The Dilapidations Consultancy

Dilapidations & Mediation: A Perfect Marriage?

James McAllister, Director of The Dilapidations Consultancy, looks at the benefits of utilising Mediation as the method of dispute resolution in adversarial Dilapidation Claims.

Dilapidation claims in commercial property are on the increase; this is widely acknowledged by all leading practitioners in the field and was covered in some detail in our article 'Dilapidations On The Rise' [2011]. Fortunately, most claims are settled well before proceedings are issued and counsel appointed. However, a fair few claims still suffer the recalcitrance or obstinacy of the associated parties and/or their 'experts', and so a courtroom battle will ensue. The obvious disadvantage to this being that the associated legal costs will invariably outweigh the 'value' of the claim (i.e. the disparity between both positions) meaning the only victory may be of the Pyrrhic variety.

It is a well known fact that true 'expert' dilapidations practitioners have never been near a courtroom; this is testimony to their ability in either preparing a fair and reasoned claim from the outset, or, if defending, providing persuasive evidence to discredit their counterpart's woefully exaggerated claim culminating in the shaking of hands on a figure that is nothing other than the true measure of loss. Naturally, if the claim is accurate in the first place, and both surveyors are suitably versed in the legal formalities governing these matters, then the claim may well be settled in nothing more than a few letters and a single draft of a Scott Schedule.

Regrettably, most landlords and their have-a-go 'expert' advisers fail to grasp the simple principle that a terminal dilapidations claim is an allegation of breach of contract and the costs contained therein represent a claim in damages.[1] They further overlook the fact that, in law, damages (unliquidated) is a remedy to compensate loss, and one cannot recover what one has not lost. A generous application of common sense should be enough alone to halt the production of a highly inflated claim, which, taken to the extreme, could be tantamount to fraud.[2] Whilst there have not been any reported cases of fraud in dilapidations so far, it is perhaps only a matter of time.

So for those claims that don't seem to benefit from the appointment of two like-minded practitioners singing from the same hymn sheet, what practical alternative is there to having one's day in court?

The obvious answer to this is mediation. As a recognised mechanism for dispute resolution the world over, mediation is fast becoming the primary method of ADR (alternative dispute resolution) and is infinitely preferable to litigation; and the reasons are clear to see. Mediation offers a fast, effective and inexpensive way of obtaining a legally-binding agreement for the participating parties to conclude their dispute.

There is, of course, a criterion to be met and not all disputes are ripe for mediation. However, since mediation is most commonly applied to situations where the law does not provide an answer (e.g. the correct 'value' of liability) or a remedy, it provides a way for the disputants to reach a mutually acceptable settlement, bypassing the legal costs associated with the less-appealing alternative.

It also means agreement can be achieved in a timely fashion leaving the parties to return to their core-business activities without losing weeks, months or even years of valuable (and irrecoverable) time which would inevitably be swallowed up by litigation; this says nothing of the stress that would also be avoided.

[1] Unless implementing a Landlord's 'self-help' clause during the term pursuant to the provisions set out in *Jervis v Harris* [1996] Ch 195; [1996] 1 All E.R. 303, where the Landlord's costs are recoverable as a debt rather than damages.
[2] Section 2, Fraud Act 2006.

Since the Woolf reforms to the Civil Procedure Rules in 1999, disputing parties are actively encouraged by the courts to co-operate and consider the use of ADR prior to proceedings,[3] especially mediation. More significantly, where the dispute arises out of contract, and where ADR is an express resolution mechanism within the contract, the court can enforce the binding nature of the ADR clause before taking the matter further.[4]

It should be made clear that mediation is a voluntary process[5] and both parties must come to the table of their own accord. Unlike litigation, one party cannot force mediation upon the other simply because it suits them,[6] although it should be noted that if the dispute does proceed to court, woe betide the party that declined mediation when offered.[7] It should, however, be reiterated that mediation is not necessarily appropriate for all disputes, and in such cases, could be legitimately refused without reprimand (or risk of an adverse costs order), particularly where the law does provide an answer and a remedy, or where there was 'no realistic prospect of success'.[8]

Mediation is also private and confidential and does not exist in the public domain; this keeps the dispute and all its gory details behind closed doors. One often overlooked benefit is that mediation has the ability to preserve relationships whilst the dispute is negotiated and settled, which is of utmost importance in certain business relationships which litigation has the tendency to destroy.

Above all, mediation can be seen as a 'win-win' outcome to a dispute, as opposed to the more mercenary 'win-lose' concept of traditional dispute resolution. When taking in to account the cost of litigation to the respective parties, 'lose-lose' is perhaps closer to the truth since even the *winning* side will rarely recover all of their outlay. The positive 'win-win' attribute of mediation exists on the simple premise that the settlement decision is not enforced upon the parties by a neutral arbiter; rather it allows the parties to reach their own terms and conditions for settlement, of course ably assisted by the Mediator who is simply the neutral party facilitating and nurturing the negotiations towards agreement. In dilapidation claims there will generally always be a value (unless pending demolition of the subject property is a factor), so assuming the parties get to a point where that value is acceptable to both, then the objective of the exercise will have been achieved. If not, then it will be clear that the impasse is fuelled either by one party refusing to accept the true extent of their liability, or the other seeking to recover more than they are entitled to. If the impasse cannot be resolved by the Mediator (and there are a number of techniques at hand to overcome this) then it will be the parties who have failed leaving them to have their day in court after all.

So, a dilapidations claim is perhaps the perfect type of dispute for a mediated settlement where the efforts of their representatives, 'expert' or otherwise, fail during initial negotiations. Most mediation sessions can be arranged within a few weeks and can also be concluded in a single session at a cost of only a few hundred pounds per side. If successful, the parties walk away, not only relieved at finally reaching a conclusion, but *both* feeling they have succeeded. They will also have a legally-binding souvenir of their efforts; naturally, this can always be enforced in court further down the line if one side fails to keep their side of the bargain.

As always, early professional advice is invaluable, particularly where the dispute appears to be fractious from the outset and may therefore benefit from a mediated outcome whilst the relationship between the parties is still amicable. It is worth reiterating that mediation is voluntary and requires the agreement of both parties; if this can be achieved, then the first hurdle will have been overcome towards successful resolution.

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[3] CPR Rule 1.4(2)(e).
[4] *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).
[5] *Halsey v Milton Keynes General NHS Trust and Steel v Joy & Halliday* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.
[6] *Wyatt v Maxwell Batley* [2002] EWHC 2401 (Ch).
[7] *Dunnett v Railtrack Plc* [2002] EWCA Civ 303.
[8] *Hurst v Leeming* [2002] EWHC 1051 (Ch).