When Should You Leave it to the Experts?

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The recent Court of Appeal decision in *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd* has not only given clear guidance as to how to determine the jurisdiction of an expert appointed to determine a contractual dispute, but has also provided an interesting insight into the machinations of the valuation of a large development site.

The parties entered into a conditional contract for the sale of land at Smith's Farm, Great Dunmow in December 2011 with a number of conditions precedent, the main condition being satisfactory planning permission free from challenge. Planning was granted in November 2014 for 370 homes, a school and ancillary development.

The price for the site was to be based on the value of the development, by reference to various factors, including revenue per square foot and infrastructure costs. The parties were obliged to use reasonable endeavours to agree certain matters relevant to the valuation, with an obligation to appoint an independent valuer to act as an expert if any of the matters could not be resolved by agreement.

Perhaps not unsurprisingly, the parties were some distance apart on price. The seller valued the site at over £43m; the buyer at around £29m, revised down to about £20m on the basis that the permission was about to expire.

A chartered surveyor was appointed to act as the expert in accordance with the contract. Six months after his appointment, a number of questions about the assumptions forming part of the price calculation had not been answered by the information provided to the expert by the parties (both of whom were being advised by QCs), so the expert himself sought legal advice from another QC with the agreement of the parties.

On the basis of this advice, and eight months after he was appointed, the expert provided his opinion. Notwithstanding the terms of his appointment, he construed the contract differently and explained that he believed the correct valuation date was a different date. The claimant landowner challenged the expert's jurisdiction as a matter of law for the courts to determine.

The landowner succeeded both at first instance and at the Court of Appeal, which decided that the expert did not have exclusive jurisdiction. There was no express right in the relevant clause in the contract conferring that power on the expert, or excluding the parties' ability to refer the matter to the court.

The decision provides a salutary reminder as to best practice when it comes to drafting conditional contracts and agreeing on matters post-exchange:

- Agree as many matters upfront prior to exchange as possible, in order to reduce the areas of potential dispute.
- Remember that matters referred to experts are rarely clear-cut; as such, they will take several weeks to properly determine. Many expert determination clauses require a decision within a period of six to eight weeks, but that is usually unrealistic.
- When drafting and negotiating an expert determination clause, bear in mind the following quote from Lord Justice Patten: “There is and cannot be any real dispute that the scope and nature of an expert's jurisdiction is determined by the contract between the parties. The expert has no other source of authority and is unregulated in terms of his powers by statute.”
- Consider what areas (if any) of the contract should be capable of reference to an independent expert in cases of dispute, and what qualification that expert should have (e.g. chartered surveyor, chartered town planner or counsel).
- Above all else, ensure that the contract drafting is clear and precise, providing examples where required to aid construction. Areas such as valuation and overage frequently give rise to disputes which could be avoided if the parties had taken specialist advice or had not rushed the contract negotiation without adequate scrutiny of the drafting.

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