PUMP COURT
CHAMBERS

Agreeing to be bound by an expert's determination of a boundary line - procedure and consequences

"ADR should be considered before issue and at all stages of a claim. At the case management conference, parties should be prepared for a discussion about what steps have already been taken to try to resolve the claim, and in appropriate cases the parties will be invited to consider whether their dispute, or particular issues in it, could be resolved by ADR, and when that should take place."

Para10.5 of **The Business and Property Courts of England & Wales Chancery Guide 2022**

"In [boundary disputes], professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures."

Ali v Lane [2007] 1 EGLR 71

"The territorial imperative is the driver in boundary litigation. If the court's warnings are ignored, there will one day be a final reckoning of the total expenditure and immeasurable human misery, and the hoary maxim "he that goes to law holds a wolf by the ears" will strike a chord".

Cameron v Boggiano [2012] EWCA Civ 157

" … the allure of a (possible) speedy and informal procedure … turns out not to be so attractive"

Walton Homes Ltd v Staffordshire CC [2014] 1 P & CR 10

Advantages

- The appointed expert will be familiar with the relevant specialist or technical issues to resolve a dispute.
- It is usually cheaper, quicker and less formal than litigation.
- It is confidential.
- An expert can adopt an inquisitorial, investigative approach.

- The parties appointing the expert can agree (and bind themselves contractually) that the determination will be final and binding.

- Although, as between the parties, the expert's decision is final and binding, an expert can be sued for negligence by a party if the expert does not exercise the appropriate skill and care in reaching the decision[1].

Potential disadvantages

- The expert's remit depends entirely on the contractual terms of the expert's appointment. There are no back-up rules of procedure and process as there are under the CPR.

- So, an expert generally has no power to order a party to disclose relevant documents or to issue a witness summons compelling a witness to give evidence. It can therefore be more difficult for experts to ascertain the full picture.

- The procedure therefore lends itself less well to disputes with a contested factual element.

- There is a serious issue as to the extent to which an expert can, in the course of making a determination, validly make a finding on a matter of law; and, if so, the extent to which, if at all, an expert's finding on a matter of law is immune from challenge in the court.

How final is final?

The starting point is that, if parties have agreed to refer an issue for final and binding determination by an expert, the determination will indeed be final and binding even if it is mistaken and wrong.

In **Jones v Sherwood Computer Services PLC [1992] 1 WLR 277**, the Court of Appeal held that, where parties have agreed to be bound by the report of an expert, the report cannot be challenged on the ground that mistakes[2] have been made in its preparation. The Court of

[1] Though an expert might seek to include a clause excluding liability for negligence.
[2] The decision in **Jones** marked a distinct sea change from the long -standing position that an expert who had given a certified determination was only liable to an action if the expert had been dishonest. That change is the consequence of the decision in **Sutcliffe v Thackrah [1974] AC 727** that an expert can be liable for damages in negligence if the expert acts negligently in making a determination.

Appeal applied, with approval, the dictum of Lord Denning MR in **Campbell v Edwards [1976] 1 WLR 403**:

"It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it".

The circumstances when a determination by an expert can be challenged are thus now "*tightly circumscribed*": see **Cadogan Petroleum Plc v Tolley [2009] EWHC 3291**.

The limited grounds for challenge

In summary, an expert's 'final and binding' decision will only be open to challenge on one of the following 5 grounds:

a. Fraud or collusion

"Fraud or collusion unravels everything": **Campbell v Edwards [1976] 1 WLR 403**.

b. Partiality

Establishing partiality involves showing either actual bias or apparent bias.

The test for *actual bias* requires proof that the expert is actually prejudiced in favour of or against a party: see **Macro v Thompson (No.3) [1997] 2 BCLC 36**.

The test for *apparent bias* is "whether the fair and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": see **Porter v Magill [2002] 2 AC 357**.

The views of a 'fair and informed observer' are likely to be rather different than the views of an angry and aggrieved loser.

c. Unfairness

There is no general requirement for the rules of natural justice or due process to be followed for an expert determination to be valid and binding between the parties: see **Bernhard Schulte GMBH & Co KG v Nile Holdings Limited [2004] EWHC 977**. So, by way of example, the published guides for surveyors and chemical engineers have withdrawn the advice, previously given to experts, to comply with the rules of natural justice.

There is, however, an implied obligation to act fairly: see **Ackerman v Ackerman [2011] EWHC 3428 (Ch).**

Griffin v Wainwright and another [2017] EWHC 2122 (Ch) is an example of an expert determination being set aside partly due to procedural unfairness. The expert entertained further submissions from one party, after telling both parties that her determination was complete and that she would not enter into any further correspondence with either party, and without giving the other party the opportunity to respond.

Breach of the requirement of fairness will not, however, be fatal to the decision where the result would "inevitably" (**Amec Civil Engineering v Secretary of State for Transport [2005] 1 WLR 2339**) have been the same, or at least where it was "overwhelmingly likely" (**Worrall v Topp [2007] EWHC 1809 (Ch)**) that the decision would have been the same.

d. Manifest error

Importantly, 'manifest error' is a ground for challenge only if the parties have expressly made it so in their terms of reference.

"Nowadays, if parties wish to contract on the basis that they will not be held to mistakes made by the expert in the course of carrying out his instructions, they must needs include a term like this with regard to manifest error.": **Walton Homes Ltd v Staffordshire CC [2014] 1 P & CR 10**

In the absence of a clause of that kind in the terms of reference, a wrong decision is usually not susceptible to challenge unless the expert has materially departed from instructions or exceeded jurisdiction:

Manifest error has been held to mean a "plain and obvious error".

"All errors are manifest when discovered; but such clauses are intended to be confined to oversights and blunders so obvious and so obviously capable of affecting the determination as to admit of no difference of opinion": see **Veba Oil Supply & Trading GmbH v Petrotrade Inc [2001] EWCA Civ 1832**.

e. Material departure from instructions.

This is the ground for challenge which gives rise to the most difficulty.

In deciding whether an expert has materially departed from instructions it is necessary first to identify the expert's "decision-making authority".

Hoffmann LJ explained the concept and impact of the expert's "decision-making authority" in **Mercury Communications Ltd v Director General of Telecommunications [1994] CLC 1125**.

" … in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision- making authority. One must be careful about what is meant by 'the decision-making authority'. By 'a decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made".

So, if the expert has answered the right question wrongly the decision will be binding.

If, on the other hand, the expert answers the wrong question, the decision is a nullity. In some cases, this can be easy to identify. For example, an expert's determination will not be binding if the expert has analysed the wrong boundary. Such departures from instructions are obviously likely to be rare.

The concept of 'answering the wrong question' becomes much more problematic, however, where the expert's determination involves deciding a matter or matters of law.

In **Mercury Communications** the question of law which arose to be decided in the course of making a determination was as to meaning, as a matter of construction, of certain clauses in a telecommunications licence granted by the Secretary of State. Hoffmann LJ put the point quite clearly:

'The parties have agreed to a decision in accordance with [the true] meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority".

In other words, if the expert is asked to make a determination which involves deciding mixed questions of fact and law, it is implicit in the instructions given to the expert that the expert will apply the law correctly. If the expert applies the law incorrectly then the expert has, in so doing, answered the wrong question, has gone outside the scope of the expert's decision-making authority and thus departed from instructions.

The problem which arises where an expert makes a decision on a question of law is likely to be of particular relevance in the case of a boundary dispute. Many questions of law may potentially arise in such a dispute. For example, the meaning and proper interpretation of words in a parcels clause, whether adverse possession has been established, whether the surveyed position of a boundary has changed by reason of a boundary agreement.

Deciding a question of law

(i) Can the expert be asked to determine a question of law?

The position on this used to be very clear. In **Re Davstone Estates Ltd 's Leases [1969] 2 Ch. 378**, a lease provided that the certificate as to the lessor's expenses issued by the surveyor appointed by the lessor was to be "final and not subject to challenge in any manner whatsoever". The Court held that the question of what expenses were within the ambit of the clause was a question of interpretation of the agreement and therefore a question of law,

and this question was not a matter for decision by the surveyor. That, if the clause purported to confer on the surveyor the power to decide what expenses fell within the ambit of the clause, the clause was void as contrary to public policy, since it purported to oust the jurisdiction of the courts on questions of law.

However, the law has moved on. More recently, Chadwick LJ in **Brown v GIO Insurance Ltd [1998] Lloyd's Rep. I.R. 201** said that:

"I am satisfied that there is no rule of public policy which prevents parties from agreeing to submit the final and conclusive decision of a third party some issue which involves questions of construction or of mixed fact and law."

Similarly, in **Inmarsat Ventures Pie v APR Ltd [Lawtel, May 15, 2002]** Tomlinson J said:

"It is clear to me that the parties have entrusted this question [of law] to the exclusive competence of the appointed expert, and that this is a bargain which the law permits them to make. Indeed, I am inclined to think that, in these days, this is not simply a bargain which the law permits parties to make but it is one which the law positively encourages them to make"

So, there is no doubt now that an expert can properly be asked to decide a question of law.

(ii) What happens if the expert gets the question of law wrong?

The first point to bear in mind is that many expert land surveyors (probably wisely) expressly decline to get involved in a question of law.

But if they are instructed to take on a question of law and agree to do so, the balance of authority indicates that they must decide the question of law correctly. In other words, if an expert, having been instructed to do so, takes on a question of law then they will have gone outside the scope of their decision-making authority if they get the question of law wrong and the court will have power to interfere in the determination.

Lord Neuberger summarised the position in **Barclays Bank PLC v Nylon Capital [2011] EWCA Civ 826**:

" … where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected".

In such circumstances, according to Lord Neuberger, *"it seems to me to follow that the court can review, and, if appropriate, set aside or amend the expert's decision"*

Lord Neuberger brought home the practical consequences of this with two further observations:

"I appreciate that, in cases of this sort, the advantage of leaving all points of law to the final determination of the expert is that it results in a relatively quick and cheap process for the parties. However, it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations."

"After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue".

For the avoidance doubt, Lord Neuberger stated that the observations of Knox J in the earlier case of **Nikko Hotels (UK) Ltd v MEPC plc [1991] 2 EGLR 103** (to the effect that an expert's decision on a point of law was final and not open to challenge) could not safely be relied on.

Summary

Tempting as it may be for neighbours, to refer their boundary dispute to an expert for a quick final and binding determination (thereby avoiding the delay, stress and cost of court proceedings), the circumstances where that is a worthwhile option are probably quite limited.

1. Boundary disputes often involve issues of law.

2. An experienced surveyor may well to decline to decide matters questions of law – either in negotiating the terms of reference, or by way of a qualifying remark in the final report.

3. The usual issues of law – interpretation of words in conveyances, adverse possession, boundary agreement – can be complex and if an expert is prepared/persuaded to determine an issue of law, there is inevitably a risk of error (or at least arguable error).

4. The aggrieved losing party will be able to challenge the supposedly 'final and binding' decision by means of court proceedings if, as is quite possible, they can find an arguable error of law in the determination. So, the neighbours are off to court after all.

5. The substance of the boundary issue should therefore be carefully analysed. If no questions of boundary agreement or adverse possession arise[3] (and the parties certify that in their letter of instruction) and the expert is asked, purely as a matter of surveying, to identify and mark out on the ground, the line of the boundary as ascertainable from relevant, plans, stated dimensions and areas, and photographs, that will lead to a *final and binding* determination – even if it is mistaken!

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[3] Or, if an issue of law is identified, the parties agree the issue and confirm fact and substance of the agreement in the letter of instruction.