

EXPERT DETERMINATION: THE CURRENT POSITION

Recent cases on enforcing expert determination procedures and decisions

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1. Appointment of the expert – lack of cooperation by one party:
 - (1) *Cream Holdings Ltd v Davenport* [2008] EWCA Civ 1363 (09 December 2008). Expert valuer of shares had not been properly appointed. In that case it was held that a tripartite agreement was required before the engagement was complete. Valuation was not binding.
 - (2) *Cream Holdings Ltd v Davenport* [2011] EWCA Civ 1287 (09 November 2011). New valuers were appointed by President of Institute, but parties had still not agreed the terms of the engagement. Implied term requiring parties to cooperate by agreeing to terms which were reasonable (including limitation of liability).
2. Court has discretion to stay court proceedings if parties have agreed to expert determination, but may decide in a particular case not to do so (eg *Thames Valley Power Ltd. v Total Gas & Power Ltd* [2006] 1 Lloyd's Rep 441).
3. Challenging the decision of the expert:
 - (1) Decision not binding if expert has exceeded his jurisdiction.
 - (2) Decision not binding if expert has materially departed from his instructions:
 - (a) *Jones v Sherwood* [1992] 1 WLR 277 (CA).
 - (b) But it was held in *Ackerman v Ackerman* [2011] EWHC 3428 (Ch) (Vos J, 21 December 2011) that consequences of departure from instructions depend on the type of departure involved. “... *it seems from these authorities that ... a departure from substantive instructions will be material and automatically invalidate a decision unless it is trivial or de minimis, but that a departure from express or implied procedural instructions or an unfairness will not always do so*”. Decision binding despite departure from procedural instructions, as decision would have been the same in any event.

- (3) Decision not binding if expert is shown to have been actually partial, but apparent partiality is not enough (eg *Ackerman v Ackerman*).
- (4) Apart from cases in which the contract uses words such as “in the absence of manifest error”, the decision cannot be challenged on the ground that the expert made a mistake on a matter which he had jurisdiction to decide:

"The fact that he [the expert] may be patently wrong does not mean that he has not done what he was appointed to do nor that he has asked himself the wrong question. To take any other view would lead to the sort of refined arguments such as have been deployed here and go a long way to emasculate the requirement that the decision of the expert, as a matter of contract between the parties, be final and binding. Thus, the advantage of cost, speed and finality would be seriously diminished." *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992] 1 E.G.L.R. 148, per Judge Paul Baker Q.C. at 151L-M.

- (5) There is no general requirement that the expert must comply with the rules of natural justice: *Bernhard Schulte GmbH v Nile Holdings Ltd* [2004] 2 Lloyd's Rep 352. But in some cases it may be held that there is an implied obligation on the expert to act fairly (eg *Ackerman v Ackerman*).
- (6) No general rule that expert either does have jurisdiction to decide what the contract means or that he does not have jurisdiction to decide what the contract means.
- (a) *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826 (18 July 2011), [2011] BLR 614, [2011] 2 Lloyd's Rep 347, [2011] EWCA Civ 826. Accountant. No jurisdiction to decide the points of interpretation which were in dispute. These went to the expert's jurisdiction.
- (b) *Wilky Property Holdings Plc v London & Surrey Investments Ltd* [2011] EWHC 2888 (Ch) (Deputy Judge Richard Snowden QC, 04 November 2011). Expert was a surveyor and barrister, and he had jurisdiction to decide various points of interpretation.
- (c) *Ackerman v Ackerman* [2011] EWHC 3428 (Ch) (Vos J, 21 December 2011). Expert was a QC. If he applied the wrong construction, he departed from his instructions, and the court might interfere (if material).

For further information, see *Expert Determination*, 4th edition, by Kendall, Freedman and Farrell (Thomson Sweet & Maxwell, 2008)

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