

The art of mediation

With the courts increasingly ordering mediation in a bid to reduce their lists and costs, RICS is focused on maintaining its stronghold in the dispute resolution field. Paul Rose explains how

Commercial property surveyors should be familiar with the RICS Dispute Resolution Service (DRS) that appoints arbitrators and independent experts in rent review and other property disputes. DRS trains RICS-accredited mediators who are qualified to mediate on all types of property disputes.

Mediation types

Facilitative mediation is non-judgemental. In this respect it is different from expert determination, adjudication or arbitration, where a decision of one form or another is required. In contrast, evaluative mediators express opinions. The RICS neighbourhood scheme uses both models.

Both facilitative and evaluative mediation are private, voluntary and non-binding unless the parties choose to make it so. The mediator is neutral and helps the parties to resolve the dispute themselves through non-confrontational dialogue. It is an effective, non-contentious means of enabling parties whose communications have broken down to talk to each other and settle their differences of opinion in neutral surroundings.

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The prime advantages of this approach are privacy and confidentiality. Mediation is subject to legal privilege. Everything, spoken or written, is done without prejudice and cannot be published or spoken about to third parties unless the parties waive privilege and confidentiality. This contrasts with court proceedings that are public and potentially embarrassing. Mediation decisions can be made binding if the parties sign a consent order – this is an agreement that is intended to be enforceable if one side reneges upon the arrangement reached.

Legal proceedings are more expensive and the parties have less control over the outcome, whereas mediation can help the parties find a solution that suits them but might be outside a court's remit. This might include agreeing a new contract of supply or payment in goods and services, as well as money: or, perhaps transferring staff.

Courts have limited powers of redress in litigation as they are restricted to the legal remedies available. A court can order either damages (by way of restitution of goods or property, or monetary compensation) or injunctive proceedings. A court cannot order litigants to renegotiate their relationship, give mutual apologies or provide discounts for future orders. In contrast, mediation offers the parties an opportunity to provide their own remedies incorporating all of the above and more.

Unlike litigation, and in some respects arbitration, mediation allows the parties to remain in control, with the ability to change proceedings swiftly to suit their needs as discussions evolve. It enables broken communications to be restored, can restart stalled relationships and assist in building trust for the future. It is not unusual for disputes that have been festering for many years to be settled in a day.

Mediation is not constrained by the legal process, or its formalities. It has the advantage of offering rapid, practical solutions to problems beyond the courts' discretion. The advantages of confidentiality and privacy are particularly effective when they can help to preserve and improve business or neighbour relationships.

There has been a marked increase in mediation in the last decade, encouraged by the courts through the introduction of CPR 1.4 (2) in order to relieve the case lists. The courts are encouraging mediation and tend to impose costs sanctions on parties refusing to enter into mediation.

Mediator's role

In property, RICS-accredited mediators are experienced in disputes covering: service charges, professional fees, terms of relief from forfeiture, boundary and neighbourhood matters such as noise, use of common areas and shared use of refuse facilities. RICS mediators are also experienced in handling compensation claims in compulsory purchase and easements, as well as construction and agricultural claims.

Last year, mediators handled construction disputes involving: garden walls, kitchens, extensions, loft conversions, electrical, roofing, plastering and plumbing/drainage contracts.

Neighbourhood disputes mediated have included contested boundaries, rights of way, shared driveways, trespass and obstruction to parking spaces, noise, use of refuse bins and antisocial behaviour. The growing tendency toward a litigation-oriented society has fuelled the rise in these types of cases.

Valuation cases have involved compensation for easements and compulsory purchase compensation.

Service charge disputes have included shops as well as offices. Lease forfeiture proceedings are also being steered toward mediation with greater frequency because of court initiatives.

Training skills

In 2008, RICS began a five-day training programme divided into three modules designed to teach through a series of role plays. Trainees are faced with increasingly difficult scenarios, for example: time limited cases, high emotions, parties threatening to walk out and multi-party disputes where participants have different agendas.

The course develops skills, emphasising patience, listening, focus, building trust and confidence, including dealing with the parties' emotions, needs and interests. Other equally important skills are: re-framing language, clarifying attitudes, probing for reasons and motives, and testing the practical reality of objectives. All these skills are needed to increase the chances of the parties settling their dispute.

Litigation costs

Sir Rupert Jackson's review of civil litigation costs was published in January 2010 and identified significant weaknesses in the existing litigation structure that gave rise to disproportionate and unnecessary costs – an expense that all parties generally seek to avoid. The report calls for greater education of the general public, legal professionals, businesses and the judiciary in the benefits of mediation. Sir Rupert recommends that an annually edited, neutrally published handbook of mediation and ADR should be available to every lawyer, business and judge. Consequently, solicitors are recommending mediation as the preferred means of dispute resolution whether before or after proceedings have been issued.

In forthcoming issues of the journal, we will take a look at a variety of case studies demonstrating how mediation can work; as well as some cases that, despite best efforts, ended in the courtroom.

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For more information, visit www.rics.org/drs

For mediation training courses, please contact Mrs Raj Sohal via rsohal@rics.org



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