Development Disputes

Current issues for property litigators

Expert determinations & the powers of the Court

John Furber QC

John was called to the Bar in 1973 and took silk in 1995. His practice is principally devoted to all areas of real property law and litigation, with particular emphasis on commercial leases and issues related to property development. He is currently Chairman of the Property Bar Association and is the general editor of *Hill and Redman's Law of Landlord and Tenant*.

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Development agreements often contain provisions for the determination of specified disputes by a suitably qualified expert (for example, as to whether a 'satisfactory planning permission' has been granted, or as to the final price payable). Sometimes, all disputes between the parties may be required to be determined in this way and any such determination is often expressly stated to be 'final and binding' on the parties. By agreeing such a provision, the parties have chosen one method of dispute resolution in preference to other possibilities, such as determination by an arbitrator, subject to the provisions of the Arbitration Act 1996, or determination by a court, in accordance with the general law. The probable reason for making this choice of a method of dispute resolution, which is not subject to any established procedural code, is a perception that such an expert determination is desirable because it is both speedy and informal and also conclusive. Is this perception well-founded?

Unlike an arbitrator or a judge, who must reach a decision based on evidence put forward by the parties, an expert is in theory at least engaged to perform an essentially professional function, being the provision of an answer to the question posed, using personal expertise, being professional skill and knowledge. The obvious remedy available to a dissatisfied party, who considers that the expert has not performed the required function properly, is an action in negligence and/or breach of contract claiming damages for any loss thereby suffered.

However, in practice now the expert does not simply provide a short written answer to the question posed. In order to ensure that all relevant material is considered, the expert will often adopt a procedure akin to that more obviously appropriate to an arbitration (and indeed sometimes such procedures may be required by the terms of the agreement). He may invite the parties to put material before him and will make directions as to how this shall be done. A hearing may possibly be required, as in the recent case of *Woodford Land Ltd v Persimmon Homes Ltd*, where numerous points of law were argued before a legal expert over a couple of days. All this is done without the expert having the benefit of the powers of control given to an arbitrator by statute or to a court by the Civil Procedure Rules. The inevitable consequence of adopting a procedure of this sort, which is not in itself objectionable, is that the perceived advantage of speed and informality is at least diminished.

Further, the case law shows that an expert's determination may not be conclusive, even if the parties have apparently agreed that it should be. Although there is no right of appeal against an expert's determination, it is well established that a court can set aside such a determination, if the expert has gone outside his remit or mandate, for example by determining a different question from that referred to him. However, in the past this jurisdiction was understood to be very limited, and did not enable the court to intervene in the event of any other error of law by an expert. This dictum of Knox J in *Nikko Hotels (UK) Ltd v MEPC Plc*[1] was often quoted:[2]

> *"The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."*

1 [1991] 2 EGLR 103
2 Ibid at p 108

It now appears that this may be an over-simplification and indeed Lord Neuberger MR has said in B*arclays Bank PLC v Nylon Capital LLP*[3] that *"I do not consider that Knox J's observation…can safely be relied on"*[4]. In the *Barclays Bank case*, the Court of Appeal preferred the more elaborate description of the jurisdiction given in *Mercury Communications Ltd v The Director General of Telecommunications*,[5] where Hoffman LJ (dissenting) said:[6]

> *"So 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. This is because the court's views about the right answer to the question are irrelevant. On the other hand the court will intervene if the decision-maker has gone outside the limits of his decision making authority.*
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> *One must be careful about what is meant by 'the decision-making authority'. By a 'decision-making authority', I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. 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. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criteria."*

This description might suggest that if (i) an expert has to determine a question of law and (ii) in the view of the court he makes a wrong determination of that question then (iii) he is not determining the question in accordance with the mandate given him, so that the court may then intervene (see the observations of Thomas LJ in the *Barclays Bank* case).[7] It is important to emphasise that the Court of Appeal did not have to decide in the *Barclays Bank* case that the law is as stated above, as the court was there concerned with an issue as to jurisdiction, and not with *"an issue relating to interpretation of the mandate given to the expert in relation to a dispute where it is accepted the dispute is within his jurisdiction"* (using the language of Thomas LJ).[8] However, this is not the first time that the analysis of Hoffmann LJ has been quoted with approval in the Court of Appeal (see *National Grid Co Plc v M25 Group Ltd).*[9]

Applying this approach (in a probably uncontroversial manner), where an expert determining a rent review must have regard to defined criteria, the parties will not be bound if he takes an erroneous view of those criteria: *Level Properties Ltd v Balls Brothers Ltd*.[10]

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3 [2011] EWCA Civ 826; [2012] Bus LR 542
4 Ibid at paragraph [66]
5 [1994] CLC 1125
6 Ibid at p1140
7 At paragraph [35]
8 At paragraph [42]
9 [1999] 1 EGLR 65, per Mummery LJ at p.68F-H
10 [2007] 2 EGLR 26

The *Barclays Bank* case is particularly interesting because Lord Neuberger MR was prepared to go further into the issue of the Court's powers than was necessary for the decision in the case and, although his reasoning is therefore not binding, his views will be very influential and do suggest how the law is developing.

After reviewing the case law (including *Nikko*) and expressing approval of the dissenting judgment of Hoffmann LJ in *Mercury*, Lord Neuberger reached the following conclusion:

> *"69. Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann LJ said in Mercury v The Director General [1994] CLC 1125, 1140: 'The parties have agreed to a decision in accordance with this meaning and no other. 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.*
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> *70. 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 qualifications, 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."*

Assuming that Lord Neuberger's views will in due course be held accurately to represent the law, what are the consequences? Although Lord Neuberger specifically refers to valuations by an expert, his observations must be applicable to all expert determinations. Similarly, although he refers to errors of law made by persons without legal qualifications, it is difficult to see why errors of law made by lawyers acting as experts (or as legal assessors advising experts) should be treated differently. The result would appear to be the creation of an unrestricted right of appeal against an expert determination on the grounds of an error of law, as compared to the "limited and prescribed" rights of appeal available under the Arbitration Act 1996. This would not be in accordance with the apparent intentions of parties who have agreed that specified issues should be referred to a person chosen for his expertise, for the purposes of reaching a final and conclusive determination. As a consequence of the exercise of this right of appeal, the views of a specialist lawyer chosen by the parties to determine a difficult issue of law might be overturned by a judge, not chosen by the parties, who might not have the specialist's familiarity with the relevant area of law.

The trend towards judicial activism is demonstrated by the recent related decisions of Henderson J in *Woodford Land Ltd v Persimmon Houses Ltd*[11] and *Persimmon Homes Ltd v Woodford Land Ltd*.[12] This litigation related to an agreement for the sale and purchase of a development site in Doncaster. The agreement contained provision for any disagreement between the parties to be referred for determination to a person of appropriate qualifications and expertise, acting as an expert and not an arbitrator, his decision to be final and binding, save for any manifest error. Numerous questions of law were referred to Mr. John Male QC for his determination; he was chosen because he is well known for his expertise in the law of property. As mentioned above, there was a hearing before Mr. Male before he reached his decision.

A number of interesting issues were raised in the litigation in the Chancery Division which followed Mr. Male's decision. For example, in *Persimmon Homes Ltd v Woodford Land Ltd* the judge was asked to make a declaration as to the meaning of one of the determinations made by Mr. Male; not surprisingly, he held that this issue ought to be referred back to Mr. Male as *"the person best placed to provide any clarification or supplementary determination that may be needed"* and that in so doing Mr. Male would *"in substance still be proceeding under the reference originally made to him"*.[13] However, the most remarkable decision reached by the judge was in *Woodford Land Ltd v Persimmon Homes Ltd* where a claim for rectification of a term of the agreement was raised. Both parties accepted that, despite the apparent width of the dispute resolution clause in the agreement, the Court had jurisdiction to determine this claim, because of the nature of the remedy sought, being a remedy that only the court can grant and which is always discretionary in its nature.[14]

Mr. Male had already reached a decision as to the true construction of the term which was the subject of the claim for rectification, apparently on the basis of a concession made by Woodford. However, the hearing by the judge in *Woodford Land Ltd v Persimmon Homes Ltd* took a course which must have surprised the parties. The Judge summarised what happened then in the later case of *Persimmon Homes Ltd v Woodford Land Ltd*:[15]

> *"Although neither side had come to Court expecting to argue the question of construction, because it had already been determined by Mr. Male in a manner that was contractually binding on them, I took the view that the court still had to consider the question as an essential preliminary to the rectification claim, and that Mr. Male's determination, although binding as a matter of contract between the parties, did not and could not bind the Court. The reason why the Court could not ignore the question of construction was that if the agreement on its true construction already had the meaning for which Woodford contended there would then be nothing for the Court to rectify. By the end of this hearing, this analysis was common ground between the parties, and I therefore began my judgment by considering the question of construction. I decided it in favour of Woodford, and thus in the opposite way from Mr. Male (before whom Woodford had in effect, conceded that Persimmon's construction was correct). This had the unfortunate result, from Woodford's point of view, that the rectification claim then had to be dismissed, although I held (obiter) that, if I was wrong on the question of construction, the rectification claim would have succeeded".*

11 [2011] EWHC 984 (Ch)
12 [2011] EWHC 3109 (Ch)
13 At paragraph [32]
14 See *Persimmon Homes Ltd v. Woodford Land Ltd* at paragraph [21]
15 At paragraph [6]

This was indeed an *"unfortunate result"*. It undoubtedly undermines the authority of a duly-appointed expert and it is difficult to see why, if the parties to litigation are contractually bound by a decision relating to the construction of an agreement, which neither has alleged to be flawed in law, the court should reopen that issue on its own initiative, even though the issue is not strictly *res judicata*. Woodford's advisers may have come to share this view, because Henderson J[16] records that Woodford *"belatedly"* wished to challenge his analysis and to contend *"that the Court was bound to deal with the rectification claim on the footing that Mr. Male's determination on the construction question was correct"*. Henderson J refused to allow Woodford to pursue this argument, but subsequently permission to appeal was granted by the Court of Appeal and the appeal was heard in May 2012. At the time of writing, no judgment has been given.

A different claim for rectification was made in *Persimmon Homes Ltd v Woodford Land Ltd* (in which an appeal was also heard in May 2012). As there was such a claim, which was within the Court's jurisdiction as explained above, Henderson J decided that other associated disputes should not be referred to Mr. Male, being firstly a question of construction *"because it covers much of the same ground as the rectification claim, and the Court would need to consider it in the context of the rectification claim"*[17] and secondly a claim based on estoppel *"because its factual connection with the rectification claim is so close, and because it is inherently unsuitable for expert determination"*.[18]

It should be clear from this brief survey that expert determination not only may no longer have the advantage of speed and informality but also may be more readily challenged in court than had previously been understood. Against this background, the intending parties to development agreements should consider whether this method of dispute resolution is commercially effective. On reflection, they may conclude that the statutory framework provided in the case of determination by an arbitrator by the provisions of the Arbitration Act 1996 and the "limited and prescribed rights" to refer to the Court given thereby, may give greater certainty in the operation of the dispute resolution procedure. So the answer to the familiar question – "arbitrator or expert?" – may in the future more often be "arbitrator".

16 At paragraph [7]
17 At paragraph [30]
18 At paragraph [31]