The Strange Case of the Determination of the Independent Valuer

The case of Premier Telecom Communications Group Ltd v Webb was reviewed by the Court of Appeal in July 2014 ([2014]EWCA Civ 994). It does not appear to have received much critical comment. The case involved the valuation of shares in quite an unusual circumstance which does not concern the reader.

It is the guidelines for challenge to the decision/determination of the independent valuer where issues of law are or may be decided which are key.

The judgment of the Court of Appeal was given by Lord Justice Moore-Bick with whom the other members of the Court agreed.

Lord Justice Moore-Bick referred to the judgment in Barclays v Nylon* [2011] EWCA Civ 826 *and especially underlined the comments of Lord Neuberger who is now President of the Supreme Court of England and Wales. He said

> My only reservation concerns the suggestion that an error by the expert on *any* point of law arising in the course of implementing his instructions might justify setting aside the determination. The judge treated this as an open question on the basis of certain comments made by Lord Neuberger M.R. in *Barclays Bank v Nylon Capital*. It is necessary to remember, however, that those comments were obiter and that neither of the other members of the court expressed agreement with them. It is possible that the parties might by their agreement define the terms of the expert's mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases to do so would risk undermining the whole purpose of the reference. Ultimately, however, as Lord Denning observed in *Campbell v Edwards* [1976] 1 W.L.R. 403, 407 (and as Lord Neuberger himself was at pains to emphasise in *Barclays Bank v Nylon Capital*), it all comes down to the construction of the contract under which the expert was appointed to act. Only by construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties.

What is worthy of note is the dismissive nature of the comments by Lord Justice Moore-Bick as to the suggestions by Lord Neuberger.

Therefore for the avoidance of doubt this article sets out those carefully argued suggestions noting of course they were made ex tempore and were not seemingly supported by the remaining members of the Court of Appeal in Barclays v Nylon. *There is, in my view, a powerful argument for saying that, depending, of course, on the terms of the particular contract in question, a valuation by an expert, even whose valuation is agreed to be "final and binding", can be challenged in court if it can be shown to have been arrived at on the basis of a mistake of law.*

> ***63*** *The analysis of Dillon LJ in Jones v Sherwood [1992] 1 WLR 277 quoted in para 30 above is unexceptionable as far as it goes, but it can be said to raise almost as many questions as it answers. If the expert "valued the wrong*

number of shares", it is scarcely controversial to suggest that his decision could not stand if it was challenged in court (unless, perhaps, the parties' agreement had, bizarrely, plainly excluded such a mistake from being challenged). But what if the expert had valued the right number of shares on the wrong basis (e.g. because of his misinterpretation of the company's articles of association, he had valued the shares on the assumption that they could not be transferred without the concurrence of the board, whereas they could, in fact, be freely transferred)? It seems to me that in such a case, it could be said to be an open question whether the test propounded by Dillon LJ, namely that the valuation will be binding unless "the expert had not done what he was appointed to do", is satisfied.

64 *Of course, it is very dangerous to generalise, as the extent of the expert's mandate in any case must depend on the words of the particular contractual provision and the documentary, factual and commercial matrix of that provision. Nonetheless, in the absence of any other direction or indication, it seems to me that a contractual provision which simply required an expert to value specified shares in a company may well not mean that his determination was immune from attack if it could be shown that, as a matter of law, he had valued the shares on the wrong basis. His contractually agreed instructions could, (I emphasise again) in the absence of a provision or indication to the contrary, be said to be to value the shares in accordance with the legal rights and obligations they carry with them. To value shares on the assumption that they could not be freely sold, when, as a matter of law, they could be, would not, it can be said with force, result in a valuation of the shares according to the contractual arrangement between the parties.*

65 *Accordingly, despite the fact that it has, as Thomas LJ says, been frequently cited, I do not consider that Knox J's observation in Nikko Hotels v MEPC plc [1991] 2 EGLR 103, 108, as quoted above in para 31, can safely be relied on. Of course, the parties may expressly or impliedly agree, either in their original contract or thereafter, that, if the valuation exercise entrusted to an expert "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", but I do not consider that this by any means necessarily represents the general rule. After all, if there is a dispute between the parties as to the number of shares owned by the party whose shares are to be valued, a mistaken conclusion on the point by the expert would, according to Dillon LJ, render the valuation assailable in court, whereas, according to Knox J's approach, the conclusion would appear to be unassailable as being one which "necessarily" had to be decided in order to effect the valuation.*

66 *I do not consider that this view is called into question by the observation of Sir Donald Nicholls V-C in Norwich Union v P&O [1993] EGLR 164, quoted in para 32 above. As is clear from reading the decision of the Court of Appeal, the relevant issue in that case did not involve a "bare point of law" – per Dillon LJ at [1993] EGLR 164, 168M. It was for the expert to decide what*

constituted the relevant documents, which was more an issue of fact (and, possibly, professional assessment) than an issue of law. In any event, the reasoning of Sir Donald, although worthy of great respect, is not binding on this court, and was much more widely expressed than that of the Court of Appeal.

67 *It seems to me that the correct position is that identified by Hoffmann LJ in his dissenting judgment (whose authority derives much support from the fact that his view prevailed in the House of Lords - [1996] 1 WLR 48) in Mercury v The Director General [1994] CLC 1125, 1140, quoted in para 33 above. It also appears to me that, while the point was not so fully or clearly discussed by Lord Slynn of Hadley, who gave the sole reasoned speech in the House of Lords, he appears to have taken the same view – [1996] 1WLR 48, 58G-59B. (It is true that the approach of Knox J was apparently approved by the Court of Appeal in RE Brown v GIO Insurance Ltd [1998] Lloyd's LR Ins and Reins 201, 208, but the court in that case does not appear to have been referred to the decision or reasoning in Mercury v The Director General [1994] CLC 1125, [1996] 1 WLR 48).*

68 *Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann LJ said in Mercury v The Director General [1994] CLC 1125, 1140, "The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority", and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.*

69 *I appreciate that, in cases of this sort, the advantage of leaving all points of law to the final determination of the expert is that it results in a relatively quick and cheap process for the parties. However, it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations. It would, I suggest, be surprising if that were the effect of an expert determination agreement, when the Arbitration Act 1996 gives a right (albeit a limited and prescribed right) to the parties to refer points of law to the court. That Act applies where the parties have entered into an arbitration agreement, which gives them a much greater ability, in law and in practice, to make representations and to involve lawyers in connection with the arbitration, than parties enjoy in connection with the great majority of contractual expert determinations.*

70 *After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue. If they do not, they may also think it sensible to try and agree whether the expert's decision on the point will be treated as final and binding or whether the disappointed party should have the right to refer the issue to the court. If the latter, then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision, and it may also assist the parties in arriving at a settlement.*

71 *Sometimes, it is not possible to show that the expert has made a mistake of law in arriving at his valuation, because he has not expressed a view on the issue of law, and it cannot be said that he was under a duty to do so, and it is not clear from his determination how he must have decided the issue. In such a case, it seems to me that there would be no basis for challenging the determination on the basis of error of law. For the reasons already given, if the expert needs to determine a point of law which divides the parties, he may think it right not only to decide the point and say how he has decided it, but to indicate what the valuation would have been if he had decided the point the other way.*

However it is worth noting that the judgment was published in spite of the explicit wishes of the parties that the judgment should not be published thus it could be assumed that the remaining members of the Court of Appeal did concur with that element of Lord Neuberger's speech.

These guidelines are key as Lord Neuberger states it would seem odd were parties be able to appeal from an arbitration on a point of law, with difficulty, but not those involved in an Expert Determination.

It is quite clear that where a member of a Dispute Adjudication Board has erred in its decision of a point of law then the dissatisfied party can issue a Notice of Dissatisfaction and subsequently have the issue reviewed by arbitration.

The regime within Adjudication is different as the Courts at all levels consider such decisions inviolate. However some readers carry out both functions on occasions and should be aware of the President's comments.

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