principle of valuation, not law) as an appropriate test. He pointed out that the sum of £2.712m, if discounted and then divided by three (rather than by two) comes to approximately £146,475. That sum is, Mr Burton submitted, so close to £130,000 that it cannot be coincidence, and it demonstrates that Mr Harris must have proceeded on a wrong principle. He must, Mr Burton submitted, have assumed that it was a 'ransom strip' situation and so failed to carry out his instructions to make an open market valuation as between a willing seller and a willing purchaser. Reference was made to practice statements issued by the R.I.C.S. to its members.

21. I do not derive much assistance from the practice statements, not only because their use in this type of valuation is not mandatory, but also because I find it singularly difficult to see a clear dividing line between a valuer taking account of the release of 'marriage value' (which the relevant practice statement permits) and his taking account of an extra bid from a 'special purchaser' (which it prohibits). I can readily accept that a notional vendor or lessor who ruthlessly exploits a purchaser's or tenant's problems (as the landlord of the electricity substation tried to do in ***Northern Electric v Addison*** [1997] 2 EGLR 111) must be disregarded because he would not be a willing vendor or lessor.

22. However the fundamental objection to this part of Mr Burton's case (which was not put forward before the Judge) is that it is seeking, by a process of inference, to turn a non-speaking valuation into a reasoned valuation and then to attack the reasons. On the facts of this case the materials on which the inference is to be based are very tenuous. Indeed, were it not for Mr Burton's skilful advocacy I would have said that the point was quite unarguable. Even if the materials had been more substantial and the process of inference less speculative, the court should in my view turn its face against that sort of argument, except in wholly exceptional circumstances. The whole point of instructing a valuer to act as an expert (and not as an arbitrator) is to achieve certainty by a quick and reasonably inexpensive process. Such a valuation is almost invariably a non-speaking valuation, with the expert's reasoning and calculations concealed behind the curtain. The court should give no encouragement to any attempt to infer, from ambiguous shadows and murmurs, what is happening behind the curtain.

23. I must now return to the point which was relied on before the Judge, that is the difference between the limited right of way over the roadway which Morgan Sindall supposed itself to have until it acquired the freehold of the roadway itself, and the unlimited right of way (assuming it to be such) granted by the deed of 29 May 1975.

*24.* Before the Judge counsel then appearing for Morgan Sindall argued that the roadway subject to an unlimited right of way already enjoyed by Morgan Sindall was something different from the roadway subject to a limited right, and that Mr Harris had therefore valued the wrong subject-matter. The Judge rejected that argument. Echoing Dillon LJ in ***Jones v Sherwood Computer Services*** [1992] 1 WLR 277, 287, he asked himself what the parties had agreed to remit to the expert for valuation. That was the roadway, 'the property' as defined in the schedule to the option agreement. He accepted the submissions of counsel for Farms that *"there is no evidence before the court to suggest that that is not precisely what the valuer did value. Any mistake that may have been made was as to the attributes of the land that was being valued and not the identity of the land. Indeed, it is perfectly plain that there is no evidence to suggest that the valuer himself made any mistake at all. So far as the evidence goes he valued the land in accordance with his instructions. Any mistake that may have been made was not in the valuation but in the formulation by the option agreement of the task which was to be undertaken by the valuer."*

25. In my judgment the Judge was entirely correct in accepting those submissions and dismissing the originating summons. I do feel some measure of sympathy for Morgan Sindall because from what I have seen of the papers, the price fixed by Mr Harris for a stretch of roadway over which it already had some rights, and which might not by itself hold the key to any eventual development of the Grove land, seems distinctly steep. But that is always a possible consequence of deciding to take and exercise an option in this form.

26. Since this court has heard argument on the basis of the draft amended notice of appeal, and since it is largely concerned with possible inferences from material which was before the Judge, I would grant leave for amendment of the notice of appeal. But I would dismiss this appeal both on the ground argued before the Judge and on the new ground raised in the amended notice.

**Lord Justice Tuckey:** I agree.

**Lord Justice Hutchison:** I also agree.

**ORDER:** Appeal dismissed with costs.

MR D TATTON-BROWN (Instructed by Titmuss Sainer Dechert, 2 Serjeants Inn, London EC4Y 1LT) appeared on behalf of the Appellant
MR A TANNEY (Instructed by Beachcroft Stanleys, 20 Furvival Street, London EC4A 1BN) appeared on behalf of the Respondent