

**ARBITRATORS AND EXPERTS
THEIR DIFFERENT FUNCTIONS**

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Introduction

1. A professional person appointed by the parties to determine a property dispute will be required to act either as an expert or as an arbitrator. The distinction is fundamental: the duties of an arbitrator and an expert are different and, in the event of error by the appointed person, the remedies of the dissatisfied parties are also different.
2. This paper will describe the distinction. In short, an arbitrator performs a quasi-judicial function, subject to various statutory provisions (see the Arbitration Act 1996), and must primarily act upon evidence put forward by the parties. An expert performs an essentially professional function, being the provision of an answer to the question posed (EG a valuation) using personal expertise, meaning professional skill and knowledge.
3. I will here devote more time to the role of the expert, as other speakers will be considering the role of the arbitrator, by reference to the powers of the court available in arbitrations, pursuant to sections 68 and 69 of the Arbitration Act 1996.

The Expert

4. The expert must use personal skill and knowledge, making such investigations as considered appropriate. He is engaged by the parties to provide an answer to a question and the most obvious remedy of a dissatisfied party who considers that the expert has not performed the required function properly would be an action in negligence and/or breach of contract claiming damages for loss thereby suffered. (For a rent review case where such a claim failed, showing the inherent difficulties, see Zubaida v. Hargreaves [1995] 1 EGLR 127).
5. In theory, the expert can proceed to answer the question without the assistance of any submissions or evidence from the parties, providing a speedy, cheap, informal resolution of the dispute. In practice, this does not now usually happen and a procedure akin to that more obviously appropriate to an arbitration is often adopted. The expert will invite the parties to put material before him and will make directions as to how this shall be done. If this course is adopted, the expert plainly must have regard to this material and may be liable for breach of duty if failing to do so. However, the expert does not have the powers given to an arbitrator by statute (for example, as to disclosure of documents) and any ability to award costs must derive from the contractual provisions between the parties whereby the appointment to act as expert is made (EG the lease).
6. Legal issues may arise which must be resolved before the question put to the expert can properly be answered. If the expert is not a lawyer, it may be necessary for him to seek legal advice and indeed there may be liability for breach of duty if such advice is not taken and followed when provided.
7. There is no possibility of an appeal as such against a decision of an expert, but the court is not entirely powerless to intervene (see the general principles identified by Lightman J in British Shipbuilders v. VSEL Consortium Plc [1997] 1 Lloyd's Rep 106, set out in full in Hill and Redman at para. A2263, Note 10). In

- particular, the court can set aside a determination if the expert has gone outside his remit, for example by determining a different question from that referred to him (as in a case where, when instructed to determine a market rent, he determines a fair rent or a reasonable rent).
8. The court cannot interfere with a bona fide decision of the expert on a matter which he has sole and exclusive power to determine (for example, whether there should be an increase in the amount of a rent payable). However, a contractual provision whereby an expert is appointed (for example, a rent review clause) may contain various directions, specifying how the required valuation is to be done (such as stipulating matters to be disregarded). The expert should then act in accordance with these directions and the court may then be able to intervene if he misconstrues them (see the decision of the Court of Appeal in National Grid Plc v. M25 Group [1999] 1 EGLR 65, showing that the court must consider whether or not the relevant agreement should be interpreted as meaning that the expert has the sole and exclusive power to construe it; compare Norwich Union Life Insurance Society v. P&O Property Holdings [1993] 1 EGLR 164 where the court found it could not intervene).
 9. In an appropriate case, where a question of law is not found to be a question which only the expert can decide, the court may determine the question by making a declaration prior to any decision of the expert, but has a discretion whether or not to do so (see the National Grid case, per Mummery LJ at p.68H/J).

The Arbitrator

10. As stated above, the arbitrator performs a quasi-judicial function, acting on evidence and submissions put before him. He therefore enjoys “immunity from suit” (see Arenson v. Casson Beckman Rutley & Co. [1977] AC 405). Instead, the Arbitration Act 1996 provides for appeals, as will be described by other speakers.

11. The arbitrator is given by statute wide and important powers relating to procedural matters. For example, he may order disclosure of documents (section 34(2)(d) AA 1996) and may make peremptory orders potentially resulting in the dismissal of a claim in the event of failure to comply with any order (section 41, AA 1996). He therefore has an ability to control procedure in a way not usually available to an expert. He has statutory power to award costs (section 61 AA 1996) whereas any power of an expert to make such an award must derive from the contract whereby he is appointed.
12. The arbitrator will be appointed on account of his professional expertise and he is entitled to use his expert knowledge to arrive at his award; however, he must use it to evaluate the evidence adduced, not to introduce new and different evidence (see Checkpoint Ltd v. Strathclyde Pension Fund [2003] 1 EGLR 1).
13. The Arbitration Act does make limited provision for the determination of a preliminary point of law by the court (see section 45). This provision is not frequently used in property arbitrations. Where legal issues are identified in an arbitration before a surveyor arbitrator, a lawyer ought to be appointed to act as a “legal assessor”, advising the arbitrator as to the law.
14. **Conclusion: which to prefer?**

The tendency for an expert to invite the submission of material from the parties means that some of the theoretical advantages of such an appointment may be lost (see paragraph 5 above). Experience shows that proceedings before an expert can become protracted and the expert does not have the statutory powers of an arbitrator to control procedure. Similarly, the arbitrator is more readily subject to judicial control. Thus, if substantial sums are at stake and/or if there are potentially disputes of a legal nature, then arbitration is probably the safer and therefore better choice.