The Party Wall Consultancy

Neighbourly Disputes: An Effective Remedy?

James McAllister, Director of The Party Wall Consultancy, explores the benefits of Mediation in common neighbourly disputes.

The most adversarial (and often acrimonious) time any of us will have to deal with our neighbours is when their imposing extension threatens to blight our otherwise unspoilt views; or where our opinion on the correct location of the boundary differs from theirs, meaning the putting up of the new fence awaits a resolution to the impasse. Many 'neighbourly' disputes begin over something even more trivial, such as noise, on-street parking arrangements and, of course, the small issue of that 30ft Leylandii.

Sadly, what often starts off as something minor can escalate in to a full-blown dispute, and may even end up in court. Aside from being stressful and expensive, this can destroy relationships once and for all, which will invariably hamper enjoyment of the property and may even prompt an earlier than expected move, further adding to stress and cost.

Most neighbourly disputes are, thankfully, resolved by the generous application of some common sense and humility, but for those that are perhaps not predisposed to such a 'neighbourly' approach, there is still an alternative to court.

Mediation has grown in popularity exponentially over the last decade and is now the preferred method of Alternative Dispute Resolution, or 'ADR' as it is more conveniently known, and is actively encouraged by the courts to be considered before litigation is pursued.[1] This provides an opportunity for the disputants to settle matters at an early opportunity with a legally-binding (and court-enforceable) resolution to their dispute without the usual disadvantages associated with traditional litigation; namely cost and stress. These are the primary attributes since neither feature highly in mediation. But a further benefit of mediation is accessibility and mobilisation, which highlights the efficiency of the process. Unlike litigation, and even arbitration, a mediation session can be arranged within a couple of weeks and, the parties willing, the dispute can be settled in a single day culminating in the parties leaving with a legally binding souvenir of their hard work; this is known as a 'settlement agreement'. Thus, the boundary dispute that may have been rumbling on for five years could be brought to a conclusive resolution for a few hundred pounds per party, and within a few weeks of their mutual decision to take his route. Of course, there are certain conditions to be met, and not every dispute lends itself to a mediated outcome.

Firstly, Mediation can only take place with a bilateral agreement between the parties;[2] this is perhaps the first, and most important, step towards conciliation. Mediation is a purely voluntary process and neither party can be forced (or formerly, 'subpoenaed') to appear.[3] Either party may also end the process at any stage up to the point of settlement. This is at the very heart of mediation since, as we will see, the whole process is steered by the disputants who will ultimately set out and agree the issues in dispute and the basis of agreement. This also ensures that both walk away satisfied with the outcome and renders redundant the grounds for either to ever appeal, which, of course, is not an available post-agreement option.

Secondly, the mediator must be impartial and preferably not known to either party so as to avoid any accusations of partiality or bias. The Mediator's role is not to act as an arbiter or to provide legal advice, but instead to facilitate the parties in reaching *their own* agreement on *their own* terms against the backdrop of a recognized, tried-and-tested format. It is therefore essential the Mediator, as well as being suitably qualified and with the necessary core skills, ensures the requisite pre-mediation paperwork is in place and that their role adheres to the 'criteria' and code of conduct so as not to compromise the validity of any subsequent mediated agreement.

[1] CPR Rule 1.4(2)(e).
[2] *Halsey v Milton Keynes General NHS Trust and Steel v Joy & Halliday* [2004] EWCA Civ 576; [2004] 1 WLR 3002.
[3] *Wyatt v Maxwell Batley* [2002] EWHC 2401 (Ch).

Thirdly, the whole process is confidential and 'without prejudice', thus the parties can rest assured that there will be no record of what was discussed during the process, and that their dirty linen will not be aired in public; this is infinitely preferable to traditional litigation, particularly if the background to the dispute is of an intimate or personal nature.

Aside from the obvious benefits of keeping the dispute out of the courtroom, particularly the savings on cost, time and stress, one often overlooked benefit, possibly the most important of all, is that mediation has the ability to preserve relationships whilst still achieving its overriding objective. This is particularly important in business where the parties would ordinarily wish to maintain the relationship but for the underlying (and ongoing) dispute. Perhaps more importantly still is where the parties live a few metres apart and would rather not have to avoid each other every time the wheelie bins require retrieval or the front privet needs a trim. This is possible because mediation is principally geared towards achieving a 'win-win' outcome where both parties walk away from the mediation having at least achieved their main goal, that goal being to make the dispute go away and to salvage some dignity out of the process. Of course, the parties have to both feel they are comfortable with the outcome or they would presumably not have reached agreement. This differs significantly from litigation where the decision is generally made on a 'win-lose' basis, and if taking in to account legal fees, it is arguably more often than not a 'lose-lose' outcome for both parties. Litigation as a resolution vehicle is also corrosive and destroys relationships, which is an unfortunate by-product of the process often meaning a Pyrrhic victory is perhaps all the victorious party can truly claim.

However, not all disputes are suitable for mediation and it is worth reiterating that the whole process relies on the mutual and voluntary agreement of the parties to participate.[4] Some disputes are simply unsuitable for mediation where the law provides an answer and a remedy (e.g. trespass); or where the act by one party is of a criminal nature (e.g. fraud); in such cases, adverse cost sanctions are unlikely to be awarded against the party who refused to mediate, when offered, should the matter end up in court.[5] Some neighbourly disputes even have their own statutory mechanism for dispute resolution meaning that mediation, and indeed litigation, is supplanted by the statutory process all the time the dispute remains within the parameters of the statute. The obvious example of this is the Party Wall etc. Act 1996, which is increasingly relevant to residential property extensions, particularly in cities and densely populated areas.

The Party Wall etc. Act 1996, which applies in England and Wales, extends what was previously only legally applicable in London[6] and Bristol,[7] along with a few other areas by way of local byelaws. The implications of the Party Wall etc. Act 1996 for residential home owners and commercial property owners/occupiers is that before implementing any works deemed to be 'notifiable' under the Act, formal notice must firstly be served on the Adjoining Owner. Most commonly, this involves foundation excavations within 3 metres of a neighbouring property, and to a lower depth than their foundations; raising, lowering or cutting in to a Party Wall (including insertion of chemical damp proof courses); and building a new wall astride or up to the boundary of land not previously built on.

The Act also extends to demolishing and rebuilding a garden wall if it is 'party' in nature. Obviously, this list is not exhaustive but defines some familiar and common applications of the Act in everyday life. Once notice has been served, the Adjoining Owner will have 14 days to respond either 'consenting' or 'dissenting' to the proposals. In situations where the works involve adjacent excavations or works to a Party Wall, the Adjoining Owner's 'dissent', or failure to respond within 14 days of the notice, will trigger a dispute then requiring resolution under Section 10 of the Act. Thus, a legally-binding dispute resolution process is then set in motion meaning the parties need not pursue the matter by any other means until completion of this process.

[4] *Halsey v Milton Keynes General NHS Trust and Steel v Joy & Halliday* [2004] EWCA Civ 576; [2004] 1 WLR 3002.
[5] *Hurst v Leeming* [2002] EWHC 1051 (Ch).
[6] Part VI of the London Building Acts (Amendment) Act 1939.
[7] The Bristol Improvement Act 1847.

This means that the parties must either jointly appoint an 'agreed' Party Wall Surveyor, or each appoint their own, and the Surveyor(s) will then settle the dispute in an Award. This sets out the nature of the proposed works and defines the legal rights and obligations of each party in relation to the works and any damage they may so cause. The Award will allocate liability for paying for any damage along with costs, such as the Surveyor's fees, and will usually include a Schedule of Condition recording the pre-existing condition of the Adjoining Owner's property prior to commencement of works. This then serves as documentary evidence of pre-existing condition for future referral and protects both parties against the uncertainty of whether 'damage' has been caused by the awarded works or whether it was pre-existing. This helps avoid the inevitable later argument as to whether or not *that crack* was there beforehand. Naturally, the parties do have the right to appeal the Award in the county court within 14 days of service, assuming they consider they have sufficient grounds to do so; thereafter, the Award is binding and cannot then be challenged in any court.[8]

Neighbourly disputes therefore come in many forms, but always boil down to one common objective, and that is the need to resolve the dispute before it costs the relationship and possibly earth. Mediation provides the perfect solution to most disputes (the parties being willing) and where the proposed works fall under the Party Wall etc. Act 1996, a statutory resolution process takes precedence.

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PropertyMediator.co.uk is a specialist service providing contact details for Certified Commercial Mediators throughout the UK who are experts in the fields of dilapidations, party walls, construction and neighbourly disputes. The full website for PropertyMediator.co.uk will be online soon.

[8] Section 10(17) of the Party Wall etc. Act 1996.