Your Witness

Newsletter of the UK Register of Expert Witnesses published by J S Publications

Draft time – new edition, new process!

Preparations for edition 35 of the *UK Register of Expert Witnesses* have begun. With COP26 fresh in our minds, and with the success of our online draft renewal system last year, we have opted to try saving some CO_2 emissions by not routinely sending out paper drafts to every expert witness in the *Register* to check, sign and return. Instead, we will e-mail personalised invitations to each member during early January. They will provide a secure link giving access to the draft documents online. If there are no changes or just minor amendments, online renewal is easy and requires no paper printing. More extensive changes can be e-mailed or the draft printed and amended directly on the paper.

Of course, we understand that the vagaries of e-mail systems and spam filters will inevitably mean some of these e-mails will fail to arrive. Accordingly, we will follow up with further attempts to reach members by telephone, e-mail and post as needed.

The vast majority of members are happy with the online approach to renewal. But if it isn't for you, please let us know and we will mail a paper draft of your entry in the New Year for you to check, sign and return.

If you will be away from work during January 2022, you may wish to contact us now so that we can make appropriate alternative arrangements for your *Register* renewal.

Meanwhile, everyone here at J S Publications sends their very best wishes to you for a happy and safe Christmas and New Year.

Cut and paste fiasco!

A court local to our offices in Suffolk recently delivered us a salutary lesson on the dangers of the cut and paste function when it comes to court documents. Some 28 divorces failed due to the coming together of court reforms and cut and paste document drafting.

As part of what the Ministry of Justice calls its court estate rationalisation, all divorce proceedings are now dealt with by a single court in Bury St Edmunds, just 10 minutes down the A14 from our Newmarket office. One effect of this concentration of casework at a single location is that anything odd in case pleadings will all arrive in one place. Previously, of course, divorce petitions were scattered across the land.

In *Celine-Shelby & Yorston, The marriage of* [2021] *EWFC* 80, 28 divorce petitions were listed for hearing in open court. They were all referred by the judge who is, on a day-to-day basis, in charge of the Divorce Unit at Bury St Edmunds, to Her Honour Judge Roberts (who is the lead judge for divorce in this country). She in turn referred them to the High Court.

In April 2022, the law is going to change to allow 'no-fault' divorce. As it stands today, though, the sole ground for divorce is the irretrievable breakdown of the marriage. This has to be proved by establishing, amongst other possibilities, unreasonable behaviour. These days, the legal profession encourages petitioners to plead only what is strictly necessary to satisfy the requirements of the Act. In these 28 cases, the particulars of behaviour were found to be absolutely identical in each petition! Namely:

'For about a year prior to the separation the respondent would become moody without justification and argumentative towards the petitioner. He/she would behave in this way on at least a couple of days every week, which would cause a lot of tension within the home thereby making the petitioner's life very uncomfortable. During the same period the respondent would also often ignore the petitioner and decline to communicate with him/her. He/she would also behave in this way on about two days every week, which would also cause a lot of tension within the home and make the petitioner's life very difficult. The respondent showed no interest in leading the life of a married woman/man for about a year before the separation. For example, he/she would go out socially on his/her own and basically exclude the petitioner from his/her life thereby making him/her feel very dejected.'

It is clear what has happened here. Each petitioner had used a firm called *iDivorces* to draft their petitions. *iDivorces* sent identical 'standard wording' to each petitioner asking them to adapt it to their own circumstances. Not one of them changed anything, not even the *he/she's*!

As Mr Justice Moor says: '*Each case must, of necessity, be different. Different spouses behave in different ways. It is quite impossible for each of 28 respondents to have behaved in exactly the same way as the other.*'

The potential ramifications here were serious. Moor J was considering a referral to the Director of Public Prosecutions on the basis that all this could potentially amount to the crime of perverting the course of justice. However, *iDivorces's* director's profuse apology to the court, together with a promise that it wouldn't happen again, persuaded the judge to hold back. The petitioners, meanwhile, must all start the divorce process again.

Now, I know you would never resort to such crude cut and paste antics, but the message is entirely clear: a streamlined court system is better able to detect such shenanigans.

Chris Pamplin

Inside

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Adducing extra expert evidence

All expert evidence should be 'reasonably required'

The duty of an expert witness is to help the court to achieve the overriding objective by giving opinions that are objective and unbiased in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions. The rule is that **witnesses should only testify in relation to matters within their knowledge**.

Court's power to limit expert evidence

It is important that expert witnesses do not stray beyond the scope of their particular areas of expertise. To do so may render their evidence inadmissible or seriously reduce its value in the eyes of the court. **Expert witnesses should always make it clear when a particular question or issue falls towards the very periphery of or outside their area of expertise**.

An expert report must set out the expert's qualifications, both academic and professional. Where the case calls for highly specialised expertise, details of the training or experience that qualifies the expert to provide such evidence must also be included.

Where there is any suggestion that a given expert witness has strayed beyond their particular field, the expert is likely to face vigorous cross-examination. The opposing side will seek to call into question the knowledge, skill, capability, training and education of the expert, as well as the reliability of the opinions contained in the report and presented in the courtroom.

In complex cases involving many different but related scientific or academic fields, it will be necessary to have instructed many expert witnesses on both sides. However, the **courts have to be conscious of the necessity to limit and control expert evidence and thus regulate the duration and expense of court proceedings**. They must therefore perform a balancing exercise when it comes to giving permission for an expert witness to be instructed.

While cost is an increasingly important issue, it should not be the sole determining factor when the court is deciding whether to give permission for expert evidence to be adduced. Sometimes the interests of justice will require the appointment of an expert witness in circumstances in which the cost of so doing does not ostensibly seem justified.

Experts must remain within their area of expertise

The Civil Procedure Rules (CPR) introduced the requirement that expert evidence is:

> *'restricted to that which shall reasonably be required to resolve the proceedings.' (CPR 35.1)*

The Rules also place limits on the nature and extent of the evidence (CPR 35.4(3)). The parties must consider the issue of expert evidence in a timely manner. This includes giving thought to whether expert evidence is likely to be needed at all. If it is, then the parties have to think about the relevant disciplines, the number of expert witnesses and whether oral evidence will be needed at trial. Of course, they must also **obtain permission in good time to rely on expert evidence**.

Two recent cases highlight how these considerations are currently being applied by the courts. They might, at first glance, seem somewhat contradictory.

Valuing paintings and statues

In *Borro Ltd -v- Aitken*[1], the claimant was a company providing loans secured against luxury assets including fine art and real property. The defendant was Chief Executive Officer of the company.

The core of the claim was that the defendant failed to implement or adhere to the underwriting policies. Complaint was made of several loans in particular, the first being in the sum of £1.05m secured on a painting said to be by the artist JMW Turner. Two of the other loans were secured on sculptural artworks (181,000 US dollars for a bronze casting of an Edgar Degas sculpture, and 3,412,500 US dollars secured on an architectural model known as the Tatlin Tower).

It was common ground that there would need to be expert evidence as to the value of the property on which each of the loans was secured. In the course of the proceedings, the claimant proposed that there should be one expert witness on each side to deal with the real property valuations and one other expert witness on each side to deal with the valuation of the artworks. The defendant, however, contended that it would be necessary to instruct both an expert witness on the valuation of paintings and another expert witness to value the sculptures.

Judge Johns QC gave directions for two expert witnesses on each side to value the specific artworks and gave his reasons as follows. He said that it was necessary to strike the right balance between the general and the particular. The valuation of the sculptures looked set to be a difficult exercise and one with a very significant range of opinion. He would not expect a person also instructed on the basis of expertise in valuing paintings to be able to give the Court the best help with that exercise. Indeed, an order directing just one expert witness would run the risk of tempting an expert witness outside their area of expertise. In any event, the evidence overall would be likely to be too general. But to direct different expert witnesses for each of the two sculptures could well result in evidence reflecting an unnecessarily specific expertise. The Court did not need a treatise on the Tatlin Tower or on Degas castings, but it did need reliable valuation evidence from someone experienced in the market for sculptures.

The judge recognised that he had a duty to **limit expert evidence to that which was reasonably necessary**. The claimant had submitted that the defendant's proposal involved a proliferation of expert witnesses resulting in additional costs. However, the judge considered that the significant point was that

the proposal did not really involve extra expert evidence, and so should have only a limited impact on costs. This was not, he said, like a case where a further layer of expert witnesses was proposed, dealing with the same subject matter. An example of such a case might be both surveyors and structural engineers commenting on the condition of a building. Here, if there was evidence from expert witnesses in sculpture valuation, that would mean the other art expert witnesses would not report on the value of the sculptures and would not be cross-examined on those topics at trial. The proposal was not one for extra expert evidence, it was concerned only with the identity of the expert witnesses.

A plethora of medical expert witnesses

This case should be compared with *Lavender -v- Liverpool Victoria Insurance Co*[2], which was a personal injury claim.

The claimant was a motorcyclist who had been in a collision with a car and suffered knee, head, shoulder and psychological injuries. Liability had been admitted and the proceedings were concerned only with quantum. Each side had been permitted to rely on five expert witnesses and a trial date had been set.

There were, clearly, already a large number of expert witnesses and differing fields of expertise. Directions had been given for the provision of expert evidence from both sides by:

- a consultant orthopaedic surgeon
- a consultant psychiatrist
- a consultant neuropsychiatrist
- a consultant oral and maxillofacial surgeon
- a consultant neurologist.

Further directions were given for those expert witnesses of like discipline to meet and provide joint statements. These directions provided a timetable that would result in a finalised schedule of loss and damage.

Following the directions hearing, the claimant had instructed a new legal team. His new solicitors made application to the court contending that a pain specialist was also required in respect of ongoing issues. They suggested that such expert evidence would assist the court in terms of prognosis, the pain treatment provided to date, and the likely pain treatment required in the future. They also sought permission to adduce evidence from care and physiotherapy experts. By way of explanation for the lateness of the application, the claimant said that he had been let down by his previous solicitors who had failed to enable him to put forward his case in the manner he wished. The defendant objected to the application and argued that the pain issue had been known about since the beginning and that if an expert witness was needed, that should have been flagged at an earlier case management conference by the previous solicitors.

Refusing permission for the additional expert witnesses to be instructed, Judge Simpkiss said that the overriding objective was that **all cases need to be dealt with fairly, and that was the principle that ran through all litigation**. But **fairness did apply to both sides**, and it was necessary to deal with a case proportionately and in light of the evidence that had already been put before the court in the case.

Judge Simpkiss made the point that the claimant's previous legal team had been aware of his pain issue and had not suggested that an expert would be required. The matter had not been raised until recently. His Honour acknowledged that the new legal team was trying to do its best for its client, and indeed the application was not an unusual one. However, it was felt that the existing orthopaedic and psychiatric expert witnesses would be able to address issues in respect of the claimant's rehabilitation. The introduction of a pain specialist at the instant stage would inevitably disrupt the trial date. It was far too late to bring the application. Indeed, the court would be able to assess whether amounts claimed for care were excessive and to deal with what sort of care would be required without the assistance of a specific care expert witness. The orthopaedic expert witness would be able to consider the claimant's physiotherapy. It was therefore ruled that the additional expert witnesses sought were unnecessary, especially at such a late stage.

It will be apparent that, unlike the judge in *Borro*, Judge Simpkiss did not consider that allowing the issues in relation to pain, care and physiotherapy to be dealt with by one of the five other medical expert witnesses on each side who were already involved in the case might tempt them to stray into areas outside their particular areas of expertise. This may have been because he considered the medical fields were sufficiently close and related to each other. This would follow the reasoning in *Borro* regarding the narrowness between expertise in relation to the two separate but distinct forms of sculpture. However, on the face of it, the expert disciplines, although related, do appear to be quite separate. He did not take the same view expressed in *Borro* that to allow the application would not create extra expert evidence but only concern the identity of the expert giving that evidence.

One wonders what the position might be if one or other of the expert witnesses declined to offer an opinion on the additional matters on the grounds that these were beyond that expert's specific knowledge or abilities, or if that expert witness was challenged by one or other of the parties on the qualification to opine on the matter.

Conclusion

The difference between the two cases appears to hinge on questions of **timing** and **proportionality**. **If leave is to be sought to adduce additional expert evidence, it should be sought at the earliest possible stage**.

Timing and proportionality are key

References

[1] *Borro Ltd -v- Aitken* [2021] *EWHC* 1902 (*Ch*).

[2] *Lavender -v- Liverpool Victoria Insurance Co* [2021] 7 *WLUK* 506.

Buyer beware – the hazards of expert

Courts have long sought to prevent parties from 'expert shopping'

In July 2021, the court gave a potentially very significant judgment in *Rogerson -v- Eco Top Heat & Power Ltd*[1]. The case concerned the **power of the court to allow a party to change its expert witness upon terms that can include disclosure of any reports prepared by a prior expert**. It raised the interesting question of how far back in time this power can reach.

Deterring 'expert shopping'

The courts have, for many years, acted to discourage the practice of *expert shopping*, i.e. changing one expert for another who is more supportive of the party's case.

Of course, there are many good reasons why a party might seek permission for a change of expert. However, whenever there is such an application, there must always be the suspicion that this is being done because the substitute expert's evidence will be more favourable to the party. For this reason, **when allowing an application for a change of experts, the court will usually waive privilege in any earlier expert report and order its disclosure as a condition of allowing a substitution**.

The leading case has been *Beck*[2], in which the parties had each obtained permission to adduce expert psychiatric evidence. The experts were not named in the order. The defendant obtained an expert psychiatrist's report but then lost all confidence in the expert and sought permission to change experts. The Court of Appeal considered whether and, if so, on what terms a replacement expert could be instructed.

It was held that, **once in principle it had been decided to allow a new expert, there was no reason for continuing to withhold disclosure of the original expert's report and every reason why disclosure should be made**. No room would then be left for the claimant to wonder whether the application to change experts was in reality made because the report was favourable to the defendant. The court found it difficult to imagine circumstances in which it would be permissible to instruct a new expert without being required to disclose the earlier expert's report, although it did not rule out the possibility.

A change of experts could waive privilege

Accordingly, it was held that the defendant could instruct a new psychiatrist on condition that the earlier report was disclosed. The fact that the experts had not been named in the order, so that, strictly, no permission to change experts was needed, was not argued.

Position of experts pre-action

Since the case of *Beck*, there have been many cases that have gradually extended and modified the rule on disclosure. These have tended to centre on the questions of whether experts unnamed in a directions order, or instructed to advise pre-action, are experts within the ambit of the provisions. The distinction being drawn here is between 'expert *witness*' (i.e. an expert appointed under, for example, Civil Procedure Rule (CPR) 35) and 'expert *advisor*' (i.e. an expert appointed outside CPR solely to advise the instructing side).[5]

For example, in *Carlson*[3], the CPR Pre-Action Protocol for Personal Injury Claims applied. When one party changed expert, the other party demanded sight of the first report. The court said that the aim of the protocol was not intended '*to deprive a claimant of the opportunity to obtain confidential pre-action advice about the viability of his claim, which he would be at liberty to discard undisclosed if he did not agree with it.*' So the court could not override the claimant's privilege in the first expert's report.

In another personal injury pre-action protocol claim, *Edwards-Tubb*[4], the claimant initially instructed one of the experts approved by the defendant and a report was produced. When the claimant commenced proceedings, however, a different expert's report was attached, and that report revealed the claimant had previously seen yet another expert, an orthopaedic surgeon. The defendant sought disclosure of the earlier expert's report.

Although these cases appear similar, the Court of Appeal distinguished between them because, in *Carlson*, the parties had not reached the stage where permission to adduce expert evidence was needed. Hughes LJ said in his judgment that '*the power to impose a condition of disclosure of an earlier expert report is available where the change of expert occurs pre-issue as it is when it occurs post-issue. It is of course a matter of discretion, but I would hold that it is a power which should usually be exercised where the change comes after the parties have embarked upon the protocol and thus engaged with each other in the process of the claim.*'

With regard to expert advice obtained before even the pre-action protocols apply, Hughes LJ took the view that '*where a party has elected to take advice pre-protocol, at his own expense, I do not think the same justification exists for hedging his privilege, at least in the absence of some unusual factor*'. In support of this view, he quoted the words of Brooke LJ in *Carlson*, who said that **pre-protocol, a party is free to take such advice on the viability of his claim as he wishes**. An expert consulted at that time and not instructed to write a report for the court is outside CPR 35.2.

The intention of the courts here seems clear. There is obviously an **advantage in allowing parties to explore the merits of their potential claims by seeking independent advice at a pre-action stage**. Indeed, at that point, proceedings may not even be seriously contemplated. They should expect that **such communications would be privileged** in the usual way. However, **once the parties have engaged in proceedings the position becomes somewhat different**. The **court must then exercise its discretion as to what should be made disclosable**, and whether the documents sought to be disclosed are pre-action or post-action. How this discretion should

be exercised then becomes a matter for the court in the circumstances of the individual case.

Hotel fire sheds light on court's power

In July this year, the court gave its ruling in *Rogerson*[1]. This builds significantly on the previous decisions by the court and establishes some new authority on the exercise of the court's discretion in cases where witness shopping is suspected.

The case involved a fire at a hotel. The claimant alleged that the fire had been caused by the defendant building contractor's employees, who were working at the hotel.

At an early stage, each party instructed forensic fire investigators who attended the site in the immediate aftermath of the fire. Over the following months, the investigators had communicated with each other by e-mail. Some 18 months after the fire, the claimant issued a letter of claim pursuant to the Pre-Action Protocol for Construction and Engineering Disputes and enclosed reports from its experts. The defendant issued a letter of response. Contrary to Protocol requirements, though, the defendant did not identify its expert witness. At a case management conference, the defendant applied under CPR 35.4 to rely on the evidence of a different expert witness.

The claimant raised no objection to the change but contended that this was a case that raised a clear inference of expert shopping. Notwithstanding that the first expert had not written a report, the claimant requested that the court should order the disclosure of communications between the defendant and the expert, including an attendance note of a telephone call between the expert and the defendant's solicitor.

The defendant objected to disclosure and argued that the first expert had been instructed pre-action to act merely as a preliminary advisor; no report had been written, and it was never intended that he should become the part 35 expert. The defendant further argued that, unlike the first expert, the second expert had specialist expertise in cigarette-induced fires and that it should not be irredeemably held to its first choice of expert.

The court, following the decision in *Edwards-Tubb*, were content that the **court's jurisdiction to order disclosure could attach to privileged pre-issue reports, post-issue reports and other expressions of opinion**. It accepted, however, that experts consulted at an early stage, e.g. to advise privately on the viability of a claim and who were not instructed to write a report for the court, were in a different position.

However, the status of the first expert in this case was ambiguous. Indeed, the court took the view that the defendant had not been clear and candid about the nature of the expert's involvement. The court had to distinguish between an expert instructed for an initial inspection and report on the one hand, and an expert instructed for the purposes of prospective litigation on the other, and must do this on a case-by-case basis. If the defendant was contending that the expert had been instructed on the former basis and not the latter, then it behoved it to disclose the retainer to show that this had been so.

Advisory experts should stay schtum

The court accepted that the expert had been instructed at a very early stage (immediately after the fire) and that it would not be appropriate to assume that an expert, at that stage, had been instructed as a part 35 expert. However, there had been a process of co-operation and engagement by the parties in the process of the claim. Even at the time of instruction, there was already the clear understanding that litigation was in prospect. Moreover, in cases such as this, where the likely issues were known, it was common for a party to rely at trial upon the expert who had inspected at an early stage. The court must decide for itself the point at which a process of engagement for the purposes of litigation had occurred.

Turning to the lack of a written report, the court considered that this was not fatal to an application for disclosure. The court accepted that an expert's views could be confined to oral conversations or privileged notes of attendances. In those circumstances, notes and preliminary conversations also become relevant.

Allowing the claimant's application, Alexander Nissen QC said that there was **a sliding scale with flagrant expert shopping at one end and an unexpected need to replace the expert for objectively justifiable reasons at the other**. The closer the circumstances are to the former, the more likely the imposition of conditions commanding a high price, e.g. the waiver of privilege and the scale of material to be disclosed.

He said that **the court will require strong evidence of expert shopping before imposing a term that a party discloses documents other than an expert's report** (e.g. attendance notes and memoranda made by a party's solicitor). Had there been only a faint appearance of expert shopping, this would not have justified disclosure of the solicitor's attendance notes of telephone calls with the expert, not least because of the risk that they would not properly record the expert's actual words. In this case, the inference of expert shopping was sufficiently strong to order disclosure of the note.

Conclusion

The case highlights just how early in potential proceedings the parties can be considered to be sufficiently *engaged* to bring any expert instructed within the ambit of the jurisdiction of CPR 35 once proceedings are commenced. It further provides a **stark warning about the vulnerability to disclosure orders of communications between solicitors and experts if there is any later application to change experts**.

Respecting the advisor/witness distinction is key

References

[1] *Rogerson (t/a Cottesmore Hotel, Golf & Country Club) -v- Eco Top Heat & Power Ltd* [2021] *EWHC* 1807 *(TCC).*

[2] *Beck -v- Ministry of Defence* [2003] *EWCA Civ* 1043.

[3] *Carlson -v- Townsend* [2001] *EWCA Civ* 511.

[4] *Edwards-Tubb -v- JD Wetherspoon plc* [2011] *EWCA Civ* 136.

[5] See para 5 of *Guidance for the instruction of experts in civil claims 2014* annexed to CPR 35 Practice Direction.

Setting aside expert determinations

Expert determination is generally a binding process

Expert determination (ED) is a (generally) binding dispute resolution process. It can offer a relatively quick and cost-effective means of determining disputes of a technical nature between contracting parties where the scope for dispute about the law or facts is likely to be limited. It is used frequently as an alternative to the more formal procedures of arbitration or litigation, and it has become a common means of resolving disputes in most areas of commercial life. Although it is possible to arrange an expert determination on an *ad hoc* basis, it is most usually provided for as a dispute resolution mechanism by a clause in commercial agreements.

Where expert determination fits in

The rules in arbitration have been developed over many years and are well codified in the Arbitration Act 1996. However, the rules in relation to expert determinations are less developed.

Expert determiners are, in general terms, subject to less control by the courts than arbitrators, and there are fewer ways to challenge their decisions. The enhanced status of an expert, in contrast to an arbitrator or mediator, was identified in *Jones -v- Murrell*[1]. The decision in that case supported the conclusion that **an expert's decision is generally viewed by the courts as binding**.

The expert's remit will be dependent on the contractual provisions made by the parties. There are, therefore, **no procedural rules for the parties to turn to if difficulties arise**. Once the decision of the expert has been given, and provided the expert has acted in accordance with the agreed instructions, it essentially becomes part of the contract between the parties. Accordingly, and as with any other form of contractual disagreement, **if a party fails to comply with the decision or disputes it, then a further court judgment is likely to be required before a party is able to enforce the decision**.

Being contractual, ED decisions are difficult to overturn

The position of the expert determiner, then, is a fairly autonomous one. However, **the expert should be at pains to follow the terms of engagement with precision because the party can sue for negligence if there is failure to exercise appropriate skill and care**. This is notwithstanding that, as between the parties, the **decision remains final and binding**. It should be noted that the expert could seek to negotiate for immunity in the terms of appointment.

Challenging an expert determination

A **right of appeal against an expert's determination exists in limited circumstances only**, if at all. Indeed, dissatisfaction with the correctness of the decision is not likely to sway the courts in overturning it. Consequently, where a contract provides for a matter to be decided by an expert, the decision will be binding on the parties because that is what they themselves have agreed should be the position. From the parties' point of view, this serves to emphasise the need to choose the expert determiner very carefully.

An exception to the general rule that the determination of the expert cannot be set aside arises out of the contractual nature of the relationship. **An expert's decision can be challenged if there has been a material departure from the terms set out in the contract or if it can be shown that they have otherwise failed to perform the task assigned by the parties**. However, there is an important distinction to be made between a situation where the expert answers the right question but in the wrong way, and one in which the expert fails to address the right question at all. In the latter case, the expert's decision will be a nullity; in the former, the decision is likely to remain binding on the parties and the court will have no power to intervene.

Another limited ground for challenging the decision arises in cases **where there is fraud or collusion or where the expert has acted unfairly or with obvious bias** towards one party (see *Griffin -v- Wainwright*[2]). The test imposed by the court for this requires actual bias, or a real danger of injustice resulting from the alleged bias, and not just conflicts of interest or apparent lack of independence.

It should be noted that there is no requirement for the rules of natural justice or due process to be followed for an expert determination to be valid and binding. Unlike arbitration proceedings, and despite the decision in *Griffin*, **there is no machinery for setting aside an expert determination purely on the grounds that the expert has failed to act with fairness and impartiality**. The degree of unfairness or partiality probably needs to exceed quite a high threshold to render the decision open to challenge. Even if the bias exhibited by the expert is manifest, obvious and extreme, the expert's decision may still not be set aside by the court if the court concludes that the expert would have reached the same decision in any event (*Worrall -v- Topp*[3]).

The case of *Owen Pell Ltd -v- Bindi*[4] confirmed that an expert's determination is binding (even if he had made errors in his conclusions) where the parties had agreed to be bound. Of course, it is possible for the parties to themselves widen the scope for challenge by introducing appropriate clauses into the contract. For example, a determination clause can state that the determination is binding on the parties 'in the absence of manifest error'. Care needs to be taken, as the introduction of such clauses can, in practice, lead to less certainty and provide scope for further argument over the nature and definition of 'manifest error'. Accordingly, these and any other clauses dealing with expert determination and terms of reference should be

drafted very carefully to avoid ambiguity and the risk of any satellite court proceedings.

The circumstances, then, when **an expert determination can be challenged on grounds of manifest error** are tightly circumscribed. Any errors must be serious and to the detriment of a just outcome. In *Walton Homes Ltd -v- Staffordshire County Council*[5], the High Court said that the parties had given the expert power to determine the issue, and there had been perfectly acceptable reasons for his conclusion notwithstanding any errors that had been made.

The notion that the court can look behind the decision and examine the expert's reasons when deciding if a manifest error has been made or whether he had departed from his instructions was first identified in the case of *Halifax Life Ltd -v- The Equitable Life Assurance Society*[6]. The judge in that case held that, in the context of an expert determination, the court had power to direct an expert to state his reasons or provide further reasons for his decision.

Mistake or failure to follow instructions

A recent Scottish case involving expert determination is one that is certainly worthy of comment. In *Eastern Motor Company Ltd -v- Grassick*[7], a dispute arose between a motor group and car franchise dealership over a share purchase agreement (SPA). The contract between the parties provided for the dispute to be settled by expert determination, so a price adjustment expert was appointed for this purpose.

The expert accepted instructions on the terms that had been agreed by the parties and were set out in terms of engagement. The expert duly carried out his determination and delivered a decision that was broadly favourable to the pursuer. The defenders refused to comply on the basis that the expert had failed to follow the instructions given because he failed to apply the terms of the SPA as correctly construed in law and had thus fallen into manifest error in making his determination.

As a preliminary issue, the court dealt first with the pursuer's contention that the application to set aside was misconceived. This had been more appropriate to an arbitration award. It was argued that the court was not competent, or it was at least inappropriate, for the defenders to seek to have the expert's determination set aside by way of exception. The pursuer further contended that the proper procedure would be for the expert's decision to be made subject to judicial review, and that the expert should be joined to the proceedings as a respondent. This, said the pursuer, was necessary to allow the expert to protect his interests in relation to his fee and professional reputation.

The court dismissed this argument, stating that the distinction had to be drawn between, on the one hand, resisting by way of exception the enforcement of a decision whose validity was challenged and, on the other, reducing that decision. In the present case, as in adjudication cases, the defenders had no need to reduce the decision of the price adjustment expert. It was, in fact, sufficient for them to move the court to refuse to enforce it, and that was achieved by defending the action for enforcement and did not require separate proceedings for judicial review. Further, there was nothing in the circumstances of the present case that would make it 'inappropriate' to set aside the price adjustment expert's decision. Neither was it necessary for the expert to be allowed to become a party to the proceedings... there was no allegation of misconduct or impropriety.

Turning to the substance of the application to set aside, the pursuer submitted that the question for the court to decide was not whether it considered the expert's decision to be correct. The parties had contracted to be bound by the decision and it did not matter whether a mistake had been made provided the decision was given honestly and in good faith. Accordingly, the pursuer submitted that there were only very limited circumstances in which the court could interfere.

In dismissing the defender's application, the court found that the contention that the expert had departed from his instructions because he failed to apply the terms of the SPA as correctly construed in law was misconceived. This was because it blurred the distinction between departure from instructions and making a mistake while carrying out instructions. The expert had been asked to determine questions of mixed fact and law. Where the parties had chosen to remit issues of contractual interpretation to an expert for determination, it was not open to one of them to contend the expert had departed from his instructions merely because he disagreed with the conclusion. In this case, there was no suggestion of fraud, and it had not been demonstrated that an error had clearly been made by the expert in relation to the disputed issues. In the view of the court, the defender's contention amounted to no more than disagreement with the expert's determination. In conclusion, this did not amount to a valid reason for challenge.

Enforcement under Civil Procedure Rules

In circumstances where no application is made to challenge or set aside the decision of the expert, but one or other party simply fails to comply with it, the procedure for enforcement in England and Wales is to adopt the summary judgment procedure under CPR 24, subject to any applicable requirement to arbitrate. As the **refusal to comply with the decision is a breach of contract**, the claimant should plead the contractual background, the determination by the expert, and the breach arising out of the other party's failure to comply with the determination. An expedited determination of the proceedings should then be sought in accordance with the usual summary judgment procedure.

Enforcing an ED decision may require further litigation

References

[1] *Jones -v- Murrell* [2016] *EWHC* 3036 (*QB*).

[2] *Griffin -v- Wainwright* [2017] *EWHC* 2122.

[3] *Worrall -v- Topp* [2007] *EWHC* 1809 (*Ch*).

[4] *Owen Pell Ltd -v- Bindi (London) Ltd* [2008] *EWHC* 1420 (*TCC*).

[5] *Walton Homes Ltd -v- Staffordshire County Council* [2013] *EWHC* 2554 (*Ch*).

[6] *Halifax Life Ltd -v- The Equitable Life Assurance Society* [2007] *EWHC* 503 (*Comm*).

[7] *Eastern Motor Company Ltd -v- Grassick* [2021] *CSOH* 5.

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