

# Review

## Construction, Engineering and Projects



### Hammonds Construction team resists application to stay expert determination proceedings

Hammonds Construction team in London recently found themselves in the Technology and Construction Court (TCC) resisting part 8 proceedings to have a dispute taken out of expert determination and remitted to the TCC in London.

Ramsey J determined the part 8 claim in Hammonds' client's favour thereby providing useful judicial authority on the subject of expert determination. In contrast to adjudication and litigation, expert determination is not a dispute resolution process commonly reported on, consequently there is limited guidance on such proceedings. The court judgement (*Braceforce Warehousing Ltd v Mediterranean Shipping Company (UK) Limited (2009) QBD (TCC) Ramsey J 4/6/2009*) is the only authority on the application of the Limitation Act 1980 to the process of expert determination and the question of when such a process is "commenced".

By way of background, the starting point is an agreement for lease (AFL) entered into between our client, Mediterranean Shipping (UK) Limited (MSC), the tenant of a warehouse, and the contractor, Braceforce Warehousing Limited (Braceforce). Our client's case was that Braceforce failed to undertake the design and construction of the warehouse properly, resulting in substantial defects. MSC and Braceforce had engaged in discussions over the years as to the appropriate remedial steps, which proved futile, and ultimately MSC had no option but to activate the dispute resolution machinery under the AFL, in this instance expert determination.

Prior to activating the dispute machinery and mindful of potential limitation issues on which Braceforce might seek to rely, on 16th November 2007 MSC entered into a standstill agreement with Braceforce, extending the limitation period to 6th December 2008.

On 24th November 2008 the first tier of the dispute resolution machinery was activated by way of a detailed pre-action letter which invited Braceforce to agree on the identity of an expert proposed by MSC. Agreement was not forthcoming and on 8th December 2008 the appropriate application was made on MSC's behalf to the RICS, as provided for by the expert determination machinery.

Within the pre-action letter, the issue of the impending expiry of the standstill agreement was also addressed and Braceforce were requested to agree to a further standstill agreement. MSC advised that it would be left with no option but to issue protective proceedings if agreement on a further standstill could not be reached. Braceforce failed to respond and therefore protective legal proceedings were issued in the TCC on 28th November 2008.

On the 8th December 2008 the appropriate application was made to the RICS for the appointment of an expert pursuant to the AFL and an expert was duly appointed. MSC proceeded to serve its position paper. At this juncture, Braceforce sought to delay and obfuscate matters by raising concerns over the expert's jurisdiction.

Submissions on the issue of jurisdiction were made by the parties and the expert concurred with MSC's assertions, ruling that he was satisfied that he did have jurisdiction and that the matter was to proceed. Quite properly, the expert directed that if Braceforce remained intent on pursuing the issue, the appropriate application should be made to the court.

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Braceforce applied to the court and the matter came before Ramsey J in the TCC with Braceforce seeking a declaration that the expert had no jurisdiction to hear the dispute. The primary issues before the court were whether:

- (1) the expert determination had been properly activated prior to the potential expiry of any time limits.
- (2) whether by issuing protective legal proceedings in the TCC the parties had agreed to litigate.

Ramsey J held that the limitation period was not applicable to the expert determination and, even if it was, a request had been made for expert determination before the expiry of any limitation period. In respect of the second issue, it was held that an expert appointed under a contractual expert determination clause had jurisdiction to determine a dispute between the parties. MSC had not elected to pursue court proceedings in preference to an expert determination and the parties had not agreed to one set of proceedings over another (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd (1993) AC 334 HL* was considered).

This decision is the only authority on how and when an expert determination can properly be said to have commenced. Ramsey J found that MSC's invitation to agree on the identity of an expert was to be taken as the date of "commencing" the expert determination proceedings in respect of any limitation/time periods.

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## FURTHER INFORMATION

For more information relating to this article, please contact:

**Mark Fraser**

Partner

London

T: +44 (0)870 839 1599

M: +44 (0)7825 171869

E: [mark.fraser@hammonds.com](mailto:mark.fraser@hammonds.com)

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