LEGAL ISSUES IN ARBITRATIONS - WHEN AND HOW TO TAKE LEGAL ADVICE

A paper for the Rural Arbix conference on 15 October 2015

1. The options

1. If a legal issue comes up in an arbitration, there are five options:

   (a) The arbitrator does not determine the issue, on the basis it makes no difference to the outcome.
   (b) The arbitrator takes legal advice under s.37 and then decides the point with the benefit of that advice.
   (c) If the parties both agree, the point is decided by counsel as independent expert or arbitrator.
   (d) If the parties both agree, or one party wishes to and the arbitrator agrees, the point is decided by the Court under s.45.
   (e) The arbitrator decides the point of law himself without any legal advice.

2. If the Court decides a point of law under s.45, then the arbitrator can simply follow that decision.

3. If the parties agree to refer the point of law to a lawyer for final determination, whether as expert or arbitrator, and that the surveyor arbitrator should be bound by the lawyer's decision; again the surveyor is relieved of any responsibility.

4. If, however, the arbitrator appoints a lawyer under s.37, the lawyer is a legal adviser not a legal decider. The decision remains that of the arbitrator, taking into account the parties' comments on any advice from the lawyer.

2. When points of law must be decided

5. If the point of law does not affect the result, then it need not be decided, and generally should not be. If a point of law arises in an arbitration, and it affects the result, it must be decided. The arbitrator has no power to leave the issue unresolved, and state alternative awards depending on the correct answer to the point of law. The arbitrator may, however:

   (a) make an interim award[1], which determines any facts in dispute, and provides two alternative decisions, depending on how the point of law is resolved, with directions for the determination of the point of law to enable a final award to be produced; or

[1] S.47 provides that, unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined and may, in particular, make an award relating (a) to an issue affecting the whole claim, or (b) to a part only of the claims or cross-claims submitted to it for decision.

(b) make a final award, which states his decision of the point of law, and the award which follows that; and also what the award would have been if the point of law had been decided differently.

6. Making it clear what effect the point of law has on the outcome in that way may well be of assistance to the disappointed party in considering whether to seek to appeal under s.69. Leave to appeal will only be granted, under s.69(3)(a), if the determination of the question will substantially affect the rights of one or more of the parties.

3. Taking legal advice – s.37 of the Arbitration Act 1996

7. S.37 provides:

> "*(1) Unless otherwise agreed by the parties—*
> *(a) the tribunal may—*
> *(i) appoint experts or legal advisers to report to it and the parties, or*
> *(ii) appoint assessors to assist it on technical matters,*
> *and may allow any such expert, legal adviser or assessor to attend the proceedings; and*
> *(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.*
>
> *(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.*"

8. S.37 says "the parties shall be given a reasonable opportunity to comment on" any legal advice offered to the arbitrator by the legal adviser. It does not define what sort of "comment" is envisaged, but the section says that the legal adviser is to report to the arbitrator and the parties, and this must be borne in mind. The arbitrator may wish to discourage the parties from repeating submissions they have already made, and to invite them to limit their comments to any aspects of the legal advice which they have not already addressed in their submissions. The arbitrator should not, however, be prescriptive, given that the adviser is reporting to the parties as well as the arbitrator, and the statutory right to comment on the advice.

9. If the comments lead the arbitrator to take further legal advice, than that advice too must be disclosed and the parties given a reasonable opportunity to comment on it. However, the opportunity need only be a reasonable one, and the arbitrator is under no obligation to revert to the lawyer if the arbitrator is satisfied he understands the relevant law.

4. How to get legal advice from a barrister

10. Legal advice can be obtained from a barrister, using the scheme which used to be called "Direct Professional Access" and is now known as "Licensed Access"[2]. Members of Falcon Chambers accept such instructions on the RICS Model Terms of Engagement.[3]

11. In selecting the appropriate barrister, it is important to identify a person with real expertise in the subject matter. Such a person is likely to provide speedy and accurate advice at a reasonable cost, compared to someone unfamiliar with the subject matter.

12. In many cases, the parties agree on who the legal adviser should be. If not, there are broadly two ways of selecting an appropriate person:

    (a) If the arbitrator has a particular barrister or chambers in mind, she can tell the parties, and ask if either party objects to the proposed barrister, or any of the counsel in the proposed chambers, and, if so, why.

    (b) The arbitrator can invite the parties to submit the names of up to five counsel each who they would be willing to have provide the necessary advice, and whom they confirm they have not previously instructed in relation to the dispute. They should be given an opportunity to challenge any name on the other party's list.

13. There are a number of ways in which legal advice can be provided:

    (a) A written Advice.

    (b) A conference, telephone conference, or video conference, followed by a note of the advice given which is prepared by the arbitrator, and then approved by counsel, or by a written Advice.

    (c) A hearing at which the parties' representatives present oral argument on the point to counsel, followed by a written Advice, or by a conference/telecon/videocon and a note.

14. In some cases, it may be appropriate for the arbitrator to proceed as follows:

    (a) Having selected an appropriate set of Chambers, with a number of members specialising in the relevant area, the arbitrator should prepare a letter, saying that he is seeking legal advice under the Direct Access scheme. The letter should summarise briefly the key facts and the legal issue(s), and listing, and attaching, the key documents (usually the lease, the initial directions, any statement of agreed facts, any submissions and counter-submissions, and any relevant

[2] Under the Licensed Access Recognition Regulations. All members of the RICS are entitled to instruct counsel direct under those Regulations in a matter of a kind which falls generally within the professional expertise of the members.

[3] There used to be an RICS guidance note, *Direct Professional Access to Barristers;* the last published version was the second edition, published in 2003. Members of Falcon Chambers still accept instructions on the model terms set out at Appendix F of that note.

correspondence with the parties' representatives).The letter asks that, in the first instance, counsel telephone the arbitrator to discuss the instructions, in order to decide how the advice should be given.

(b) It may be appropriate to send a draft of the letter to the parties' representatives for their comments before sending it to Chambers; however, this may be unnecessary. In any event, a copy of the letter as sent should be copied to the parties' representatives.

(c) The letter and attachments should then be sent to the Chambers, asking that one of the clerks (the business managers) telephone the arbitrator to discuss the selection of counsel and the fee.

(d) The arbitrator should then discuss with a clerk which barristers are available to provide the advice within a reasonable time, and the likely fee which each will charge for the advice.

(e) The arbitrator should then decide who to instruct, and agree that with the clerk, and fix with the clerk a time for an initial telephone discussion with the barrister.

(f) In the initial telephone conversation with the barrister, the arbitrator should discuss the issue generally, and decide with the barrister on the best way forward in the circumstances. The barrister should then be able to give an accurate fee quote. The barrister can then proceed to advise.

(g) Once a written record of the barrister's advice has been produced, whether an approved note of a conference, or an Advice/Opinion, it must be sent to the parties for their comments.

(h) The arbitrator must then consider any comments made, and may want further advice from the barrister in the light of any comments.

(i) If further advice is obtained on the comments, that advice must be sent to the parties for their further comments.

(j) The arbitrator must then determine the point in the light of the advice received and the comments.

The arbitrator who disagrees with the legal advice received

15. What if the arbitrator disagrees with the advice received? As stated in paragraph 4 above, where advice is given under s.37, the responsibility for the decision remains with the arbitrator.

16. One advantage of having the initial advice given in a conference (or telephone or video conference) is that it gives the arbitrator an opportunity of raising any queries he has about the advice with counsel, and this may avoid the problem in many cases.

17. If, however, the arbitrator remains of the view that the advice he has received is wrong, then it is his duty to say so, although he will need to set out his reasoning with some care.

5. Issue decided by lawyer acting as expert or arbitrator

18. This alternative has two differences to an arbitrator determining the issue with the benefit of legal advice:

    (a) It avoids the need for the surveyor to have to read and consider the legal advice and decide if he agrees with it and how it applies, and so reduces costs.

    (b) The arbitrator will not be responsible for the lawyer's fees (albeit with a right of recovery from the parties); rather, the parties will be liable direct to the lawyer.

19. However, this course is only possible if the parties agree. If they do, the arbitrator should ask the parties to confirm in writing:

    (a) whether the lawyer is acting as an arbitrator, with the possibility of an appeal to the Court in limited circumstances under s.69, or as an independent expert, with no possibility of an appeal;

    (b) that the parties, and not the arbitrator, are responsible for the lawyer's fees;

    (c) that the arbitrator will apply the lawyer's decision, whatever it is.

6. Decision of the issue by the Court under s.45

20. S.45 says:

> "*(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.*
>
> *(2) An application under this section shall not be considered unless—*
> *(a) it is made with the agreement of all the other parties to the proceedings, or*
> *(b) it is made with the permission of the tribunal*
> *and the court is satisfied—*
> *(i) that the determination of the question is likely to produce substantial savings in costs, and*
> *(ii) that the application was made without delay.*

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.
(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.
(6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal."

21. In *Taylor Woodrow v Barnes & Elliott*[4], Jackson J explained the purpose of s.45:

"Put colloquially the arbitrator or the parties nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration. It is essentially a speedy procedure designed to interrupt the arbitration to the minimum possible extent and it is an exception to the general rule that the courts do not intervene in the course of an arbitration".

22. There are 5 critical ingredients to a s.45 application:
(i) A question of law;
(ii) Which substantially affects the rights of the parties;
(iii) Which is being referred to the court either with the agreement of the parties or with the permission of the tribunal; and (if the latter):
(iv) The determination of the question is likely to produce substantial savings in costs; and
(v) The application is made without delay.

23. This procedure is not much used, although for a recent example of its use, see *Secretary of State v Turner Estate Solutions*[5], where there was a claim for £68 million in a construction arbitration. The s.45 application was made on 4 February 2015 and the decision given on 30 March 2015, with reasons in writing following on 30 April 2015.

24. It is probably appropriate only if the outcome of the arbitration or a substantial aspect of it turns on the point of law, it is a difficult point, resolving it will avoid the need for extensive evidence to be called, and one party wishes to have it determined by the court rather than by the arbitrator with legal advice.

25. If the s.45 procedure is to be adopted, the arbitrator should ensure that all the relevant facts have been agreed or determined. If an application to the Court is made before the

[4] [2006] EWHC 1693 (TCC)

[5] [2015] EWHC 1150 (TCC)

relevant facts needed to decide the point of law have been found, the application may be rejected: *Chapman v Charlwood Alliance Properties Ltd*[6].

7. Should the arbitrator decide the issue himself or take legal advice?

Need for proportionality between importance of issue and method chosen to resolve it

26. S.1 of the 1996 Act states two of the fundamental principles on which the Act is founded:

> "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safe-guards as are necessary in the public interest;

27. The second principle means that, even if the amount involved is fairly small, if the parties want legal advice to be taken, and are willing to pay for it, the arbitrator should accede to their wishes. "Party autonomy is one of the founding principles of modern arbitration law.[7]"

28. The first principle will mean that, absent agreement, legal advice should only be sought where that is reasonably required to ensure the fair resolution of the dispute, without unnecessary expense or delay. In many cases, this will require an assessment of the significance of the point, before a decision is made on whether to seek legal advice. This in turn means that the arbitrator will sometimes have to decide the facts and any valuation issues before he can tell whether the legal issue is of any significance, and if so how important it is.

29. The arbitrator will need to consider what is the speediest and cheapest method of resolving the issue which still produces a fair result? This will probably depend, in most cases, on two key considerations:

(a) The knowledge and experience of the arbitrator. If he has dealt with the same point before, and is very familiar with the relevant law, it may be best for him to decide it. In other situations, it may be quicker and cheaper for a lawyer who is expert in the subject matter to give advice than for the surveyor to spend hours or days in a law library trying to work out the right answer. It is also more likely to result in a fair resolution of the dispute.

(b) The importance of the issue. If a significant amount of money turns on it, or it may have implications for future rent reviews, then fairness may require that legal advice is obtained from someone expert in the subject matter. If, however, the issue is of little practical importance, then it may be best for the arbitrator to decide it himself as best he can.

[6] [1981] 2 EGLR 4

[7] per Jackson J in *Taylor Woodrow v Barnes & Elliott* [2006] EWHC 1693 (TCC), at para 58.

Anticipating the problem in the initial directions

30. The initial directions should explain what procedure will be adopted if a point of law arises. The best sort of direction is a general one, along the following lines:

> "If a point of law arises at any point during this arbitration, the parties may agree on how they would like it decided. Subject to any such agreement, I will consider how best to deal with it at the time, having regard to the importance and difficulty of the point. I may decide to appoint a legal adviser to give advice. If so, the parties will be responsible for the fees of that adviser. If I decide to appoint a legal adviser, I will notify the parties in advance, and give directions for how the adviser is to be selected. If I do receive legal advice, I will give the parties the opportunity to comment on the advice before making my decision".

The significance of the determination – issue estoppel

31. The arbitrator's decision on a point of law required to produce his award *may* give rise to an issue estoppel between the parties, which will bind them and their successors in title on any future dispute where the same issue arises. Issue estoppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been determined against him: *Arnold v National Westminster Bank plc*[8]. If that is the case, that will plainly make the point one of much greater significance than it might otherwise have.

32. S.58(1) provides: "Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them." However, that is the award, and not necessarily the reasons that led to the award.
33. As to whether an arbitration award will produce an issue estoppel, the position is not altogether clear[9].

8. When should the legal issue be determined?

Relationship between effect of issue and approach to interpretation

34. Even where a point of law is clearly of importance, it may sometimes be necessary for the arbitrator to determine the relevant facts first, if they cannot be agreed. Points of law cannot normally be resolved in a vacuum. On the other hand, sometimes the resolution of a point of law will avoid the need to find the facts and so save substantial expense.

[8] [1991] 2 AC 93

[9] See *British Railways Board v Ringbest Ltd* [1996] 2 EGLR 82, *Fidelitas Shipping v VO Exportchleb* [1966] 1 QB 630, *Ron Jones (Burton-on-Trent) Ltd v Hall* (HHJ Lloyd QC, 7/4/1998), *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [2006] NSWCA 32.

35. One example is issues over the interpretation of a tenancy agreement. In order to consider the interpretation of a document, a lawyer will normally want information on:

    (a) Any relevant information about the factual background to the lease, insofar as that background was known to the parties.

    (b) Information about how the rival interpretations work in practice. An interpretation which produces a result which seems to be contrary to business common sense will be avoided, unless clear words are used requiring such a result[10].

    See e.g. *Chapman v Charlwood Alliance Properties Ltd*[11], where the High Court refused to decide a point of law[12] in a commercial rent review dispute which turned on the interpretation of the lease (as to whether the hypothetical lease contained rent review provisions) because there were no findings on the matrix of fact.

The dangers of preliminary points of law

36. The Courts are generally not keen on preliminary points of law: see *Tilling v Whiteman*[13], *McLoughlin v Jones*[14], and see *Port Of London Authority v Ashmore*[15] for a case where an attempt at a preliminary issue failed with substantial wasted costs as a result.

When to use and not to use preliminary issues of law

37. The determination of a preliminary point of law should normally only be directed[16] if all of the following conditions are satisfied:

    (a) It is common ground that it will substantially affect the outcome.

    (b) The point can be determined on the basis of a statement of agreed or assumed facts.

    (c) A decision on the point will avoid the need for substantial amounts of evidence, so that the preliminary determination of the question in one way is likely to produce substantial savings in costs.

Alternative: decide factual/valuation issues and points of law at the same time

[10] *Co-operative Wholesale Society Limited v National Westminster Bank plc* [1995] 1 EGLR 93, *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912

[11] [1981] 2 EGLR 4

[12] Under s.2 of the Arbitration Act 1979, the predecessor to s.45 of the 1996 Act

[13] [1980] AC 1

[14] [2002] 1 QB 1312

[15] [2010] EWCA Civ 30

[16] Unless the parties agree otherwise

38. In some cases, it will be better to decide the point of law at the same time as, or after, the other issues.

39. One advantage of this is that it may be that the arbitrator will form a view on the factual and any valuation issues which means that the point of law makes little or no difference to the overall result.

40. If, however, the point of law will make a substantial difference to the outcome, then it may in some cases be desirable for the arbitrator to make an interim award, determining any facts which are in dispute, and setting out alternative valuations, depending on which way the point of law is determined, and then to determine the point of law subsequently. Alternatively, the arbitrator may, in his instructions to the lawyer, set out the factual and valuation issues and his provisional views on those.

9. Identifying and defining the issue of law

41. It is important to avoid wasted costs in sterile debates about the formulation of the issue of law. A general indication of the nature of the issue, in very broad terms, followed by submissions from each side will generally suffice.

Where parties are legally represented

42. In this case, the parties can simply be asked to agree the definition of the issue or, if they cannot, to each submit their definition of the issue. Any further clarification will be provided by their respective written submissions and counter-submissions on the issue, or, if there is a hearing, by the oral submissions made.

Where the parties are not legally represented

43. Where the parties are not legally represented, it will be especially important to ensure that there is a proper exchange of submissions and evidence before legal advice is taken, to clarify the issue and to make sure both sides have had a proper opportunity of having their say on it.

Points identified by the arbitrator

44. What is the arbitrator to do if he thinks there is a point of law which neither side has drawn attention to? This is a perennial problem for judges of all kinds, and there is no hard and fast rule as to what the right course to take is. Some judges will contact the parties on the morning of the trial to identify new points of law and cases they think are relevant and want to be addressed on. Others sit back and let counsel define the issues for them to decide. Having regard to ss.33 and 34, relevant considerations will include:

    (a) The amount or importance of the dispute.
    (b) The likely importance of the perceived point of law.
    (c) The experience and qualifications of the parties' representatives.

(d) Whether the parties have expressly agreed to proceed on a particular basis, or seem to be proceeding on the basis of a common, unspoken assumption.
(e) How likely the arbitrator thinks it is that the common assumption is wrong.
(f) The risk of injustice if the point is not raised.
(g) The likely sense of injustice, and bias, by the party who may be adversely affected by the point.
(h) The likely delay and expense if the point is raised.

10. When the arbitrator decides a legal issue himself, what is the status of the material provided by the parties directed to issues of law?

45. Where the arbitrator determines a point of law himself, without obtaining legal advice, he may receive documents from the parties' lawyers. It is important to note the different types of documents which may be produced by lawyers.

46. First, there is an "Opinion" or an "Advice" (there is no difference between these labels). This should set out the genuinely held view of the lawyer writing it. It should provide a balanced assessment, considering the points for and against a particular view. There is no objection to one of the parties obtaining counsel's opinion and sending it to the arbitrator, but if counsel is instructed to make submissions to the arbitrator, it would be wrong for them to allow their opinion to be sent to the arbitrator. The BSB Handbook says that a barrister, when acting as an advocate, must not unless invited to do so by the "court" assert a personal opinion of the facts or the law unless invited or required to do so by the court or by law.[17] The expression "Court" includes an arbitrator. There is no equivalent provision in the SRA Handbook governing solicitors' conduct.

47. Second, there is a "Submission" or "Skeleton Argument." This will not necessarily reflect the view of the lawyer who prepared it. Rather, it will set out the arguments in favour of a particular result. If prepared by counsel or a solicitor, then under both the BSB[18] and SRA Handbooks[19], it must comply with certain rules:
- It must not contain any contention which the lawyer does not consider to be properly arguable.
- It must ensure that the arbitrator is informed of all relevant decisions and legislative provisions of which the lawyer is aware whether the effect is favourable or unfavourable towards the contention for which he argues.

48. An arbitrator should not give greater weight to an Advice/Opinion than to a Submission/Skeleton Argument: see *Elmbirch Properties plc v Schaefer-Tsoropatzadis*[20] and *JC Decaux v Kwik Save Stores Ltd*[21]. The arbitrator must decide the point in accordance with the law and should not be influenced by the fact that one side's argument

[17] Rule C7.4

[18] BSB Handbook rules C3.4 and C9.2(b).

[19] SRA Handbook IB 5.2 and 5.7(a).

[20] [2007] 2 EGLR 167; Lands Tribunal - Judge Gilbart QC and Mr Paul Francis FRICS.

[21] Unreported decision dated 23 June 2006 by Owen Rhys sitting as Deputy Adjudicator to HM Land Registry REF/2004/1242) at [10].

is supported by a legal opinion. The question is whether the opinion is right, and in deciding that, it is wrong to give any weight to the identity of the person who expressed the opinion.

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October 2015