

## **Expert determination: A short cut through a swamp**

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"Would you like an appointment as an expert for an expert determination?" the nominating body representative asked. "Yes please" I replied. Then as an afterthought I added "Expert in what?" "Christmas decorations" he said.

And so it happened that a specialist construction lawyer found himself appointed to sort out a dispute about the quality of £1 million worth of Christmas novelties imported from the Far East. Some of them were painted with paint that may have been poisonous, some had rather dangerous pins sticking out in unexpected places, there was serious disagreement about the number of gold and silver balls supplied, and Santa's stockings allegedly didn't match the sample. Now I have experienced quite a few Christmases in my time and have quite well developed views about tinsel, but I would not have described myself as an expert in stockings.

In the event nobody quibbled about my Xmas expertise. What the parties really wanted was a lawyer who was experienced in resolving disputes. They had agreed to submit disputes to expert determination in order to avoid the costs and delays of litigation.

Expert determination clauses often pop up in construction related contracts. Construction contracts (as defined by the Housing Grants, Construction and Regeneration Act) must of course provide for adjudication, but expert determination may be chosen as the final dispute resolution procedure. Contracts that are outside the statute – such as development agreements, agreements for lease and such – are often subject to expert determination.

It sounds very attractive. When the dispute develops, bundle everything off to the "expert" who can have a look and a sniff and make a decision. You don't need lawyers, pleadings, disclosure, long hearings with cross examination of witnesses, all of which cost money and take time.

Unfortunately, one side is likely to lose, and the losing party will feel that something has gone wrong. Before including expert determination in your contract it is important to understand the differences between that process and conventional arbitration and litigation. Under the law, unlike the more conventional procedures, expert determination is considered to be a non-judicial process. Hence:

- There is no requirement for the "expert" to apply the rules of natural justice. This means that there is no right for both parties to have a fair opportunity to argue the case.
- Experts can use their own knowledge and expertise when deciding the case without giving the parties the chance to comment on what they are thinking.

- There may be no opportunity to cross examine witnesses who you think are, shall we say, suffering from poor memory.
- There is no requirement for the expert to give reasons for the decision, so you may not find out why you have won or lost.
- The courts have powers to assist arbitration proceedings by making orders for attendance of witnesses and such. If you are in expert determination, you are on your own.
- There is no right of appeal. Providing the expert has answered the question that was asked, it doesn't matter how wrong the answer is.
- It may be very difficult to enforce the decision in other countries. Whilst the UK courts will generally accept that if parties have agreed expert determination they will be bound by the consequences, the courts of some other countries see the process as being potentially unjust and will have nothing to do with it.
- The decision, unlike in adjudication, is final.

As a result, expert determination is a procedure that is not to be recommended for those of a nervous disposition. In particular, it is a very dangerous procedure if the dispute involves complicated questions of fact or law. It may work very well if the argument is about the market rent of a property or whether a defined trigger event has happened (such as the granting of planning permission), but it really isn't suitable for resolving disputes about final accounts in construction contracts.

And the objectives of speed and economy are not always achieved. The Supreme Court of Queensland gave judgment on 31 March in a construction case that started off as an expert determination process in May 2004, *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd*. There have been three experts involved to date, one arbitrator and several judges. It is likely that in the case report (the third published so far) will not be the end of matter. It would almost certainly have been cheaper to take the whole dispute either to court or arbitration from the start.