Your Witness

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The Jackson Reforms and costs budgets

The 'Jackson Reforms' (see *Your Witness* 60, June 2010) will alter the way personal injury practitioners conduct litigation. One significant change concerns the way in which multi-track cases (those worth £25,000 or more) are run. From April 2013, claimant solicitors will be required to file a *costs budget* with the court soon after a defence is received. This is, of course, at a very early stage in the litigation process.

The costs budget is:

- a report on **costs that have been incurred** and
- an estimate of the **costs to be incurred** from the date of the budget up to and including any trial.

This budget will be considered by the opponent on the case and be the subject of legal argument. The court can, and is likely to, make revisions to the budget and will eventually make a *Costs Management Order* specifying the budget.

The costs budget includes not only the solicitors' estimated charges, but also specific estimates for counsels' fees, all experts' fees and any disbursements. Once a case ends, the costs recovered from the opponent will, in all probability, not be allowed to exceed the costs set out in the Costs Management Order.

It is going to be important that solicitors can include in the costs budget an accurate estimate of all potential expert witness fees and expenses. Otherwise there will be an underestimate in the costs budget and that is going to lead to problems recovering the expert's fees and expenses.

So, from April, you should be on the look out for solicitors asking for an 'estimate of fees'. In providing the same, you will want to be sure that all possible stages of a case are considered. For example, re-examining the client and preparing a supplemental report; reviewing reports prepared by other experts; reviewing documentation; attending case conferences; preparing joint statements; and attending trial to give evidence in person.

Of course, your contractual relationship is with your instructing solicitor. If the contract stipulates that your cost estimates are not binding, then if the total work exceeds the estimates your solicitor will be contractually liable for the shortfall.

If that is how you see it, then doubtless you will think that it should be up to the solicitors to schedule realistic costs if they want to be able to claim them back. If you are more of a pragmatist, you will understand that it's not going to be easy to tie down costs so early in a case. If costs budgets will be assumed to be fixed, that is just going to make it more difficult for the lawyer to obtain the full costs. As always, any problem your instructing lawyer has in getting paid will likely be a source of frustration for you down the line, so take care!

Goldring accuses experts of fee padding

Lord Justice Goldring, speaking at the Bond Solon Conference in November 2012, warned expert witnesses against 'fee padding' to artificially increase their fees. He said that, in 2011, £160 million had been spent from the public purse on experts' fees but that, following attempts by government to impose checks on this by the introduction of hourly fee rates, the number of hours worked by experts on a case-by-case basis had 'increased significantly'. Goldring said that the cynical view was that experts were 'padding it out' to get the same fees they had received before. He said that if this was the case, it was 'wholly unacceptable' and likely to lead to some sort of capping by a fixed fee regime.

Perhaps unsurprisingly, the judge's comments have met with a somewhat frosty reception from experts. Indeed, many feel that the Legal Services Commission (LSC) now has only one role: to cut expenditure in any way possible. Goldring might believe experts to be 'cynical' in seeking artificially to maintain their fee levels, but experts would have to go far to match the cynicism of the LSC. It has sought an arbitrary reduction in experts' fees without, it seems, any regard to what it actually costs an expert to produce a report. It would, perhaps, not be so bad if the LSC was honest in its approach, but to dress it up in high-sounding rhetoric and to seek to pass off the cuts as if experts were to blame is really going too far. Comments posted on the *Law Society Gazette* website do, in any event, echo my own concerns and question the accuracy of the LSC's statistics. It is pointed out that the Norgrove Family Justice Report was highly critical of the lack of systematic data collection by the LSC and the Ministry of Justice.

The LSC does not appear to have published the figures or the research upon which Lord Justice Goldring has relied, and there is no evidence to suggest that the figures are anything other than anecdotal. Even if this were not so, any suggestion that expert witnesses are being dishonest is derisory. The truth of the matter is that experts are having to be much more accurate about how they record their time. Probably, with fees pared to the bone, they are simply ensuring that they claim for every hour they have worked!

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Litigants in person and experts

Legal aid cuts likely to create flood of unrepresented litigants

As has been widely heralded, the legal aid cuts being introduced in April 2013 will largely remove public funding for private law proceedings (that part of our civil law system that involves relationships between individuals, e.g. the law of contracts). This, coupled with the current poor economic climate, will almost certainly lead to a huge increase in the number of people who choose to represent themselves in legal proceedings rather than retaining expensive lawyers.

That is not to say, however, that litigants in person are a new phenomenon. A review of literature from 1990 to 2010 was published by the Ministry of Justice in June 2011. It states:

> *'Civil cases had high levels of non-representation, particularly among defendants: 85% of individual defendants in County Court cases and 52% of High Court cases were unrepresented at some stage during their case. Most unrepresented litigants were inactive and did not participate in their case. However, a small but significant proportion of cases involved at least one active party who was unrepresented throughout the life of their case: 28% in the County Court and 17% in the High Court.'*

With this anticipated growth coming on top of cuts in spending and staff, the courts and legal groups have expressed varying degrees of horror at what this will mean in practice. In what follows, the guidance and issues identified by the legal bodies and courts are considered to see what lessons they contain for expert witnesses asked to work with litigants in person.

Civil Justice Council reports

In June 2011 a Civil Justice Council working party, '*Access to Justice for Litigants in Person*', was asked to consider the effects of, and make recommendations for, measures that might be put in place to deal with the expected flood of litigants in person. The working party acknowledged that the growth in litigants in person would be on '*a considerable scale*'. The working party made its recommendations recently in a report[1] to the Lord Chancellor and the Secretary of State for Justice; the Government's response is awaited.

Effect on expert witnesses has not been studied

The report covers a variety of measures, from the possibility of pro bono advice and assistance to the recognition that there should be a thorough review of court forms to make them more accessible to non-lawyers. So far, there has been little consideration of the effects on the instruction of suitable experts, or the specific difficulties that experts are likely to encounter. The only mention of experts focuses on an anticipated reluctance on their part to act for litigants in person. It states:

> *'When expert opinion is required for a self-represented litigant to form or be helped to form a view on the merits of a claim, or as part of the evidence required in a case, sometimes the proposed expert will decline to accept instructions unless they come from a solicitor. Unless there is good reason for this requirement in the individual case, this approach should be discouraged, including by the associations of which experts are often members. Where the approach is related to the question of payment of fees, to invite payment in advance of fees is an unobjectionable course (where the expert is unwilling, having regard to the circumstances of the self-represented litigant and the case, to act pro bono). The associations of which experts are often members might also valuably ensure that their members are themselves fully aware of relevant pre-action protocols where these deal with access to necessary documents.'*

What the courts are doing

Some courts have already made their own provisions. For example, in January 2013 a booklet was published by the Judicial Office as a self-help guide for litigants in person. The author of the 16-page guide, Mr Justice Foskett, takes litigants through each stage of the process, from giving notice and presenting documents to how to behave in court, apply for costs and seek permission to appeal. The president of the Queen's Bench Division, Sir John Thomas, recognised that court procedures may present difficulties to people unfamiliar with them, and that the guide was intended to '*smooth the way*'.

The Family Division, too, is putting in place measures that will come onto effect at the end of the summer of 2013. Speaking at a child care law conference in London on the court reform programme, Mr Justice Ryder said, in June 2012, that judges will be adopting an inquisitorial approach to family cases, limiting cross-examination by the parties themselves, to deal with the increasing number of litigants in person. Ryder said that many unrepresented parents would be coming to court without the benefit of legal advice identifying solutions to their problems or the merits or otherwise of their proposals. Neither would they have received advice on the issues the court can address. To offset this, the Judge said that the judiciary and courts service plan to devise a '*private law pathway*' – guidance telling litigants in person about the court process. The court also hoped to publish a '*statement of inquisitorial principle*' defining the judge's role in proceedings and demonstrating that, save in relation to adversarial fact-finding sufficient to make the ultimate decision before the court, the judge's function is inquisitorial.

Mr Justice Ryder said that in a typical case involving litigants in person there may be restrictions on the right of one party to cross-examine another, and there would be reliance, instead, on each party having their say, the judge identifying the issues upon which further assistance is needed and then the judge asking questions of each party directly.

It seems there is to be active discouragement of

expert evidence in this system in which the judge multi-tasks as quasi-legal advisor and judge. The use of experts will be limited, which would, said Ryder, give judges greater control over the issues that are to be determined. He added that:

> *'... the judge decides what is to be determined, what is the evidence that is necessary for that decision to be made and how it is to be tested before the court.'*

Commenting on the limited use of experts, he said that experts were, in his view, '*misused and overused*'. While he thought that there was still a place for independent social work and forensic experts to advise on issues that are outside the skill and expertise of the court, or to provide an overview of different professional elements in the most complex cases, he thought that, on the whole, the court could get by without them. Furthermore, he said materials would be provided for the court upon which judges and magistrates can rely without resort to expert evidence. These proposals relating to experts are to be contained in new rules and practice directions to be published.

Law Society's view

The Law Society, mindful that, increasingly, the opposing party in proceedings might be a litigant in person, published guidance for solicitors in April 2012. The practice note considers the issues that solicitors should take into account in their dealings with litigants in person, including managing any conflict between duties to the court and duties to the client. Solicitors are warned against misleading or taking unfair advantage of litigants in person, but provision is also made for assistance to the litigant in person and deferring to any 'latitude' the court may offer.

Solicitors are expected to avoid technical language or legal jargon and to provide copies of any pre-action or special protocols that apply. They are also expected to carry out the bulk of the preparatory work, such as preparing court bundles and providing written arguments and documents to the court and the litigant in person in good time before any hearing. It is left to the solicitors to decide whether they choose to do this additional work at their own expense or whether they will seek to pass this on to their client, providing they keep their client informed from the outset, of course.

What is a litigant in person?

There is no single authoritative definition of the phrase 'litigant in person'. Generally, it is understood to refer to a party to litigation who is acting on his or her own behalf, without a legal representative, and who is both acting on the record and authorised to conduct litigation under the Legal Services Act 2007 (LSA 2007).

The Civil Procedure Rules (CPR) do not define 'litigant in person', but are consistent with the above definition. They refer to certain acts that must be done either by the party or the party's legal representative, for example, signing of the statement of truth in certain documents (CPR PD 22.3.1). Provided there is no question over mental capacity, a litigant in person has the right to conduct the litigation, to appear in court and, indeed, to take any steps in relation to the litigation.

A litigant in person has a right of audience before any court and the right to call and examine witnesses (paragraph 3(1), Schedule 2, LSA 2007). These rights are personal rights and cannot be delegated, save under the LSA 2007.

Therefore, litigants in person cannot conduct their litigation or represent themselves in court through or by anyone other than an authorised legal representative or person who is exempt under the LSA 2007[2].

For the purposes of a litigant in person, the '*conduct of litigation*' means the:

- issuing of proceedings in any court in England and Wales
- commencement, prosecution and defence of such proceedings, and
- performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions) (paragraph 4(1), Schedule 2, LSA 2007).

The meaning of 'ancillary functions' is considered to refer to the formal steps required in the conduct of the litigation. The dividing line between steps that do and do not amount to the 'conduct of litigation' is a question of importance for anyone assisting the litigant in person because unless they are authorised or exempt under the LSA 2007, they cannot lawfully carry out any function that falls within the definition of 'conduct of litigation'.

Expert witness fees and disbursements

A litigant in person can recover costs for the same categories of work that would have been allowed if the work had been done by a legal representative (CPR 48.6(3)(a)(i)). Similarly, a litigant in person can recover only the same types of disbursement as would have been allowed if the disbursements had been made by a legal representative (CPR 48.6(3)(a)(ii)). The obvious examples are counsel's and expert witness fees. However, allowable disbursements do not include disbursements for the work that a legal representative (if instructed) would have done.

For example, in *Agassi -v- Robinson*[3] a litigant in person engaged a member of the Chartered Institute of Taxation to instruct counsel in relation to a tax appeal. The court held that this was work that would normally have been done by a solicitor instructed to conduct the appeal. Consequently the payments made to the tax expert could not be claimed as a disbursement. The court, however, did recognise that there could be a thin line between legal services and the provision of expert advice. Without deciding

Judges expected to guide litigants through the legal process

Litigants in person can recover expert witness fees from the losing party

Quality of instructions likely to be poor

the point, it said that part of the tax expert's fees might be recoverable as a disbursement if they amounted to expert fees for specialist work which would *not* normally be done by a solicitor. The only exception to this would appear to be in relation to claims for costs.

CPR 48.6(3)(c) provides that a litigant in person can recover the costs of obtaining expert assistance from a law costs draftsman who is a member of the Academy of Experts or the Expert Witness Institute, or a Fellow of the Association of Law Costs Draftsmen.

Expert's instructions

Given that a litigant in person is authorised to instruct an expert witness and call expert evidence, there is a greatly increased risk that the accuracy and quality of the instructions will fall below that normally to be expected (although even the general quality of instructions from lawyers has fallen in recent years).

An expert witness who might not be familiar with court practices and procedures will not have the guidance and assistance of an instructing solicitor, and may also be without the benefit of costs warnings. Since *Jones -v- Kaney*[4] and *Phillips -v- Symes*[5], solicitors have known that it is important to warn expert witnesses they instruct that a costs order could be made against them if they are found to have '*acted recklessly or in flagrant disregard*' of their duties to the court. The court in *Phillips* said that experts should be referred by the instructing solicitor to the relevant sections of the CPR and the declaration that experts must sign. Clearly, without an instructing solicitor, the novice expert could be in some jeopardy.

One only hopes that the 'leeway' the courts will give litigants in person will extend to the experts they instruct. In any event, experts instructed by litigants in person should avail themselves of the right to seek guidance from the court on any aspect of their instructions or procedure about which they are unsure.

The rules in some courts do provide for assistance to be given by solicitors and counsel for the other parties, and this is something that is likely to become more prevalent. The *Admiralty and Commercial Court Guide*, for instance, states that:

> *'... where a litigant in person is involved in a case the court will expect solicitors and counsel for other parties to do what they reasonably can to ensure that he has a fair opportunity to prepare and put his case.'*

Litigants are far more emotionally engaged

Chapter 15 of the *Chancery Guide* includes a section on litigants in person. It specifies that, while it is not the function of court officials to give legal advice, they will do their best to assist any litigants. Furthermore, representatives for other parties must treat litigants in person with consideration. It is possible, then, that the court might consider it reasonable that some assistance be expected with some aspects of the expert evidence and the expert's instructions.

Course of proceedings

As recognised by the Law Society in its guidance to solicitors, the involvement of a litigant in person will often slow down the litigation process – judges may have to take time to explain proceedings, and will wish to ensure that all parties are 'court ready'.

Solicitors are reminded that correspondence and telephone calls from some litigants in person may be emotive, repetitive and potentially hostile. Responses, they say, should be relevant, measured and calm, and solicitors should behave in a manner of which the court would approve. This includes treating litigants in person with courtesy and in a way that an ordinary person would regard as fair and reasonable.

Their duty to the court and, for solicitors, to their own client, should be their primary consideration throughout. This is likely to be no less relevant advice for experts.

Experts should also bear in mind that litigants in person have a personal stake in the outcome of proceedings. This is likely to make them emotionally engaged, demanding and less likely to settle cases at an early stage. (Mind you, with many lawyers now having a financial stake in their clients' cases, perhaps this isn't going to be that much of a culture shock!) Indeed, experts should be wary of getting caught up in the litigant in person's enthusiasm and falling into acting as an advocate or 'hired gun'.

Experts should bear in mind that examination (and cross-examination where the opposing party is a litigant in person) can be emotionally charged. Family cases, in particular, can involve litigants in person who are particularly angry or upset, or even vexatious. However, questioning should not be aggressive, and the judge should intervene if the boundary is deemed to have been crossed.

One of the difficulties posed by litigants in person is that they often lack the necessary knowledge and skills to both instruct appropriate experts and assess the weight and probative value of the evidence. This is particularly true in litigation such as patent cases, where the evidence is technical and the court requires the expert evidence to be competent and thoroughly tested in cross-examination. This was amply demonstrated in *Tamglass -v- Luoyang North Glass Technology*[6].

In that case, involving a patent, a Chinese company sacked its English lawyers and represented itself through an employee. It also instructed its own expert who, the court found, was not independent, was not instructed as to the English rules on the conduct of expert witnesses, and did not understand the necessary approach to issues of validity. Furthermore, he had written his expert report in Mandarin, and had signed the English translation without any indication that he knew what he was signing. To compound matters, the opposing expert was not cross-examined at all by the litigant in person, the

result being, unsurprisingly, that the judge found all the expert evidence to be of little assistance.

Claims against experts

Unfortunately the increased numbers of litigants in person is almost certain to result in more claims against experts. Indeed, litigants in person will be more prone to make claims against the lawyers, the judge and anyone else who does not agree with them! A great number of these claims are likely to be spurious or vexatious, or will arise from a lack of legal and procedural knowledge. Nevertheless, with the removal of expert immunity by *Jones -v- Kaney*, the risk of suit by litigants in person will, no doubt, become something of an occupational hazard.

Such claims are likely to be given short shrift by the courts, though, provided the expert has complied with the overriding duty, as defined by the CPR, and has not acted recklessly or in flagrant disregard of such duties. (Note that expert witnesses are, of course, still immune from claims brought against them by an opposing party, as opposed to their own client.)

Although the experienced expert witness might be expected to assist a litigant in person in understanding procedural matters in relation to the expert evidence and the contents and preparation of the report, the expert should strictly avoid anything that might be seen as straying into the territory of a legal advisor. In particular, no expert should give advice on the legal merits of a claim or do anything that could be ascribed to the role of a solicitor.

The reasons for this are two-fold. First, the costs of work that falls within the definition of 'conduct of litigation' are unlikely to be recoverable. Second, such experts will be left open to a claim if any advice given, or work done, falls outside the scope of their expertise and the litigant in person relied upon it.

Expert's fee

Experts should bear in mind that one of the principal reasons that a litigant in person is unrepresented is likely to be that they are unable to afford the cost of a solicitor.

Guidance to solicitors issued by the Law Society dictates that, where the other party in litigation is unrepresented, solicitors must advise their client that, even if they are successful and are awarded costs, there is the risk that the litigant in person may not be able to pay the costs. Solicitors must also advise their client that, where the other party is unrepresented, this could lengthen the proceedings and add to the client's own costs and to the costs of proceedings generally. Furthermore, a litigant in person can recover those costs if successful.

It must also be recognise that a litigant in person might have difficulty in meeting the expert's fee. In addition, the time and expense to the expert may well be increased by the litigant in person's lack of legal knowledge. While CPR 48.6(3)(a) permits the litigant in person, if successful, to recover expert fees as a disbursement from the other party, this is likely to be a long process.

Note that if the other party is also unrepresented, there is always the possibility that the expert fee will not be recovered at all! Paragraph 156 of *Access to Justice for Litigants in Person* anticipates that experts might, consequently, have some reluctance in accepting instructions from litigants in person. The Civil Justice Council's working party offers the hopeful solution that, in some cases, experts might consider taking pro bono work. If not, then it acknowledges, somewhat grudgingly, that it is not unreasonable for experts to ask for payment to be made in advance.

Conclusions

The rise in the numbers of litigants in person is likely to create tension in an already strained justice system. Lack of public funding and the increased numbers of litigants who are unrepresented or on conditional fee agreements will place opposing parties in the unenviable position that their costs will be increased and their chances of recovering those costs will be reduced.

Lord Hoffman has spoken of the inherent 'chilling effect' or 'ransom factor'. This is the fear of involvement in proceedings involving litigants in person and the temptation for parties to pay something to be rid of the potentially costly litigation, regardless of the real merits of the claim. This, he said, was a situation that could not have arisen in the past and is very much a modern development.

Changes in the law relating to conditional fee agreements may improve the situation of some defendants but it will not make any difference in cases where claimants are litigants in person. Consequently, there will be some pressure on judges to redress the balance. Although the interests of justice may require the courts to give litigants in person some latitude, the court must also exercise with great care its powers of case management in the light of the overriding objective. This means identifying at an early stage cases that cannot succeed and taking robust action to prevent them running on to the detriment of the parties and everyone else involved.

So far as experts are concerned, although the working party feels they should be encouraged to act for litigants in person, they will be subject to the same 'chilling effect'. Experts must consider carefully the implications of accepting such instructions. Certainly, they should ensure that, unless they are undertaking to act pro bono, payment should be sought up front.

Possibly Ryder J has it right... that litigants in person and expert witnesses just don't mix. Save in exceptional circumstances, experts should keep out of cases involving litigants in person. Rightly or wrongly, there will certainly be a temptation to do so.

There'll be a strong temptation to not get involved!

References

[1] See *http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/self-represented-litigants.htm*

[2] See *Gregory -v- Turner* [2003] *EWCA Civ* 183.

[3] *Agassi -v- Robinson (Her Majesty's Inspector of Taxes)* [2006] *UKHL* 23.

[4] *Jones -v- Kaney* [2011] *UKSC* 13.

[5] *Phillips -v- Symes (No. 2)* [2004] *EWHC* 2330.

[6] *Tamglass Limited Oy -v- Luoyang North Glass Technology Company Limited and Nov Aglaze Limited* [2006] *EWHC* 65 (Ch).

Determining jurisdiction

Court can override ED decision even if parties agreed to be bound

There is a general presumption that, where parties have made an agreement for a particular form of dispute resolution, that agreement will be binding on both parties and they should be held to it[1]. In *Barclays Bank -v- Nylon Capital*[2], the Court of Appeal considered how far this presumption should be applied to the jurisdiction of an expert appointed under an expert determination (ED) clause, and whether the agreement reached by the parties could overreach the powers of the court to determine the expert's jurisdiction.

Barclays Bank -v- Nylon Capital

The case revolved around what had to be paid to whom when Barclays pulled out of a joint venture with Nylon Capital. Barclays issued claims against Nylon seeking declarations by the court that they were not obliged to pay anything. Nylon applied to stay the action in the High Court pending settlement of the dispute by way of an ED procedure provided by the agreement. The High Court rejected Nylon's arguments because it considered that the clause only applied to any dispute regarding the *amount* of any payment and not a dispute as to *whether* any payments were actually due. Nylon appealed.

The construction of an arbitration clause should start on the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship should be decided by the arbitration tribunal. Where there is any disagreement regarding the extent of an arbitrator's jurisdiction, the provisions set out in the Arbitration Act 1996 will be applied. However, a distinction is to be made between arbitrators and expert determiners. The latter are not subject to any formal procedural code and, consequently, have been subject to little control by the court.

In the first instance, the extent of jurisdiction has been for the expert to determine. In *Mercury Communications*[3], Hoffman J said that although the court might act to correct a decision-maker who has stepped outside its authority, the court should not intervene and declare in advance what the limits of that authority will be.

In the Court of Appeal, Thomas LJ, giving the leading judgment, distinguished ED clauses from arbitration clauses on the basis that arbitration is usually an alternative to court proceedings to determine all of the issues between the parties. ED clauses, on the other hand, generally presuppose that there may be more than one type of dispute resolution procedure.

Both Thomas LJ and Lord Neuberger MR made the point that the jurisdiction of the expert may be open to challenge in the courts when it involved pure points of law. The court will not generally interfere in a matter within the jurisdiction of the expert, but the scope of the mandate (including the principles on which the determination must be made as derived from the contract) could be wholly a question of law that should be considered by the court. Neuberger LJ added that there was a powerful argument for saying that a valuation by an expert, even where it was agreed to be 'final and binding', could be challenged in court if it could be shown to have been based upon a mistake of law.

Neuberger LJ thought that it would be sensible for parties to consider the referral of any point of law to the court to decide as a preliminary issue. Alternatively, if the parties agreed to leave a point of law for the expert to decide, they should seek to agree whether the expert's decision was to be final and binding. If it was not to be binding, then he thought it would be sensible for the expert to give an indication of the extent to which the determination would have differed if he had decided the point of law the other way.

The Court next considered challenges to ED on matters of procedure. Noting that there was no procedural code for ED, the court found that, unless the parties specify the procedure, then the expert determines how to proceed. It will be rare for procedural challenges to succeed.

Turning to the question of whether the expert should be permitted to decide the jurisdictional extent under the terms of any agreement, the Court of Appeal reaffirmed the ruling in *Mercury Communications*. The interests of justice and convenience will affect whether the expert or court should decide the question first. In every case, it was for the court to determine whether it was faced with a dispute that was real or hypothetical. If it was real, then it was for the court to decide whether it was in the interests of justice to determine the matter itself, rather than allowing the expert to determine it first. In the *Barclays* case it was clear that the dispute as to jurisdiction was not hypothetical and it was in the interests of justice for the court to rule on this. *Barclays* was not pre-empting the contractual machinery. It was asking for the issue of interpretation of the agreement (whether the expert was entitled to say payment was due) to be determined.

The court is the ultimate decision maker

The rationale applied by the Court of Appeal was centred firmly on the assertion that it is always the court that is the ultimate decision-maker on whether an expert has jurisdiction. Dismissing the appeal, the Court held that this was clear law. This was so even if a clause purported to confer that jurisdiction on the expert in a manner that was final and binding.

The important areas of clarification given in this case are that **it is always appropriate for the court to make the final decision on matters of law such as the expert's jurisdiction**. The question of whether the expert or court should consider the issue first should be decided by the dictates of justice and convenience.

Chris Pamplin

References

[1] *Channel Tunnel Group Ltd -v- Balfour Beatty Construction Ltd* [1993] *AC* 334.

[2] *Barclays Bank plc -v- Nylon Capital LLP* [2011] *EWCA Civ* 826.

[3] *Mercury Communications Ltd -v- The Director General of Telecommunications* [1996] 1 *WLR* 48.

Expert determination

With the growing frequency of commercial contracts making provision for expert determination (ED) where disputes arise involving technical matters, and with the courts pushing ADR, ED is likely to become an increasingly fruitful field for experts. ED is less formal than arbitration proceedings, and the inclusion of an ED clause in a commercial agreement can often avoid costly litigation when an expert opinion is needed on a disputed technical matter. Business areas where such a clause is common include broadcasting and telecommunications, IT, government procurement, energy, banking and finance.

It is important to understand the extent to which parties are free to refer matters to ED and, in particular, whether the scope of an ED clause can extend to claims for rectification, injunctions, specific performance and similar remedies. The previous article in this issue deals with *Barclays Bank -v- Nylon Capital*, which affirmed that in determining an expert's jurisdiction, the court is the ultimate decision-maker. The recently decided case of *Persimmon Homes* illustrates how such a determination may be applied in practice.

In *Persimmon Homes -v- Woodford Land*[1] there had been a lengthy dispute concerning a development site. The agreement between the parties effectively provided for 'any dispute' to be referred for ED. Notwithstanding this, the claimant issued court proceedings, claiming a number of remedies, including applications for specific performance, injunctive relief, estoppel and rectification. The defendant applied to strike out or stay all of the claimant's case (save for the rectification claim) on the ground that all of the heads of relief sought were squarely within the scope of the expert's remit, based on the wording of the dispute resolution clauses in the agreement between the parties. Relying on *Thorne -v- Courtier*[2], the defendant submitted that on its true construction, the agreement conferred an exclusive mandate on the expert to determine all of the issues.

The court considered the application of the provisions in the agreement to determine what issues could be referred to ED. Although both parties had agreed that rectification was not a remedy within the expert determiner's powers under the contract clause, the court also gave guidance on this and about what other matters could fall under the expert's mandate.

Henderson J dealt first with the question of rectification. He affirmed that rectification was a discretionary remedy and was one that only the court could grant. He pointed out that rectification would have retrospective effect, as the document in question would subsequently be read as if it had originally been drawn in its rectified form. It lies, he said, exclusively within the jurisdiction of the court to accomplish this. It is not something that can be achieved through agreement between the parties or ED.

He then went on to deal with other remedies that might come within an expert's remit – and here the position was less certain. So far as claims for an injunction or for specific performance of terms of a contract were concerned, he could see no reason, in principle, why a validly appointed expert could not order the parties to do, or refrain from doing, something, or to perform an obligation in the agreement that would, in substance, replicate an injunction or decree for specific performance. He acknowledged that an expert would not, of course, have the same powers as the court to enforce compliance or to deal with any breach. He did not, however, make any firm ruling on this and effectively left the point open.

He observed that any clause that purported to refer 'any dispute' for determination would always be a matter for construction and could not be read literally. The boundaries had to be drawn somewhere and it was for the court to decide what construction two reasonable businesspeople making the agreement would have placed on these words.

The judge thought it significant that both parties had agreed that a claim for rectification was not within the expert's scope, and that if this was not intended to come within the meaning of the terms, what was? In this case, commercial common sense suggested that the parties would have intended that the court should be free to determine any questions on construction of the agreement on which the rectification claim (which the parties agreed was outside the scope of the expert's jurisdiction) depended, along with any estoppel points based on the same facts.

This approach was also supported by procedural considerations, because determination of the rectification and related estoppel claims would require detailed evidence, disclosure of documents and cross-examination of witnesses. The fact that an expert would not have the same power as the court to make orders in relation to any of these procedural steps, or to enforce observance, suggested to the judge that the parties could not have intended these disputes to come within the scope of an expert's remit.

In this case, since rectification was a head of the claimant's claim, the court took the view that the proceedings should be allowed to continue without imposing a stay. Nothing in the agreement required associated points of construction to be referred to an expert before a rectification claim could proceed. Such a requirement would, in any event, have given rise to the risk of inconsistent decisions by the expert and the court. The parties could not reasonably have intended that. This suggested that, where a reasonable rectification claim was properly brought before the court, the court should also have jurisdiction to determine any points of construction of the provisions sought to be rectified.

Use of expert determination on the rise

References

[1] *Persimmon Homes Ltd -v- Woodford Land Ltd* [2011] *EWHC* 3109 (Ch).

[2] *Thorne -v- Courtier* [2011] *EWCA Civ* 460.

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