



Expert determination: an update

by Nicholas Gould, Partner

Introduction

Expert determination has been used for many years as a means of independent valuation. For example to value the shares of a company, for valuing property and for establishing levels of rent. It has not been used that frequently in the context of construction disputes, but clearly lends itself to the economic and definitive resolution of valuation-based disputes. There is of course no reason why expert determination could not be used for any dispute, but it is valuation disputes where the technique offers the most benefits.

In the recent case of *Owen Pel Limited v. Bindi (London) Limited*,¹ Owen Pel entered into a contract to build an extension and undertake mechanical and electrical work at Holme Lacy. Their relationship broke down and Owen Pel left site before the work had been finished. Subsequently, the parties agreed to have their dispute determined by an independent expert. The expert was to be appointed by the Royal Institution of Chartered Surveyors (RICS). An expert was appointed by the RICS and in September 2007 the expert decided that Owen Pel was entitled to £53,487.76 plus VAT. They were to be paid within 7 days of the decision, and Bindi was to pay 80% of the expert's fees.

Bindi refused to make payment, and as a result Owen Pel commenced legal proceedings and sought summary judgment. Bindi defended their position but argued that there was an implied term in the expert determination agreement, that the decision would be of no effect or would be set aside if:

- 1 the expert breached the principles of natural justice;
- 2 the expert was biased or gave the appearance of bias; or
- 3 the expert's decision was made with obvious errors or the conclusion was perverse.

Owen Pel's position was that the decision was binding, even if it was wrong, and that the rules of natural justice did not apply to expert determination. They went on to say that even if the rules of natural justice did apply, then the expert had not breached those rules.

Contractually Binding

It is now accepted that when parties agree by contract to refer a dispute to a person as an expert, then the expert's determination is binding on the parties. However, this has not always been the position and it is worth considering the development of the law in this area in order to better understand the binding nature of an expert determination.

In *Dean v. Prince*,² Lord Denning recognised the binding nature of an expert's decision, but also recognised that there might be some exceptions. First, the decision of an expert could be set aside for fraud. However, he went on to state that it could also be impeached for mistake or miscarriage. So, much like the decision of a first instance judge, Lord Denning concluded that it may be possible to "appeal" the decision of an expert where there had been a mistake in the expert's analysis which led to the expert's decision. However, this can no longer be good law. Lord Denning himself abandoned that approach, in favour of

¹ Unreported case of 19 May 2008, TCC, Birmingham, HHJ Frances Kirkham.

² [1954] 2 WLR 538

recognising the binding and definitive nature of an expert's decision in the subsequent case of *Campbell v. Edwards*³.

In *Campbell v. Edwards* the Court of Appeal had to consider the expert determination of a valuer. Lord Denning recognised that the reason for upsetting the decision of valuers no longer existed, and therefore it was now possible to recognise the binding nature of an expert's decision. Lord Denning stated:-

"In former times (when it was thought that the valuer was not liable for negligence) the court used to look for some way of upsetting a valuation which was shown to be erroneous. They used to say that it could be upset, not only for fraud or collusion, but also on the ground of mistake: see instance what I said in Dean v. Prince. But those cases have to be reconsidered now. I did reconsider them in Arenson v. Arenson [1973] 2 WLR 553. I stand by what I said there. It is simply the law of contracts. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives a valuation honestly and in good faith, they are bound by it. Even if he makes a mistake they are bound by it."

Lord Denning was simply giving effect to the contractual arrangement between the parties. The parties had agreed to be bound by the expert's determination (in that case a valuation) and so the parties were obliged to give effect to the decision. It was not for the court to interfere and come to a different valuation. If the valuer had made a mistake or if one party was arguing that the decision was erroneous then that was irrelevant. Providing that the valuer had done what he had been asked to do then the parties were bound by it, subject to fraud or collusion. In *Campbell v. Edwards* Lord Denning said that *"fraud or collusion unravels everything"*. The only exception, therefore, is where a party can show fraud or collusion by the expert.

The question of whether a mistake by an expert would render the decision invalid was eventually considered in 1991 by the House of Lords in the case of *Nikko Hotels (UK) Ltd v. NEPC Plc*⁴. In that case, the House of Lords made it clear that provided the expert valued the thing that he was supposed to value or answered the question that had been put to him, then the court would enforce the decision. Knox J said:

"If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."

Knox J's statement is frequently quoted, because it makes the point well. In effect, an expert can come to any decision, providing that the decision answers the question. There is, therefore, a great responsibility on experts to carefully consider the dispute and arrive at a carefully considered decision.

The following year, the Court of Appeal approved Lord Denning's approach in *Campbell v. Edwards*. In the case of *Jones & Others v. Sherwood Computer Services*⁵ the Court of Appeal said:

"If two persons agree that the price of property should be fixed by a valuer on whom they agree and he gives a valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. If there was fraud or collusion, of course, it would be different. Fraud or collusion unravels everything."

3 [1976] 1 WLR 403

4 [1991] 2 EGLR 103

5 [1992] 1 WLR 277

It is clear then that the decision of a valuer given to resolve a contractual dispute between two parties is binding on those parties. There is no right of appeal, even if the decision is wrong. A party would need to show fraud or collusion in order to unravel the decision.

Did the Expert Answer the Question put to Him?

In *Owen Pel v. Bindi* the expert had been asked to value the work in accordance with the final account. All aspects of the final account were considered, including any contra charges. Her Honour concluded that the expert had indeed considered the final account matters and the contra charges and come to a conclusion about the value of the final account. In the Judge's view the determination was "*clearly within the scope of the Agreement*".

The expert had therefore answered the correct question and in reliance upon *Campbell v. Edwards* the decision was enforceable. In conclusion, the Judge decided that the summary judgment application under Part 24 of the Civil Procedure Rules succeeded.

Natural Justice; Actual Bias and Apparent Bias

The question, however, remains as to whether actual bias or apparent bias might also result in the court refusing to enforce the decision of an expert. First it is important to understand the distinction between actual and apparent bias. There are two cases that are of some assistance. First, in the case of *Re Medicaments and related classes of goods*⁶ it was said that actual bias applied "*where a judge had been influenced by partiality or prejudice in reaching his decision, and where it had been demonstrated that a judge is actually prejudiced in favour of or against the party ...*".

The second case is the House of Lords decision of *Porter v. Magill*⁷. The House of Lords in this case established the test for apparent bias:

"where the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

A party would need to demonstrate that a judge (or expert or valuer) is actually prejudiced in favour of or against a party, while the tests for apparent bias requires the court to consider what a neutral observer would make of the situation. Very clear evidence would be needed to show actual bias, but the test for apparent bias is easy to apply, although it is still subjective in nature.

In the case of *Macro v. Thompson (No. 3)*⁸ the court concluded that it was actual partiality, rather than the appearance of partiality, that was important when considering the decision reached by an expert valuer who is not acting as an arbitrator in a quasi-judicial manner. Their concern was that auditors and others might find it difficult to discharge this requirement when going about their normal duties because of their many long-standing professional relationships. Cook J in the case of *Bernhard Schulte v. Nial Holdings*⁹ developed this further by stating that there was no requirement for the rules of natural justice to be followed in an expert determination. The expert determination was, in his view, valid and binding between the parties. In this case the expert had simply arrived at a decision without providing detailed reasons.

6 [2001] 1 WLR 700

7 [2001] 2 AC 357

8 [2002] BCLC 36

9 [2004] Lloyd's Rep. 352

Should natural justice be implied?

The defendant in *Owen Pel v. Bindi* argued that a requirement for natural justice should be implied into the expert determination agreement. In support of their argument, they said that it was a matter of public policy under the Human Rights Act 1998.

There were two main aspects to their argument. First, that the giving of reasons meant that the rationale for the decision could be interrogated. If the reasons revealed a breach then the decision should not be enforced. Second, taking evidence from one party in the absence of the other created the appearance of bias, and once again the decision should not be enforced.

Was the giving of reasons relevant?

Further, the expert had been asked to give reasons. If the expert had only been asked to provide a figure then it would not be possible to know how the expert had arrived at his decision, and perhaps following *Bernhard Schulte* the rules of natural justice would not apply. However in *Owen Pel v. Bindi* the expert had provided reasons. It was possible to consider his rationale and arguably the rules of natural justice should apply. This would mean that the expert would be in breach of those rules if the expert's reasons demonstrated that the expert had not considered all the issues put to him.

HHJ Frances Kirkham was not convinced by that argument. The primary obligation on the expert was to deliver a decision about the value. In the Judge's view the wording of the agreement between the parties demonstrated that they intended to be bound by the decision of the expert. Further, the Judge did not want to use the reasons for the decision as a way of avoiding enforcement. If it were possible to undermine an expert decision by looking at their reasons, then experts would not give reasons, which would be undesirable. The parties would not be able to understand how the valuation had been arrived at, and the giving of reasons could only assist the parties' understanding, regardless of whether the parties accepted the reasons or otherwise.

This does not necessarily mean that the court will not insist on an expert stating reasons or providing further reasons for a determination. In the case of *Halifax Life Limited v Equitable Life Assurance Society*¹⁰ the High Court directed an expert to set out further reasons for his determination. The judge considered that the expert had failed to provide adequate reasons for his conclusions in relation to areas of concern raised by one of the parties. The court had power to require further reasoning to be provided, either because of the provisions in the contract for determination, or alternatively simply under the court's case management powers. In this case the court adjourned the hearing in order to allow the expert to provide detailed reasons in order to enable the court to determine whether the decision was final and binding.

Was there an appearance of bias?

The allegations of bias arose from the site visit. There were two separate inspections. This was because one of the parties refused to agree that everyone could inspect the property together. The parties did, however, agree that the defendant's party would accompany the expert during the morning and then the claimant's party during the afternoon.

None of the defendant's representatives asked to be present during the afternoon meeting. In the judge's view they could easily have done that. They could not now complain that the expert did not summarise to them what was said during the claimant only visit. They accepted the process without complaint. In the judge's view the application of the test in *Porter v. Magill* would mean that a fair-minded observer would not conclude that there was a real possibility that the expert had been biased in this situation.

Conclusion

Expert determination can be an economic way of finally resolving valuation disputes. An expert can consider both parties' arguments and then come to a definitive conclusion about the value.

The benefit is that it is economic, and of course binding on the parties. It is not possible for either party to complain about minor discrepancies, mistakes or errors that the expert might have made when attempting to come to a conclusion. The parties have agreed to be bound by that expert's conclusion. This must be weighed up though against the saving in time and money of following what can be a very rapid process by comparison with arbitration or litigation. Clearly, many business people can see the benefit and are happy to accept the risk of the expert perhaps making a mistake which in most cases will not be fundamental.

Expert determination can also be used to deal with the valuation aspects of a complex dispute. For example, if the parties are already in dispute, perhaps heading towards an arbitration or the court, it may be possible to hive off a part of the dispute that relates to valuation. The expert can finally determine that part. This can often save time and money, for example in a construction dispute the expert may be able to determine the value of disputed variations.

Expert determination could be used more frequently in the construction industry. It may be included within the contracts at the outset (subject to the availability of an adjudication), or it may be that the parties are able to agree to use an expert to resolve the valuation aspects of a dispute that has already arisen.

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