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EXPERT DETERMINATION IN PROPERTY CONTRACTS: THE LEGAL FRAMEWORK

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INTRODUCTION

1. This paper sets out to explain and explore the legal framework in which expert determination clauses operate. It considers how expert determination compares with arbitration and court proceedings; what the advantages and disadvantages of expert determination are; the circumstances in which a determination by an expert can be challenged, or other redress obtained in the event of an adverse decision; and the tactical considerations that might apply when drafting and invoking expert determination clauses.

DOES IT MATTER ? – YES !

2. Property lawyers regularly encounter provisions that seek to refer issues or disputes to an independent expert (normally a valuer/ surveyor) for final determination, for example: Rent Review, Overage Agreements, Options, Lease Renewals, schedules of condition, compensation for surrenders/mineral extraction and fixture & fittings valuations.
3. These clauses are commonly called "expert clauses" and may take different forms, for example "speaking" decisions, which require written reasons, or "non-speaking" decisions which do not.
4. Note by way of further example:
 - 4.1. Law Society/RICS Model Form of Rent Review Clause (1985 ed):

Valuation A : Determination in default of agreement by arbitration (upwards only or upwards or downwards)

Valuation B: Determination in default of agreement by independent valuer acting as an expert (upwards only or upwards or downwards)

Valuation C: Determination in default of agreement by arbitration or by independent valuer acting as an expert at the landlord's option (upwards only or upwards or downwards)

- 4.2. "PACT" Scheme – Professional Arbitration on Court Terms, Law Society/RICS scheme for settling renewal terms, includes model schemes using expert determination.
 - 4.3. "Q.C. Clauses" - which might simply be conditions precedent (e.g. a requirement to obtain an opinion of the % chances of obtaining planning permission) or expert determination proper.
5. There are (at least) three reasons why we should understand the legal framework in which these clauses operate:
- 5.1. The clauses are prevalent – we should have a basic understanding of what they mean.
 - 5.2. If we are drafting documents, do we want include such clauses ? Or modify them for our own ends ?
 - 5.3. If we are litigating, do we want to invoke or avoid an expert determination clause ? Is it to our advantage to invoke or try and ignore an expert clause ?

COMPARISON WITH OTHER PROCEDURES

6. The latter two points engage a comparison between expert determination and other methods of resolving disputes, most notably arbitration or Court (but also ADR). Relevant considerations include:
 - 6.1. Expense (expert determination is usually cheaper)
 - 6.2. Speed (expert determination is usually speedier)
 - 6.3. Convenience (for the parties and their advisors)
 - 6.4. Expertise (getting the decision right)
 - 6.5. Privacy and confidentiality (one of the main advantages of arbitration)
 - 6.6. Costs awards (experts rarely have power, fees usually split)
 - 6.7. Finality (do you want an avenue of appeal ?)
7. Much will turn on the nature of the issue or the dispute. The obvious point to make is that, when the issue is solely one that requires an expert view (e.g. pure valuation) then that may lend itself to determination by a single expert appointed by the parties. But that is an oversimplification. Such issues are rarely cut and dried – otherwise the parties would be able to agree them without a third party. Often issues of construction or law are involved (e.g. what is the hypothetical term in a rent review).

Due Process ?

8. One important consideration is whether the parties want “due process” and the application of natural justice in determining the issue at hand. Unless the contract stipulates the contrary, there is no general standard that the rules of natural justice must be complied with, although in some cases the Courts have set aside decisions where specific instances of unfairness have been demonstrated (see below).

Final and Binding ?

9. Expert determination leads to a binding result – if it does not, it is not expert determination, it is a form of ADR. Most clauses expressly refer to the determination being “*final and binding*” sometimes with “*for all purposes*”, but sometimes with a qualification e.g. “*save for manifest error*” (see below). Once a binding procedure has been invoked, it cannot unilaterally be abandoned (but can be with the consent of all parties).
10. A comparison with other forms of procedure shows that expert determination sits in the middle of the spectrum in terms of finality and due process:

	Binding ?	Route of Appeal ?	Natural Justice/ Due Process ?
Court Proceedings	Yes	Yes	Yes
Arbitration	Yes	Yes	Yes
Adjudication (construction disputes)	Yes	No	Yes (but qualified)
Expert determination	Yes	No	No (but some exceptions)
Conciliation	No	No	No
Mediation	No	No	No

IS IT AN EXPERT CLAUSE ? - CONSTRUING THE CONTRACT

11. Whether the parties have chosen expert determination or arbitration (or something else such as a non-binding view) is a matter of construction of the relevant contractual provision. Modern leases and agreements normally make the position quite clear. Usual terms include “*acting as an expert not as an arbitrator*”, when appointing an expert. An express reference to “arbitration” or the appointment of “an arbitrator” will usually be sufficient to make the distinction the other way.

12. However, the authorities make clear that the contract must be construed as a whole and the labels and terminology used by the parties is persuasive but not conclusive (Palacath Ltd v Flanagan [1985] 2 All ER 161; Cott UK Ltd v FE Barber Ltd [1997] 3 All ER 540). The contract might describe a party as an expert, but confer powers and impose a procedure that makes him or her an arbitrator or vice versa.

13. In David Wilson Homes Ltd v Survey Services Ltd [2001] 1 All ER (Comm) 449 (CA)), the Court had to determine what character the following clause had:

"...any dispute or difference arising hereunder between the Assured and Insurers shall be referred to Queen's Counsel of the English Bar to be mutually agreed between the Insured and Assured or in the event of disagreement by the Chairman of the Bar"

14. The Judge and Court of Appeal took different views on the proper construction, with the Court of Appeal holding it was an arbitration clause, not an expert QC clause. The fact that the clause failed to say that it was final and binding did not, according to the Court of Appeal, make any difference one way or another.

EXPERT DETERMINATION COMPARED WITH ARBITRATION

15. There are similarities:

- 15.1. A consensual "ousting" of the Court determining an issue (up to a point)
- 15.2. Determination of a private individual for a binding decision.
- 15.3. Appointment of an expert in the relevant field.
- 15.4. Scope for modifying and adapting the reference – because the parties can agree (almost) anything they want.

But the differences are probably more notable:

1. No Judicial Determination by an Expert

16. One of essential characteristics of an expert determination is that it is NOT a judicial determination of a dispute, whereas an arbitration is.

"Traditionally a distinction has been drawn between the two on the basis that a tribunal must act judicially by applying the law, whereas an expert, unless the parties agree some other basis for his decision, decides according to his own expert opinion"

Russell on Arbitration (23rd ed) at 2-028. See also Bernhard Schulte GMBH v Nile Holdings Ltd [2004] 2 Lloyd's Rep 352 (below)

*"The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. **The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation.** There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."*

per Lord Esher MR in Re Carus-Wilson v Green (1887) 18 QBD 7

Need for an "Issue" but not a "Dispute" ?

17. Re Carus-Wilson has often been used to justify the distinction that an expert is appointed to determine an "issue", before a dispute has arisen, whereas the nature of judicial determination (arbitration or court) is to resolve a "dispute".
18. One of the former leading cases on construing whether a clause was intended to operate as an arbitration clause or as appointing an expert focused in particular on this distinction (Arenson v Casson Beckman Rutley & Co. [1975] 3 WLR 815).

19. However, the distinction has been largely discredited. The parties will normally be in a dispute before they appoint an expert, because they cannot agree on (say) a valuation themselves. Many clauses have words such as *"in the absence of agreement ... shall be referred to an expert appointed by the parties"*

2. Duty to Apply Own Expertise

20. A second distinguishing feature of expert determination is that the expert is to use his or her own expertise and decide the issue himself or herself, with or without the assistance of the parties (Palacath Ltd v Flanagan [1985] 2 All ER 161). Unless the contract stipulates to the contrary (which is rare), the expert can come to his or her own conclusions regardless of the parties' submissions (Bernhard Schulte GMBH v Nile Holdings Ltd [2004] 2 Lloyds Rep 352 at [95]).

21. This goes to the heart of expert determination. It is interesting to note the latest RICS Guidance Note ¹ on this issue:

"4.4.1 General

Unless limited by previous agreement, the independent expert should assume that it is preferable to verify all information and to carry out all investigations that a reasonable surveyor acting as an independent expert might be expected to carry out, together with any that he himself considers would assist him in reaching his decision. These should include:

- comparable evidence (including as appropriate independent verification);
- effect of lease terms;
- measurements/floor areas (this should be done by the independent expert and not by a member of his staff, although he may use the assistance of a member of staff);

¹ RICS Guidance Note: "Surveyors Acting as Arbitrators & as Independent Experts in Commercial Property Rent Reviews" 8th edition. Paragraph 5.1 makes clear the guidance is not limited to rent review.

- condition of the subject premises as found and as to be valued under the terms of the lease;
- planning and user; and
- any relevant matters which have not been excluded from the remit either by the lease documents or by any assumptions or limitations agreed with parties.

Even if the parties have produced a statement of agreed facts and agreed that the independent expert may rely on it, it is still the independent expert's duty to ensure that he has all the information that is necessary for him to reach his own conclusion based on his own opinions and calculations.

4.4.2 Common ground between the parties

The independent expert should assume that he cannot rely on any apparent common ground in the parties' submissions unless they have mutually agreed that this common ground can be adopted in reaching the decision.

4.4.3 Parties' representations

In most cases, the parties themselves like the opportunity of submitting an agreed statement of facts and representations (and sometimes also counter-representations). The independent expert should appreciate that, subject to any special terms attached to his appointment, he is not constrained by the limits of value set by the parties' representations.

4.4.8 Investigation

The independent expert will have to decide the weight to give to any evidence found by him or passed to him by the parties. In any event he has a duty to make his own investigations into details of all transactions which he considers might be relevant and all matters of fact affecting the rental value of the property. As a general rule it is considered to be good practice that even when the parties have produced agreed comparable evidence the independent expert should still make his own enquiries of persons with first hand knowledge of the transaction.

4.5.8 Independent expert not bound by representations

Unless the independent expert's terms of reference stipulate that the appointee is both to receive and to be bound by written representations, it follows from the nature of his task that he could be justified in finding a figure outside those which may have been put before him by the parties. If there is a direction in the lease that he is to be bound by written representations, it is possible that he may be

regarded by the court as acting as an arbitrator even if not described as such. In such circumstances, the appointed surveyor should seek to establish by agreement with the parties the nature of his appointment.

22. A previous version of this guidance received judicial approval in Wallshire Ltd v Aarons [1989] 1 EGLR 147.

23. On the other hand, an arbitral tribunal (like a court) arrives at its decision on the evidence presented to it and on the submissions of the parties and in accordance with the law applicable to the arbitration (see s.46 of the Arbitration Act 1996).

24. That said, s.46(2) of the Arbitration Act 1996 does allow the tribunal to decide the matter "*in accordance with other considerations as are agreed by the parties*" – which gives plenty of scope for the tribunal to apply its own expertise if the parties so agree.

3. Procedure

25. The procedure adopted in an expert determination is usually far more informal than an arbitration or court proceedings. It usually (but not universally) involves written submissions from both parties and/or their experts, cross submissions, (possibly) clarification of points by the expert, an informal meeting with the parties or their experts and/or site visits, culminating in the production of a decision or report. The contract will determine whether any step is compulsory.

26. This is closely connected to the issue of due process and natural justice, below.

4. Application of Arbitration Act 1996

27. The 1996 Act does not apply to an expert determination. This has important implications because the 1996 Act supplements any contractual provisions in the reference. By way of example:

No Statutory Power to Stay – of tactical importance

27.1. The power to stay proceedings in s.9 of the Act. A stay will be granted if there has been no step in the proceedings "to answer the substantive claim" and provided the clause is not void, inoperative or incapable of being performed (s.9(3)&(4))

This does not exist for expert determination and so if a party ignores an expert determination clause and issues proceedings, the Court does not have a statutory power to stay the proceedings (see David Wilson Homes Ltd v Survey Services Ltd [2001] 1 All ER (Comm) 449 at [2] (CA)).

This does not mean there is no remedy. The Court has an inherent jurisdiction to stay proceeding under s.49 SCA 1981 (Channel Tunnel Group v Balfour Beatty Construction Ltd [1993] A.C.334).

However, there is a much broader discretion on whether to grant a stay than under s.9 of the 1996 Act. The Court will consider whether the expert clause is suitable for resolving the dispute; whether the agreed machinery is workable; whether the issues engage points of law and (in one case) whether the parties had prepared for the hearing (see Thames Valley Power Ltd v Total Gas & Power [2006] 1 Lloyds Rep 441).

Enforcement

27.2. Under s.66 of the 1996 Act, an arbitral award may be enforced summarily with the permission of the Court as if it were a judgment of the Court. No such power exists for an expert determination. The only way to enforce such an award is to issue a separate action on the award and obtain judgement on it, which obviously adds to the expense and causes delay. It also gives the opposing party a chance to attack the award (albeit on very limited grounds – see below).

Serious Irregularity

27.3. Under s.68 of the 1996 Act, an arbitral award can be challenged if there has been a "serious irregularity" in the conduct of the arbitration. No such provision exists for expert determination – but note Worrall v Topp (below).

CHALLENGING A DETERMINATION AND OTHER REDRESS

1. No Appeal from Expert Determination

28. One of the most important practical differences between expert determination and judicial dispute resolution is that an expert's determination cannot be appealed (in the true sense) and can be challenged only in very limited circumstances. There are statutory rights of appeal in arbitration for:

- 28.1. lack of substantive jurisdiction under s.67
- 28.2. serious irregularity in the course of arbitration under s.68
- 28.3. appeal on a point of law under s.69 (for which leave is required and the conditions are onerous)

Note though it is possible to exclude the jurisdiction of the Court under s.69 by agreement – known as "exclusion agreements".

29. There is NO appeal from an expert's determination (unless, unusually, the contract stipulates to the contrary). The determination will be binding on the parties, even if it can be shown to have been wrongly decided, sometimes even if there has been a mistake in a matter of construction or law. This is the risk that the parties take when agreeing to refer their dispute to an expert.

30. The Court can however set aside the determination, but in very limited circumstances.

31. The early cases leaned to the view that a determination could be set aside if the expert made a mistake or other grounds akin to a general appeal. That is not the law now.

Material Departure From Instructions

32. The modern trend is firmly to focus on whether the expert materially departed from his or her instructions. The relevant principles were recently summarised by Cresswell J in Halifax Life Ltd v The Equitable Life Assurance Society [2007] 1 Lloyd's Rep 528:

"42 The express or implied terms of the relevant agreement determine whether the outcome of the procedure is a decision which has been made in accordance with the contract and which is binding on the parties. Those terms determine how the expert determination should be conducted. Broadly:

(1) Putting on one side cases of fraud, collusion or partiality (which are not relevant to the present dispute), 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: per Dillon LJ in Jones v Sherwood Computer Services plc [1992] 1 WLR 277 at 287.

(2) In the absence of terms of the contract which provide otherwise (such as "save for manifest error"), an expert determination cannot be challenged on the ground that the decision was mistaken, so long as the expert has answered the right question and has not otherwise materially departed from his instructions: per Knox J in Nikko Hotels (UK) Ltd v MEPC Ltd [1991] 2 EGLR 103 at 108B.

(3) The test for deciding whether an expert has materially departed from his instructions was considered in Veba Oil Supply & Trading GmbH v Petrotrade Inc [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295, Simon Brown LJ.

43 Where a contract provides that the decision of the expert is binding save for "manifest error", the expression "manifest error" refers to "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion" (see Veba Oil Supply & Trading GmbH v Petrotrade Inc [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295 at 302)."

33. Therefore, in order to nullify an expert's determination, it must be shown that the expert did not carry out the exercise or function he or she was

contracted to do. It is not enough to show he did what he was contracted to do, only wrongly. The test is very difficult to establish. A challenge failed the Nikko Hotels claim, even though it was assumed that the expert construed the contract wrongly (i.e. committed an error of law). That is because the parties had agreed to appoint the expert to construe the rent review clause and had agreed his decision would be final and binding.

34. The challenge also failed in Jones v Sherwood Computers because the accountants had valued what they were supposed to value, albeit that there may have been valid criticisms of the methodology used.
35. The challenge succeeded in Jones v Jones [1971] 1 WLR 840 because the valuer was required to instruct a named surveyor to value stock and machinery but in fact valued it himself.

Errors of Construction and Law

36. The Court will not generally speaking set aside a determination simply because the expert has made an error of law or wrongly construed a contractual provision. The key issue is what it is that the expert has been asked to determine. If the expert is asked to construe a contract, then simply because the Court finds the expert got it wrong (an error of law) will not be sufficient to set it aside (Nikko Hotels (UK) Ltd v MEPC Ltd, above and Ponstarn Investments Ltd v Kansalis Osaki Panki [1992] 22 EG 103).
37. However, there is also a line of authority to the effect that an expert can be instructed to construe the contract correctly and that a failure to do so will be a departure from his instructions (see Mercury Communications Ltd v Director General of Telecommunications [1996] 1 W.L.R. 48). In Homepcae Ltd v Sita South East [2008] P&CR 24 the Court of Appeal set aside an expert's certificate based an erroneous interpretation of the word "minerals" on the ground that the mining lease in question had not, properly construed, delegated the question of construction of that term to the expert. That case also held that letters written by the expert after the determination could be used to show that he had made an error.

38. In Postel Properties v Daichi Lire (1993) 65 P&CR 244, it was held that even though a Court would not upset a determination once made, even if the Court was sure that it was based on an erroneous construction, it could make a ruling on a point of construction in advance of the expert's determination. The Court left open the question of whether an expert would be bound to follow the Court's ruling. Technically, it would seem that an expert would not be so bound, but the Court described this possibility as more theoretical than real.
39. Unless stated to the contrary, an expert will be required to come to a decision in accordance with English Law. A failure to do so will be a departure from instructions.
40. Most of the cases dealing with errors of law have been concerned with errors of construction. It must be doubtful whether the Courts would adopt such a rigid approach in a case of an error of black letter law, for example, if an expert applied a repealed statute or had regard to authority that had been overruled.

No General Duty to Apply Natural Justice

41. It follows from the non-judicial nature of expert determination that there is no general duty to apply natural justice in the decision making. This was most recently affirmed in Bernhard Schulte GMBH v Nile Holdings Ltd [2004] 2 Lloyds Rep 352, Cooke J.

95. There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed. There is no useful purpose in phraseology such as "quasi judicial" or "quasi arbitral" as Lord Simon made plain in Arenson and although the use of the word "expert" is not conclusive, the historic phrase "acting as an expert and not as an arbitrator" connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves. Although, contrary to what is said in some of the authorities, there are many expert determinations of matters where disputes have already arisen between the parties, there is a difference in the nature of the decision made and as Kendall points out in pars. 1.2,

15.6.1. and 16.9.1. **the distinction is drawn and the effect spelt out, namely that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties."**

42. An example of this is bias. It is not enough for there to be perceived partiality in a determination - actual bias must be established (Macro v Thompson (No.3) [1997] 2 BCLC 36)

43. However, the authorities do not speak entirely with one voice. In Worrall v Topp [2007] EWHC 1809, Kitchen J. held that an independent expert did have an implied duty to act fairly. Specifically, an expert was obliged to ensure that communications from one party were copied to all other parties so that they could comment on them: "*fairness must generally demand that each party should have an opportunity to respond to contentions made by any other party*". But query – is this misconstruing the nature of expert determination and seeking to impose a quasi - judicial function ?

44. In the event, the Judge held that the lapse was not so serious and that the decision was made in accordance with the terms of the contract.

45. In Halifax Life Ltd v The Equitable Life Assurance Society [2007] 1 Lloyd's Rep 528, Cresswell J. held that an expert was under a duty to give reasons for his or her decision BUT only because, in that case, the terms of contractual provisions stipulated that the decision was to be binding "*save for manifest error*". It was therefore a necessary implication that the expert had to give reasons, otherwise it would be impossible to ascertain whether there had been manifest error. It is doubtful whether there is a freestanding duty for an expert to give reasons – everything will depend on the contractual provision dealing with the appointment.

2. No Immunity from Suit - Experts can be Sued

46. Another important distinction between an expert determination and an arbitration is that an arbitrator has immunity from suit because he or she is

exercising a judicial function. The immunity is statutory and conferred by s.29 of the 1996 Act (but appears not to covers acts of bad faith).

47. Experts have no such immunity. On the contrary, because they act as an expert appointed by the parties, they owe common law duties to those who appoint them (see Arenson v Casson Beckman Rutely & Co, above, and Currys Group plc v Martin [1999] 3 EGLR 165, in which it was held that there is no difference between the duties owed by a valuer appointed by a single party and an expert appointed jointly by the parties.

48. In Bernhard Schulte GMBH v Nile Holdings Ltd, Cooke J. held:

"94. The lack of immunity for experts, where they act negligently, was made clear by these authorities but this has nothing whatever to do with the validity or invalidity of the determination made by the expert as between the parties. The determination will be binding between them unless it can be challenged on the basis of fraud, collusion, bias or material departure from instructions, but if there has been negligence on the part of the expert, the damaged party may sue the expert in respect of any loss suffered."

49. Thus, an expert can be sued for breach of contract and/or negligence by an aggrieved party to a determination. Negligence would not be enough to set the determination aside – but it does give the aggrieved party another possible route of redress.

50. However, in the case of surveyors, the remedy may be more theoretical than real.

51. There has been considerable debate in the authorities as to whether it is essential for a claimant to show the valuation to be outside the bracket as a precondition to establishing liability, or whether it is sufficient to find specific instances of negligence in the process used. In Goldstein v Levy Gee [2003] PNLR 35, Lewison J. grappled with the conflicting authorities and ultimately decided (despite his own doubts on the coherence of the law) that he was bound by the Court of Appeal's decision in Merivale Moore v Strutt & Parker [2000] PNLR 498. He held a claimant does have to show the ultimate result is outside the bracket and that even if specific instances of negligence can be proven, this is not enough if the result is

within the accepted margin of error (at paras. 68&69). Lewison J. had particular regard to the following passage in Merivale when coming to this view:

“Various further considerations follow. First, the “bracket” is not to be determined in a mechanistic way, divorced from the facts of the instant case. We were shown a list of figures giving either the bracket determined, or the percentage divergence from the true value found nonetheless not to have been negligent, in a series of recent cases. I did not find that of assistance, save as a graphic reminder that it is not enough for a plaintiff simply to show that the valuation was different from the true value. Second, if it is shown even at the first stage that the valuer did adopt an unprofessional practice or approach, then that may be taken into account in considering whether his valuation contained an unacceptable degree of error. I think that that is what is meant by Mr Robin Stewart Q.C. in his judgment in Mount Banking Corp. v. Cooper [1992] 2 E.G.L.R. 142 at 145D . Third, where the valuation is shown to be outside the acceptable limit, that may be a strong indication that negligence has in fact occurred. That is said in Mount Banking at 145J . The judgment in that case was commended in general terms by Balcombe L.J. in Craneheath, but it is not clear how far that commendation extended to all the specific elements in it. Some caution at least has to be exercised in this respect, because the question must remain, in valuation as in any other professional negligence cases, whether the defendant has fallen foul of the Bolam principle. To find that his valuation fell outside the “bracket” is, as held by this court in Craneheath and also, I consider, by the House of Lords in Banque Lambert , a necessary condition of liability, but it cannot in itself be sufficient”.

52. There are cases which indicate a different approach may be permissible (see Neuberger J's decision in Lewisham Investment Partnerships v Morgan [1997] 2 EGLR 150 and the Court of Appeal in Arab Bank plc v John D Wood Commercial Ltd [2000] 1 WLR 857) but the balance of authority does suggest that it will not be enough merely to show negligence in the process making, but also that that the result was outside the bracket.

53. The cases also suggest that if the value is shown to be outside the bracket, then the burden shifts to the defendant to explain that despite this, there was no negligence. Moreover, if specific faults with the methodology can be established, then this may point to the end result being wrong (see the approach taken by Lewison J. in Goldstein). There is an important caveat. The bracket approach will not apply to a contractual claim where a specific breach of the terms of the retainer is alleged.

54. In the case of a joint expert – the difficulties of showing negligence are likely to be more formidable, particularly if the valuer has taken on board the submissions of the parties' surveyors and comes down on one side rather than the other. The fact that one of the parties' surveyors has put forward the case ultimately adopted by the valuer might suggest that the valuer is *Bolam* competent.

55. These difficulties no doubt caused the Editors of Simpson Encyclopaedia on Professional Negligence and Liability to state at 8.56:

"However, there is as yet no reported instance of a claimant succeeding in establishing negligence against a surveyor acting as an independent expert"

Although now see Cairns v Christie & Co. (2009) Exeter CC.

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