

Valuing property in accordance with contract (Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd)

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Property Disputes analysis: In its judgment, the Court of Appeal not only considered the interrelation between the Supreme Court's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* and the day-to-day practicalities of conducting expert determinations, but also provided useful clarification on the limits of an expert's jurisdiction to construe the underlying contract that defines their role. Tom Roscoe, a barrister at Wilberforce Chambers, discusses the case.

Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd and others [\[2019\] EWCA Civ 1683](#), [\[2019\] All ER \(D\) 107 \(Oct\)](#)

What are the practical implications of this case?

There are two interesting practical implications.

First is the interrelation between the Supreme Court's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [\[2018\] UKSC 24](#), [\[2018\] 4 All ER 21](#), (concerning the binding nature of contractually specified methods for varying contracts) and the day-to-day practicalities of conducting expert determinations.

An expert determination process is a creature of the parties' agreement, and the agreement defines the process. The agreement may well (as in this case) contain anti-informal variation clauses.

On the other hand, parties will often seek to 'agree' all manner of things (statements of agreed facts, lists of issues, procedural directions etc) with varying degrees of formality in the course of the expert determination process itself.

As highlighted in this decision, parties conducting expert determinations will need to have express regard to any variation formality clauses in the governing agreements and consider whether any matters 'agreed' in the determination are intended to vary the governing agreement in the event that the later agreement is (deliberately or otherwise) at odds with the earlier. Otherwise, matters 'agreed' in the expert determination process will not have contractual effect.

Second is useful clarification from the Court of Appeal on the limits of an expert's jurisdiction to construe the underlying contract that defines their role. There was some tension between earlier Court of Appeal authorities on this issue (*Norwich Union Life Insurance Society v P&O Property Holdings Ltd* [\[1993\] 1 EGLR 164](#) and *National Grid Co plc v M25 Corp Ltd* [\[1999\] 1 EGLR 164](#)).

It has now been held that, '[t]he balance of authority is... now firmly in favour of preserving access to the courts to determine this legal issue going to jurisdiction'. Unless there is something in the contract defining the expert's task that 'can be read or implied as making him the sole arbiter' of issues about the extent of his role, the courts will have jurisdiction to determine such questions (judgment of Patten LJ at para 43).

In practice this means that:

- expert determinations may become more susceptible to challenge, and therefore perhaps a less desirable dispute resolution mechanism
- clear words will be required to exclude the court's jurisdiction if the parties intend the expert to have exclusive jurisdiction to construe the agreement which defines their role

What was the background?

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The expert was appointed under a conditional contract for the sale of land to provide a valuation of the land. The 'Valuation Date' was defined by clause 6.2 of the contract to be 'the Challenge Expiry Date or (if later) the date of the valuation'. When the expert came to prepare his valuation, the Challenge Expiry Date had passed. On a first, and literal, reading of the contract, the Valuation Date appeared therefore to be the date of the valuation.

The parties' surveyors, in accordance with the expert's directions, prepared a 'Statement of Agreed Facts' which recorded that the Valuation Date was to be the date of the valuation. The expert thereafter instructed leading counsel to advise upon a different issue. In providing that advice, counsel noted that the literal reading of clause 6.2 was wrong, and that on a proper construction, the Valuation Date should be the (earlier) 'Challenge Expiry Date'.

Crest agreed with that advice and considered that the expert should therefore prepare his report using the earlier valuation date. Great Dunmow disagreed with that construction, but in any case argued that the parties were bound to the later valuation date by the terms of the Statement of Agreed Facts. Great Dunmow sought declarations to that effect. Crest opposed them, and also challenged Great Dunmow's claim for declarations on the jurisdictional basis that the determination of the correct valuation date was solely a matter for the expert.

At first instance, it was held by HHJ Kramer that—(i) the court had jurisdiction to determine these issues; (ii) as a matter of construction the Valuation Date should be the Challenge Expiry Date; but (iii) but the Statement of Agreed Facts amounted to a binding agreement to use a different date—ie, the date of the valuation.

What did the court decide?

Between the trial at first instance and the Court of Appeal's decision, the Supreme Court decided *MWB*. That focussed attention on a clause in the conditional sale contract in this case that required certain formalities for variations, which were not met by the Statement of Agreed Facts.

In circumstances where a change to the valuation date from that specified in the contract would have amounted to a variation of the contract, and the formalities for variation were not met, it was held that the Statement of Agreed Facts could not have had contractual effect (see para [26]).

To avoid the effect of *MWB*, Great Dunmow argued on appeal that the Statement of Agreed Facts may instead take effect by operation of an estoppel, and the Court of Appeal has remitted the case to the Chancery Division for further directions to address that issue.

In view of the detailed argument on the issue, the Court of Appeal continued to consider (*obiter*) the jurisdiction questions. *Norwich Union* (a case in which an arbiter was found to have sole jurisdiction to determine what it meant for a development to have been 'completed' in the context of a funding agreement) was distinguished on the basis that in that issue there was a mixed issue of law and fact. It was instead held (at para [43]) that the valuer's task was to value the property in accordance with the contract, applying the Valuation Date prescribed by that contract, and that was not itself a task which the expert was to be the sole arbiter of.

Case details

- Court: Court of Appeal, Civil Division
- Judges: Lord Justice Patten, Lord Justice Moylan and Lord Justice Singh
- Date of Judgment: 17 October 2019

Tom Roscoe's practice covers the range of property, trust and commercial chancery litigation, including insolvency and fraud. He is regularly instructed in the context of disputes arising from high-profile property developments, including to seek relief against unlawful protest activity directed at them (eg fracking sites and HS2). He has particular recent experience of substantial contentious trusts disputes, especially those with property law issues. He regularly advises upon and acts in disputes in other jurisdictions, including the Cayman Islands, British Virgin Islands, Channel Islands and the DIFC. In *Great Dunmow Estates*, Tom Roscoe was junior counsel for the appellants.

Interviewed by Kate Beaumont.

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