

# Your Witness

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## Expert witness immunity

The Supreme Court has fixed the date of the hearing in the case of *Jones -v- Kaney* (see *Your Witness* 59 p 6) for 11 January 2011. This latest attempt to remove an expert's immunity is based mainly on drawing an analogy between the immunity of an advocate and that of an expert. Because the Court of Appeal has removed an advocate's immunity, so the argument goes, it is no longer tenable for expert immunity to remain.

It's the view of many legally trained observers that the Supreme Court will use this opportunity to remove expert immunity or, at least, severely curtail it. Clues to the thinking of the judiciary are said to be contained in both the *Meadow* case and the series of cases that resulted in the removal of immunity for advocates. For example, intervening in the case of Sir Roy Meadow, the Attorney General argued that expert witnesses were 'more robust' than their lay counterparts, and therefore liability for failure to give careful and correct advice to their clients should not inhibit them from giving truthful and fair evidence in court. But the Court of Appeal in *Meadow* confirmed that expert immunity, as it currently stands, means that 'no [civil] action lies against witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in the court of justice'.

Of course, even though expert witnesses are currently immune from civil suit, they can be prosecuted in the criminal courts if, for example, they have lied about their qualifications. And despite Collins J's attempt to make it otherwise, expert witnesses still have to answer to their professional regulators when the need arises.

The courts have hinted that an expert's immunity from suit would be unnecessary provided that the expert's liability was clearly defined and limited. Such considerations were key in the House of Lords decision to remove immunity for advocates, and it seems likely that a similar argument will be followed when it falls to the court to consider *Jones -v- Kaney*.

## Analogy to advocates is flawed

Despite the apparent keenness of lawyers to see expert witness immunity fall, I do not agree that the analogy holds. Expert witnesses are *not* the same as lawyers. Lawyers are part of the legal system, but expert witnesses are simply guests in it. How many lawyers have to use their holidays to attend court? It's common practice for NHS consultants instructed as expert witnesses!

If expert witnesses have their immunity to suit for damages removed, they – and their insurers –

will need to be ready to deal with actions brought against them by disgruntled litigants who lose their cases. How many professionals will trouble themselves to assist the court in such a situation? It should be remembered that **witness immunity is not in place for the benefit of experts** – a point that appears to have been missed by many. As Otton LJ put in (in *Stanton -v- Callaghan* [2000] 1 QB 75 c):

*'...[witness] immunity is not granted primarily for the benefit of the individuals who seek it. They themselves are beneficiaries of the overarching public interest, which can be expressed as the need to ensure that the administration of justice is not impeded.'*

If the Supreme Court does curb expert immunity to civil suit, it will have to be mindful of how the greater public good of the proper administration of justice (through the ready supply of expert witnesses) can remain protected.

## Juries and conflicting expert evidence

On page 2 we consider some guidance issued by the Court of Appeal on how juries are supposed to choose between experts who, although respected and senior in their discipline, hold different opinions on the evidence. The Court of Appeal tells us that the choice a jury makes between two such experts should be on a *logically justifiable basis*.

Whatever the senior judiciary may say, though, the difficulty remains that the real basis upon which a jury reaches a decision in any particular case is never known. As demonstrated in the case of Sally Clark, it is almost impossible to state with precision which part or parts of the mass of evidence put before the jury in a complex and lengthy case have been a key factor in the decision-making process. Juries are not required to give reasons for their conclusions. Consequently, any guidelines given in relation to the judge's summing-up are an exercise in risk limitation. Indeed, there is always the danger that directions to juries may become over-prescriptive, or, at worst, guide them too forcibly in a particular direction.

The judiciary believes (*c.f.* the case of *Kai-Whitewind*) that juries are competent to deal with conflicting expert evidence; the fact that experts are unable to agree does not neutralise that evidence or give ground for the withdrawal from the jury of that evidence. However, most would recognise that, with ever more complex and sometimes controversial expert evidence being presented to juries, they need all the help they can get!

*Chris Pamplin*

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# Courts and conflicting evidence

The use of expert evidence in cases involving infant death has long been an area that has excited controversy and debate. Miscarriages of justice in cases of Sudden Infant Death Syndrome (SIDS) and Shaken Baby Syndrome have been, if not numerous, then certainly of high public profile.

In June 2010 three cases involving expert evidence in 'shaken baby' cases came before the Court of Appeal. They involved similar features, and the appeals were heard consecutively (*Louise Henderson, Ben Butler and Oladapo Oyediran*<sup>1</sup>). The expert evidence in these cases had been complex, appeared conflicting and, in some cases, involved 'cutting edge' medical theories and techniques. In two of the cases the appeals involved fresh expert evidence.

## Nothing but expert evidence

Moses LJ, in introducing the Court's ruling, summed up the problems in this type of case.

He highlighted the difficulty that courts and juries sometimes have in accepting that, in some cases, the cause of death simply cannot be explained. He said that experts, prosecuting authorities and juries must reconstruct as best they can what has happened. There remained a temptation to believe that it is always possible to identify the cause of injury to a child. Where the prosecution was able, by advancing an array of experts, to identify a non-accidental injury, and the defence could identify no alternative cause, it was tempting to conclude that the prosecution had proved its case. Such a temptation, he said, must be resisted. In this, as in so many fields of medicine, the evidence may be insufficient to exclude, beyond reasonable doubt, an unknown cause. He recalled the case of *Cannings*<sup>2</sup> and its aftermath, which demonstrated that, even where on examination of all the evidence, every possible known cause has been excluded, the cause may still remain unknown.

The three cases highlighted a particular feature: where it is alleged a baby has been shaken in the care of a single adult when no other person is present. In such cases, the evidence to prove guilt may consist of expert evidence alone. It must never be forgotten, said the judge, that expert evidence is relied upon to prove that the individual defendant is lying in the account he gives, either at the time or at trial. The correct management of such evidence is, therefore, of crucial importance.

The Court identified a need to find a correct approach to such evidence, and said that, if a conviction is to be based merely on the evidence of experts, then that conviction can be regarded as safe only if the case proceeds on a *logically justifiable basis*.

The Court of Appeal took the view that in one of the cases before it the expert evidence had succeeded in establishing guilt. However, in contrast, it considered that in another of the cases

there was no logically justifiable basis upon which a reasonable jury, properly directed, could conclude that the expert evidence adduced by the Crown had established guilt. Consequently, in an effort to give a more balanced and logical approach, the Court was minded to give guidance on the way in which expert evidence should be managed in cases that depend solely on expert evidence.

## Logically justified basis – pre-trial arena

The Court placed emphasis on the proper marshalling and control of evidence in the period before it is presented to a jury. Judge LJ in *R -v- Kai-Whitewind*<sup>3</sup> had rejected any suggestion that conflict of opinion between reputable experts would automatically 'neutralise' expert prosecution evidence. It is, then, for a jury to evaluate the evidence of both experts when they are in disagreement. So how can it be ensured that the verdict is reached on the logically justifiable basis the court has identified as being necessary?

Emphasising the importance of the pre-trial process, the Court of Appeal gave guidance in the following terms.

- The judge who is to hear a particular case should deal with all substantive pre-trial hearings.
- It is desirable that the judge has experience of the complex issues and understanding of the medical science. (The Court acknowledged that, while this is easy enough to achieve in the Family Division, it will be more problematic in the criminal jurisdiction.)
- The judge should act to prevent experts 'wandering into unnecessarily complicated and confusing detail'. This should be achieved by proper and robust pre-trial management. Without it, said the Court, the real expert issues cannot be identified in advance.
- The judge should act pre-trial to narrow the real expert issues.
- The judge should be able to identify whether the expert evidence a party wishes to adduce is admissible. The test adopted for this is described in the judgment of King CJ in *R -v- Bonython*<sup>4</sup>:
  - (i) whether the subject matter of the opinion falls within the class of subjects upon which the expert testimony is permissible, and
  - (ii) whether the witnesses have acquired, by study or experience, sufficient knowledge of the subject to render their opinion of value in resolving the issues before the court. (This was qualified by *R -v- Reid & Ors*<sup>5</sup>, which dealt with evidence in the emerging science of DNA profiling, when the court acknowledged the need to recognise the importance of new techniques and new advances in science.)

The Court quoted the words of Baroness Kennedy QC in her report on *Sudden Unexpected Death in Infancy*<sup>6</sup>. It cautioned doctors against

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*When a trial is based exclusively on expert witness evidence...*

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*... conviction must be on a logically justifiable basis*

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using the courtroom to ‘fly their personal kites or push a theory from the far end of the medical spectrum’, and recommended a checklist of matters to be established by the trial judge before expert evidence is admitted, including:

- Is the proposed expert still in practice?
- To what extent is he an expert in the subject to which he testifies?
- When did he last see a case in his own clinical practice?
- To what extent is his view widely held?

The Court of Appeal thought that the third of these was of particular importance. Clinical practice, it said, affords experts the opportunity to maintain and develop their experience. Clinicians learn from each case in which they are engaged, and continuing experience gives them the opportunity to adjust previously held opinions and alter their views. They are best placed to recognise that that which is unknown one day may be acknowledged the next.

The Court also pointed to the provisions now contained in the Criminal Procedure Rules 2010. With regard to meetings of experts and the preparation of statements under Rule 33.6.2(a) and (b), the Court thought that such a meeting would not achieve its purpose unless:

- it takes place well in advance of the trial
- it is attended by all significant experts, including the defence experts, and
- a careful and detailed minute is prepared afterwards, signed by all participants.

The Court considered that it would be preferable if others, particularly legal representatives, did *not* attend.

The case management hearing may also present an opportunity for concerns to be aired as to prior criticism of an expert and an expert’s previous tendency to travel beyond his expertise. Whilst such history may not be a ground for refusing admission of the evidence, it may well trigger second thoughts as to the advisability of calling the witness.

### Logically justifiable bases – the summing up

In the view of the Court of Appeal, by following these guidelines the case would proceed on a logically justifiable basis, so far as the expert evidence was concerned. However, it also recognised that the judge has a role in ensuring that the structure and quality of his summing-up result in a logically justifiable conclusion.

By the time the judge comes to sum up the case to the jury, the issues and the evidence should be understood by everyone, including the jury. While it is conventional to discuss the law with counsel, the judge should, generally, also take the opportunity to discuss the issues of expert evidence before counsel address the jury. The judge will thus be in a position to structure his summing-up to those issues and identify which evidence goes to resolution of these issues. He

should generally sum up the case to the jury issue by issue, and should deal with the opinions and any written sources for those opinions issue by issue, rather than following the often haphazard order in which evidence is given during the trial.

The judge’s summing-up should identify to the jury the features of the expert evidence on which a judgment is required, as well as the factors they should consider as the basis for their judgment. Anyone reading a summing-up composed in that way should be able to understand the route followed by the jury in reaching its verdict.

### Making decisions in the face of uncertainty

The Court emphasised that particular caution is required in cases involving expert evidence in developing areas of science. Juries should be reminded that science develops, and that what was previously thought unknown may become recognised.

It is important that the possibility of an unknown cause should not be overlooked. Merely because the expert evidence does not point to some other reasonable explanation of the facts does not, in itself, mean that there is no other explanation. In appropriate cases, the jury should be directed that unless the evidence leads them to exclude any realistic possibility of an unknown cause, it should not convict.

In cases of conflicting expert evidence, the Court acknowledged that it is difficult enough for experienced judges, let alone juries, to express their reasons for accepting or rejecting conflicting evidence. However, it is important that the jury’s conclusion should not be based on mere impression. A jury should be given directions by the judge as to the pointers to reliable evidence and the basis for distinguishing that which may be relied upon and that which should be rejected. If the issues arise, a jury should be asked to decide whether the expert:

- has assumed the role of advocate, influenced by the side whose cause he seeks to advance
- has strayed outside his area of expertise
- has pointed to a recognised, peer-reviewed source for his opinion
- possesses up-to-date clinical experience that is equal to the experience of others whose evidence he seeks to contradict.

The Court recognised that none of these features would determine the case, and not all would be relevant every time. Indeed, the emphasis of the guidance to juries in cases of conflicting expert evidence appears to lie in guiding them away from forming random impressions and towards a process of rational analysis.

The guidelines given by the Court of Appeal are designed to provide a logically justifiable basis for the acceptance or rejection of conflicting expert opinion. While the effectiveness of the guidelines will be almost impossible to evaluate, the Court of Appeal has nevertheless made a laudable attempt to ensure that such evidence is properly managed.

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*Absence of evidence is not evidence of absence*

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### References

<sup>1</sup>*Louise Henderson -v- The Crown; Ben Butler -v- The Crown; Oladapo Oyediran -v- The Crown* [2010] EWCA Crim 1269.

<sup>2</sup>*R -v- Cannings* [2004] EWCA Crim 1.

<sup>3</sup>*R -v- Kai-Whitewind* [2005] 2 Cr App R 31.

<sup>4</sup>*R -v- Bonython* [1984] 38 SASR 45.

<sup>5</sup>*R -v- Reid & Ors* [2009] EWCA Crim 2698.

<sup>6</sup><http://www.rcpath.org/index.asp?PageID=455>

# Expert determination

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## Use of expert determination on the rise

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With the increasing use of expert determination in resolving commercial disputes, particularly in some European cross-border matters, it is timely to take a look at this form of alternative dispute resolution (ADR). We'll also consider two recent cases. In the first, the court gave useful guidelines identifying the circumstances in which the decision of an expert determination could be reviewed by the court. In the second, the court made some findings, in relation to expert determinations and the Limitations Act, which some may find surprising.

### What is expert determination?

Expert determination is a binding form of dispute resolution and is an alternative to the more formal procedures of arbitration and litigation. It is most often used in technical and/or commercial disputes where an expert is appointed by the parties to determine an issue, usually of a technical nature. Traditionally, the procedure has been employed in disputes involving valuations, and this remains a common area to which the process is well suited.

Expert determination is usually provided for in commercial contracts, but it can also be set up by the parties on an *ad hoc* basis.

### Advantages

The advantages of an expert determination are as follows:

- It allows the **appointment of an expert who is familiar with the technical issues**.
- It is usually **cheaper, quicker and less formal** than arbitration or litigation.
- Because it is less adversarial (and is also confidential), it is **less likely to result in a deterioration of business relationships**.
- The **parties do not need to instruct their own experts, and neither do they require a lawyer or advocate** (although they often do instruct lawyers to represent them).
- Unlike an arbitrator, an expert determiner can **take an inquisitorial approach** to the dispute.
- The expert determiner is **not required to refer his findings to the parties** before making his decision.
- Unlike arbitrators, the decisions and activities of expert determiners are **not subject to control by the courts nor to the arbitration legislation**.
- The decision of the expert is **contractually binding on the parties**, and there is only a right of appeal against such decisions in very limited circumstances.

### Disadvantages

What of the disadvantages?

- The expert owes a **duty of care** to the parties – if he gets the decision wrong, he leaves himself open to an **action in negligence**.
- The **scope of the expert's remit and jurisdiction are sometimes difficult to**

**decide**. This is particularly so if the contract contains an ordinary dispute resolution clause in addition to an expert determination clause which deals with only one or some matters of dispute. The clause may not be drafted with enough clarity to give the expert sufficient jurisdiction. Because he is unable to make his own ruling on this, there is always some scope for a challenge in the court.

- The **procedures available to an expert determiner are somewhat limited**, and there is no procedure for obtaining a witness summons or, in most cases, for cross-examination of witnesses.
- There is **no mechanism for enforcing the decision** of the expert without court action.
- There is **no international convention for enforcing an expert's decision** in foreign jurisdictions.

### Court powers to review determinations

In *Homepace Limited -v- SITA South East Limited*<sup>1</sup> the claimant had granted a lease of land to the defendant. The land contained minerals, although certain of these were reserved to the landlord. There was a dispute between the parties over the validity, or otherwise, of a certificate provided by an expert determiner who had been contractually appointed under the terms of a lease to rule on the economic recovery of minerals. The expert had decided that the minerals were not economically recoverable and, under the terms of the lease, the tenant (SITA) was entitled to terminate the lease and to cease paying rent.

The landlord (Homepace) disputed the expert's findings and entered into correspondence with him in which the expert sought to explain the reasons for his decision. Homepace failed to reach agreement and issued proceedings seeking a declaration by the court on whether the expert's determination was valid and binding.

At first instance, the judge held that the determination was not valid, and SITA appealed. Because of the contractual and binding nature of the expert determination procedure, the Court of Appeal had to decide on the circumstances under which it, the Court, had power to review the decision. In reaching its decision, the Court gave a useful summary of the law in relation to this.

### Summary of law relating to ED

The Court confirmed that, unless the contract specifically provides otherwise, the decision of an expert determiner can be challenged only on very limited grounds and cannot generally be appealed. The Court identified the limited circumstances in which a challenge could be mounted as being:

- failure to follow instructions
- fraud, and
- partiality.

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## Courts have limited scope to interfere

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Essentially, these are all circumstances where the expert can be said to have been in breach of the agreement.

The Court quoted the words of Dillon LJ, in *Jones -v- Sherwood Services Limited plc*<sup>2</sup>, that:

*'... the principal ground on which a party to an expert determination may succeed in a challenge to the determination is that the expert has materially departed from his instructions, so that the determination is not a determination made in accordance with the terms of the contract... . The next step must be to see what the nature of the mistake was... . If the mistake made was that the expert departed from his instructions in a material respect – e.g. if he valued the wrong number of shares, or valued the shares in the wrong company... either party would be able say that the certificate was not binding because the expert had not done what he was appointed to do.'*

In *Homepace*, Lloyd LJ confirmed that:

*'... each case depends on the terms of the contract under which the determination is made, both as to what it is that the expert has to decide and as to how far his decision is binding on the parties. In each case it is necessary to examine the determination, in order to see whether it lies within the scope of the expert's authority. If it does not, then it has no effect as between the parties. If on the other hand it does, then the contract also governs the question whether the determination is binding or whether, and if so to what extent or on what grounds, the determination can be questioned.'*

On this basis, the points that had to be decided in this case were:

- what matters the lease had entrusted the expert to decide
- whether that was what he had decided
- whether it could be shown that he had made a mistake which vitiated his decision

In addition, the Court had to decide what materials could be considered in order to decide whether the expert had made a mistake.

The Court held that the expert had been given exclusive power to determine the question of whether the minerals had been exhausted or were not economically recoverable. However, within those questions there was a point of interpretation which the lease did not entitle the expert to decide. That point was what the minerals were. The expert had left certain 'reserved' minerals out of account, and the Court of Appeal held that he was wrong in so doing. The Court held that the expert's decision on whether or not the minerals were exhausted was one that would have been binding on the parties, but only if the expert had considered the question by reference to the minerals as correctly understood. In this case he had not, and the mistake therefore vitiated his decision and the parties were not bound by his determination.

### An explanation too far

In considering the question of whether or not an expert had departed from the terms of the contract or had made a mistake, the Court held that it was entitled to look at all materials relevant to the expert's decision, and that these included any statement of reasons or any correspondence in which he had commented on or clarified his reasons.

The correspondence between the expert and Homepace was, therefore, material that could be properly put before the court and considered in deciding: (i) which factors the expert had taken into account; (ii) whether he had departed from the terms of the lease; and (iii) whether he had made a mistake in his understanding of its terms. Lloyd LJ quoting Dillon LJ in *Jones* said:

*'... the real question is whether it is possible to say from all the evidence which is properly before the court, and not only from the valuation or certificate itself, what the valuer or certifier has done and why he has done it.'*

The Court noted, however, that unless the parties have agreed otherwise, an expert is not required to state the reasons for his decision. If he has not done so, the Court is not entitled to draw inferences as to what those reasons might have been (c.f. *Morgan Sindall plc -v- Sawston Farms (Cambs) Ltd*<sup>3</sup>).

Bearing in mind that an expert determiner is personally liable in negligence, it is vital to adhere to the exact terms of the clause that sets out what is required. Indeed, such clauses should be drafted with care and precision. The Court's confirmation that the expert is not required to give reasons for his decision (save where the clause expressly provides otherwise), and having regard to the scope that written reasons give for a challenge, the expert would probably be wise to **refrain from giving reasons or entering into explanatory correspondence regarding the decision.**

### Expert determination and limitation

Actions in contract are, of course, subject to the Limitations Act. In normal circumstances they will become statute barred after 6 years has elapsed from the date the cause of action arose. This means, effectively, that proceedings must be commenced within the limitation period or, alternatively, the parties must enter into a 'standstill agreement' to preserve the position.

In *Braceforce Warehousing Ltd -v- Mediterranean Shipping Co (UK) Ltd*<sup>4</sup> the Court was asked to rule on several issues relating to expert determination and limitation. In the course of doing so, it raised an interesting dilemma. In an expert determination there is, of course, no formal issue of proceedings. Two questions arose:

- At what point can expert determination proceedings be reasonably said to have commenced?

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*Experts carry liability in negligence*

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*Issue of legal proceedings does not override the right to ED*

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- Can the issue of proceedings override the contractual agreement if one party thought the nature of the dispute was unsuitable for expert determination?

The facts of the dispute were as follows. The parties entered into a commercial agreement in 2001 by which the claimant agreed to build a warehouse and then lease it to the defendant. The defendant subsequently claimed that the building work was defective. The 2001 agreement contained an expert determination clause. This provided that, in the event of a dispute, the parties would agree on an expert to determine it or, if they were unable to agree a suitable choice, an expert would be appointed by the Royal Institution of Chartered Surveyors (RICS).

As the end of the 6-year limitation period was fast approaching, the parties entered into a standstill agreement that was to extend the limitation to 6 December 2008. On 24 November 2008, the defendant wrote to the claimant notifying them of their nomination of an expert and also inviting the claimant to enter into a further standstill agreement. The claimant did not respond and on 28 November issued proceedings in the civil court. In the interim, the defendant had applied, on 8 December, to RICS for the appointment of an expert, who was duly appointed on 28 January 2009.

#### **A matter of timing**

Relying on the limitation point, the claimant disputed the expert's jurisdiction. They argued that on 6 December 2008 the right to have the matter resolved by expert determination had been lost, and contended that the expert determination procedure was out of time – it was begun by the application to RICS on 8 December. The amount in dispute was significant; in the claimant's view, the case was more suited to determination by the court than by the RICS expert.

The defendant countered that the expert determination procedure was commenced by their letter of 24 November, notwithstanding that the claimant had failed to respond to their choice of expert. So far as the suitability of expert determination was concerned, the claimant argued that the court proceedings should be stayed until such time as it appeared that there were issues in the dispute that could not be dealt with by the expert.

Both parties were in agreement that the Limitation Act applied to expert determination proceedings and they did not require the court to make a finding on this point. However, Ramsay J, hearing the application to stay proceedings, made it clear in his judgment that he was by no means sure that the Act did, in fact, apply.

Commenting on the specific applications, the judge held that the clear intention of the parties contained in the letter of 14 November was to extend the limitation period by 1 year to 6 December 2008. The letter contained no

contractual time bar on the defendant's ability to commence expert determination proceedings. Even if it did, Ramsay J took the view that the expert determination procedure had effectively been commenced by the letter of 24 November, and that this would have been sufficient to stop time running.

So far as the suitability, or otherwise, of expert determination was concerned, the judge said that it was generally the case that parties should be held to the terms of their contracts, although the court always retained some discretion in the matter. In the present case, the fact that the claimant had commenced proceedings and now considered the chosen method of dispute resolution unsuitable were not factors of sufficient weight to avoid the contractual agreement.

#### **Limit of limitation**

Because the parties had not asked for a ruling on the application of the Limitation Act to expert determination proceedings, the judge gave no specific reasons in his judgment for his doubts that the Act applied. This is to be regretted because, if the judge is correct in his view, the effects are potentially far reaching. Section 5 of the Limitation Act 1980 provides that:

*'... an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued...'*

It is presumed that, in deciding that the Act did not apply to expert determinations, Ramsay J was mindful of Section 38 of the Act defining 'action' as 'any proceeding in a court of law'. He evidently decided that expert determination (and presumably any other non-judicial form of ADR) did not satisfy the Act's definition of an action.

The position is now somewhat uncertain. If, as Ramsay J suspects, the Limitation Act has no application in expert determination clauses, parties to such agreements will have to frame the clause with much more caution. If there are to be specific time limits on the period during which an expert determination must be commenced, it is recommended that these should now be inserted into the contract. To satisfy the requirements of any self-imposed limitation period, the expert determination will then be deemed to begin at the point that one party serves notice on the other, nominating or requiring agreement to a proposed expert, unless the clause provides otherwise.

Conversely, it must now be equally in doubt whether the commencement of expert determination proceedings will operate to stop time running for the purposes of issuing judicial proceedings. It may mean, therefore, that, notwithstanding imminent or ongoing expert determination, parties will need to issue protective court proceedings within the statutory limitation period, with an application to stay proceedings pending the outcome of any expert determination.

#### **References**

<sup>1</sup>*Homepace Limited -v- SITA South East Limited* [2008] EWCA Civ 1.

<sup>2</sup>*Jones -v- Sherwood Services Limited plc* [1992] 1 WLR 277.

<sup>3</sup>*Morgan Sindall plc -v- Sawston Farms (Cambs) Ltd* [1999] 1 EGLR 90.

<sup>4</sup>*Braceforce Warehousing Ltd -v- Mediterranean Shipping Co (UK) Ltd* [2009] EWHC 3839.

# Custom and practice

The law in relation to the interpretation of contracts and commercial agreements has long allowed evidence to be adduced in relation to the customs of a particular locality or the usage of a particular trade. The argument runs that, when construing and interpreting contractual terms, the court needs to know what was reasonably in the minds of the parties. In deciding this, the court may take account of the customs of the locality in which the parties live or carry out business, or the usage given to certain words and expressions by their trade. This is considered relevant to the interpretation of the contract if it forms part of the background knowledge available to the parties at the time the contract is entered into (see *Investors Compensation Scheme Ltd -v- West Bromwich Building Society*<sup>1</sup>). Extrinsic evidence is admissible in demonstrating the existence of such customs.

However, there has been an important proviso to this general rule. In *Cunliffe-Owen -v- Teather and Greenwood*<sup>2</sup> the court said that such evidence was only permitted where the custom was 'notorious, certain and reasonable'. This means that evidence of market practice can be admitted only where its meaning is so well known in that market as to lead to a term being implied. The notorious market practice must also be certain and reasonable and must not be illegal.

In some cases, market practices that fall within these definitions can be proved in evidence. In a few cases, though, they are so well known and accepted that judicial notice can be taken of them without the need for their existence to be proved in formal evidence. Importantly, mere trade practice was not considered admissible in construing contracts unless it fell within the notorious usage rule.

Recently there has been some shifting in the view taken by the court in cases of mere trade practice. Potentially this creates a new category of evidence that the courts did not previously allow, and may provide a new area of work for experts engaged in commercial fields.

In *Thomas Crema -v- Cenkos Securities plc*<sup>3</sup>, the court was asked to consider trade practice that fell short of notorious usage as part of the 'factual matrix or background' in construing a commercial agreement. The claimant was an investment banker in the City who was engaged as a sub-broker by the defendant, a stock broker. The claimant said that he had been responsible for raising £18 million out of a total of £20 million in connection with fundraising for a company called Green Park Ventures. This, said the claimant, entitled him to a payment of 70% of 7% of the sum he had raised. The defendant disputed the sum claimed but contended, in any event, that the claimant was only entitled to receive payment out of money actually received from the company, as this was the custom of the City. As Green Park Ventures had become insolvent, the defendant had received no

brokerage from them. He argued, therefore, that he was not obliged to pay the sum claimed.

Both parties called expert evidence on commercial practice in the City of London in relation to payment of sub-brokers. The experts were in broad agreement that there was a general market practice in the City that sub-brokers would not be paid until the broker had received a fee from the client. It was clear, however, that this was merely an understanding amongst commercial brokers in the City and it fell far short of being a notorious custom.

The claimant argued that as soon as it became apparent that a practice fell outside the rule, the court could not consider further evidence of it in relation to the agreement or its interpretation. Relying partly on the *Investors Compensation Scheme* case, the defendant put forward the counter-argument that the court was perfectly entitled to look at trade or commercial practice as part of the factual matrix that formed the background to the agreement.

The judge, Jonathan Hirst QC sitting as a deputy judge, distinguished the case from previous authorities (and in particular *Cunliffe-Owen*) on the ground that, at the time those cases were decided, the courts took a more restrictive view of the admissibility of evidence relating to the construction of contracts. He also made a distinction between evidence of notorious usage and evidence of background knowledge. Notorious custom, he said, might be applied so as to bind the parties even though one or other of them might be wholly ignorant of it (although how a party could be ignorant of a notorious custom we aren't told). Ordinary trade practice, on the other hand, could only amount to background knowledge that was generally available to both parties and was simply evidence of what might reasonably have been in their minds at the time the agreement was struck. He took the view that the court was entitled to consider such evidence but that this could never, by itself, determine the meaning of the contract. Indeed, its importance and relevance would vary from case to case.

So far as the admission of evidence was concerned, the judge did not consider it a requirement that both experts should agree on whether a trade or market practice had been established. It was for the court to decide on this, and this was not subject to whether or not there was agreement between the experts.

It must be conceded that, in deciding the case in the defendant's favour, the judge ultimately based his decision on the facts and not on the evidence of market practice. That said, however, it is significant that he was prepared to consider general market practice in the course of the proceedings. The decision does appear to open the way for expert evidence in future cases where evidence of ordinary trade practice might become admissible.

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*Custom must be  
notorious, certain  
and reasonable*

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## References

<sup>1</sup>*Investors Compensation Scheme Ltd -v- West Bromwich Building Society* [1998] 1 WLR 896.

<sup>2</sup>*Cunliffe-Owen -v- Teather and Greenwood* [1967] 1 WLR 1421.

<sup>3</sup>*Thomas Crema -v- Cenkos Securities plc* [2010] EWHC 461.

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