

**LANDLORD & TENANT DISPUTES -
IS THERE MORE SCOPE FOR ADR
THAN YOU THOUGHT ?**

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1 THE IMPORTANCE OF EARLY CASE ANALYSIS AND 2 ARE THE ISSUES SUITABLE FOR ADR ?

Landlord and Tenant disputes frequently have a different agenda than the ostensible cause of disagreement. It may be simply about money, but often it goes to the parties' respective long-term intentions for the property. These are likely to be strongly influenced by the state of the economy and the property market. In a property recession such as we are now seeing, supply exceeds demand and leases negotiated in more bullish times are likely to be over-rented. This gives tenants a commercial incentive to find ways of escaping from the lease commitment. In times of economic expansion there is a shortage of property and letting values rise. This time it is the landlord who has the incentive to find ways of escaping the lease commitment – often by bringing the lease to an end altogether.

The main areas of conflict between Landlord and Tenant that are amenable to ADR include the following – and in each case the question to be asked is what are the real issues and will mediation offer a better solution than litigation:

- Breach of covenant by Tenant – especially repair, user, alienation
- Landlord's remedy of forfeiture is likely to trigger Tenant's claim for relief from forfeiture, which will in turn generate issues about whether relief should be granted, and if so, on what terms
- Breach of covenant by Landlord – especially repair, quiet enjoyment
- Whether consent should be given to assign or sub-let, and if so, on what terms. This is particularly topical in a recessionary or falling market
- Rent arrears – more particularly if there is an arguable defence
- Claims against guarantors – more particularly if there are issues about the effectiveness of the guarantee, or the claim will trigger claims between additional parties, such as between joint guarantors or guarantor and tenant for an indemnity
- Service charges – one of the most fertile sources of disagreement
- Rent review – both as to the machinery and the assessment itself
- Renewal of a business tenancy
- Disputed rights under the lease
- Rights and obligations at the end of the tenancy

The common thread in most if not all these disputes is the reality that the Landlord and Tenant are tied by the lease into a relationship that may be long-term and that offers mutual benefits to each other. It is clearly in both their interests that the relationship is conducted constructively.

It can therefore be seen how critical and constructive it can be to flush out the present or potential issues at the earliest possible stage. Once they have been identified, the process of finding a way forward can begin. What may first appear as battle-lines may be more subtly and effectively refined as opportunities for both parties to obtain a mutual benefit.

In this area the mediation process, which focuses on *interests* rather than *rights*, has a built-in advantage over litigation. The immediate subject-matter of the L&T dispute often masks their longer-term plans which form the basis of the real issue between them. For example, the Landlord may have plans for redevelopment that are not expected to ripen for several years, or for some indeterminate period that depends on the state of the market. Conversely, it may be the tenant whose future plans dictate his desire to look for the means to end the lease commitment. Both could exist together – but neither is aware of it.

When the dispute eventually surfaces, mediation can achieve mutually beneficial results because it enables flexible solutions that cannot be provided by the court process.

3 ADVANTAGES AND DISADVANTAGES OF MEDIATION OVER LITIGATION

The analysis conducted under the previous heading will have revealed that ADR offers the following advantages:

- Cheaper
- Quicker
- Less adversarial
- Avoids, or at least reduces, bitterness, escalation of the dispute and driving parties into entrenched positions
- More flexible
- More certain
- The process is driven by the parties
- The process works from the parties' interests rather than rights
- Solutions can be arrived at that the courts cannot provide
- The commercial starting point of ADR is usually better suited to Landlord and Tenant than the strictly legal one
- The give and take approach inherent in ADR often leads to a more constructive relationship than winner takes all (or more likely everyone loses except the lawyers)

ADR has some disadvantages:

- In straightforward cases for repossession or arrears where there is no defence, the Landlord is better advised to apply for summary judgment

- It has no power to grant an injunction (but it can provide for consent to a court order containing injunctive relief)
- No pleadings, witness statements, expert evidence, disclosure (but if these are important, they go to the timing of ADR rather than the principle of resorting to ADR)
- No cross-examination (but a party who has reason to fear cross-examination may well have an incentive to settle at ADR)
- No precedent (in how many cases does this matter ?)
- Not necessarily cheap, or cheaper, compared to a one day hearing

4 WHAT METHOD OF ADR TO CHOOSE ?

The main options are:

- Negotiation – which should usually be the first method to try. But it will probably only work in straightforward cases
- Mediation – the most common method of ADR. It offers flexibility, a consensual approach and informality
- Neutral evaluation – the parties invite the mediator to give a view on the outcome of the case were it to go to trial. A non-binding evaluation or prediction may sway a party. A variation is to invite the mediator to give a view which the parties agree to be bound by.
- Executive mini-trial – the parties agree to form a panel between the mediator and a decision-maker from each side. The panel considers submissions from the parties (written or oral or both) and then seeks to bring about a settlement. This process may help each side to see the other’s case better, but (in the author’s view) is unlikely to offer any significant advantages over more traditional mediation

5 “I HAVE A WINNING CASE SO WHAT’S IN ADR FOR ME ?” AND OTHER SCENARIOS

- ***“I have a winning case”*** – all the more reason to mediate. It is a common misconception that mediation will invariably lead to a ‘fudge’ where one side will be forced to give up something that he does not need or wish to. The reality is that the party with a strong case has nothing to fear from mediation, as the settlement will be driven by and reflect the litigation risk and odds as in any other case. The party with the stronger case will therefore be able (and in practice be likely) to achieve a good settlement.
- ***“I don’t want to offer mediation as it looks weak”*** – offering mediation is a neutral step and, particularly in today’s CPR climate, is well understood as such. It does not look weak any more than offering to have a without prejudice discussion. The terms in which such an approach is made will

be phrased in such a way as not to imply any weakness or lack of confidence.

- ***“The case is unsuitable for mediation as there is an allegation of dishonesty”*** – this is another common misconception (in the author’s view). Why should an allegation of dishonesty be any more difficult to resolve out of court than an allegation of, say, misrepresentation or breach of contract ? It is true that a settlement of a claim involving an allegation of dishonesty will be unlikely to include an admission in that regard – but nor will a settlement of most claims. The settlement is more likely to consist of fresh terms of contract, or the payment of money, or both. These may or may not imply liability for the allegation, but why should this matter ? The terms will in all likelihood be recorded in a Tomlin Order, or a settlement agreement, and may be subject to confidentiality if so agreed. Another approach might be to state expressly that the terms are without any admission of liability. The receiving party should not object, as in most cases what he wants more than anything is his money. Consequently a case involving an allegation of dishonesty might be *particularly* suited to ADR and not the other way round. If what the receiving party wanted was a finding of dishonesty against the other party, he probably would not have agreed to mediation in the first place.
- ***“I can’t bear to be in the same room as the other side as I am too emotional about what they’ve done to me”*** – you don’t have to be in the same room. Most mediations start with a short round table meeting before the parties go into separate rooms (for the rest of the day), but it is not essential. The process is sufficiently flexible to accommodate adjustments.
- ***“Its an impossible case to settle as the parties are too far apart or feelings are running too high”*** – this forgets the remarkably high success rate of mediation. The day itself precipitates momentum to settle that frequently surprises the participants. It also helps the parties to understand that they are at a vital crossroads and have a last opportunity to turn back before trial. The moment of truth tends to dispel any earlier bravado. Moreover a good mediator can skillfully demonstrate to a party that his case may involve risks greater than or different to those he had seen before, or simply help him to see the case in a different light. In the end, the success rate of mediation (nationally the settlement rate is in the high 70%, commercial mediators find it nearer 90%) speaks for itself.

Here are a few tips borne of experience:

- If there is an opening round table meeting, avoid setting out your stall as if you were opening the claim at trial. It only raises hackles (as the other side’s speech will do to your side). Both sides already know the other’s

case as they would not have got as far as mediating. Better to say nothing at all of substance ('we see today as an important opportunity to try and resolve this dispute and are here in that spirit') and hold back until you see the mediator. He can then deliver the message with far greater effectiveness

- Be straight with the mediator. A plea almost bound to be ignored – the author has learned from experience to believe almost nothing anyone says to him at a mediation ! But I live in hope, not least as it makes for a far easier mediation as everyone knows where they are and it is much easier to have a sensible discussion when there is an atmosphere of trust, co-operativeness and a spirit of 'we are here to do business'
- Don't shoot the messenger. The mediator often has to deliver unpalatable news. That's his job, not his fault. Most mediators will do their job impartially and professionally, but pouring abuse or ridicule on them does not exactly help.
- A mediation tactic that seems to be becoming more common is for one side to sit with arms folded and await for the other side to make offers. It might sound like a clever tactic but is not. It is transparent what you are up to. It destroys trust when the opposite is called for. It smacks of bullying and cynicism (which it usually is). When the mediator and/or the other side realises what you are up to they are likely to (and should) stop the mediation there and then. You will then have wasted everyone's time and money (including your own). If instead you back down you will have destroyed your own credibility. Like over-aggressive litigation, the strategy is past its sell-by date and is best avoided.

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A FOOTNOTE ABOUT COSTS IF YOU REFUSE ADR

This is the subject of another talk, and the position is still evolving, but if time allows, here are some highlights of where we are at present:

- The CPR give a strong steer to ADR
- In Part 1.4(2)(e) the court has a duty to encourage the parties to use ADR
- Part 44.5 provides that, in considering costs, the court must have regard to the conduct of the parties and, in particular, the efforts made, if any, before and during the proceedings in order to try to resolve the dispute
- The pre-action protocols require parties to consider whether some form of ADR would be more suitable than litigation, and provide that litigation should be a last resort.
- The relatively little-known Practice Direction 29PD4(9) entitles the court to direct that the parties consider ADR, and if any party considers ADR unsuitable, that party must be prepared to justify that decision at the conclusion of the case in relation to costs, and not more than 28 days before trial file a witness statement without prejudice save as to costs giving the reasons on which they rely for saying that the case was unsuitable,

- The Commercial Court ADR Order is even more robust – it comes very close to requiring the parties to attempt to resolve the dispute by ADR.
- In *Dunnett v Railtrack* [2002] 2 All ER 850 the successful party was deprived of its costs as a result of its failure to agree to ADR. A similar outcome was reached in *Royal Bank of Canada v Ministry of Defence* [2003] EWHC 1479 (a landlord and tenant dispute)
- In *Hurst v Leeming* [2001] EWHC 1051 Lightman J examined many of the common justifications for refusing mediation and found some to be without validity. The judgment is worth reading for its demolition of such supposed justifications.
- In *Halsey v Milton Keynes NHS Trust* [2004] 4 All ER 920 the CA held (1) that requiring a party to mediate was likely to infringe the Article 6 right of access to the court, (2) in considering what order to make as to costs, the starting point was that costs should follow the event and that the burden was on the unsuccessful party to show why there should be a departure from the general rule, and to show that mediation would have had a reasonable prospect of success.
- Lightman J strongly criticised the decision in *Halsey* at a speech on 28 June 2007¹. He described the decision as unfortunate, and “clearly wrong and unreasonable”. Lord Chief Justice Phillips said at a speech in India on 29 March 2008² that this was “pretty punchy stuff by way of commentary on the decision of a superior court”. But he then went on to conclude that Lightman J was right, admitting that he had changed his mind. He now favours compulsory mediation.
- On 8 May 2008 Sir Anthony Clarke MR said at a speech in Birmingham to the Civil Mediation Council³ that he too agreed with Lightman J on the Article 6 issue and that as the judgments in *Halsey* were obiter, lower courts were not bound by them. But he agreed with the burden of proof remaining on the unsuccessful party in relation to costs. He nonetheless cited with approval the decision of Jack J in *Carleton v Strutt & Parker* [2008] EWHC 424 extending the *Halsey* principle so that a party might have costs awarded against them not only where it refused to mediate but if it acted unreasonably in a mediation. This is welcome but more difficult, as in most cases mediation privilege will result in the parties’ stance at mediation not being disclosable without waiving the privilege (as seems to have occurred – unusually - in *Carleton*).
- The story will no doubt continue to evolve – watch this space. However, the moral of the story is that a party refusing to attempt ADR carries ever-growing risks that it will be deprived of costs at trial or on appeal even if it was successful.

¹ <http://www.sjberwin.com/advancedsearchpublication.aspx?mid=1&rid=1&ast=4>

² http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf

³ http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf