

TO COURT OR NOT TO COURT? THE QUESTION OF ADR OPTIONS IN DILAPIDATION DISPUTES

In many Dilapidation Cases, the quantum of damages involved does not make court a cost effective option. In others, the construction technicalities involved may lead to the parties being reticent over referring the dispute to those without specialist technical knowledge and experience. So what alternative options do parties to a Dilapidations dispute have?

For claims that warrant the cost, perhaps the most obvious option is to seek reference to the Technology and Construction Court (TCC) which operates within both the County and High Courts. Claims between landlord and tenant for breach of a repairing covenant are specifically listed within the TCC Practice Direction as being appropriate to bring in TCC, which does have the specialist technical knowledge to deal with the issues involved in disputes of this nature, including Diminution Valuation arguments.

TCC procedures can have the advantage of being more relaxed and may often seek to deal with trials in stages in the hope of reducing cost. However, they are still court proceedings and although there will be a great deal of effort to keep costs proportional, this may not be the answer in the majority of claims.

So would Arbitration or Expert Determination be a better option? In theory, yes. Either is extremely well suited to this type of dispute, allowing the parties to pursue a resolution with the kind of informality and flexibility that can produce fair and cost effective results. However, in practice it is not always easy to find one individual with the experience and knowledge to assess all aspects of a claim and appointing a panel can quickly lead to an escalation in costs that makes court start to look like a viable option.

Even if a suitable individual can be found, one or other party often feels reluctant to be bound by a single person's opinion outside of a court room. Their preference is to seek guidance and assessment rather than a binding decision. It is within this context that perhaps two of the best options can be considered as a single solution.

Early Neutral Evaluation (ENE) is a non-binding, without prejudice assessment of a claim and of its defence at a stage before a dispute even reaches the courts and before major cost is incurred by either party. It involves a jointly appointed Expert in the field following flexible procedures in order to guide the parties in the relative strengths and weaknesses of their cases.

In those ENE's that I have been involved in, I have been able to sit down with the building surveyors around a table to debate the Scott Schedule and clearly identify where points are being pushed too far on a client's behalf. The movement that this alone can create towards a compromise settlement often needs to be witnessed to be believed.

A similar exercise can then be undertaken with Diminution Valuers but more often in ENE's I am asked to prepare a single Diminution Valuation on behalf of both parties. Being part of the ENE process this remains privileged but again it will frequently move the parties closer to being able to settle their differences.

In my experience the most important aspect of this option is that it does not bind the parties and they are therefore comfortable being open. It does, however, provide invaluable guidance as to how an impartial mind assesses the situation and so long as the process has been entered into with an honest intent to seek a settlement, I have yet to see the parties fail to substantially narrow the gap in their positions. Although Mediation can be an option on its own, it is at this stage, following an ENE, that I have seen it be most effective if a settlement has not already been reached. Again the process is confidential and without

prejudice so will not leave either party disadvantaged. As a result they can afford to be open and to explore a settlement with the knowledge of the likely strengths and weaknesses of their case and without fear of compromising their position.

A skilled Mediator armed with an ENE has an extremely strong platform from which to enable the parties to reach a compromise agreement, often incorporating elements that are key to them but which would be impossible, or extremely difficult, to achieve in litigation or Arbitration/Expert Determination.

There is always the possibility that one or two issues in a dispute may not be capable of being resolved in this way but even then, following the ENE/Mediation process can lead to a position where the dispute is narrowed to an either/or scenario that can be put before the court with only minimal issues requiring judgement. In this way substantial cost can be saved and a more amicable resolution reached.

With ADR and the parties' conduct being ever more closely scrutinized by the courts, ENE/Mediation is likely to have a strong developing role in dilapidation disputes

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