

Expert determination used to offer advantages over arbitration, but these days, the distinctions are blurred

Some self-restraint would cut unnecessary costs

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The point of using expert determination, rather than arbitration, to resolve a valuation dispute is that it is meant to be cheaper and quicker. Accepting an independent valuer's expert opinion to decide the matter is inherently fair; the risk of a disappointing result is the same for each side. The great advantage is, or should be, that the matter is decided at relatively little expense.

This advantage is most needed where the sums in dispute are not great. Rent reviews on smaller properties are the obvious example. Costs pressures are high, especially for tenants. The total costs of an arbitration, even those based upon written submissions alone, can easily exceed six months' rent, and rent reviews are periodic. The landlord usually has a deeper pocket than the tenant, and a determination reflecting concern for capital values as well as income. Small wonder that the tenant often resignedly agrees to pay what it is advised is an overly "full" figure, rather than incur the time, trouble and costs risk of an arbitration.

Added disadvantages

Expert determination should therefore be readily usable as a cost-effective alternative, but unfortunately, these days, it is not. Expert determinations have now become virtual arbitrations, as expensive as the real thing, but with the added disadvantage that they lack rules of procedure.

In theory, the parties should be able to give the expert details of the property and the relevant terms and tell him to come back with the value. However, human nature being what it is, parties still want to influence the decision and experts readily allow this. Even though the cases show that it is very rare for a disappointed party to succeed in holding an expert liable in negligence, it is a brave expert who simply proceeds with his task.

It is now the norm for experts to invite representations from the parties, even where the terms of their appointment do not require this. If this happens, neither party can afford not to make them. Concerned about "natural justice",

the expert exchanges them. Each party then wants to contest what the other has said, so the expert allows counter-representations. Before you can blink, the process has become virtually indistinguishable from arbitration.

The pressures to complicate an expert determination like this are great, and they are all one way. These days, it seems to be customary for independent experts to charge fees based upon hourly rates. This means that there is no incentive at all to keep the process simple and the costs down.

An expert determination is nothing but a valuation, and – subject to express directions in the lease or other instrument – it should be conducted as such. The role of an expert is quite different from that of an arbitrator. He is not weighing competing cases. There is no need to write letters recording every point, copied to both parties, nor to seek their opinions. An independent expert has no legal grounds to issue directions to the parties, as some do. This puts pressure on the parties to comply – at more expense – rather than risk annoying him. I have seen an expert "require" information from the parties' advisers, and, moreover, information needing research. It is no part of an expert's function to demand evidence. By definition, if he is an expert, he should be able to value the property by relying upon his own expertise and by making such enquiries as he expertly judges to be necessary. Since he should check the information in any case, such a demand means that three people will spend chargeable time on investigations rather than one. Similarly, there is no reason to write up a determination with all the detail of an arbitration award.

A matter of professionalism

Short of the professional bodies devising a scheme under which expert determinations in small value cases are undertaken on an agreed fixed or scale-fee basis, it is difficult to curb such cost-increasing tendencies from outside. The parties, in dispute with each other and naturally fearful of annoying the expert, are not in a position to resist such excesses. As a matter of professionalism and if this mechanism is to retain its value as a dispute resolution process, independent experts need to do so themselves.

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