SETTING ASIDE AN EXPERT'S DETERMINATION

Introduction

Expert determination (ED) is intended to be quick, no nonsense and cheaper than its brothers and sisters[1]. In particular parties are expected to leave all the procedural baggage at the departure lounge when embarking on this dispute resolution journey. More important and attractive to the users of ED is the minimal intervention by the court. There are limited grounds for challenges at the court of first instance or appeals to the Court of Appeal.

Those familiar with ED will know that the limited grounds for a challenge include:

i) Manifest error
ii) Expert failed to follow his instructions

The latest case ***Begum v Hossain & Sunam Tandoori Limited [2015] EWCA Civ 717*** where Roth J gave the sole judgment with which Patten and Longmore LJJ agreed allowed the appeal in that the Expert failed to follow his instructions. Whilst this is not a construction case it is important to the construction fraternity as ED is being more frequently used in construction and engineering disputes.

The Background

In 2007 two partners Ms Begum and Ms Hossain (the Parties) formed a company on a 50/50 basis to operate an Indian restaurant and takeaway in Kent. In 2009 the partners had fallen out and on about August 2009 Ms B presented an unfair prejudice petition under the Companies Act 2006 s994. The Parties reached a settlement whereby they agreed that Ms H would purchase Ms B's shareholding at a price to be determined by an independent expert valuer.

In summary the terms of the settlement provided:

(i) Ms H will purchase Ms B's shareholding 'at a price to be determined by an independent valuer with experience in valuing shares in private companies operating in the Indian restaurant sector.."
(ii) Naming the expert valuer
(iii) That the value of the shares should be calculated to reflect the price that a willing buyer and a willing seller, in the actual position of the Parties would arrive at
(iv) That the valuer should have access to all of the books, records and documents in the possession or control of the company
(v) That said books and records of the company included any handwritten takings
(vi) Ms B warranted that the books and records of the company included materially were accurate records of the company's actual takings

[1] litigation and arbitration

(vii) The Expert shall not give reasons

The Expert was given authority to employ assistance from other professionals at his sole discretion had he so required. Such an option is generally incorporated into most terms of an arbitrator's, adjudicator's and ED's terms of appointment.

In about June 2011 the Expert Valuer issued his determination with reasons complete with a full report explaining the basis and methodology of the valuation. The Expert stated this:

> *"In preparing my valuation, my principal approach, and the one upon which I place most reliance is the Income Approach or Earnings Multiplier. This method of valuation has a long pedigree and is the approach used most widely by investors and operators and, consequently, valuers. An 'all risk' yield or multiplier is applied to maintainable income, which a valuer assesses following a review of historic and current trading information. The multiplier is selected to directly reflect market sentiments."*
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> *"It is my view that it is not the role of the valuer to decide whether or not the trading accounts provided are truthful and on the basis that they have, to date, been relied upon for VAT purposes, I have no alternative than to assume that they are reliable. In the event that a jointly appointed independent forensic accountant determines that they are not accurate and both parties agree to the revised accounts, I reserve the right to amend my opinion of the value accordingly."*

Ms B challenged that determination / valuation on the basis that the Expert had materially departed from his instructions insofar as the Expert had based his opinion entirely on the Profit and Loss accounts and failed to give any consideration to the figures or information set out in the 'handwritten takings' referred to in the settlement agreement.

<u>The Law</u>

Roth J in the CA explained that the law, which was not in dispute between the Parties, was that as set out in the court at first instance by Mr Sheldon QC's judgment.

The leading case is ***Jones v Sherwood Computer Services Plc [1992] 1 WLR 277 at 287 [1992] 2 All E.R 170*** whereby Dillon LJ with agreement from Balcombe LJ stated at 287:

> *"On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning MR said in Campbell v Edwards*[2]*, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material*

[2] [1972] 1 WLR 403 at 407G [1976] All ER 785

respect – e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in Jones (M) v Jones (R.R)[3], the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do."

Further, in the case of ***Veba Oil Supply & Trading GmbH v Petrotrade Inc***[4], Simon Brown LJ had set out the principles as:

(i) *A mistake is one thing, a departure from instructions quite another. A mistake is made when an expert goes wrong in the course of carrying out his instructions. The difference between that and an expert not carrying out his instructions is obvious.*

(ii) *Under the old law a mistake would vitiate the expert's determination if it could be shown that it affected the result. That was the concept of material mistake established in* ***Dean v Prince [1953]*** *and* ***Frank H Wright (Construction) Ltd v Frodoor Ltd [1967]*** *cases. Not so, however, with regard to a departure from instructions …..*

(iii) *Under the modern law the position is the same as it was with regard to a departure from instructions, different with regard to mistakes. As Lord Denning explained in Campbell v Edwards, if an expert makes a mistake whilst carrying out his instructions, the parties are nevertheless bound by it for the very good reason that they have agreed to be bound by it. Where, however, the expert departs from his instructions, the position is very different; in those circumstances the parties have not agreed to be bound."*

Lloyd J judgment in ***Shell UK Ltd v Enterprise Oil Plc***[5] stated that the parties are not bound by a determination in the circumstances where the expert has failed to follow his instructions.

The Issue[s]

The Expert was instructed to arrive at a fair value of the business shares taking into consideration *inter alia* the handwritten notes of the takings. The handwritten notes were expressly agreed to be part of the books and records.

Did the Expert carry out his instructions?

[3] Jones (M) v Jones [RR] [1971] 1 WLR 840 [1971] 2 All ER 676 Ch. D
[4] [2001] EWCA Civ 1832 [2002] 1 All ER 433
[5] [1999] 2 All ER (Comm) 87 at 108

Court of Appeal Decision

According to the Court of Appeal by failing to take into account the handwritten notes the Expert had been in abdication of his responsibility. The Judge's view was that the fair value should be calculated having regard to the books and records of the company. Objectively viewed the process of valuation had to take into account not merely the fact that such handwritten takings existed but what they stated. Matters for the ED in his discretion included: (i) how much weight was to be given to the information in the handwritten takings (ii) whether any, and if so what, adjustment to the figures in the trading accounts was required and (iii) whether the handwritten takings were to be preferred.

An ED conclusion cannot be challenged on the basis of the conclusions the Expert reached or the calculations he made. The Judge considered that the Expert had by putting the handwritten notes aside misinterpreted his mandate. Instructing an accountant was an option for the Expert and the cost associated therewith was part of the Expert's expenses for which the Parties would eventually be liable for.

The Judge also found it significant that Ms B had warranted that the handwritten notes were accurate records of the company's takings.

The price to be determined was the price which a willing buyer and a willing seller in the actual position of these Parties would have arrived at. A willing seller would clearly have put forward the handwritten takings as reflecting the actual takings of the business, on the basis that the trading accounts used for tax purposes were understated. Faced with that, a willing buyer would no doubt have looked at the handwritten takings and may have asked for an explanation as to the discrepancies.

The question is one of construction of the express terms of the settlement. The valuer had been mandated to have arrived at a fair value of the shares having regard to the books and records of the company (including the handwritten notes). That meant as a matter of ordinary construction, that he had been required to have arrived at his valuation by considering the content of all those documents and not simply some of them. If he had considered he needed the assistance of an accountant, he was entitled to obtain it at the parties' expense. The Expert did not follow his mandate and therefore the valuation had to be set aside.

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