Statement of Agreed Facts in development valuation dispute: "to bind or not to bind, that is the question..."

Anna Ralston-Crane, Marcus Barclay & Nick Wood

The Court of Appeal has just handed down its Judgment in the *Crest Nicholson* and *Great Dunmow* dispute, which was first before the courts in summer 2018 (*Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd & Crest Nicholson PLC (1) Stephen Downham (2)*).

It looks like the matter may be heading back to the High Court for round three, however.

Summary and implications

- In summary, the Court of Appeal has held that the parties in an expert determination were not contractually bound by an agreement (as to the valuation date to be adopted by the expert) recorded in a 'statement of agreed facts'.
- The date that they had purportedly agreed was not the date provided by the sale contract.
- The rationale for the appeal court decision in this case is that the underlying sale contract (which was also the agreement under which the expert was appointed) contained an express clause outlining how the parties were to lawfully effect any variation to the contract.
- The statement of agreed facts did not comply with this variation regime and so did not bind the parties.

The Court of Appeal has left it open to the landowner (who is seeking to uphold the position reached in the statement of agreed facts) to ask the High Court to consider a further argument based on estoppel, so this may not be the end of the road.

Background and Analysis

The central (and doubtless valuable) issue between the landowner (*Great Dunmow Estates*) and the developer (Crest) is the valuation date on which an appointed expert (Mr Downham) is required to use in determining the price of a development site acquired by Crest.

The sale contract stated, in terms, that the land price must be ascertained by Mr Downham on the challenge expiry date (the date on which the relevant planning consent became incapable of challenge) or (if later) the date of his determination.

The key point is the status and legal effect of the valuation date adopted in the statement of agreed facts.

The parties had seemingly agreed, through the parties' surveyors compiling and signing the statement of agreed facts, that the valuation date should be the date of the expert's determination.

Yet it transpires that the contract provides for a different date.

Initially, the experts agreed the valuation date

When the dispute first came before Mr Downham, in the usual way, he directed that the parties should produce a statement of agreed facts. They did so and the valuation experts for both Crest and Great Dunmow indicated in the signed statement that the valuation date was to be the date of Mr Downham's determination

However, later on in the conduct of the expert determination, the expert obtained advice from a barrister on some of the valuation assumptions. In that advice, the barrister opined that the valuation date was the challenge expiry date and not the date that the parties had agreed in the statement of agreed facts.

The High Court found that the correct date was the challenge expiry date

This litigation arose when Crest subsequently contended that, notwithstanding the statement of agreed facts, the contractual valuation date that must be adopted by the expert was the (earlier) challenge expiry date, according with the advice of the barrister.

The High Court decided that it had jurisdiction to consider the matter of valuation date and also found that the statement of agreed facts was binding contractually on both the parties and Mr Downham.

Despite the court also deciding that the correct valuation date was, in fact, the challenge expiry date (as far as the true meaning of the contract was concerned), the parties were accordingly bound by their agreement on the later date.

Crest appealed

Interestingly, the appeal was originally centred on the status of a statement of agreed facts. Doubtless of little surprise to those in the real estate industry, the case was advanced on the basis that:

> a. The statement of agreed facts could not have been intended to have contractual effect and the parties ought to have been able to move on or away from the statement as the matter advanced; and
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> b. Still less, the parties could not have intended to have entered into an agreement (through a statement of agreed facts) that would have varied the underlying contractual valuation date.

Compelling arguments though they may have been, a simpler solution presented itself when the Supreme Court gave Judgment, after the first trial

in this litigation, in a case considering contractual variations, which was of direct relevance to this matter.

The appeal Judges found that (following the aforementioned Supreme Court decision – *MWB Business Exchange Centres Ltd -v- Rock Advertising Limited* [2018]), parties to a contract can decide a regime for varying the original contract; if that regime is not followed any potential variation is of no legal effect.

In the present case, there *was* such a clause in the sale contract and the statement of agreed facts did not comply with the variation regime. Accordingly, the court concluded that the statement of agreed facts was not binding.

Potential for Dunmow to run an estoppel argument

That is potentially not the end of the matter. Whilst the path seems clear for the expert to proceed to a determination of price, adopting the challenge expiry date as valuation date, Dunmow can decide whether they want to ask the High Court to consider an estoppel argument.

In rudimentary terms, that will turn on whether the parties ought equitably to be held to the agreement reached in the statement of agreed facts in all the circumstances of this case and regardless of the earlier contractual valuation date.

If this estoppel argument is run, will the court decide that it would be unconscionable to 'release' Crest from the position taken in the statement of agreed facts? That will be a highly fact sensitive issue for the court, so even if the argument is advanced, it may be difficult to discern any general proposition of the law on this issue.

Points to note

Practitioners, agents and surveyors ought to note – if there had been no contractual variation regime in the sale contract, then the parties may have been held to the statement of agreed facts.

Any decision to agree points in a statement of agreed facts ought to be carefully considered, as the law stands, there may be no going back.

There are also perhaps further points on which there is still no final landing on this issue – does an expert or arbitrator have power to relieve the parties of an agreement reached during a dispute resolution process if it is wrong or if it would be equitable to do so? Could such an agreement be vitiated if there was a clear mistake? It is perhaps a shame that the MWB case provided such a decisive answer to the main point at issue – it would have been interesting to see how the Court of Appeal dealt with the appeal as originally advanced.

This is an area of law that continues to warrant a careful watching brief.

About the Authors

Marcus Barclay
Partner

Nick Wood
Partner

Anna Ralston-Crane
Senior Associate

Law . Tax