# EXPERT WITNESSES AND EXPERT DETERMINATIONS

# WHAT IS DONE AND WHAT COULD BE DONE BETTER
# A BARRISTER'S PERSPECTIVE

*Paper tabled at the Arbitrators' and Mediators' Institute of New Zealand Inc Conference in Auckland on 6 August 2011 for the Workshop on Expert Witnesses and Expert Determinations.*
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## 1. Introduction

### *1.1. My Paper*

1.1.1. In this paper I consider the roles of the expert witness and the expert making a determination. The roles are distinct, but often the same practitioner can end up acting as both in the course of their career.

1.1.2. I will discuss the experiences I have had with experts and make suggestions for maintaining a harmonious relationship between expert, counsel and client.

## 2. Expert Witnesses

### *2.1. What Makes Expert Witnesses Different*

2.1.1. The use of experts as witnesses in a trial can be traced back to the 16th century, as can be seen in *Buckley v Rice-Thomas* (1554) 1 Plows 118. The Courts criticized the use of experts in 1622 (*Adams v Canon* (1621) Ley 68, 1 Dyer 53 per Sir William Coke), and 1873 (*Lord Abinger v Ashton* (1873) 17 LR Eq 358 per Sir George Jessel). Sir William Coke expressed the concern that "opinion" or "thinking" was not an adequate basis upon which a Court should make its determinations, and cautioned that opinion evidence could not result in a perjury charge. Sir George Jessel concurred in this caution, and pointed out that evidence which could not result in a perjury charge was unsafe, as it was "too regularly" likely to coincide with the views of the party engaging the expert.

2.1.2. The general position at common law (now articulated in Section 23 Evidence Act 2006) is that a statement of opinion is not admissible in a proceeding to prove the truth of what is believed. The reason for this is that witnesses in a case are giving evidence as to the matters they have experienced (for example, seen heard or touched), not their beliefs or opinions. That said, obviously, a lay witness can give opinion evidence on "common knowledge", for example asserting that they believe someone was drunk.

2.1.3. However, the common law recognises that there are technical areas outside of common knowledge and that, when deliberating, a tribunal might benefit from the assistance of expert opinion in understanding the matters in issue. At common law, the Courts admitted expert evidence, as long as the Judge was satisfied that the matters which the expert evidence addressed were outside "common knowledge" and expert opinion was required.

*2.2. Extent of Qualification Necessary to Be an "Expert Witness"*

2.2.1. Before one can testify as an expert witness, the qualifications of the individual as an expert must be established. No one credential can furnish a universal qualification as an expert. Many factors are relevant, such as the area and nature of educational specialisation and whether any graduate degrees were obtained. Additionally, publications, honors and awards, positions in professional associations (including relevant committee work), and all other factors that support the person's status as an expert are also relevant and important qualifying factors. Extensive, meaningful work experience is also considered relevant and necessary.

2.2.2. Work experience may be of many types. An expert might be someone who has worked in research and development in their field, or has more practical, on-the-job knowledge of the workplace, or may be an academic.

2.2.3. Another relevant consideration for the lawyer (albeit not a "qualification" in the true sense of the word) is the expert's skill as a witness. A lawyer should evaluate the expert's ability to use good judgment in analyzing facts and articulate this clearly, to express complex material in a fashion that readily can be understood by those who do not have expertise in the field, and to handle intense cross-examination by opposing counsel.

*2.3. Expert Witnesses Code of Conduct*

2.3.1. The *Code of Conduct for Expert Witnesses* ("the Code") is an important touchstone. It is written primarily as a code of conduct applicable to cases heard in the High Court.

2.3.2. I will refer to "the tribunal" rather than "the Court" because the current discussion is occurring in the context of arbitration. However, unless adherence to the Code is an agreed term of the arbitration, the relevance of the Code is the standard of conduct that it represents and the use to which it might be put by lawyers and witnesses alike.

2.3.3. The first part of the Code emphasises that the expert witness' primary duty is to the tribunal. In particular, the expert witness is **not** an **advocate** for the party who has engaged them. The witness "has an overriding duty" to assist the tribunal impartially on relevant matters within the expert's area of expertise. Thus the "price" paid for the privilege of their opinion evidence being admitted, is this duty to assist the tribunal and not advocate.

2.3.4. Those two requirements are, in my experience, frequently honoured only in the breach. Disappointingly, it is rarely possible to predict the tribunal's reaction to this behaviour. My own view of it is that expert witnesses unwittingly undermine their credibility by avoiding the making of sensible concessions and then explaining them.

2.3.5. What tribunal would, or should, believe an expert witness, acting uncooperatively – as happened to me recently - who when asked whether they were there to assist the Court eventually said the party who appointed them…

…well, that's who I represent.

2.3.6. The second part of the Code sets out several matters that the expert witness's evidence must address. This includes (but is not limited to):

(a) acknowledging that the witness has read the Code and agrees to comply with it;

(b) confirming that the evidence is within the expert's area of expertise;

(c) stating the expert's qualifications as an expert;

(d) stating the facts and assumptions upon which the expert's opinion is based;

(e) giving reasons for the opinions, and specifying any literature (or other material used or relied on) in support of the opinions expressed; and

(f) describing any examinations, tests or other investigations upon which the expert has relied and details of any person who carried them out.

2.3.7. The expert witness also has an obligation to inform the Tribunal if they have knowledge or information that would qualify (or otherwise limit) the completeness or accuracy of their evidence.

2.3.8. This second part of the Code is forms a useful checklist against which the evidence of the expert can be measured, even when they have not fully dealt with these matters themselves. Knowing this, expert witnesses should exercise caution. Any failure to adhere to the levels of disclosure required by the Code will cause them to appear partisan, and may undermine the credibility of their evidence.

2.3.9. An example arose in *Bromley v Hoskings* FC Whangarei, 5 April 2011 FAM 2010 008 0069, Judge McHardy where questions about the independence of an accountant proffered as an expert arose:

> Mr. H notes that the applicant's evidence is not tendered on the basis of independence or (except for that implicit in the profession) expertise. There is and should be accorded importance in every aspect of those qualities which entitle evidence to be treated as that of an expert evidence [sic]. Neither Messrs M and Q take the rules for experts sufficiently seriously to specifically acknowledge them in their briefs. For Mr. Q, knowledge of the contents of Schedule 4 HCR was elicited as an afterthought. Mr. H therefore submits that if the "expert witness" has not been given consideration from the beginning (which is the reason why briefs for expert witnesses customarily refer in the opening passages to having read and undertaken to abide by the rules) then the witness cannot establish the prerequisites to his evidence being taken as expert.

2.3.10. The third part of the Code gives the Tribunal authority to direct an expert witness to confer with another expert witness. In addition, the Tribunal can direct an expert witness to try to reach agreement with another expert witness on matters within the field of expertise of the expert witnesses.

2.3.11. The Tribunal can require expert witnesses to prepare and sign a joint statement setting out the matters on which the experts agree and the matters on which there is disagreement (and giving the reasons for disagreement). It is open to an arbitrator to make similar orders, either on their own or by application: Articles 19, First Schedule Arbitration Act 1996; clause 3, Schedule 2 (applicable to domestic arbitrations or where opted into in international arbitration).

2.3.12. When conferring with another expert witness, an expert witness should exercise independent and professional judgment and should not act on the instructions or directions of any person, particularly instructions to withhold or avoid agreement.

*2.4. Limitations on Expert Evidence*

2.4.1. For many years, the main limitation and traditional rule of evidence was that a witness should not testify as to the "ultimate issue" the Court has to decide. For instance, an expert was able to opine on the differing values of, say, business assets as misrepresented and as they actually were, but not on what the damages consequent on the misrepresentation were – a fine line.

2.4.2. However, that rule has been amended by section 25 Evidence Act 2006 which, in its relevant parts stipulates that:

> …an opinion by an expert is not inadmissible simply because it is about (a) an ultimate issue to be determined in a proceeding or (b) a matter of common knowledge.

2.4.3. The qualification that must be met is that the Court must be likely to:

> …obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding

*2.5. Comments on Experts – Good and Bad*

2.5.1. In closing I wanted to comment on the good and bad:

(a) Good expert witnesses:

(i) Have a sound overall understanding of their discipline and can explain it simply;

(ii) Realise they are *part* of the case, not the case in its entirety;

(iii) Advise counsel on additional information that might be obtainable on discovery and which might improve the certainty of their opinion;

(iv) Make proper concessions and show respect for the Court and other counsel and thereby gain the confidence or at least respect of all parties;

(v) Familiarise themselves with court and hearing processes including such things as forms of address, speed of delivery, etiquette, prohibitions on discussing evidence while under oath;

(vi) Understand that their opinion must, of necessity, be based on other evidence which might alter during the trial, *not* "what they were told by counsel";

(b) Poor expert witnesses:

(i) Ring the solicitor or barrister at least daily to check that their evidence really was "the best";

(ii) Show a lack of self-belief and anxiety, which transmits into an intangible erosion of the tribunal's confidence in what they are saying;

(iii) Capture the client financially by waiting to the point where so much has been spent briefing them that resistance to further overbilling is futile;

(iv) Do not delegate so much of the investigation behind their evidence that it ceases to be their opinion.

## 3. Expert Determination

### *3.1. Introduction*

3.1.1. The role of the expert acting as an independent witness must be contrasted with the role of the expert called upon to make a determination.

3.1.2. Expert determination is a process where – as the name suggests - an independent expert (I will refer to them as an "ED" for Expert Determiner) decides one or more issues between parties.

3.1.3. Expert determination is a popular method of resolving disputes that involve qualitative or quantitative issues, or issues that are of a specific technical nature, or a specialized kind.

3.1.4. That said, the reality is that from a wide-angle legal viewpoint, there would appear to be little difference between an ED and an arbitrator – both have their foundations in a contract between parties now in a dispute.

### *3.2. A Starting Point?*

3.2.1. The most obvious starting point is the definition of "arbitration" in section 2 of the Arbitration Act:

> Arbitration means any arbitration whether or not administered by a permanent arbitral institution.

3.2.2. That is hardly useful. The definition therefore leaves, at least at the statutory level, arbitration and expert determination indistinguishable.

### *3.3. Issues*

3.3.1. Given these similarities the issues are:

(a) Why might the disputants wish to ensure the person they appoint is an ED and not an arbitrator?

(b) When is an ED an arbitrator?

(c) Why might an ED wish to be an arbitrator?

(d) Why might an arbitrator wish to be an ED?

3.3.2. In my view the answer lies in the somewhat murky realm of what the parties intended, coupled with the degree of volition they show to the "harsher" process, namely ED.

3.3.3. This is consistent with the origins of both processes lying within contract: *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 where at [54] Fisher J. stated:

> The defendants did not argue that this process was intended to be anything other than arbitration. In isolation the referral of the dispute to an "expert" in circumstances where the grounds for challenge were purportedly confined to fraud or corruption (cl 6) might have been consistent with expert determination. But the explicit statements that the process was to be conducted as an arbitration under the Arbitration Act 1996 (clss 5.1 and 6), coupled with the many contractually conferred procedural rights discussed below, places it beyond doubt that the dominant intention here was to have an arbitration. …

*3.4. Intention and Volition*

3.4.1. As will be evident from some of the scenarios, determining whether the parties have appointed an arbitrator or an ED, is no simple task. While "intention" is a readily recognisable contract law element, I include the further concept of volition by which I mean a *manifest* intention to submit to ED.

3.4.2. Respectfully, I believe there would be a difference between the interpretation that would be placed on a Dispute Resolution regime, contained in a contract:

(a) Entered into at *the beginning* of a long term relationship – similar to that in *Methanex;* and

(b) Entered into between parties *after* the relevant dispute has arisen.

3.4.3. In the first of those two cases it can be seen that there is far less opportunity for an informed choice to be made because the precise nature of the dispute is unknown. Could they really have intended to not have the safety valves and framework provided by the Arbitration Act?

3.4.4. It will be evident from this approach that simply using the word "expert" or "independent expert" is not going to be determinative. On the other hand, the use of the word "arbitrator" is almost certainly going to trigger application of the Arbitration Act regime.

*3.5. Why Might Parties Opt for ED and Not Arbitration?*

3.5.1. There are two answers to this. First, unfortunately, parties may not know what they are doing. But secondly, informed parties will choose ED over arbitration because it *sounds* less complicated and as conceived by them just may be. The usual focus on simplicity arises from;

(a) Their intention to avoid lengthy hearings arising from the pedestrian taking of evidence;

(b) Their intention to reach finality – they see certainty of decision as preferable to quality after a certain investment of time and money; and

(c) The perceived benefits of using a decision-maker who has very specific expertise and who is probably an industry expert (for instance in gas reserve calculations) and not a dispute resolution professional, such as a lawyer or career arbitrator.

3.5.2. Other potential distinctions between arbitration and expert determination, are, in tabular form:

| Potential Distinctions | | |
|---|---|---|
| **Feature** | **Arbitration** | **Expert Determination** |
| Foundation and Framework | Statute and Contract | Contract |
| Expertise of Decision-Maker | Arbitrator will have familiarity with legal area (e.g. commercial law) and some knowledge of subject matter of dispute, most probably from involvement in cases of that kind | ED will be experienced in subject matter of the dispute, with acknowledged expertise in that area. Probably also has a working knowledge of the legal area involved. |
| Witnesses | Will hear from independent witnesses retained by parties to the dispute and may appoint expert under Article 26, Schedule 1. | Depending upon terms of engagement ED *may* be entitled to interview witnesses and take their testimony into account. May be entitled to appoint other experts in sub-fields if permitted. |
| Interim Measures | An arbitrator has the power to grant interim measures: Art 17 et seq, Schedule 1<br>Non-compliance with an interim order risks a finding of contempt. There is a requirement that courts enforce interim orders with minor exceptions. | An ED does not have the power to grant interim measures<br>(1) unless authorised by the contract; and<br>(2) that will automatically have the coercive effect of a Court order (ie, non-compliance with ED will not be contempt of Court) |
| Court Assistance | The parties will have an automatic right to court assistance, as will the arbitrator, with the taking of evidence and such processes. | An ED has no coercive power to gather evidence, other than through the enforcement of contractual rights. |
| Appointment | By contract between the parties but with Court assistance where problems arise. | By contract between the parties. |
| Reviewability | Decision may be subject to review: Art 35/36 of Schedule 1 and Clause 5 of Schedule 2. However possible for parties to exclude clause 5 rights where public policy involved. | Decision is probably final, barring breach of the appointment contract or manifest error (unless contract of engagement says reviewable or not final). |
| Enforcement | Decision may be enforced internationally using Court enforcement processes and convention. | Enforcement depends upon parties performing the duties the decision places upon them and enforcement of contract of engagement in relevant jurisdiction. |
| Immunity of Decision-Maker | Automatic immunity from suit under s13 of the Arbitration Act | Immunity only if explicitly granted under the contract with the ED. Then subject to rules of contractual interpretation instead of statutory. |
| Venue | Parties to agree or arbitrator will determine | Parties to determine if relevant but ED may proceed without parties. |
| Right to Apply Own Knowledge | Arbitrator's use of knowledge of subject-matter of dispute may, or may not, be misconduct depending | ED's knowledge of the subject-matter of the dispute is the reason for them being engaged. They are |

| Feature | Arbitration | Expert Determination |
|---|---|---|
| | upon whether parties have opted out of clause 3(1)(b) Schedule 2. | expected to apply their own knowledge. |

3.5.3. There are no hard and fast rules, or "brightline" factors, indicating whether parties have "achieved" the appointment of an arbitrator or an ED.

*3.6. Suggested Approach*

3.6.1. There is obvious risk that an ED regime will:

(a) Be interpreted by a Court as an arbitration regime; and

(b) Be inadequate for the parties' purposes.

There is a lesser risk that an arbitration regime, tailored to express the parties desires for efficiency, finality, and accuracy, will present them with problems. This can extend to the limitation on rights to submit and hear evidence and give reasons for a decision (indeed all of the features discussed in table 3.5.2 above).

3.6.2. That may seem counter-intuitive as it appears to be stepping into the jaws of the more formal regime. But it is also stepping into the greater protections that it provides.

*3.7. Problems and Experience*

3.7.1. It is an odd fact that commercial drafters appear to be willing to spend more time drafting elaborate ED regimes, than tailoring arbitration regimes. The latter would, in my experience, be tidier and professionally safer. The existing Act works as an easy checklist of attributes that the relevant regime requires and the aspects that need to be 'cut down'.

3.7.2. Thus the discussion can become confused as the tailored arbitration regime is really what the parties intended with the term "Expert Determination". As mentioned earlier, ED is popular in disputes involving qualitative or quantitative issues, or issues that are of a specific technical nature, or a specialized kind, because it is generally considered to be a speedy, informal, inexpensive, and confidential of resolving the dispute. There is nothing stopping that continuing under the arbitration rubric.

3.7.3. It is possible in any contract to not only stipulate, perhaps, for say mediation to precede arbitration or litigation, but also to set up different "standards" or "tiers" of arbitration depending upon the matters at issue. So for instance, disputes over say stock levels or stock values in an asset acquisition agreement, might be required to be referred to the quick-fire determination of a stipulated independent accounting firm with the relevant expertise. That quick-fire regime could apply also to matters involving say scientific knowledge.

3.7.4. There will always be experts that parties wish to have determine their disputes. I am not suggesting that they be dispensed with. I am suggesting that overall the back up provided by the Arbitration Act, tailored in tiers if necessary, is a better contractual starting point.

*3.8. Immunity*

3.8.1. A specific point raised by Bob in his paper is the negotiation of immunity for the ED. Some expert appointments contain clauses that state that the expert is to be immune from suit and that there is to be no involvement of the expert in proceedings or correspondence after the decision.

3.8.2. Adoption of my suggestion would leave the ED with the protection given by section 13 and a resulting reduction in the "fuss" that is attending these appointments. The focus could then move to the more important issues relating to the other features above.

3.8.3. If the parties conversely wish to preserve the liability of the appointed expert, then there is nothing stopping them simply making a joint appointment of the Expert for their opinion, with a separate agreement in the background, operating between the disputants as to the features addressed above.

## 4. Addendum

*4.1. Recent Case – Barclays Bank Plc v Nylon Capital LLC*

4.1.1. I am grateful to the Honourable Justice Clyde Croft of the Victorian Supreme Court who spoke to me following the workshop at which this paper was discussed. His Honour pointed out the very recent decision in *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826 which was decided on 18 July 2011. The parties were involved with a hedge fund and the relevant agreement ("called the LLP Agreement") provided for fees (2% of the net asset value of the fund and 20% of any increase in value) to be paid to Nylon.

4.1.2. The agreement adopted expert determination as the mode of resolution of disputes concerning calculation and allocation of profits. The relevant clause stipulated that the affected party could refer the matter to an accountant for determination. The expert accountant was also given the power to determine any dispute concerning the interpretation of the agreement and to determine whether he or she had jurisdiction. Reference of the matter to expert determination could be made up to 30 days after an allocation of profits.

*4.2. Issue*

4.2.1. A dispute arose about the allocation of profits; however, no allocation had taken place. In part, this was because the parties could not agree on the proper interpretation of the profit allocation provision in the LLP Agreement. The matter in issue was whether the expert nevertheless had jurisdiction.

4.2.2. The Court also had to decide whether to stay the proceeding, given that the right to determine his or her jurisdiction had also been given to the expert under the LLP Agreement and, on its face, not the Court.

4.2.3. The Court explained that the approach to expert determination clauses is different to arbitration clauses. The Court noted that arbitration clauses are to be interpreted on the assumption that the parties intend *all* disputes between them, including a dispute

as to the tribunal's jurisdiction, to be decided by the arbitral tribunal: This is also the position in New Zealand under the Arbitration Act, Schedule 1, Art 16.

4.2.4. In distinction, the Court noted that expert determination clauses usually involve the parties electing to have *certain* of their disputes referred to the expert. While, respectfully, it is not always true that arbitration is *always* intended to be the method of choice for *all* disputes between parties, it is usually the case. While not expressly stated in the decision, the Court appears to have considered it perverse that an expert with an intended limited jurisdiction could, if the submission to the contrary was accepted, arrogate to themselves jurisdiction of issues outside of their expertise. At paragraph [27-8] the Court said:

> However, although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause. The rationale for the approach in *Fiona Trust* is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.
>
> In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of *Fiona Trust* does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. The LLP agreement illustrates this: the parties agreed by Clause 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under Clause 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute. Therefore, quite unlike the position under agreements with arbitration clauses (as exemplified by *Fiona Trust*), the parties have chosen two alternative forms of dispute resolution. There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in *Fiona Trust* is inapplicable. The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way.

4.2.5. The court held that, even where an expert determination clause conferred a right on an expert to determine his or her jurisdiction, the court is the ultimate decision maker on the expert's jurisdiction. The Court referred to the dissenting judgment of Lord Justice Hoffman in *Mercury Communications Ltd v The Director General of Telecommunications*, [1996] 1 All ER 575 (that dissenting judgment being later approved by the House of Lords on appeal: *Mercury Communications Ltd v The Director General of Telecommunications* [1996] 1 WLR 48), where Hoffman LJ stated that

> …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.

4.2.6. Explaining this, at [69-70], the Court said in *Barclays*:

> …"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", and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.
>
> 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. It would, I suggest, be surprising if that were the effect of an expert determination agreement, when the Arbitration Act 1996 gives a right (albeit a limited and prescribed right) to the parties to refer points of law to the court. That Act applies where the parties have entered into an arbitration agreement, which gives them a much greater ability, in law and in practice, to make representations and to involve lawyers in connection with the arbitration, than parties enjoy in connection with the great majority of contractual expert determinations.

4.2.7. The Court drew a distinction between two situations that could arise between parties who have, in their contract, settled the foundation principles upon which a matter (say, price) is to be calculated. In the first situation, a dispute might arise about how those principles are to be applied – something upon which an expert would have great experience and knowledge. In the second situation, a dispute might arise about a more legalistic issue – for instance it might be argued that a component of the pricing formula was in fact a "penalty" and not enforceable. The Court in Barclays suggests that the former situation will be for the expert to decide, but the latter will be for the Court and it is not really conceivable that the parties intended the expert to decide a problem of the latter kind.

4.2.8. Hence, in *Barclays* the Court considered that it was "questionable" whether the parties would have intended an accountant "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." The Court also suggested the approach the expert and parties might take expert determinations where points of law arise, at [71-72]:

> 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. If they do not, they may also think it sensible to try and agree whether the expert's decision on the point will be treated as final and binding or whether the disappointed party should have the right to refer the issue to the court. If the latter, then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision, and it may also assist the parties in arriving at a settlement.
>
> Sometimes, it is not possible to show that the expert has made a mistake of law in arriving at his valuation, because he has not expressed a view on the issue of law, and it cannot be said that he was under a duty to do so, and it is not clear from his determination how he must have decided the issue. In such a case, it seems to me that there would be no basis for challenging the determination on the basis of error of law. For the reasons already given, if the expert needs to determine a point of law which divides the parties, he may think it right not only to decide the point and say how he has decided it, but to indicate what the valuation would have been if he had decided the point the other way.

4.2.9. The Court considered the interpretation and scope of the Expert Determination Clause. Under the agreement 30 days had to elapse after allocation of profits before the dispute could be referred to the expert. That made it clear that the making of an allocation was a condition precedent to the appointment of an expert. The expert had no jurisdiction to determine any issues until there had been an allocation, as the Court explained at [54-55]:

> This view also accords with the commercial rationale of sensible businessmen. They would have considered it sensible to entrust to an accountant for expert determination questions relating to the allocation once an allocation had been made or it had been determined that Mr Burnell was entitled to make an allocation. The parties would not have gone beyond this. In contradistinction to arbitration, they would not have had any procedural safeguards and would have wanted a tribunal suited to the broader issues, in accordance with Clause 26.2. It was suggested by the LLP that an accountant might be able to take legal advice because of the

> provisions of Clause 26.1(D) which makes provision for the payment of fees and expenses of the expert. It may be that the clause is wide enough to enable the accountant to employ a lawyer to advise him on the interpretation of the clause, but it is difficult to understand why, save in relation to narrow questions of interpretation relating to the process of allocation, it would have been contemplated by rational and sensible businessmen that general issues of interpretation of the agreement in its contractual matrix would fall to be determined by an expert accountant relying on the advice of a lawyer rather than by a judge to whom the opposing arguments would be put briefly and a decision obtained within the well understood procedures of the Chancery Division or the Commercial Court as the courts chosen by the parties under Clause 26.2.
>
> In my view, therefore, there can be little doubt about the meaning of the clause, even if a very generous construction is given to it. The expert does not have jurisdiction to determine any issues until there has been an allocation. There has been none. Moreover, the question whether Mr Burnell was entitled to make an allocation which brought into account the profit on Barclays capital investment was an issue which went to the jurisdiction of the expert for the reasons I have explained at paragraphs 46 and 47 above.

*4.3. Upshot*

4.3.1. *Barclays* inferentially draws distinctions that assist with clarification of the differences between the two processes. From it can be drawn the, at least tentative, conclusions that:

(a) There is a working assumption that parties to an arbitration agreement intend all disputes to go to the arbitrator unless the contrary is clear;

(b) Conversely, parties to an expert determination process intend only disputes within the direct professional expertise of the expert to be determined by that method;

(c) Irrespective of the conclusion the expert reaches, or might reach, as to their jurisdiction, that decision will be capable of challenge and can be made by the Court.

(d) There are good reasons why a Court deciding upon an issue such as this *should not* defer its decision until the expert has made their decision about jurisdiction.

4.3.2. With respect to point (c) above, in New Zealand an arbitrator has the power to determine his or her own jurisdiction: Schedule 1, Art 16. Once the arbitrator has ruled on whether or not they have jurisdiction, an appeal may be made to the High Court within 30 days, which will decide the question finally. There is no need to wait until the arbitrator's award to bring this appeal. I am uncertain of whether the process in the United Kingdom is the same.

4.3.3. However the existence of Article 16 is another reason why, in my respectful submission, that the suggestion of contract drafters erring on the side of appointing **arbitrators** and then clarifying the process they should adhere to (to make it more like expert determination, if desired) is workable and would lessen the kind of confusion that existed in *Barclays.*

David Connor