

# Resolve to resolve: A review of the RICS Dilapidations Scheme for expert determination

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## ABSTRACT

The RICS announced the setting up of a new initiative for resolving dilapidations disputes by expert determination at the Dilapidations Conference in September 2014. It is a consensual procedure in which the parties agree to refer terminal dilapidations disputes to expert determination if they are not resolved within 9 months.

This paper is a review of the various forms of dispute resolution and in particular, considers the new RICS initiative for expert determination of dilapidations disputes. It looks at how differing dispute resolution methods can be appropriate for certain types of dispute and not so appropriate for others, and asks whether signing up to the RICS scheme could be a disadvantage as well as an advantage. The article also considers Appropriate Dispute Resolution in comparison to litigation and suggests reasons why Appropriate Dispute Resolution is not used more widely, apart from under the direction of the courts.

Towards the end of the paper there is an assessment of the status quo and a forecast of what the

future might hold. In making its predictions the paper reaches what some may see as an unexpected conclusion.

**Keywords:** ADR (Appropriate Dispute Resolution), litigation, expert determination, mediation, arbitration, negotiation, early neutral evaluation, dilapidations

## INTRODUCTION

A new initiative for resolving dilapidations disputes was promoted by the RICS at the latest Dilapidations Conference. The scheme suggests a simple protocol to promote the use of independent experts for the resolution of disputes that have not been settled within a particular period of time. It is consensual and based upon agreement between parties, agreement that can be made at any time during the lease or in the period afterwards until the dilapidations claims are settled.

The RICS Dilapidations Scheme is a relatively standard expert determination scheme based upon written submissions and counter-submissions presented by the parties to the expert. The expert has the right to visit the subject property in formulating the determination, which should be in writing, but only reasoned if the parties so request.

The novelty of the initiative is that the parties agree a period of 9 months from the end of the lease term in which to resolve their dispute. If the dispute is not resolved in that time it is referred to expert determination.

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This raises some interesting points and it is worth reviewing the different types of Appropriate Dispute Resolution (ADR) and how they can relate to the various differing views of dispute resolution.

### THE PURIST VIEW

At the most purist level, dilapidations negotiations focus on the strict legal interpretation of the tenure documents and the consequences of any breaches of those tenure obligations. This needs to be taken in the context of the demised premises as far as their age, location, use and character is concerned, and there are many considerations to be taken into account.

The focus will be on the loss suffered by the claiming party, which is usually the landlord but does not always have to be so. In arriving at a figure that represents that loss, the breaches of covenant are scheduled and the appropriate remedial works identified. These works are priced, either by surveyors or contractors, and consequential losses such as fees added to arrive at a benchmark figure for the dispute.

That benchmark figure is then reviewed to assess whether it actually represents what the claimant party has lost as a result of the other parties' breach of covenant. That is based on the notion that damages for breach of covenant in relation to property are assessed as the effect of those breaches on the reversionary value of the interest concerned. Consequently, there is a subsequent process to be followed after the calculation of the cost of the works.

### THE COMMERCIAL VIEW

Whereas the purist view is based on a detailed analysis of the lease terms and involves a series of five or six predetermined steps to arrive at a specific figure, there is another side to the use of dilapidations in which there is a movement away from the

strict legal interpretation to consider the use of the various options in a wider commercial context. The objectives of the parties are not as restricted by the constraints of the legal process, although the same considerations adopted by the purist will often be applied.

Examples of this could be cases in which the dilapidation claims form part of a much wider consideration, such as a company going into administration or where a number of different properties or leases were involved. The overall objective is not the dilapidations disputes *per se*, but the dilapidations liabilities; resolving these disputes is part of a much greater consideration. Under these circumstances, the claimant may instruct the surveyors to discard part of the claim in order to achieve a settlement at a particular time or at a particular level so that an interest can be marketed without the encumbrance of an ongoing dispute.

Another example could be where a tenant wishes to renew a lease and the landlord wishes to use the tenant's obligations under the old lease in the negotiations for the new lease. In both of these instances the dilapidations are not the overall objective but are part of a larger cause.

In some ways, the more commercial approach can involve a greater level of risk for the parties as there can be a tendency for surveyors to cut corners in procedure. There is a balance that needs to reflect the level of commerciality in the client's objectives and the need to follow the procedures adopted by the purists. A commercial view also needs to be taken when considering the proportionality of fees incurred in undertaking dilapidations claims on behalf of a client, be it landlord or tenant. There needs to be an efficiency in the process to meet a client's requirement for value for money.

### MID-TERM SITUATIONS

The RICS scheme envisages terminal dilapidations claims (where the lease term has

ended). However, a similar balance between the purist and the commercial also needs to be found in mid-term situations. There are usually two situations in which dilapidations procedure is employed mid-term; one being where the landlord wishes to forfeit the lease and the other where a landlord wishes to use a right contained in a lease to enter into the property and undertake remedial works where the tenant is in default.

Both forfeiture and entry into the property require legal procedures to be adopted and as such are more time consuming and costly than standard terminal situations. Nevertheless, the client's objectives will dictate the attitude in which the case will be approached. There will also be an economic consideration, as where letting markets are weak there will be less of a desire to forfeit than where they are strong, but in both cases it is likely that there is a concern over the physical state of the property which the landlord is trying to rectify.

At the time of writing (September 2014), years of recession are easing and the accompanying release of fiscal restrictions on property has resulted in a disparity of growth within property markets. Some areas of activity and markets are booming and others are slower to catch up. Whether this will result in a period of slowing and consolidation in the markets or not remains to be seen, but the profile of the property industry is changing in the light of changes in the economy and as such the procedures in areas such as dilapidations dispute resolution need to be adaptable to reflect them as they will have a strong influence on the approach that the parties take to dilapidations claims.

## METHODS OF ADR

There are five principal methods of ADR that can be used for resolving a dispute. These range between early neutral evaluation and litigation, but to review just these five leaves out the most effective and commonly utilised

method of all — plain and simple negotiation. The majority of dilapidations disputes do not get anywhere near any form of dispute resolution procedure as the parties simply discuss with each other the basis of the dispute and the circumstances in which they find themselves. Surveyors are trained to negotiate and the success rate in avoiding references to third parties is extremely high and proves the point.

## Negotiation

Negotiation has the highest level of flexibility of procedure and can be readily adapted to fit the circumstances of any dispute so that both the purist view and commercial requirements can be accommodated without difficulty. However, it is not perfect and disparities can occur if the abilities of the parties' negotiators or the financial muscle they are able to apply (for example) are unevenly balanced. Consequently, there are instances in which the ability to refer a dispute to a third party is required if an imbalance is to be avoided.

## Early neutral evaluation

Early neutral evaluation is the simplest and most straightforward of all of the ADR procedures available. In many instances, surveyors manage to resolve the vast majority of scheduled items in a dispute but can be stymied by a few particularly awkward issues that can hold up the resolution process. Early neutral evaluation enables one or both of the parties to confer with a third party expert on an informal basis and obtain another's opinion on the difficult items.

The method is extremely flexible as there are no restrictions in procedure save that it is accepted that the process is entirely voluntary and the opinion provided has no official standing. In many ways that is its strength as it can be instigated rapidly and without excessive cost.

Forms of evaluation are used daily without those involved realising. Every time a

case is discussed with a work colleague with a view to moving a dispute forward a form of evaluation is being used. Early neutral evaluation simply uses an independent third party to facilitate that process.

### Expert determination

Expert determination is a more formal method of dispute resolution whereby an independent third party is appointed to determine the correct outcome of a dispute. In dilapidations terms, that would usually be to identify the correct level of a settlement payment required to be paid by one party to the other. The onus is on the expert to arrive at the correct result. Consequently, the expert can make their own investigations independently of the parties and is not bound to reply on submissions when coming to a decision. Further, although the onus lies with the expert, the expert is able to confer with other independent parties whose expertise may lie in a related but not identical field; for example, the interlink between valuers and building surveyors.

Expert determination is enforceable by the courts and, save for a demonstration of bad faith or bias on the part of the expert, the courts would tend to endorse the determination without opening up the detail.

The expert is assisting the parties to resolve a dispute to which they are expert is not a party. The parties are free to decide how they want the dispute to be resolved and what procedures the expert is to employ, although usually the expert will guide the parties to ensure that a workable method is adopted. However, as long as each side has the opportunity to present their position and understand and respond to the case being made against them there is complete flexibility in the method.

Expert determination does have its restrictions. The obligation on the expert to arrive at the correct answer tends to steer the process towards the purist approach and there is little opportunity for the flexibility required

for the more commercial disputes. Further, the legal technicalities and judgments required for interim situations would mean that these would tend to fall outside the scope of expert determination.

The RICS scheme ties the parties into set procedures and timescales. On the face of it that is commendable and the procedures set out would enable the expert to arrive at a determination that is enforceable. However, the requirement for the parties to provide submissions and counter-submissions is likely to lead to an elongated and costly process. Further, it is not appropriate for every dispute and parties requiring a more commercial view may find themselves forced into an inappropriate process.

### Litigation

Litigation is currently the most common method of resolving disputes, but this may simply be because none of the alternatives have found sufficient favour within the legal profession. Further, whereas every other method requires the agreement of the parties to enter into them it, litigation can be commenced unilaterally by one party without the agreement of the other.

The main complaints about litigation are that it is slow and costly, both of which are true, but it has the ability to consider any case presented by the parties, commercial or purist and at any stage of the lease term. Frequently the judge is more of a general lawyer and does not have specialist knowledge of the matter that the court is presiding over. As the judgment is made on the basis of the court's interpretation and assessment of the evidence presented, decisions can be reached that would not be made had the judge had specialist knowledge of the subject area.

### Mediation

Mediation is much favoured by the courts at the moment and there is pressure on disputes entering into litigation to be referred to

mediation early in the process. Although there is a formality to the procedure, mediation is not constrained to the documentation under which the dispute has arisen and can look outside the strict purist rights and wrongs in an attempt to achieve a resolution, thereby avoiding the delays and costs associated with litigation.

The mediator acts as a facilitator and does not form or impose a decision on the parties. The process is entirely private and if the mediation fails, the conduct of the mediation is not relayed to the court. The motivation to achieve settlement is largely to avoid the considerable cost of a full trial.

The ability of mediation to look outside the rights and obligations of the documentation makes mediation ideal for commercial disputes as the mediator can guide the parties through the commercial pressures of the dispute which, in many cases, can be driving the lack of agreement. Mediation is less appropriate for the purist due to the tendency to step outside the documents. Where the dispute simply turns on the interpretation or application of documentation, it is unlikely that mediation would be the best method to employ.

### Arbitration

Arbitration has been referred to as 'poor man's litigation' due to the similarities in procedure in many cases. The arbitrator reviews the case put to the tribunal and can consider commercial and purist views alike. Those cases can be put as written submissions and there is no obligation to present to an aural hearing. That can save significant amounts of time and expense. Further, the arbitrator can be a specialist in the field being heard and this can be a significant advantage over litigation where the judge may not have an in depth knowledge of the subject.

Arbitration is a consensual process based on the agreement of the parties to arbitrate, but there is much flexibility available to the parties in how they decide to have their dispute

determined. It is possible to carve out specific parts of the dispute and have them decided at specific times.

The legislation covering arbitration gives the arbitrator considerable procedural flexibility and as a result the process can be significantly faster and more cost-effective than litigation, but just as effective in achieving a result. Arbitration awards are binding on the parties and can be enforced by the courts if needs be. All of these methods of ADR are predicated on the basis of the independent third party acting in good faith, honestly and without bias or favour.

### CONCLUSION

The RICS scheme is not perfect but should be lauded for the initiative taken to provide a quicker and more effective method for resolving outstanding dilapidations disputes. The main problem is that it is not appropriate for all types of dispute and signing up for the scheme may not be the panacea that is hoped for in all situations.

In many quarters it is recognised that the established legal remedy provided by litigation is prohibitively costly and time consuming, such that disputes are settled unjustly or inappropriately simply because of a fear of the litigation process. That cannot be right.

What is equally disturbing is that faster and more cost-effective methods of dispute resolution exist but are not being used. That may simply be because by the time the use of ADR needs to be discussed between the parties, they have fallen out so badly that they cannot agree about anything. It is more likely that there are a number of reasons, of which that may be one, including a reluctance of the parties to hand over control of their case to another over whom they have no control, but seeing that that is precisely what happens in litigation it seems to be a hollow argument.

The main issue is that litigation is the only process that can be commenced unilaterally

by one party and that forces the other party to enter into that process. Until there is a significant change of heart in the legal profession to either include ADR clauses in leases or be more open-minded about the use of other forms of dispute resolution to litigation, the situation is unlikely to change

significantly. So for now, the best form of resolution for dilapidations disputes is what it has always been and it will remain with the building surveyor and the valuer to prepare the claim and negotiate it through to a settlement, and they should be given every support to do so.