



# Falcon Chambers

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**“Navigating uncharted procedural waters: dealing with un-cooperative parties, natural justice, privilege and other procedural problems”**

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1. In Court, tribunal and arbitral proceedings, navigating the procedural steps leading up to the final determination is pretty easy. That is because there is a reasonably comprehensive body of rules telling the decision maker what he or she can and cannot do; there is a wealth of case law providing still further guidance on the meaning and proper application of those rules and, perhaps most importantly, the same procedure falls to be applied every time such that it soon becomes second nature.
2. The procedural life of an independent expert is not so easy. There is no body of rules that automatically applies to an expert determination. Instead, the rules of engagement are (hopefully) set out in the expert determination clause. Some expert determination clauses are clear in their meaning and comprehensive in their scope; others less so. Because the procedural code is a bespoke one, it is most unlikely that there will be any case law guidance on what to do in cases of doubt.

3. All this, of course, is quite deliberate. Expert determination is supposed to be a more simple and straightforward process. But the other side of that coin is that independent experts do not then have the same familiar tools to resolve particular procedural problems that may be encountered along the way. What tools does an independent expert have at his or her disposal and how should they be used? To what extent can longstanding principles of court/arbitral proceedings be imported into an expert determination to fill any gaps? Where are the procedural traps and how might they be avoided? In this paper, we will endeavour to suggest one or two answers to those questions.

**(1) *Dealing with uncooperative parties (and their legal representatives)***

4. In Court proceedings, the Court directs the parties to provide their statements of case, evidence and submissions in accordance with a timetable set out down shortly after proceedings are begun. If a party fails to comply with those directions, the Court can make an ‘unless order’ or indeed simply strike the party out. If in the course of the litigation, it becomes apparent that the trial judge will need to see particular documents or hear from a particular witness, the Court can simply make an order to that effect and, in default of compliance, can again impose meaningful sanctions.
5. But what about an expert? The latter’s armoury is not as extensive as that enjoyed by a Court. But equally, the expert is by no means helpless. We set out below some of the means by which problems of this kind may be overcome:
  - (1) The first port of call is the expert determination clause. It may be that express provision is made for the parties to disclose particular documents; call particular witnesses and/or provide their submissions in accordance with a timetable. If that is so, the Court may make an order for specific performance of the obligation that the party has failed to perform.<sup>1</sup> Accordingly, if, for example, one of the parties has declined to disclose a document that is central to the expert’s determination, the latter could invite the other party to issue proceedings for an order compelling production of the document.
  - (2) Even where the expert determination clause does *not* contain any express direction that assists in the circumstances, it will generally be an implied term of the expert determination provisions that the parties will cooperate in bringing the

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<sup>1</sup> *Bruce v Carpenter* [2006] EWHC 3301 at [26] (order requiring production of documents) and *Smith Peters* (1875) LR 20 Eq. 511 (order requiring a party to permit an inspection).

determination to a conclusion.<sup>2</sup> In an appropriate case, a failure to provide the relevant document might constitute a breach of the implied duty to cooperate which, in turn, would enable a Court to make an order for specific performance against the defaulting party. However, it is not always possible to fill in the gaps in the expert determination procedure by recourse to implied terms. In *Re Benfield Greig Group plc* [2000] BCLC 488, the expert determination clause did not contain any express provision for the parties to see information held by the other and the Court declined to imply any such right.<sup>3</sup>

- (3) The simplest solution to the problem is for the expert to simply proceed to make the determination in the absence of the relevant document or information. In *Rajdev v Becketts* [1989] 2 EGLR 144, it was held that, where a party had failed to send his representations in respect of rent review within the time allowed under the procedural provisions in the expert determination clause, the expert was entitled to proceed to make the determination in the absence of those representations. It was even said that had representations been received late (but before the determination had been made), the expert would have been entitled to disregard them.<sup>4</sup> However, an expert would be well advised to give the defaulting party fair warning before proceeding in the absence of representations or important evidence from that party, particularly in cases where the principles of natural justice may be said to apply to the expert determination (the latter are considered in the next section of this paper).
- (4) An alternative approach would be for the expert to warn the parties that production of the relevant document or other material is critical to the determination and to indicate that, absent compliance, the expert will be unable to complete the determination and/or be forced to resign. It may be that, faced with the possibility that the determination will fail to produce a result, the defaulting party will have a change of heart.
- (5) Where the expert is required, as part of the determination, to resolve contested issues of fact, the expert may be entitled to draw adverse inferences from a party's failure to provide a particular document or a statement from a particular witness. But such cases are likely to be rare.

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<sup>2</sup> *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd* [1947] AC 428 at 436 and *Wilky Property Holdings Plc v London & Surrey Investments Ltd* [2011] EWHC 2888 (Ch) at [52] – [58].

<sup>3</sup> Per Arden J at [49] – [56].

<sup>4</sup> See p147 at L.

6. Fairness dictates that we also say something about the (no doubt exceedingly rare) occasions where the expert's life is made difficult, not so much by the parties themselves, but by their advocates.
7. Here again, experts may have a harder time of it because they do not have the same far-reaching powers as Court judges do and because they are often less culturally familiar with business of bringing bolshie and verbose advocates to heel. The real harm that an advocate can do to an expert determination (other than seriously getting up the expert's nose) is to waste precious time needed to finish the determination process within the agreed or expected timetable. We set out below some of the more common advocacy misdemeanours and some suggested means of dealing with them:
  - (1) ***Banging on:*** Advocates are often guilty of making the same point in submission and/or cross-examining about it again and again and again. The reason for doing so may be because he or she thinks the point is a good one and wants to make absolutely sure that you, the expert, has got hold of it. Alternatively, it may be because it has not gained the traction that the advocate had hoped during his or her first few goes at it and the advocate wishes to bang their head against the same wall one more time. Whatever the reason, repetition does harm, not good, and experts need not abide it. A suitable prompt can be administered gently at first ("Mr Duckworth, I have understood that particular point") and then, if necessary, more firmly ("Ms Cox, you have made that point several times: now move on").
  - (2) ***The protracted whinge:*** By the time of the hearing, clients and their advocates have often got one or two bees in their bonnet about how the other side have gone about preparing their case. That often leads to time being taken up at the hearing with lengthy and impassioned speeches about how unsatisfactory/unfair it all is. It is one thing if the advocate is seeking to suggest that the expert should take some particular action (eg. adjourning the hearing of the determination to a later date); but it is often the case that the advocate is not actually asking for the expert to do anything and is simply engaging in a good, old-fashioned whinge, erroneously imagining that the expert will then consciously or sub-consciously 'have it in for' the other party. Rather than sitting back passively whilst the mud-slinging war wages, the prudent expert should cut to the chase: "Mr Duckworth are simply

making me aware of your general dissatisfaction or do you have an actual application to make and, if so, what is it?”

- (3) **Cross-examination ad infinitum:** Left to their own devices, many advocates (particularly inexperienced ones) will cross-examine for hours, days even, and in any event for far longer than is necessary to enable the expert to make his or her decision. One obvious solution to this sort of problem to set a time limit for cross-examination. That could be done by agreement at the directions stage of the process. But even if a strict time limit is not set, there is no reason why the expert should not indicate a broad aspirational timetable at the start of the hearing and then gently police it as the hearing goes along. Remind the first cross-examining advocate that he or she has now had one out of the two hours allotted for each party’s cross-examination and that fairness dictates that the second advocate’s time for cross-examination should not be unduly curtailed. You may not notice it, but we can tell you from experience that, once an advocate has a judge, arbitrator or expert starting to breathe down their neck about time, lines start to be drawn through questions that are of more peripheral significance to the advocate’s case. That, of course, is no bad thing.

**(2) Principles of Natural Justice**

8. It is appropriate to re-cap the rules of natural justice as they apply in ordinary Court or arbitral proceedings before considering whether and to what extent they also apply in the context of an expert determination. In summary, the position is as follows:

- (1) In *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 the Lands Tribunal provided the following guidance on the proper approach to be taken by an expert tribunal:

“It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision.”

- (2) In *Zermalt Holdings SA v Nu-Life Upholstery Repairs Limited* [1985] 2 EGLR 14 further assistance on the extent to which an arbitrator may make use of his own expertise was provided by Bingham J:

“I fully accept and understand the difficulties in which an expert finds himself acting as an arbitrator. There is an unavoidable inclination to rely on one's own expertise, and in respect of general matters that is not objectionable but is desirable and a very large part of the reason why an arbitrator with expert qualifications is chosen. Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mentioned so that it can be explored. It is not right that a decision should be based on specific matters that the parties have never had a chance to deal with, nor it is right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance.”

- (3) In *Irwell Valley Housing Association v O'Grady* [2015] UKUT 0310 (LC), Martin Roger QC said this (at para 32):

“What does not seem to me to be permissible in those circumstances (i.e. where the parties have engaged with the process by attending a hearing or making submissions in writing) is for the FTT to undertake further research of its own in order to make good deficiencies in the evidence after the hearing. If it wishes to do that it is necessary that it provide the parties with notice of the fruits of its investigations if they are to form any significant part in its reasoning. The parties must be given the opportunity to comment on the evidence used by the FTT in arriving at its conclusion. In practice, therefore, the burden of supplementing inadequate evidence adduced by the parties with further material which may be readily available to the FTT should be undertaken before the hearing is concluded.”

- (4) However, it is relevant to consider the conduct of the aggrieved party, as well as that of the court or tribunal, when considering whether there has been a breach of natural justice. In *C A Trott (Plant Hire) v Humble* [2012] UKUT 391, the Leasehold Valuation Tribunal based its determination on a decision in an earlier case, without providing a copy of it to the landlord's valuer, having incorrectly assumed that landlord's valuer had appeared as an expert witness for one of the parties in the earlier case and must therefore have known all about it. On the face of it, that was a clear breach of the principles discussed above. However, an appeal against the Leasehold Valuation Tribunal's decision ultimately failed because the landlord's valuer had not objected to the Leasehold Valuation

Tribunal's use of the earlier decision or otherwise communicated his embarrassment during the hearing and had only sought to do so on appeal.

9. But do the principles of natural justice apply to an independent expert, as they do to a Judge or an Arbitrator, in the same way or indeed even at all? The position, as a matter of the general law, is as follows:

- (1) In *Hounslow London Borough Council v Twickenham Gardens Developments Ltd* [1971] Ch. 233 (at pages 259–260) Megarry J said this:

“The real question for me, however, is whether the principles of natural justice apply to the architect's notice at all.

...

“I think the answer must be no ... It seems to me that under a building contract, the architect has to discharge a large number of functions both great and small which call for the exercise of his skilled professional judgment. He must throughout retain his independence in exercising that judgment. But provided he does this, I do not think that, unless the contract so provides, he need go further and observe the rules of natural justice, giving due notice of all complaints and affording both parties a hearing. His position as expert and the wide range of matters he has to decide point against any such requirement, and an attempt to divide the trivial from the important with natural justice applying only to the latter would be of almost insuperable difficulty. It is the position of independence and skill that affords the parties proper safeguards and not the imposition of rules requiring something in the nature of a hearing. For the rules of natural justice to apply, there must, in the phrase of Mr Harmon, be something in the nature of a judicial situation and this is not the case.”

- (2) In *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm); [2004] 2 Lloyd's Rep 352 Cooke J said this (at para 95):

“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.”

- (3) In *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, having discussed the line of authority leading up to and following Megarry J's dictum in the *Hounslow* case, May LJ said this:

“There will be circumstances in which an engineer, using his knowledge of the course of the contract and its progress and incidence, can properly make a decision under clause 66 on request from one of the parties without formal

reference to the other. There will be other occasions when he needs information from one or both of the parties. If he entertains representations from one party over and above those inherent in making the request for a decision in the first place, fairness may require him to invite representations from the other party. But I would not go so far as to say that this is a straitjacket requirement in all circumstances. He may be well aware, as in the present case, what the other party's position is. I do not consider that the letter of 6 December should be seen as containing representations which obliged the engineer to invite balancing representations from Amec.”

10. Does that therefore mean the independent experts can simply forget about the rules of natural justice? Sadly life is not that simple. Although there is no automatic overarching requirement for an independent expert to abide by the rules of natural justice, that may still follow as a matter of the express or implied terms of the particular expert determination clause.
11. In *Ackerman v Ackerman* [2011] EWHC 3428, it was held that it was an implied term of the expert determination provisions in the agreement that the expert would act fairly and that the expert had breached that duty by failing to give one side the opportunity to comment on a proposal made by the other.
12. Whether and to what extent an expert determination clause operates so as to import the principles of natural justice into the expert determination process is, of course, a matter of interpretation of the particular clause in question. It is not therefore possible to provide any rules of general application about when the principles of natural justice will apply. However, there are a number of potential signposts within an expert determination clause that may point towards the conclusion that the principles of natural justice apply:
  - (1) Where the expert determination clause contains an express direction that the independent expert should “act fairly” or “observe due process” (or some similar formulation), that may well justify the conclusion the parties intended the principles of natural justice to be observed.
  - (2) The more that the structure of the expert determination process is made to resemble Court or arbitral proceedings (with provisions made for written evidence, oral cross-examination and submissions at a hearing), the more likely it is that an obligation to abide by the principles of natural justice will be implied.



- (3) On the other hand, if the expert determination process contains features that are *not* found in ordinary Court or arbitral proceedings (eg. an express direction that the expert should conduct his or her own investigations following receipt of the parties' submissions), it is less likely that the principles of natural justice will be found to apply.
13. What are the consequences of a breach of the principles of natural justice? As is clear from the decision in *Ackerman*, a breach of an implied duty to act fairly is analogous to a departure from the express procedural instructions in the expert determination clause and, in principle at least, it is capable of rendering the ensuing determination unenforceable.
14. However, it is not every breach of an implied duty to act fairly that will cause the determination to be unenforceable. In *Ackerman* it was held that a test of "materiality" had to be applied in order to determine whether or not the breach made the determination unenforceable. When applying the "materiality" test, the Court will "consider all the circumstances, the nature of the omission or departure, and the effect it had on the expert in reaching his decision".<sup>5</sup> A breach will be "very likely to be material if, objectively judged, the challenging party has reasonably lost confidence in the independence of the expert on solid evidential grounds. In other words, one relevant and important circumstance making it most likely that a determination will not stand will be if, objectively viewed, the expert has demonstrated any lack of proper independence".<sup>6</sup>
15. Although each case must be judged on its own facts, it is clear from the authorities that the bar is a relatively high one: in both *Ackerman* and *Worrall v Topp* [2007] EWHC 1809, breaches of the implied obligation to act fairly were found to be insufficiently serious to render the expert's decision unenforceable.
16. Nevertheless, if the terms of the expert determination clause leave any scope for argument that some or all of the principles of natural justice are intended to apply to the expert determination process, the counsel of perfection is undoubtedly for the expert to proceed on the assumption that they do. An expert might usefully seek further protection by raising the issue at the initial meeting and by inviting the parties make clear whether they contend that the expert determination clause carries any express or implied duty to abide by some or all of the principles of natural justice. Any additional procedure agreed at the initial meeting may then be structured accordingly.

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<sup>5</sup> Per Vos J at [382].

<sup>6</sup> Per Vos J at [383].

### **(3) Privilege**

17. The question of privilege, in particular in relation to the much-misunderstood 'without prejudice' rule, is one which is of real importance in the context of its effect on what matters may and may not be admitted as evidence in an expert determination.
18. The starting point for questions of admissibility is that all documentary material which is relevant to the issues on which a determination is sought will be admissible as evidence, subject to specific and defined exceptions.

#### *(a) Legal Professional Privilege*

19. Legal professional privilege divides fairly neatly into two categories – legal advice privilege and litigation privilege.
20. The first of these, and probably the most well-known, is legal advice privilege. Broadly, all communications between a legal adviser and his client created for the purpose of giving or receiving legal advice can be withheld from disclosure. As Lord Chief Justice Taylor put it:  
  
“...a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent.”
21. This rule has always been particularly carefully guarded in the historic authorities. Communications between lawyers and their clients therefore have a special status which does not attach to any other category of documents. The reasoning behind ensuring that a person is free to tell absolutely anything to their lawyer without fear of discovery, but is not entitled to the same security when speaking to their accountant, bank manager, surveyor or financial adviser is unclear, but probably not a question which need detain us here.
22. It is also the case that, in the context of litigation, legal privilege (known, unsurprisingly as 'litigation privilege') extends beyond the immediate client and also protects communications between a legal adviser and a non-professional agent or third party which come into existence after litigation is contemplated or has begun and are made with a view to that litigation.<sup>7</sup>

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<sup>7</sup> *Waugh v British Railways Board* [1980] AC 521.

23. This distinction can be particularly important in our field of property-related disputes. Critically, communications between property professionals (surveyors, architects, managing agents etc) before litigation is in contemplation are not privileged, even if they express an opinion on the potential merits of a dispute. So if, for instance, a solicitor obtains a report from a surveyor with a view to advising the client, but does so before litigation is contemplated, that report will not be privileged. Advice from even the most experienced and well-qualified managing agent on the legality of a particular issue cannot attract privilege, absent the prospect of a live dispute.
24. Further, contrary to the understanding of many clients, merely copying a solicitor in to an email or letter does not give that communication a shield of privilege. What matters is the substance of the document, and only those documents directly seeking or giving advice can be privileged under this heading.
25. To the extent that the rule relates to litigation, then, it is relatively straightforward to apply, though we will go on in a moment to look at a couple of issues which can cause confusion. First, though, there is a more pressing question for present purposes, which is the extent to which litigation privilege in relation to third parties is applicable outside litigation properly-so-called, and in particular in the context of expert determinations.
26. It is accepted that litigation privilege does apply in the sphere of arbitrations.<sup>8</sup> There is, though, no authority which directly deals with the question of whether or not communications between a legal adviser and third parties made for the purpose of assisting in the conduct of a current or proposed expert determination would be protected in the same way. Absent such authority, it is necessary to consider the position from first principles.
27. Since litigation privilege is intended to allow parties to a dispute to prepare for that dispute privately, essentially in order to ensure that there can be a fair trial, the fundamental question is as to whether or not what is proposed is an adversarial process akin to a trial in relation to which such secrecy is necessary. In *Re L (a Minor) (Police Investigation: Privilege)*<sup>9</sup>, the House of Lords considered the question of whether or not litigation privilege could apply to a medical report obtained by a mother in care proceedings, which the police wished to see in order to found a prosecution against her. The Court found (albeit not unanimously) that, because care proceedings were

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<sup>8</sup> *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1974] AC 405 (HL).  
<sup>9</sup> [1997] AC 16 (HL).

essentially investigatory rather than adversarial, litigation privilege did not apply, and the police should have the report. Lord Jauncey of Tullichettle, with whom the majority agreed, said:<sup>10</sup>

“Lord Denning M.R., Roskill L.J. and Lord Simon of Glaisdale all emphasised the important part which litigation privilege plays in a fair trial under the adversarial system. This raises the question of whether proceedings under Part IV of the Act are essentially adversarial in their nature. If they are, litigation privilege must continue to play its normal part. If they are not, different considerations may apply.

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...litigation privilege is essentially a creature of adversarial proceedings.”

28. In order to ascertain whether or not litigation privilege is relevant to an expert determination, then, one must consider whether that determination can properly be described as 'adversarial', and whether the parties need to be able to prepare in secret in order to ensure a fair outcome. If so, then communications between a legal adviser and a third party which came into being for the purposes of assisting with the determination will be privileged and should not be required for production in disclosure.
29. As previously indicated, even where privilege is found to apply, there are traps for the unwary which may render documents disclosable. It is true that for legal advice privilege to apply a communication between a lawyer and his client need not be made directly. So, for instance, a surveyor could seek advice on a legal point on behalf of his client and relay that advice back to the client without losing privilege in relation to it.
30. A stark warning as to the limits of that approach is to be found, however, in *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)*[2003] EWCA Civ 474. That case was part of very complex and involved litigation arising out of the Bank of England's investigation into the collapse of the BCCI banking group. The Court was asked to consider whether communications made by an internal committee at the Bank of England with its former and current employees involved in regulating BCCU were protected by legal advice privilege. The documents had been prepared to assist the Bank's lawyers in giving it advice in relation to the statutory Bingham Inquiry.
31. The Court of Appeal rejected the Bank's assertion of privilege, on the basis that legal advice privilege could not be claimed for documents other than those passing between a

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<sup>10</sup> At 25 and 26.

lawyer and his client. Accordingly, documents passing internally within the Bank were not privileged, even when produced for the purposes of obtaining such advice.

32. That decision came as a nasty surprise to legal practitioners and has created a great deal of uncertainty. The practical effect is that it is safest to treat as privileged only communications between lawyers and those in an organisation charged with seeking advice from them, though of identifying the latter creates its own problems.
33. The other obvious weakness of these forms of privilege is the problem of waiver. If a privileged document comes into the public domain or into the hands of the other party to a dispute in circumstances where the information it contains can no longer be said to be confidential, privilege is lost. Indeed, the waiver may not be limited only to the disclosed document, but can create a chain-reaction, where other documents which would otherwise have been privileged are also required to be disclosed.

*(b) "Without Prejudice" Privilege*

34. The principle that communications made 'without prejudice' cannot be put into evidence is probably the best known rule governing the admissibility of evidence and no doubt one with which you are already familiar. It is also, however, one of the least well understood rules and therefore there is some value in considering how it works in practice.
35. Essentially, the without prejudice rule allows parties to a dispute to engage in negotiations with a view to resolving their dispute by a mutually-accepted compromise, without having to reveal those negotiations to the court. It therefore sits sensibly with litigation privilege; the parties are able to prepare their own cases, and negotiate with one another, and in neither case do they risk adversely affecting their prospects in the determination of the matter, should it proceed to trial or similar.
36. Accordingly, as with litigation privilege, it is obviously based on policy. It is obviously conducive to settlement, which all tribunals seek to encourage, if the parties can make offers which they know will remain hidden from the determining judge. That allows them to negotiate freely without fear that an offer will be perceived as a sign of weakness or a lack of faith in the strength of their own position if the negotiations do not achieve a final result.
37. Therefore all negotiations genuinely aimed at achieving a settlement, whether oral or in writing, are excluded from being given in evidence at the trial of the substantive matters

(although in court proceedings such matters often become relevant later in relation to the question of costs).

38. For exactly the same policy reasons, in an expert determination the expert should not be told about the process of any negotiations between the parties, unless both parties agree that it is necessary or appropriate that he should be so told. It is probably arguable that, as with litigation privilege, in some types of expert determination which are not properly adversarial, the without prejudice rule is not applicable. Realistically, though, even in relatively non-adversarial determinations such as some rent reviews, it is ordinarily preferable for an expert not to take account of negotiations which a party was not intending should be disclosed, simply because doing so inhibits negotiations and makes compromise less likely.
39. Where a determination is adversarial, however, it is important to understand the proper extent of the without prejudice rule so that it can be applied appropriately. There are two primary ways in which it is ordinarily misunderstood. The first because the rule is, in one sense, rather broader than is commonly believed, and the second because in another sense, it is far narrower. Both are commonly met in practice and very important.
40. The rule is broader than is usually thought because it applies to all communications which are made with the genuine intention of settling a dispute that has arisen between the parties to the communication in question. It is not necessary for a document to bear the express words, 'without prejudice' in order to attract protection under the rule. Rather, all *bona fide* statements which touch upon the strengths or weaknesses of the parties' cases (or which place a valuation on a party's rights) forming part of an attempt to compromise the dispute are protected.
41. But the rule is narrower than is often thought because a document cannot be rendered inadmissible simply by putting the words 'without prejudice' on it. This is a practice which one frequently comes across when dealing with litigants in person (and, more surprisingly, some lawyers too). A letter which contains no offer of a compromise, but simply makes assertions or admissions is sometimes headed 'without prejudice', presumably in the belief that such a label will protect the document from eyes of the tribunal.
42. In fact, the label does not and cannot conclusively render a document privileged. If the status of a document is challenged, the tribunal is obliged to consider its contents in order to decide whether or not it is admissible based on whether or not it amounts to a

genuine attempt at settlement. The without prejudice protection cannot be invoked unless and until a dispute has arisen which is capable of compromise.

43. These rules are of importance in the context of expert determinations, not least because they do not apply only to formal offers made once solicitors have been instructed. In practice, privilege is often asserted in relation to pre-dispute correspondence, even to documents created before any form of formal disposal of a dispute is even threatened. The words 'without prejudice', whilst they sometimes signal that a communication is likely to be privileged, are certainly not conclusive.
44. An instructive example of this in practice is to be found in the case of *Bradford & Bingley plc v Rashid* [2006] UKHL 37. Bradford & Bingley were the mortgagee of a property. In 1991 the borrower defaulted and the lender obtained a possession order and sold the property. The proceeds did not cover the whole debt. The lender wished to recover the shortfall but struggled to trace the borrower. After ten years it tracked him down and asked him to make an offer of payment. After an exchange of letters the borrower wrote to the bank saying that he was, 'willing to pay approximately £500 towards the outstanding amount as a final settlement.'
45. At first sight, such a letter appears to be an offer of settlement and therefore a proper attempt to settle a dispute. But the House of Lords drew a careful distinction. The letter referred to the 'outstanding amount' and consequently acknowledged the debt which was at the heart of the claim. Since the existence of the debt was admitted, there was no dispute which could be settled and consequently the without prejudice rule was not engaged at all.
46. This case certainly emphasises how carefully one must analyse communications in order to establish whether or not they really are 'without prejudice'. Essentially, one has to ask oneself whether the communication was written at a time when a dispute had already arisen, what the substance of that dispute was at the time, and then whether the relevant document contained a genuine attempt to settle that dispute. Looking for the words, 'without prejudice' does not provide any sort of shortcut to that strict analysis.

#### **(4) Confidentiality**

47. There is, though clients are often surprised to discover it, no general principle in English law which entitles them to withhold disclosure of a document which they consider necessarily confidential, whether because it contains commercially sensitive information or for some other reason. If the document is relevant to the dispute then in ordinary

litigation it must be disclosed to the other party and will be admissible in evidence. This is so even where the documents have been supplied to the disclosing party in confidence by a third party.

48. The exceptions to that rule are very limited, and none of them are likely to apply to most commercial disputes. A requirement for disclosure of material which would involve a breach of a third party's rights under Article 8 of the ECHR can be resisted. A journalist can refuse to disclose a source. And in some circumstances disclosure of technical secrets such as computer code can be resisted. Otherwise, however, relevant information must be disclosed and can be relied upon in open court.
49. Because of that, some parties simply decide not to bring litigation rather than risk revealing important confidential information. Failing that, it is sometimes possible to redact information in order to limit the exposure. In very rare circumstances the court may consider holding a hearing in private, though obviously that will not assist if it is the other party from whom the client wishes to withhold information.
50. In this respect, then, there is much to recommend expert determination rather than ordinary litigation. Expert determination and, to a lesser extent, arbitration, are private proceedings. In the context of arbitration, the degree of privacy is debatable in any event,<sup>11</sup> and such privacy as there is can be eroded by applications to the court on connected issues.<sup>12</sup>
51. In expert determination, there are fewer opportunities for applications to the court to be made, and the parties can take positive steps to ensure their confidentiality. First, the expert determination clause may impose a duty of confidentiality on the expert expressly in relation to the documents and other information received during the course of the reference. Such a clause is certainly a wise measure if this is a matter of concern, because, as far as we have been able to establish, there are no authorities dealing with the question of confidentiality in the course of expert determinations.
52. Notably, even a contractual duty of confidentiality is ordinarily subject to a few exceptions. In *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184, Lawrence Collins LJ was considering a contractual provision in an arbitration. He considered and approved a well-known passage in a case relating to confidentiality in banking

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11 *Insurance Company v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.

12 *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No.3)* [1988] 1 WLR 946.



agreements, *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, where in a famous passage, Bankes LJ said:<sup>13</sup>

“In my opinion it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer”.

53. Lawrence Collins LJ went on to consider how those principles had, over time, been adopted into the arbitration context too, and found five exceptions to the contractual duty of confidentiality which is commonly found in arbitration agreements<sup>14</sup>. Having carefully considered each example where a confidentiality agreement had been overridden by a court order,<sup>15</sup> he found<sup>16</sup>:

*“In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.”*

54. The overriding duty of disclosure was emphasised in *Cadogan Petroleum plc v Tolley* [2009] EWHC 3291 (Ch) by Peter Smith J, who said<sup>17</sup> in the context of ordering disclosure in relation to a contractual settlement agreement that:

*“34 It might be that in the exceptional circumstances of the case namely that the parties agreed that “x” should provide an expert determination on certain terms which precluded him being required to give evidence that the decision is right. However it seems to me that in so far as such an agreement prevents the disclosure of documents which are necessary for a fair disposal of a trial such a provision in my view would be void and contrary to public policy. I cannot accept that parties can agree in effect to restrict the discretionary power of a Court to order the disclosure of documents where appropriate so as to enable there to be a fair and just disposal of an issue. The decision*

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13 At 472-473.

14 Note that in an arbitration agreement there is ordinarily an implied, rather than express, duty of confidentiality.

15 At [85] – [102].

16 At [107].

17 At [34] to [35].

*might have been correct on the facts but for my part I do not accept it is correctly decided in so far it is put forward as a general proposition.*

*35 Accordingly I determine that the Applicants are entitled to disclosure of such parts of the Settlement Agreement as are necessary to obtain a fair and just disposal of the trial. However such right to disclosure does not necessarily extend to unlimited inspection. I fully accept that the former GPS Defendants are entitled to preserve their confidentiality. For the moment therefore the document should go in the second part of the list for disclosure but should not be inspected until the parties agree or the second stage is determined pursuant to this judgment.”*

55. Generally, though, these are obviously concerns which arise later. It remains the case that expert determination is appealing to many parties precisely because there is more prospect of maintaining confidentiality than in ordinary litigation, and accordingly it is important during the course of such a determination to limit dissemination of any confidential material as far as possible, and certainly in accordance with the provisions agreed by the parties.

**(5) Reasons for the determination**

56. As you all undoubtedly know, there are various elements which any well-drawn decision will contain. One would normally expect to see:<sup>18</sup>
- a. The name of the expert;
  - b. the names of the parties;
  - c. the issue they asked the expert to determine;
  - d. the relevant contract and expert determination clause;
  - e. the manner by which the expert was appointed;
  - f. the terms of reference;
  - g. the procedural directions;
  - h. a description of the extent to which the parties have complied with those directions;
  - i. the decision itself;
  - j. any reasons;
  - k. the principal amount of money, if any, to be transferred from one party to another;
  - l. the timetable (if appropriate) for compliance with all of part of the determination;

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18 The following very helpful list is taken from Kendall on Expert Determination, 5<sup>th</sup> Edn., 2015, at 12.8-2.

- m. interest, if any;
- n. the fees and expenses;
- o. any other costs dispositions; and
- p. regardless of the form of the decision, it should be signed,<sup>19</sup> dated and sent to the parties.

57. The decision should also comply with the requirements of the contract giving rise to the expert determination clause, to the extent that it includes any specific provisions in that respect.

58. The reasons for the decision can be very brief. Indeed, parties often prefer a brief determination because such a decision limits opportunities for challenges and thus is more likely to provide finality for the parties. In *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 the decision was, very simply:

*“Corporate Technology Group Plc. We have acted as independent chartered accountants to determine the combined software sales of L.G. Software Ltd. and C.T.G. Software Ltd. for the period of 12 months ended 30 November 1987 calculated in accordance with appendix 1 to the offer document for the acquisition of Corporate Technology Group Plc. and schedule 5 to the deed dated 13 February 1987 relating to the acquisition of Corporate Technology Group Plc. (“the sales.”) We determine that the sales amount to £2,527,135. We have sent copies of this report to Deloitte Haskins & Sells and to Peat Marwick McLintock.”*

59. Of that, only the underlined words are actually the decision, and no reasons are given whatever. The Court accepted that the determination was effective in those terms.

60. Such an approach has indeed been expressly encouraged by the Courts. Harman J has found<sup>20</sup> that:

*“...in an expert's decision the classic rule is that silence is golden and the expert should give no explanation as to how he has come to his decision, leaving it unassailable even if apparently low or high.”*

61. Thus, unless an expert has agreed beforehand that reasons will be given, he will not be compelled to do so by the court.<sup>21</sup>

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19 There is, strictly, no implied term requiring that such a decision be signed: *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC).

20 In *Re a Company (No 00330 of 1991) Ex P. Holden* [1991] BCLC 597 at 602.

21 See Kendall on Expert Determination, 5<sup>th</sup> Edn., 2015, at 14.7-6.

62. Where, however, the contract requires reasons to be given, and the reasons actually given do not explain sufficiently the decision which has ultimately been reached, the court may not order enforcement of the decision when sought, and may instead direct the expert to give further reasons, as occurred in *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] EWHC 503 (Comm).<sup>22</sup> Notably, it was suggested in that case that the failure to give sufficient reasons rendered the determination non-binding. The Court in *Halifax* referred to the overriding objective and decided instead to adjourn pending the receipt of further decisions, but the submission was not outlandish, and accordingly where reasons are required they must be provided.
63. It is also perhaps worth noting that the common practice of circulating a draft decision prior to issuing a final version, whilst it can be helpful (for, for instance, correcting factual errors) also provides sometimes unhelpful opportunities for an unsuccessful party to adduce further submissions or otherwise challenge the decision before it has been made. It is therefore wise to specify what comments are sought and give a timetable for provision of those. In the case of Court judgments which are circulated prior to their formal handing-down, only typographical and factual corrections are entertained, and it is suggested that a similar approach be adopted in the context of an expert determination too.
64. Of course, once the decision has been made and notified to the parties, the role of the expert is at an end. So, too, is this lecture. We hope that its contents have been, if nothing else, a helpful reminder of the procedural difficulties which may arise in the context of expert determination, at least insofar as those have a legal character, and a rudimentary chart to assist with navigating through the ones you will regularly encounter.

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22 At [85] to [96].