

## PROPERTY COMMENTARY – FEBRUARY 2012

### Either You Have It or You Don't

Every so often I meet with my colleagues to 'chew the fat' as it were. We have a bit of a contest in that questions are fired at us as to situations which could face us in our normal working day. The most recent set of questions revolved around jurisdiction. Fortunately, before question time I received a magazine from the Chartered Institute of Arbitrators which contained a summary of a Court case regarding a determination of the jurisdiction of the Expert. There is nothing like having an edge! I have decided, therefore, to devote this letter to the continuing theme of dispute resolution.

A lot of the time parties to a dispute cannot even agree the time of day let alone the terms upon which the dispute is to be heard. They often try and negotiate themselves into a position of strength. This takes many forms. In one or two instances proceedings have to be halted due to an intervening family matter which sometimes (coincidentally!) occurs during the school mid term break. At other times the parties are seeking to remove the independent third party. This often involves a challenge to their jurisdiction.

The recent Court case of *Barclays Bank plc –v- Nylon Capital LLP [2011] EWCA Civ 826* was concerned with the Expert's ability to determine their jurisdiction. The agreement appointing the Expert provided for the Expert to determine his own jurisdiction. The parties disagreed on the determination issue. The Court held that whatever the Expert decides on jurisdiction, his decision is not final and can always be challenged unlike his determination of a matter within his jurisdiction. The case, of course, provides guidance as to the Court's approach concerning the entitlement of Experts to decide on their own jurisdiction.

The Expert's terms of reference are determined by the contract between him and the parties. If that contract is silent on the Expert's ability to determine jurisdiction then the Expert has no such authority. What the Courts are concerned with is not so much the Expert's ability to determine jurisdiction but whether such a decision is final and binding. Based on this case clearly it is not, and that is the right decision.

By contrast, the Arbitration Act 1996 spells out that the Arbitrator is permitted to determine their jurisdiction by virtue of Section 30. All that is needed is for the parties to agree that the Arbitrator can determine their jurisdiction. The decision (Award) is still subject to challenge under Section 67.

The moral I suppose is, make sure that when you enter into a contract the terms of reference are clear. If it is an Independent Expert and you envisage a jurisdiction problem, make sure that power is given to them in the contract. If you are facing an Arbitrator, take a look at Section 30 of the 1996 Act. If you want to object, look at Sections 31 and 32. Section 30 is non mandatory. Sections 31 and 32 are mandatory and contain time limits.

As my Father always used to say 'forewarned is forearmed'.



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