

## Expert Determination: avoiding howlers on and off the pitch

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**The return of the Premier League this weekend is always a reminder that results matter, whether decided on the pitch or off it. As players, owners and investors gear up for another season, the spotlight isn't only on goals and league tables, but also on the contracts and clauses that shape fortunes behind the scenes and the disputes that inevitably follow.**

Expert determination rarely takes centre stage in conversations about dispute resolution, but it's quietly having a moment. Indeed, while the usual suspects of adjudication, litigation, and arbitration continue to dominate the headlines, I've recently noticed an uptick in matters heading to this niche, but highly practical mechanism of dispute resolution, particularly where the issues are technical and time, as is so often the case, is money ...

Jonathan and I have both been acting as expert determiners for over 10 years and between us have written various blogs on related topics (for example, [Resolving disputes through expert determination | Construction Blog](#), [Expert determination and adjudication: an adjudicator's view | Construction Blog](#) and [TCC stays expert determination proceedings | Construction Blog](#)). What strikes me most in recent times is how expert determination isn't just about being confidential and time/cost-efficient, it increasingly calls for a high level of technical expertise and, often, legal scrutiny. Right now, I'm involved in three such cases and, interestingly, most aren't construction contracts, but rather development agreements and property-related contracts, where adjudication is not available as of right. If you've ever drafted or argued over price adjustments, completion accounts, rent reviews, or earn-outs, you've probably seen the trend too: more contracts are pointing disputes towards expert determination. And, for the benefit of those that haven't, what is it exactly?

### **Expert determination**

Expert determination is a form of alternative dispute resolution where, as the name suggests, parties appoint an independent subject matter expert to decide certain issues in dispute, typically where a valuation or specialist opinion is needed, rather than an analysis of the law. It's therefore often used for disputes that turn on technical judgment rather than legal argument, so it's better suited to those where the relevant facts are not significantly contested and can be established from documentary evidence.

### **Why use expert determination?**

## **1. Subject-matter expertise first**

One of the biggest advantages of expert determination is that your dispute is decided by someone with specialist knowledge of the subject. Judges and arbitrators often rely on expert witnesses to explain technical issues, but in expert determination, the decision-maker is the expert. Expert determiners can and should investigate beyond the submissions, test the numbers, and apply their own specialist knowledge. While it can mimic adjudication, it often involves greater reliance on the determiner's own investigative work and expertise (similar to an expert witness) rather than solely on the evidence presented by party-appointed experts (though parties may still choose to use their own). Ultimately, determiners are appointed for their specialist technical or commercial knowledge which can make the process much more focused and practical. If you want to act (or appoint) with confidence, the [RICS Online Expert Determination Training](#) provides a solid benchmark in structured learning on appointment, procedure, and drafting determinations.

## **2. Cost and speed**

As I mentioned, the appointed expert deals directly with the technical issues, which often removes the need for additional expert witnesses and keeps costs down. With fewer formalities i.e. no fixed timetable and no lengthy hearings, it makes it usually faster and cheaper than going to court or arbitration.

## **3. Flexibility**

Expert determination operates in a more informal, streamlined way and can be used either on its own or alongside mediation, arbitration or litigation. However, unlike some of the other processes, it is highly flexible and can be shaped to suit the parties' needs. Beyond choosing an expert with the right qualifications, the parties can also agree on key elements such as the expert's terms of reference, the timetable, where any meetings take place, the language of the proceedings and the valuation rules to be applied. So, unlike a court or tribunal, the expert is not bound by rigid procedures and can adopt a more inquisitive, problem-solving approach to reach a fair outcome.

## **4. Preserving relationships**

Because it's private, confidential (unless required to be made public or ultimately challenged by litigation), and less adversarial, expert determination is often better for preserving business relationships too. Instead of escalating conflict, it creates space for resolution without the public or confrontational aspects of litigation or arbitration.

## **5. Finality and certainty**

The parties can agree that the expert's decision is final and binding, with no right of appeal. This removes the risk of lengthy challenges, saving time, cost, and uncertainty. Unless the contract provides otherwise, court or tribunal intervention is very limited (which I'll come onto). This contrasts with litigation (and, to some extent, arbitration), where appeals can prolong proceedings and increase costs without guaranteeing a definitive outcome.

## **Drawbacks**

However, as with all forms of dispute resolution, there are drawbacks:

### **1. Dependence on a single individual**

The outcome of expert determination rests entirely on the judgment of a single individual so if the chosen expert lacks true independence or the right skills, the decision can be flawed. Experts are often not required to provide detailed reasons and, in some cases, any reasons at all, for their

decision which can leave parties feeling uncertain about how it was reached and makes it harder to identify whether there has been a mistake. Where reasons are given, parties have greater visibility of the expert's thought process, but this also increases the scope for a challenge based on manifest error. To really benefit from the process, it's therefore essential for parties to agree the right expert in the subject matter and (if there is a right of appeal on account of a manifest error of law) a strong legal knowledge and ability to determine the law.

## 2. Procedural informality

While informality generally keeps expert determination quick and cost-effective, it also means fewer procedural safeguards. There is usually limited evidence gathering, no cross-examination, and less opportunity for parties to feel they have had a "full hearing" of their case. Litigation and arbitration are grounded in formal rules and statutes designed to ensure due process and so in the absence of these protections, it becomes problematic if one party is uncooperative or seeks to obstruct the process.

## 3. Limited grounds for appeal

The expert's decision is usually binding and final, with very few avenues to challenge it (except for fraud, bias, or manifest error). As I mentioned above, this finality can be beneficial, but it can be risky if the expert makes a mistake, as there's no built-in appeal process like in court or arbitration. But "final and binding" doesn't mean immune and a recent decision involving West Ham United's owners is a timely reminder that, where the clause allows it, a court can set aside an expert's decision .....

### The West Ham Case

The most recent decision in which a judge refused to treat an expert's decision as final came earlier this year in the Commercial Court's ruling in [WH Holding Ltd v E20 Stadium LLP \[2025\] EWHC 140 \(Comm\)](#) (the *West Ham* case). WH Holding Ltd (WHH), the holding company for West Ham United, had a clause under a Concession Agreement requiring them to pay E20 Stadium LLP (E20) a "Stadium Premium Amount" in the event of certain shareholder transactions. The parties agreed that any dispute relating to this would be decided by expert determination, and that the expert's decision would be "*final and binding in the absence of manifest error*". When the transactions were triggered, the expert ruled in E20's favour, ordering WHH to pay £3.6 million. However, WHH subsequently challenged the determination, claiming there were two manifest errors in the expert's reasoning.

The court clarified that this was not an appeal of the expert decision, and its role was *strictly limited* to determining whether the errors alleged were indeed *manifest*. The Court found two clear errors in the expert's reasoning:

- i. Misinterpreting "or" as "and", causing separate transactions to be treated as one.
- ii. Using inconsistent values for a key calculation ("A" in the formula) without basis in the agreement.

In doing so, the court rejected pejorative terms like "blunder" or "howler" from previous authorities as subjective and unhelpful, and instead, provided more useful guidance for us going forward, that the error had to be "*so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*".

### **They think it's all over ... is it now?**

The court found in WHH's favour and set aside the expert determination for manifest error ordering E20 to repay the £3.6m. However, permission to appeal was allowed on 15 April 2025 and I believe the appeal is expected to be heard in November 2025. In the meantime, and in summary, what does the case tell us about expert determination?

Expert determination remains a powerful, if under-appreciated, tool in the dispute resolution toolkit. Its great strength lies in speed, confidentiality and subject-matter expertise, but those same qualities bring risks: a single expert's reasoning can be decisive, and opportunities to challenge are deliberately narrow. However, where an expert's reasoning contains an error that is obvious, outcome-determinative, and beyond legitimate debate, a determination can be set aside. Successfully challenging an expert determination is uncommon, given the high threshold required to demonstrate a manifest error and so it will be interesting to see how the appeal unfolds over the coming months.

However, if nothing else, the West Ham case is a timely reminder of the importance of drafting. Careful drafting of ADR clauses, together with precise reasoning by the expert, are essential to avoid outcomes that unravel under scrutiny. ADR clauses should spell out the scope of the expert's role, define any carve-outs for manifest error or fraud, and make clear whether reasons must be given. For experts, the case is a reminder that clarity, precision, and strict adherence to contractual wording are essential, and this is where having an expert determiner with a technical and legal background can be enormously beneficial.

Ultimately, expert determination works best where it is tailored to technical disputes, but parties must draft with precision to ensure finality means what they intend. Done well, expert determination delivers clarity and closure where parties need it most. Done poorly, it can lock parties into flawed results with little recourse.

All I ask is for West Ham to let their football, not disputes, make the headlines this season. Saturday's opening game at the Stadium of Light did just that, but sadly for all the wrong reasons ..... ✂



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