SERVICE CHARGE MACHINERY:
THE ROLE OF AN EXPERT

TALK TO THE PROPERTY BAR ASSOCIATION

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Functions of Experts

The role of experts has been described as follows in Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd [2004] 2 Lloyds R. 352. In that case Cooke J said at [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 paragraph 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."*

Experts commonly have a number of contractual functions under leases:

(1) to determine and certify, for example, the level of estimated or actual service charge expenditure in a particular service charge year;

(2) to determine the tenant's proportion of service charge payable;

(3) To resolve disputes between parties to the lease or between occupiers in a building.

It is to be noted at the outset that the appointment of an expert to determine issues relating to service charge is curtailed, if not totally ousted, in the residential context by the powers conferred on the Leasehold Valuation Tribunal (now the First Tier Tribunal) by section 27A(6) of the Landlord and Tenant Act 1985. A contractual requirement for expert determination in that context may have at most a technical function, in satisfying the contractual preconditions for a demand.[1] It may, however, be more sensible for the law to evolve in that particular context so as to allow a First Tier Tribunal determination to stand as a determination, and to avoid unnecessary technicality and duplication.

The Certification Function

Is Certification a Condition Precedent to Liability?

This is naturally a question of construction, but certification will usually be treated as a condition for liability, as without it, the amount which has to be paid by the tenant will be indeterminate.

By way of illustration of the usual view, in Finchbourne Ltd v Rodriguez,[2] the tenant of a flat was required to pay a fixed percentage of expenditure incurred by the landlord in relation to the block of flats. The amount to which the percentage was to be applied was to be ascertained and certified by the managing agents of the landlord acting as experts,

[1] In London Borough of Brent v Shulem B Association Limited [2011] 1 W.L.R. 3014, at paragraph [39], Morgan J. J. stated that "*It may be that this reference to the finality of the surveyor's decision is no longer contractually effective in view of section 27A(6). I did not hear specific argument on that point*." Contrast the position of the Lands Tribunal in Warrior Quay Management Co Ltd v Joachim [2008] EWLands LRX_42_2006, where it stated (at paragraph [25] that "*The absence of any proper certificate is a matter which may weigh against WQMC and may result in the LVT deciding that a lesser sum than hoped for by WQMC may be decided to be the amount payable. Also the absence of the certificate should result in the position being that the amount which is decided by the LVT to be payable by way of shortfall will not be payable until a proper certificate (certifying that at least this amount is payable) is provided by WQMC's auditors or accountants*."

[2] [1976] 3 All E.R. 587; see too Wagon Finance Limited v Demelt Holdings Limited unreported Transcript, Court of Appeal, 19 June 1997.

and not arbitrators. In answer to the question as to whether the ascertainment and certification of that amount was a condition precedent to liability to pay the charge, the trial judge said succinctly: *"Of course the answer is yes. Otherwise the tenant could not know what sums they have to pay"*. There was no challenge to that part of the decision on appeal.

The one case going against the grain is Scottish Mutual Assurance Plc v Jardine Public Relations Limited.[3] A tenant of offices challenged a service charge liability on a number of grounds, including that the landlord had failed to abide by the lease machinery and had not complied with certification requirements. The service charge under that lease was payable annually on demand, being a fair proportion of expenditure determined by the landlord's surveyor. It was further provided that a certificate should be provided by the landlord showing the amount of the service charge, which certificate was stated for the purpose of this covenant be conclusive evidence of the amount so to be paid (save in the case of manifest error). Mr David Blunt QC (sitting as a Judge of the Technology and Construction Court) accepted the submission that, on the terms of the instant lease, the requirement for a certificate was purely "machinery", and that the "absence of such a certificate would not prevent the Plaintiff from recovering service charges", at any rate where the clause in question contained a primary obligation to pay, with the certification requirement being a merely subsidiary part of that payment obligation.[4] The certificate's sole function was to be conclusive evidentially, but not to be a precondition for liability. The document purporting to be a certificate was in any case bad, and did not comply with the content requirements under the lease. It was therefore open to the Court to undertake the relevant determination of sums due.

As to that case, if the underlying premise, that the certification requirement was purely procedural and hence not a precondition on the true construction of the lease, is correct, then the case is unexceptionable. However, it is suggested that the underlying premise is open to question, as (a) certification is usually a precondition to liability, and not mere

[3] [1999] E.W.H.C. 276 (TCC).
[4] Ibid., page 33, and see also at 36.

machinery, as it determines the extent of the liability, and (b) the case appears to go significantly further than other cases in allowing the Court to substitute its own expertise for that of the contractually appointed expert.

That Jardine is probably to be regarded as an "outlier" case seems confirmed by Jacey Property Company Limited v De Sousa.[5] The tenant agreed to pay the "proper and fair proportion as determined by the landlord's surveyor of the expense of repairing renewing rebuilding" various items. There was no issue in that case as to the manner of apportionment or the reasonableness of the costs. In considering the question of whether certification was a condition precedent, Arden L.J. distinguished Jardine. She said as follows: "*That case was very different. In this case the court makes no determination of the due amount payable by the tenant, whereas in Scottish Mutual the court made that determination. Moreover, it was not in issue in that case that some person other than the landlord's surveyor or the court could make the determination. That is the issue in the present case. As I see it, the machinery in the clause must be followed. It is not a situation where it is impossible to use the machine for which the parties have clearly provided*".[6]

Returning to the usual orthodoxy, in Akorita v Marina Heights (St Leonards) Limited,[7] certification was found to be a condition precedent to liability. There, the appellant tenant argued that no interim or final service charge was due because of a lack of end-of–year certification. No document constituting a valid certificate was provided by the respondent. Such certificates as there were had been prepared by accountants, not the contractually required surveyor, and it was also plain from the face of the documents that no expertise had been applied to the contents of those documents.[8] The Tribunal concluded that the lease did make the certificate for interim and final charges a condition precedent to liability. It considered that the wording was plain, and that this conclusion was in line with the general position recognised by a leading textbook.[9]

[5] [2003] E.W.C.A. Civ 510.
[6] At paragraph [50].
[7] [2011] U.K.U.T. 255 (LC)
[8] See at paragraphs [20] – [21].
[9] Referring with approval to *Woodfall's Law of Landlord and Tenant,* Volume 1, paragraph 1-780.

The above cases discuss the need for certificates in within the framework of whether or not they are pre-conditions to be complied with or mere machinery that may be ignored. Leonora Investment v Mott MacDonald Ltd[10] suggests a different conceptual analysis. In that case, the landlord had claimed for services provided by serving a demand completely outside the contractual machinery of the lease. The Court of Appeal decided that it was not entitled to do so. This was not simply because a proper demand was a contractual precondition for liability. Tuckey L.J. stated (at paragraph [22]) that:

> "*I do not see this as a case in which the leases contain a condition precedent to the landlord's right to recover. Rather they prescribe the contractual route down which the landlord must travel to be entitled to payment. The prescribed route in this case is, we are told, a very familiar one and it is obviously not difficult to follow. The statement will be of considerable importance to the tenant. It gives him information about the actual service costs for the past year, which only the landlord will know, and how they have been apportioned to him so that he can make an informed decision as to whether to pay or not in the knowledge that the landlord may acquire a right to forfeit if he does not. [Counsel for the landlord] had to accept in argument that the logic of his submission was that the landlord can make a demand for service charge outside the part 2 regime in any form, for any service cost for up to six years. This would be contrary to what sensible commercial parties would contemplate in a relationship carefully defined by the terms of a commercial lease.*"

He went on to observe (at paragraph [24]) that:

> "*The conclusion I have reached may seem harsh or over technical, but if so it results from what I consider to be the proper construction of the leases. No one has challenged the judge's conclusion that it was open to the landlord to issue a revised statement. Nor would I. Provisions of this kind should not be seen as procedural obstacle courses. Businessmen dealing with one another often make mistakes and there is no scope for saying that the provisions in this clause only gave the landlord one opportunity to get it right. I say nothing about the landlord's*

[10] [2008] E.W.C.A. Civ 857.

> *prospects of being able to get it right even now, because we have not heard argument about this.*"

What Constitutes A Certificate?

A lease may set out what amounts to a certificate.[11] Where it does not, the question is one of substance and not of form. As a matter of general principle:

(1) Where all that is required is a "certificate" without more, however, it is considered that usually the substance and intent of the document are what matters, and not the form it is in.[12]
(2) What matters is that the document is an expression of judgment, opinion or skill on the part of the appointed certifier.[13]
(3) Use of the word "certify" is not a pre-requisite for a valid certificate.[14]
(4) Given that the purpose of a certificate is to inform the intended recipients of the information which it contains, it must ordinarily be issued to them.[15]
(5) Experts are not, however, under any duty to give reasons or (but subject to the principles discussed below) to observe the rules of natural justice.[16]

In Rexhaven Ltd v Nurse and Alliance And Leicester Building Society,[17] the management company under a 999 year lease of a dwelling was required, on each quarter day, to provide a certificated estimate of expenditure for the ensuing quarter, setting out the tenant's proportion. The certificate was stated to be binding and conclusive. The management company sent two letters which cumulatively set out the amount of on account charge that would be claimed. One letter was sent on 29 September 1993, and the more detailed explanation was set out in a letter sent on 27 October 1993, that is, after the quarter day had passed. H.H. Judge Colyer QC (sitting as a Deputy Judge of the

[11] As they did in Jardine, where the certificate was bad as it did not comply with the contractual provisions.
[12] Token Construction v Charlton Estates (1973) B.P.R. 48, at 52; Minster Trust v Traps Tractors Ltd [1954] 1 W.L.R. 963; Cantrell v Wright & Fuller Ltd [2003] B.L.R. 412.
[13] Token Construction v Charlton Estates (1973) B.P.R. 48, at 52.
[14] Token Construction v Charlton Estates (1973) B.P.R. 48, at 57.
[15] London Borough of Camden v Thomas McInerney (1986) Const. L.J. 293.
[16] Bernard Schulte & Co KG v Nile Holdings Ltd [2004] 2 Lloyd's Report 352; Vimercati v BV Trustco Limited [2012] E.W.H.C. 1410 (Ch) at paragraph [21].
[17] (1996) 28 H.L.R. 241.

Chancery Division) accepted that those letters constituted a certificate on the true construction of that particular lease, and that the condition precedent to liability for an on-account charge had been satisfied:[18]

> *"The lease gives no definition of what is meant by "a certificate". So what is a certificate for the purposes of this clause? Has the word any established meaning, so that if a draftsman used it without defining the word, the reader would know what the term means? "Certify" and cognate expressions deriving therefrom, are widely used terms. Extracts of documents at title are certified every day of the week by solicitors as true copies. Facts are certified as correct, and so on. But in final analysis the word is usually otiose and adds little, if anything, to the recital of the extract or the facts and the verifying signature of the party who provides it. Use of the word sometimes makes it clear that that party warrants the truth of what is certified-a somewhat otiose concept where the landlord is certifying its own estimate. Clearly however, "a certificate" is a document. It has to be written out. Mr Neuberger adopts Chambers' definition of the word:*
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> *"Certificate-a written definition of fact". The Concise Oxford English Dictionary, I observe, has a slightly different definition. "A document formally attesting a fact." Mr Neuberger submits that as to the certificate, to require a person to provide a certificate of its own estimate, that is as opposed to a certificate of an actual expenditure, is no more than to require that person to provide a statement in writing of the estimate and that the letters of September 29, 1993 and October 27, 1993, which I have read, taken together comply with the provision of the lease. He says that the purpose of the provision in the lease is to ensure that the tenant has knowledge of the total estimate of expenditure and the proportion that is payable by her. The purpose was more than met by those two letters.*
>
> *"I accept that the plaintiff's case here derives some assistance from R. v. St. Mary's Vestry, Islington 25 QBD 523, especially the observations on pages 527 and 529. I derive some assistance, although of course that authority is only persuasive since I am construing a document from the observations that were made in that case. I accept, however, the propositions that Mr Neuberger has relied upon and in these circumstances I find that the letter*

[18] At pp. 249 – 250.

> *of October 27, which of course was precise as to its figures, did satisfy the requirement for "a certificate", by which word I see the draftsman of this lease was requiring nothing more or less than a formal statement in writing of the precise amount or amounts. I would observe, but this is obiter dicta; that if the figures had been scribbled on the back of an envelope and handed in a highly informal manner to the tenant, in my view that would not be enough. Some degree of solemnity or formality is needed for a document to satisfy the requirement of this lease. It is not enough that it be scribbled down casually. It has to be written down and it has to be written down with precision; but here it was. I therefore see no hope of success in the defence that there was no good certificate in this case."*

A similar view – that the question was one of substance, and not of mere form - was taken by the Court of Appeal in *Wagon Finance Limited v Demelt*,[19] in which a tenant's argument that a document which failed to state that the landlord "certified" expenditure was not a certificate failed. The document was plainly intended to be a final statement of account, and provided a reasonable amount of detail. In substance, therefore, the function of a certificate was fulfilled.

Use of Similar Concepts: Determination or Resolution by an Expert

Determinations or resolutions are treated as being functionally the same as certificates, that is, one can expect them to be treated as pre-conditions for liability.

The Upper Tribunal decision in Rigby v Wheatley[20] dealt with a tenant's obligation to pay insurance rent. The insurance rent payable was a "fair proportion (to be determined by the Lessor's surveyor for the time being)" of the amount to be expended by the landlord on insurance of the building, payable on demand. The Tribunal rejected the argument on behalf of the landlord that the right to demand insurance rent was independent of the requirement for a determination to be made by the surveyor. Rather, that determination was a precursor to a valid demand. The Tribunal noted that without such determination, there was no basis on which a tenant would be able to know the

[19] Unreported transcript, 19 June 1997.
[20] [2005] EWLands LRX_84_2004

amount of his liability.[21] The Tribunal did not accept the view expressed in the decision of the Leasehold Valuation Tribunal below that, for determination to be conditional, more emphatic language would be required.[22] Further, the Tribunal did not accept the Leasehold Valuation Tribunal's attempt to distinguish between certification and determination, stating that the distinction made was one of pure form over substance.[23].

A Pre-Condition To What?

In Wembley National Stadium Limited v Wembley (London) Limited,[24] a lease required accounts to be prepared as soon as practicable after each year end. The quarterly on-account service charge was then to be calculated by the lessor's accountant. In default of the latter, the lease provided that on account charges were to be made at the same level as the last quarter's instalment paid in the preceding year. The landlord complied with neither the account nor the calculation requirements for a number of years. Instead, a claim was brought (and then abandoned) for actual expenses incurred in the relevant years. The ultimate claim was instead for payment of the advance service charges, payable by reference to the amount due on the last preceding quarter. The tenant argued that the landlord was no longer entitled to claim sums on account of historic years. The tenant argued that the issuing of a claim for actual costs incurred waived any entitlement to on-account costs. This submission was rejected by the Chancellor, who stated that no such waiver had occurred and that a contingent liability to pay on account charges remained.[25] Further, the non-provision of accounts had nothing to do with liability for on-account charges. Under the structure of the lease in question, the preparation of accounts followed the payment of on-account sums, and was an independent obligation. Therefore, a mere breach of the obligation to provide accounts in that case was not a defence to a claim for on-account service charges.[26]

[21] Ibid., paragraphs [37] – [38].
[22] Ibid, paragraph [40].
[23] Ibid., paragraph [42].
[24] [2007] E.W.H.C. 756 (Ch).
[25] At paragraphs [65] – [66].
[26] At paragraph [67]. The Chancellor noted that the tenant would have access in any event to other remedies in order to compel compliance, particularly where such delay would perpetuate a liability to pay balancing payments.

Attributes, Qualifications and Independence of the Certifier

While experts are generally regarded as having a free hand in their determinations (an assumption that we will revisit below), there are a number of cases which (perhaps somewhat qualifying the view expressed in Bernhard Schulte, above) do impose what appear to be principles similar to the basic rules of natural justice.[27] Obviously, first and foremost, the expert must also have been appointed in accordance with the provisions of the contract.[28] However, in the context of leases, where the expert is often not a third party unassociated with either landlord or tenant, but a managing agent being paid by the landlord, questions of (in effect) bias arise.

Attributes

In, it is suggested, quite exceptional cases, it could be that the precise characteristics of the expert are so narrowly circumscribed that an assignment of the reversion leads to the expert determination provisions being rendered in operable. For example, a lease granted by a Council where the expert was a Council official, might not work if assigned to a private-sector entity.[29] It would appear that, in such a case, the Court will step in to operate the machinery. Apart from such seriously bespoke provisions, however, care must simply be taken that the professional appointed has the appropriate quality and level of skill.[30] With that in mind, we turn to the next two questions.

Qualifications and Independence

(1) What makes a person an expert?

[27] Albeit adapted to the special circumstances of an expert determination, and the fact that the procedure may not entail an adversarial hearing between the parties, but rather an inquisitorial function.
[28] Epoch Properties Limited v British Home Stores (Jersey) Limited [2004] 3 E.G.L.R. 34 (Court of Appeal: Channel Islands), paragraphs [28] – [30].; Jacey Property Company Limited v De Sousa [2003] E.W.C.A. Civ 510 (where the certification was done by a solicitor and not by the landlord's surveyor as provided for in the lease); Akorita v Marina Heights (St Leonards) Limited [2011] U.K.U.T. 255 (LC), paragraphs [20] – [21].
[29] St Mowden Developments (Edmonton) Limited v Tesco Stores Ltd [2007] 1 E.G.L.R. 63, where the certifier was the borough treasurer of the local authority landlord.
[30] As to which see Jacey, above.

(2) Can a landlord or landlord's agent act as an independent expert?

Both of those questions arose for consideration in New Pinehurst Residents Association (Cambridge) Limited v Silow.[31] In that case, the landlord was a tenant-owned residents' association. Originally, the landlord was the developer. Under the terms of the relevant leases, there was a power to appoint managing agents in the management of the building. The managing agent was to certify annual service charge contributions as experts. The residents' association decided to elect a committee to be agent. They were not qualified formally to do that, and their appointment was challenged. On independence, the appellant in the New Pinehurst case relied on Finchbourne Limited v Rodrigues.[32] In that latter case, the landlord, controlled by a Mr Pinto, appointed a firm, Pinto & Co, as managing agents for certification purposes under the relevant leases. Pinto & Co was in fact Mr Pinto himself. As there was no meaningful practical separation between the landlord and managing agent, the essential arbitral function of certification could not be fulfilled.

Distinguishing Finchbourne, Kerr L.J. stated that[33] "*I think two principles are to be derived from [Finchbourne]. First, it is quite clear that the managing agents must be legally distinct from the lessors. Second, since they are to act as experts and not arbitrators, I must accept from the judgments that a measure of expertise is to be required from them; but I would not accept that they have to be professional persons with professional qualifications*". As a general rule, it is not necessary for the expert to be entirely independent from one of the parties, though it is necessary for the expert to reach an independent judgment.[34] An example may be found in Skilleter v Charles:[35] it was

[31] [1988] 1 E.G.L.R. 227,
[32] [1976] 3 All E.R. 581
[33] at 229.
[34] See J. J. J. Kendall, C Freedman, J. J. J. Farrell, *Expert Determination* (4th ed., 2008), paragraphs 8.7.1 -8.7.3. A further example of a failure to certify independently is to be found in *Hickman v Roberts* [1913] A.C.229.
[35] [1992] 1 E.G.L.R. 73; see too Parkside Knightsbridge Ltd v Horwitz [1983] 2 E.G.L.R. 42 (certifier was parent company of landlord).

acceptable for a landlord to appoint as its managing agent a landlord-owned company. The Court noted that this arrangement was acceptable unless it could be shown that the arrangement amounted to a "complete sham". On the basis of these cases, it would appear that there is an actual bias test, or something like it. However, it is considered that there must at least be a question as to whether or not that is too narrow an approach, and whether apparent bias may not be enough, especially where the expert's function is *quasi*-judicial.[36] At any rate tougher language is evident in Concorde Graphics v Andromeda Investments SA,[37] a case in which the person doing the determining was indeed too close to the landlord.

Challenging the Certificate

The above principles would allow a challenge to a document on the basis that it is not, after all, a "certificate" or produced by an "expert". Those principles present what are fairly obvious grounds of challenge, though these are grounds that are also fairly common. However, there are more technical bases for challenge:

(1) Non-conclusive certificates: If a certificate is not stated by the terms of the lease to be "conclusive" or "binding", or words to that effect, then it may be capable of being re-opened by the parties for the purpose of challenging the contents of that certificate,[38] though it may still be that the context of the contract requires, even absent express words, that the determination of the expert be treated as final and binding to the exclusion of the Court.[39]

(2) Conclusive certificates. It may be that the parties have explicitly agreed to confer full jurisdiction on all matters on an expert, or that the certificate is

[36] It may be that the demands for independence of the parties are tighter where the function of the expert is to resolve disputes, rather than to certify amounts: Kendall, Freedman, Farrell, *Expert Determination* (4th ed., 2008), pages 134 – 135, 230 – 234.
[37] [1983] 1 E.G.L.R. 53.
[38] Universities Superannuation Scheme Ltd v Marks & Spencer Plc [1999] 1 E.G.L.R. 13.
[39] See e.g. Regent Holdings Incorporated v Alliance (unreported, Court of Appeal, 23 July 1999); Homepace Limited v Sita South East Limited [2008] 1 P & C.R. 24, at paragraph [28] *per* Lloyd L.J. It is said that strong words are required to achieve this result: Beaufort Developments (NI) Limited v Gilbert-Ash Limited [1999] 1 A.C. 266.

conclusive but subject to qualification. The overarching question is whether the Court will lose its ability to police questions of law.

On (2), the general principles governing such challenges are set out in the following principles provided by Lightman J. in British Shipbuilders v VSEL Consortium:[40]

> *"(1) Questions as to the role of the expert, the ambit of his remit (or jurisdiction) and the character of his remit (whether exclusive or concurrent with the jurisdiction of the court) are to be determined as a matter of construction of the agreement;*
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> *(2) If the agreement confers upon the expert the exclusive remit to determine a question (subject to (3) and (4) below), the jurisdiction of the court to determine that question is excluded because (as a matter of substantive law) for the purposes of ascertaining the rights and duties of the parties under the agreement the determination of the expert alone is relevant and any determination by the court is irrelevant. It is irrelevant whether the court would have reached a different conclusion or whether the court considers that the expert's decision is wrong, for the parties have in either event agreed to abide by the decision of the expert;*
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> *(3) If the expert in making his determination goes outside his remit, e.g. by determining a different question to that remitted to him or in his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the court may intervene and set his decision aside. Such determination by the expert as a matter of construction of the agreement is not a determination which the parties agreed should affect the rights and duties of the parties, and the court will say so;*
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> *(4) Likewise the Court may set aside a decision of the expert where […] the agreement so provides if his determination discloses a manifest error;*
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> *(5) The court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the conditions with which the expert must comply in making his determination, but (as a rule of procedural convenience) will (save in exceptional circumstances) decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one party considers that the expert got it wrong. To apply to the court in anticipation of his decision (and before it is clear that he has got it wrong) is likely to prove wasteful of time and costs — the saving of which may be presumed to have been the, or at least one of the, objectives of the parties in agreeing to the determination by the expert.*"

[40] [1997] 1 Lloyd's LR 106. See too the discussion in Aviva Life & Pensions UK Limited v Kestrel Properties Limited [2011] E.W.H.C. 3934 (Civ).

Can The Court's Jurisdiction To Decide Issues of Law Be Ousted By Contract?

If an expert gets the law (including questions of construction) wrong, can the decision be challenged in the Courts if his error related to a question he was authorised to answer? This error may manifest itself in a number of ways. The expert may have misunderstood his jurisdiction, or he may have decided a point of law inside his jurisdiction in the wrong way. There is an open question as to whether those two questions are entirely conceptually distinct. The law has not evolved straightforwardly, and there has yet to be a case which synthesises what is often conflicting case law, developed in separate strands which are not always easy to reconcile. I will look first at the general attitude of the Courts towards legal error in principle, and I will then turn to the traditional categories of "departure from instruction" and "error of law within jurisdiction".

There is authority for the proposition that an expert's certificate cannot be conclusive on matters of law (which include questions of construction).[41] In Re Davstone Estates Ltd's Leases,[42] a lease provided that a surveyor's certificates were conclusive as to the level of contribution payable by a tenant towards costs of repairs. The tenant complained that the certificate wrongly treated design defects as disrepairs. Ungoed-Thomas J. concluded that a clause purporting to oust the Court's jurisdiction on questions of law was void as a matter of public policy, and that a provision purporting to do so was severable.

The conclusion is at odds with the later case of Nikko Hotels (UK) Limited v MEPC plc,[43] a rent review giving rise to a dispute as to whether the expert determination was to proceed on the basis of actual rates charged, or on the basis of the published room rates (which were higher as they did not take into account concessionary or discounted room rates). The expert preferred the landlord's approach, resulting in a higher rent. The tenant complained. Knox J. decided, having reviewed the conflicting earlier authority (including

[41] No public policy objections arise where the question is one of fact: Baker v Jones [1954] 1 W.L.R. 1005, at 1010. Such a decision may be challengeable for fraud or perversity: see West of England Shipowners Mutual Insurance Association v Cristal Limited [1996] 1 Lloyd's Rep. 370.
[42] [1969] 2 Ch. 378
[43] [1991] 2 E.G.L.R. 103.

the unreported Court of Appeal decision in Jones v Sherwood Computer Services Plc[44]) that there was no bar on experts determining questions of construction as part of the proper exercise of their expertise, and that Davstone had gone too far. He further observed that:[45]

> *"The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.*"

This approach has received some endorsement by later Court of Appeal authority.[46]

The question is still not settled, however. It is to be noted that in Barclays Bank Plc v Nylon Capital LLP, the Court of Appeal has left open the question of whether any error of law within the expert's remit will always be reviewable by the Court,[47] though the point has yet to be definitively settled. It is considered (subject to what is said below in relation to manifest errors and material departure from instructions) that the present attitude of the Court is that it is likely to be more receptive to challenges founded purely on errors of law, and that Nikko Hotels is a much-weakened authority. It is, of course, a

[44] Now reported at [1992] 1 W.L.R. 277.
[45] *Ibid*., at 108.
[46] Brown v GIO Insurance Limited [1998] Lloyd's Rep. I.R. 201, at 208 (where Chadwick L.J. L.J. expressly stated that there was no rule of public policy against referring to a third party "*some issue which involves questions of construction or of mixed law and fact*"); West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Limited (The Glacier Bay) [1996] 1 Lloyd's Rep. 370, at 377; Mercury Communications Limited v Director General of Telecommunications [1996] 1 W.L.R. 48; British Shipbuilders v VSEL Consortium [1997] 1 Lloyd's Rep 106; National Grid Co v M25 Group [199] 1 E.G.L.R. 65; See also Inmarsat Ventures Plc v APR Limited (High Court, unreported transcript, 15 May 2002).
[47] See Barclays Bank Plc v Nylon Capital LLP [2011] 2 Lloyd's Rep 347, paragraphs [35] (*per* Thomas LJ)and [63] – [72] (*per* Lord Neuberger M.R., who expressly questioned the safety of relying on the cited passage from Nikko Hotels); Persimmon Homes Limited v Woodford Land Limited [2011] E.W.H.C. 3109 (Ch); Ackerman v Ackerman [2011] E.W.H.C. 3428 (Ch) at paragraph [291].

point on which reasonable views may differ. While judicial oversight may be welcomed by some, it is somewhat curious that this dispute resolution mechanism appears to be attracting significantly greater scrutiny in the Courts than other modes of dispute resolution, somewhat undermining the point of expert determinations.

"Non-Trivial Departure from Instructions" ("Jurisdictional Error")

This is not an instance of an expert doing something badly within jurisdiction, but, rather, an instance of something done by the expert which is on close inspections outside the scope of his instruction.[48] It appears that, save perhaps in the case of a particularly widely drafted expert determination clause,[49] it will generally be open to the parties to challenge an expert's determination where he has materially not done what the contract required him to do. An expert may not define his own jurisdiction. It is for the parties to confer it by contract. What they have conferred is a question of construction of the relevant contract.

An illustration of this can be found in National Grid Co Plc v M25 Group Plc.[50] In that case, relating to a rent review by expert determination, the independent expert was asked to determine the rent on review having regard to, amongst other matters, the terms of the lease relating to user. Those were contractual directions and instructions in accordance with which the expert was required to act, and the parties had not, therefore, conferred upon the expert the sole exclusive right to determine the meaning of certain provisions of the lease, as had been done in (for instance) Norwich Union Life Insurance Society v P&O Property Holdings Limited.[51] Accordingly, if, on the true construction of a particular lease, the question of the meaning of a provision of the lease goes to the scope

[48] See the discussion in Ackerman v Ackerman [2011] E.W.H.C. 3428 at paragraphs 258 – 263, and 274
[49] Barclays Bank v Nylon Capital LLP [2011] 2 Lloyd's Rep 347, at paragraphs [23], [28] (*per* Thomas L.J., pointing out that in an expert determination, particular issues are referred to the expert, whereas arbitration clauses operate more widely); paragraphs [63] – [73] (*per* Lord Neuberger MR). A clause may delegate the interpretation of the scope of the expert's instructions to the expert too: see Dixons Group Plc v Murray-Oboynski (1997) 86 B.L.R. 16.
[50] [1999] 1 E.G.L.R. 65. See too Homepace Ltd v Sita South East Ltd [2008] 1 P. & C.R. 24, in which case a surveyor was to provide a certificate confirming that minerals had been exhausted. The contract did not, however, confer on him the power to determine what "minerals" were for the purposes of the contract. See too Level Properties Limited v Balls Brothers Limited [2008] 1 P. & C.R. 1.
[51] [1993] 1 E.G.L.R. 164,

of the expert's instructions, then it would seem that those questions remain capable of determination by the Court.[52]

The question was reconsidered in some detail in Veba Oil Supply & Trading GmbH v Petrotrade Inc.[53] This case related to a contract for the sale of gasoil. The mutually appointed independent expert under that contract was to determine the density of the gasoil by reference to a prescribed testing method, such determination to be conclusive save for fraud or manifest error. The expert used a different test, producing a different result, as a result of which the buyers brought a claim for losses they had suffered. The sellers applied for summary judgment on the basis that the Court's jurisdiction had been ousted. The Court of Appeal determined that, in not following the contractual direction as to the type of test to be used, the expert had departed from his instructions. The next question was whether that was a *material* departure or not. Having considered the authorities, Simon Brown L.J. pointed out that there was a conceptual difference between misunderstanding one's instructions, and not following what the contract required one to do, and making a mistake, albeit within the instructions set out by the contract. While a mistake made by an expert in executing his properly understood instructions could only be vitiated by a "material mistake", when an expert was mistaken as to his instructions, the threshold was not so high. The reason for that was that, in the latter case, he was not carrying out what he had been instructed to do badly; he was not carrying out what he had been instructed to do at all. In a case in the latter category, he stated that "*[g]iven that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure in the first place. Rather, I would hold any departure to be material unless it can be truly characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party*".[54] The test, therefore, is better described as "non-trivial departure from instructions". While one is able to state the tests in a neat way so as

[52] See too Director General for Telecommunications v Mercury Communications Limited [1996] 1 W.L.R. 48, at pages 58 – 59 (agreeing with the dissenting judgment of Hoffmann L.J. L.J. in the Court of Appeal (unreported, 22 July 1994) on this point).
[53] [2002] 1 All E.R. 703.
[54] See at paragraph [26]; see too Shell UK Ltd v Enterprise Oil Plc [1999] 2 All E.R. (Comm) 87.

to make the two bases of challenge conceptually distinct, there is a question of how stable the conceptual distinction is. Could one not say that the mistake (if there was one) in Nikko was about instructions, because valuing something the wrong way is really not much different from valuing the wrong thing?

It is suggested that the earlier authorities, arguably including Jones v Sherwood Computer Services Limited,[55] Nikko Hotels (UK) Limited v MPEC,[56] but also Pontsarn Investments Limited v Kansallis-Osake-Pankki,[57] approached the question of "departure from instructions" in a manner which is different from the way that question is understood in the line cases following a later case, Mercury Telecommunications.[58] The approach in that latter case appears to have been to treat the "instructions" as an accumulation of the individual legal questions asked of the expert under a contract, and not merely the general one ("what is the rent?"). The earlier cases appeared to regard the "instructions" as being the general, overarching question the expert was asked to determine, and regarded the legal questions that needed to be answered "along the way" as subsidiary questions lying within the expert's contractual jurisdiction (and hence outside the Court's supervision).[59]

The newer cases, however, appear to regard the subsidiary legal questions as cumulatively amounting to the instructions of the expert, so that, if the expert answers one of those questions wrongly, he is not in fact acting in accordance with the parties' bargain as it was intended by them to operate.[60] The latter approach permits a broader range of challenges to expert determinations, as this approach allows one to argue that more or less any error of law committed by an expert in the course of his deliberations

[55] [1992] 1 W.L.R. 277.
[56] [1991] 2 E.G.L.R. 103.
[57] [1992] 1 E.G.L.R. 148.
[58] [1996] 1 W.L.R. 48, and in particular the judgment of Lord Slynn at pages 58 – 59. Note also the approach of Timothy Lloyd Q.C. (sitting as a deputy judge of the High Court) in PosTel Properties Limited v Greenwell [1992] 2 E.G.L.R. 130 (a case in which a declaration was sought before an expert had determined the question, and an application strike the proceedings out was dismissed).
[59] See e.g. Nikko Hotels at 109.
[60] See for instance Barrington v Sloane Properties Limited [2007] EWLands LRX_31_2006, at paragraph [51].

(provided the error is capable of being established from his reasoning (if available)) would allow one to argue that he had stepped outside the ambit of the instructions of the contract.

Challenging a Decision Made Within the Scope of Instructions

Subject to the view ventured above, that many errors of law can respectably be characterized as jurisdictional, an expert's determination may be impeached on other, limited grounds:[61] naturally, fraud and collusion remain invalidating grounds.[62] However, beyond those grounds, it is accepted that, in accordance with the policy of encouraging parties to resolve disputes without recourse to the Court, the Court should be slow to find that a certificate ought to be set aside for other reasons.[63]

An expert determination may be set aside for "material" or "manifest error", meaning "*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*".[64] This avenue of challenge may however only be open to the parties if the contractual terms provide for it.[65] Absent such an express term, the parties may remain saddled with the decision, no matter how wrong, unless it can be attacked for some other ground.[66]

[61] In addition to any grounds which go to the validity of that expert's appointment in the first place, which are separate issues and are discussed above, paragraphs [***] – [***].
[62] "Fraud and collusion unravels everything": Campbell v Edwards [1976] 1 W.L.R. 403, per Lord Denning M.R.; South Eastern Railway v Warton (1861) 2 F.&.F. 457.
[63] Toepfer v Continental Grain Co Limited [1974] 1 Lloyd's Rep 11, at 14 (*per* Cairns LJ, adding "fundamental mistake" to the list of grounds).
[64] Veba Oil Supply & Trading GmbH v Petrotrade Inc [2002] 1 All E.R. 703.
[65] The issue was argued but left open in Alliance v Regent Holdings Incorporated (unreported, Court of Appeal, 23 July 1999). Gage L.J. L.J. there stated that, absent an express term, he would not have implied one on the facts of that case. In Veba Oil Supply & Trading GmbH v Petrotrade Inc [2002] 1 All E.R. 703, at paragraph [33], Simon Brown L.J. L.J. apparently considered that it was necessary to have an express clause to that effect, relying on the departure from the law as stated in Dean v Prince [1954] Ch 409 at 427 in subsequent cases. K Reynolds QC and G Fetherstonhaugh QC, *Handbook on Rent Review*, paragraph 11.12.5, state that an express provision to this effect is required. The latter view is supported by Clemence v Clarke (1880) H.B.C. (4th edn), Vol. 2, para. 54 at 65.
[66] In Alliance v Regent Holdings Incorporated (unreported, Court of Appeal, 23 July 1999). Gage L.J. L.J. left open the possibility that a manifest error might have allowed the argument that the expert had not followed his instructions, or had stepped outside his authority; as to whether a plain error can amount to a vitiating ground for other reasons, see Conoco (UK) Limited v Phillips Petroleum Company [1998] A.D.R.L.J. 55, at page 70. The proposition that the mere fact that there is a manifest error means something

As suggested above, however, the concept of jurisdictional error (that is, departure from instructions) is an evolving one, and, if the view prevails that the instructions that the expert has to follow are an aggregate of the legal questions he is required to answer in order to reach his ultimate conclusion, and not just the overarching question ("What is the rent?"), then it may well be that errors within jurisdiction and errors as to jurisdiction will shade into one another.

has gone wrong with the expert's compliance with his instructions was, however, doubted in Pontsarn Investments Limited v Kansallis-Osake-Pankki [1992] 1 E.G.L.R. 148, at 151,