

Considerable expertise

Expert determinations These are governed by a strict legal framework. Joanne Wicks QC and Roger Cohen say that awareness of the rules will avoid unnecessary failures

It is common for property disputes to be resolved by an independent expert, rather than by court proceedings or arbitration. Lease terms, for example, often provide for a rent review to be determined by an expert and many development and overage agreements and other commercial property contracts include clauses under which disputes on a range of issues are to be referred to an independent expert.

This article considers the legal framework governing an expert's determination and what it means for those involved in the process.

Legal framework

First comes the contract between the disputing parties. The expert is not a party to this, but the contract defines the scope of the expert's task and is the source of his authority. If the expert strays beyond the parameters of that task, his determination will not be binding. The provisions of the contract can be supplemented or varied by a subsequent agreement between both parties, preferably in writing.

The contract will contain implied and express terms. Implied terms, for example, will invalidate any determination that is made on the basis of fraud, collusion or bias on the part of the expert. The parties will have agreed to be bound only by a determination that has been honestly given, even though the contract does not expressly say so.

Then comes the expert's contract of retainer. He may be instructed by one party only or jointly by both. The expert's key obligation is the contractual duty of care; the client's main duty is to pay the expert's fees. The expert can be sued if he does not adhere to the terms of this contract; this (subject to any limitation of liability) includes failing to exercise the skill and care of a reasonably competent professional in carrying out his task.

Third, the law imposes on the expert a duty of care to both parties, whether he is instructed by one or both of them, subject to the terms of his retainer.

Fourth, the expert is governed by the rules of his professional body, which may go beyond the minimum standards required by the law.

Issues under the contract

● **Appointments:** The contract may require the expert to have particular experience or to possess a specific characteristic. The parties may contest the expert's qualifications. If they can agree, so much the better; there will then be no doubt that the expert's decision is binding. If not, the party that has insisted on the appointment will risk paying for a decision that does not bind the other.

Before the appointment and to reduce the risk of apparent favouritism, the expert and the parties should keep contact to a minimum and communicate as much as possible in writing.

● **Procedural matters:** Unless the main contract states otherwise, the expert will generally have a free hand as to the procedure to use to reach a determination. There are, however, three limiting factors.

The first is the implied term invalidating any determination reached by fraud, collusion or bias. "Bias" here means actual not merely apparent partiality. The second concerns the express terms of the contract by which the expert is instructed. If he fails to use a particular process specified in the contract, he will be in breach. The third limitation is the term implied into the expert's retainer that he will not only act with due care and skill but will also reach his decision fairly, holding the balance between the parties. If he adopts a manifestly unfair procedure, he risks being liable in damages to those retaining him.

Some contracts impose an unrealistic timescale for reaching a determination. In such cases, it will be necessary to agree a variation to the contractual timetable at the outset, since a determination delivered outside that timescale will not be binding.

Statements of agreed facts

A statement of agreed facts (SOAF) can be a useful management tool. In arbitration, a SOAF agreed by the parties' surveyors is a legally binding contract with a special feature – it enables the arbitrator to be entitled either to enforce the statement or to release the parties from it as the demands of justice require. For example, the SOAF may be ambiguous or lead to unforeseen consequences. If so, the parties can be released from the agreement as a whole.

However, what happens if, in an expert determination, the main contract and the SOAF, or the SOAF and the independent expert's findings, conflict? The lease may provide for the hypothetical lease to be for a term of 10 years, but the SOAF may say that the lease to be valued has an assumed term of five years. The SOAF may contain nothing to suggest that the parties have agreed new provisions regarding the term of the hypothetical lease. In which case, the expert must be faithful to his instructions and value a 10-year term, unless the lease has been varied. This requires clarification from the parties.

If the expert notices that the term of the hypothetical lease is wrong, he should raise

PRINCIPLES GOVERNING THE STATUS OF EXPERT DECISIONS

● Questions as to the role of the expert, the ambit of his remit (or jurisdiction) and whether that remit is exclusive or concurrent with that of the court are to be determined by interpreting the agreement.

● If the agreement gives the expert an exclusive remit to determine a question, the jurisdiction of the court to determine that question is excluded (subject to the points below).

● If the expert, in making his determination, goes beyond his remit, for example by determining a different question from that which was remitted to him, or fails to comply

with any condition that was required of him under the agreement, the court may intervene and set aside the decision.

● Likewise, the court may set aside a decision of the expert where the agreement so provides if his determination discloses a manifest error.

● The court has jurisdiction ahead of a determination by the expert to determine a question concerning the limits of his remit or the conditions with which the expert must comply in reaching his determination.

However, it will (save in exceptional circumstances) decline to do so.



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the discrepancy with the parties. This has nothing to do with proceedings in court; the professional should do so if an instruction from the client does not meet the client's needs.

A variation of a lease must be documented with all the terms of the lease as varied stated or referred to in one document. A SOAF may not achieve this. If the lease has been validly varied, all is fine. The other possibility is that the parties are implementing the review. The review may concern office premises. No floor area is given for the hypothetical premises. The valuers agree the areas, which are documented in the SOAF. In order to have a review, the premises must be measured. Neither the lease nor the instruction to the expert has changed. The expert is entitled to adopt those measurements if, acting with reasonable skill and care, he believes them to be correct.

If in doubt, the expert should consult the parties and clarify his instructions. He must adhere to the task required by the lease.

Expert's determination

The crucial distinction between an expert and an arbitrator is that the former makes a determination based on his research, skill, experience and judgment, not simply on the evidence adduced by the parties and

their submissions. If the expert does not act with due care and skill, he will be negligent, and although his decision will be binding on the parties, it is liable to be attacked from both sides.

An expert is not obliged to give reasons for his decision unless the main contract provides for this or he has agreed to do so. In the first case, a failure to provide adequate reasons will invalidate the

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determination. In the second, it will stand, but the expert will be in breach of contract. In either case, the court may require him to give proper reasons.

If he does give reasons, they may be scrutinised by the court. The expert is not obliged to respond to queries on the way in which he has reached his decision, but if he chooses to do so, the court may also consider that explanation.

In litigation, the judge has the advantage of the slip rule: he can correct an accidental slip or omission in a judgment or order. Unless it has been agreed, the expert has no such protection. Once a determination has been made in accordance with the

provisions of the main contract, it is binding on the parties. It will cease to be so only in the unlikely event that the parties agree that it should not be so binding.

Court proceedings may be brought before or during the expert determination process to obtain guidance on how the expert is to approach his task. The process will usually be halted while the court does its work. After the determination has been

made, proceedings may be brought to challenge its validity. The question before the court will be whether the expert has done what the main contract has asked of him. A decision may be binding on the parties but nevertheless wrong; in that case, the expert is at risk of a claim for breach of contract or negligence.

The risk of the expert failing to deliver will be reduced if the parties, their advisers and the expert know what must be done and why.

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