

CBC Indus., Inc. v. Cunningham, 2014 NCBC Order 4.

STATE OF NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 1187

CBC INDUSTRIES, INC., f/k/a
CUNNINGHAM BRICK COMPANY,

Plaintiff,

v.

J. CALVIN CUNNINGHAM II;
J. CALVIN CUNNINGHAM III; ANNE
B. BEVAN; JACOB R. CUNNINGHAM;
CATHERINE H. CUNNINGHAM;
MARGARET B. BADDOUR; DEBORAH
LYNN BURLESON, in her capacity as
successor trustee of the BECK FAMILY
TRUST; and JULEE T. CUNNINGHAM,

Defendants.

ORDER APPOINTING APPRAISER

THIS MATTER is before the Court upon the parties' request that the Court appoint one or more appraisers in the above-captioned case. The Court held a status conference on September 19, 2014, at which all parties were represented by counsel and consented to appointment of an appraiser.

Pursuant to the Court's Order Setting Briefing Schedule for Appointment of Appraiser (the "Scheduling Order") entered on September 22, 2014, the parties have submitted Proposed Orders Appointing Appraiser (the "Proposed Orders"). After considering the Proposed Orders, the briefs in support of and in opposition to the Proposed Orders, and the arguments of counsel at the status conference, the Court hereby **ORDERS** as follows:

1. After full and careful review of the nominations submitted by each party, the Court appoints John E. ("Jay") Gibson, Jr. of Elliott Davis LLC in Greenville, South Carolina to serve as Appraiser in this matter and to carry out the specific instructions delineated herein.

2. Within five (5) days of the entry of this Order, the Appraiser must certify to the Court in writing that he meets the following qualifications:
 - a. Personally has the equivalent of a minimum of five (5) total years of full-time business appraisal experience (e.g., if only 50% of practice is business appraisals, then would need ten (10) years' experience at that level);
 - b. Personally has taken responsibility for, or has shared responsibility for a sufficient number of complete business valuations with comprehensive written reports to satisfy the Court of Appraiser's expertise and usefulness to the Court;
 - c. Personally and currently holds a business valuation credential of at least one of the following: ABV, CBA, ASA (but only if in business valuation), CVA, or CFA;
 - d. Personally has been involved in at least one business valuation involving developing an opinion or conclusion of value where the standard of value was Fair Value, as defined by the law of the state in which the valuation was undertaken;
 - e. Personally has completed at least one business valuation with a comprehensive written report in the building materials and manufacturing, construction-products, or a construction-related industry;
 - f. Personally has never been retained by, or referred business by (i) any party to this case or an officer or director of a party or (ii) any individual counsel of record (Ronald Davis, Brent F. Powell, Joe E. Biesecker, J. Calvin Cunningham, II, J. Calvin Cunningham III, or Phillip Baddour) ("Counsel of Record") in this case;
 - g. Personally has not had any significant social interaction (e.g., a meal) with (i) any party or an officer or director of a party to this case or (ii) any individual Counsel of Record in this case; and
 - h. Personally has not made a political or other contribution to (i) any party or an officer or director of a party to this case or (ii) any individual Counsel of Record in this case.

3. The Appraiser is instructed to provide, within five (5) business days from entry of this Order and before commencing work, estimated fee and expense budgets to perform the appraisal, with any key assumptions upon which the fee and expense budgets are based. Unless the key assumptions on which the budget and fee estimates are based do not materialize in a way that is outside the control of the Appraiser, and absent the agreement of the parties and the Court, the fees and expenses to be paid to the Appraiser will not exceed the budgeted amount provided by the Appraiser. The Appraiser will be provided an advance retainer equal to one half of the estimated fee and expense budgets. Upon satisfactory finalization of the report, the second half of the estimated fee and expense budget will be paid to the Appraiser.
4. In accordance with N.C. Gen. Stat. § 55-13-31(a) the Court assesses the reasonable compensation and expenses of the Appraiser against Plaintiff CBC Industries, Inc. (“CBC” or the “Company”), subject to any later decision by the Court to shift costs in its discretion upon a finding that any party acted “arbitrarily, vexatiously, or not in good faith” with respect to demanding appraisal as provided in N.C. Gen. Stat. § 55-13-31(a).
5. The Appraiser shall comply with the following instructions:
 - a. **Scope of the Appraiser’s Work.**
 - i. The Appraiser is to develop a complete opinion or conclusion of value with a comprehensive written report fully documenting the information considered, research and analysis undertaken, valuation methods considered and employed, conclusion of value, and key assumptions upon which the opinion rests.
 - ii. The Appraiser shall apply “customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal.” To that end, the Appraiser shall take into consideration all relevant valuation factors from whatever source the Appraiser deems appropriate, including but not limited to information provided by the Company and its professional advisors, the shareholders who are dissenting

from the transaction and their professional advisors, the CPA for the Company, or any other source. The parties to this action will be allowed to meet individually with the Appraiser and provide whatever information each party deems relevant in determining the fair value of the Company shares as of the Valuation Date. Copies of all written information or documents provided to the Appraiser by one party will be provided to Counsel of Record for the remaining parties.

- iii. In determining the per-share fair value of the Company, the Appraiser is expected to take into consideration all relevant valuation factors reflected in current valuation concepts and techniques when determining the value of the Company. The parties (and not the Court) have identified jointly as to some and separately as to others, the following list of issues. The Court has not made any determination as to whether the following factors should or should not be included in the appraisal. The Appraiser should exercise his professional judgment, with professional standards, to decide whether or not to take any of these issues into account in conducting the appraisal.
 1. Management's ease or difficulty (or the necessity thereof) of finding a willing buyer for the Company given its trends and outlook;
 2. Any efforts to sell the Company or its assets, and any actual transactions (including all documentation related to the General Shale, Inc. transaction;
 3. Whether the Board of Director's October 28, 2013 vote to make distributions to directors and officers should be included or excluded from the fair value;
 4. Whether fair value should include an imputed value of directors' and officers' free use of a company-owned beach house rather than use it to generate rents;

5. Whether fair value should include or exclude the recycling dirt division and the manner in which management handled distributions therefrom;
6. Whether there are factors related to management's performance and its consideration or failure to consider strategic options for the Company that bear on fair value as of November 14, 2013;
7. Whether there are market timing factors or macroeconomic factors that affect the fair value as of November 14, 2013;
8. Whether the retirement age of management and presence or absence of a succession plan for the Company bear on the fair value as of November 14, 2013;
9. Whether the General Shale Asset Purchase Agreement ("APA") provides guidance on appropriate methodologies to value CBC's remaining assets not included in the APA;
10. If comparable sales or market multiple analysis is conducted, the identification of the comparable transactions related thereto such that appropriate comparison can be made with the unique nature of the production assets sold in the APA;
11. Whether additional matters identified by the parties or the documents that are as yet undiscovered bear on the fair value as of November 14, 2013.

b. Authority of Appraiser in Performing the Appraiser's Work

- i. The parties to this action will allow the Appraiser full access to the Company facilities, interviews with any party (including current members of Company management or remaining shareholders), access to the Company CPA and the records he has in relation to the Company, and access to any requested documents or information that are available or reasonably able to be assembled or compiled by the Company or any party. Any fees incurred by

the Company due to the need to involve the Company CPA will initially be paid by the Company but will ultimately be handled in the same manner as in paragraph 4. The Appraiser expressly has the authority to have ex parte communications with each party. If the Appraiser is not reasonably receiving the full cooperation of a party or the Company CPA in providing information or documents, he has the freedom to promptly bring this to the attention of Counsel of Record, and then to the Court if the Appraiser is still unable to timely obtain requested information. The time frame estimates discussed in the following section will be adjusted, as the Court may order, should delays occur in the Appraiser being provided requested information.

c. Timing and Timeframe for Appraiser's Appointment and Work

- i. Within ten (10) business days from entry of this Order, the Appraiser will provide a document and information request of anticipated documents and information needed from each party to the Court and all parties. Each party will have twenty (20) calendar days to provide the Appraiser with the information requested of that party. The Appraiser will then have forty-five (45) calendar days from the receipt of substantially all information requested to perform all steps the Appraiser determines necessary to complete a draft of the valuation report. The draft of the report will be distributed to the Court and all Counsel of Record. The Court and the parties will have twenty-one (21) calendar days to provide any written feedback to the Appraiser, including any documents or information they deem appropriate for the Appraiser to consider. Copies of all written materials submitted to the Appraiser during this time will simultaneously be provided to all other parties and the Court. The Appraiser will then take into consideration any relevant information, feedback, or comments that in his independent judgment should be considered and finalize

his report within fifteen (15) days of the end of the twenty-one (21) day comment period.

d. Additional Instructions

i. Standard of Value

1. The Appraiser shall determine the per-share fair value of the Company immediately before the effectuation of the corporate action on November 14, 2013 (“Valuation Date”), the date the Company shareholders approved the sale of certain assets of the Company to General Shale, Inc. Fair Value is defined as follows by N.C. Gen. Stat. § 55-13-01:

a. The value of the corporation’s shares (i) immediately before the effectuation of the corporate action as to which the shareholder asserts appraisal rights, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable, (ii) using customary and current valuation concepts and techniques generally employed for similar business in the context of the transaction requiring appraisal, and (iii) *without* discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to N.C. Gen. Stat. § 55-13-02(a)(5).

2. The Appraiser shall use Fair Value, as defined above, as the standard of value, and is not to apply any other standard of value, or use fair value defined by any other source, including any concepts used in GAAP financial reporting or by the Internal Revenue Service, other than the statute quoted above.

3. The Appraiser is to use Fair Value, as defined above, as the standard of value which, subject to adjustment by the Court, effectively yields the value of the shares on a pro-rata basis.
4. The Appraiser shall determine the “value of the corporation’s shares immediately before the effectuation of the corporate action as to which the shareholder asserts appraisal rights, excluding any appreciation or depreciation in anticipation of the corporate action.” The statute includes the phrase “unless exclusion would be inequitable,” but the Court instructs the Appraiser not to consider that language in performing the appraisal because that is a legal issue for the Court to determine after the Appraiser has completed his work.

ii. Premise/Presumption of Value

1. The Appraiser is instructed that the Fair Value standard of value does not dictate whether the most appropriate premise or presumption of value is as a going concern, liquidation, or some other basis, if any. The parties to this lawsuit disagree on whether the appropriate premise/presumption is some form of liquidation, a going concern, or another appropriate basis, if any. Due to this disagreement, the Court instructs the Appraiser to consider all premises/presumptions of value he deems appropriate and, if professionally possible and the specific circumstances of the Company so warrant, analyze and report to the Court using alternative premises/presumptions of value (i.e., going concern, an appropriate form of liquidation, or other appropriate basis, if any). With regard to the liquidation premise/presumption of value, the

Appraiser shall consider each liquidation
premise/presumption professionally possible.

iii. Sub-appraisals

1. The Appraiser shall determine, within the first 15 days of the 45 days allotted for evaluation and preparation of his draft report, whether appraisals of real estate, vehicles, equipment or other assets owned by the Company on November 14, 2013 are needed. Upon such determination, the Appraiser shall notify the Court and all Counsel of Record, and the parties shall select the appraisers of those specific assets utilizing, as closely as possible, the selection criteria set forth in Section 1 of this Order. All deadlines set forth in Section 5(c) of this Order shall be suspended from the date the Appraiser notifies the Court and all Counsel of Record until the Appraiser has received such necessary asset sub-appraisals. If sub-appraisers for specific assets are necessary to the Appraiser, the costs of any such asset sub-appraisers shall be paid in the manner set forth in Section 4 of this Order. Any sub-appraiser shall appraise the subject property using the same premise or presumption of value as the Appraiser.
2. The Court instructs the Appraiser that the Company reports that it was attempting to sell itself or its assets, in whole or in part, and liquidate as of the Valuation Date, and in fact is now well along in the process of liquidation. As such, the Company reports that certain assets and liabilities on hand as of the Valuation Date are no longer present as of today and that the remaining assets and liabilities of the Company not sold or satisfied in the General Shale transaction or in other sales are now being held in CBC. To the degree that the Appraiser determines that valuations are needed of any

particular asset that is no longer owned by the Company, the Appraiser should take into consideration all available information, including but not limited to the actual sales price of assets that might have been sold subsequent to the Valuation Date (with any adjustments the Appraiser determines are appropriate to reflect the asset value as of the Valuation Date).

iv. Statutory Interpretation

1. Should any question arise as to the proper interpretation of the statute by the Appraiser, the Appraiser is to address the issue as follows:
 - a. The Appraiser will define the question or issue in writing;
 - b. The Appraiser further will identify and explain various potential interpretations or treatments of the issue the Appraiser sees, along with the likely general impact on valuation approaches, methods and conclusions that different interpretations or courses of action might have, to both the Court and the parties; and
 - c. The Court shall determine the appropriate method for instructing the Appraiser as to the correct interpretation of the statute.

v. Confidentiality

1. Within five (5) days from entry of this Order, the Appraiser shall sign “Exhibit A” to the Court’s Protective Order.

Plaintiff’s counsel is ordered and directed to serve a copy of this Order on the Appraiser within three (3) days of entry of this Order. Nothing contained in this Order shall eliminate or affect the right of any party in this lawsuit to retain its or his own expert witness, to use at trial or otherwise.

SO ORDERED, this the 17th day of November 2014.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases