

I beg to differ

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Carrie de Silva considers dispute resolution and far-reaching changes in practice and philosophy

Disputes are inevitable in business. Indeed, handling them has given rise to a profession that has grown exponentially over the past century. But the wrong resolution can be dramatically expensive, in terms of both the immediate financial costs for the parties involved and the effect on client retention and the professional reputation of their advisors.

This article reviews changes that have been taking place to alternative dispute resolution (ADR), its key features and those of tribunals and the courts, relevant to residential and commercial surveyors.

Those working in Wales, Scotland or Northern Ireland will be aware of the differences in their areas and details of those that apply are included as appropriate.

Alternative dispute resolution

The principles of ADR are largely applicable across the UK, and the approach is now established into the British dispute resolution scene through court rules. ADR embraces mediation, arbitration, early neutral evaluation, conciliation and the use of an ombudsman.

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[RICS](#) has a [Dispute Resolution Professional Group](#), which provides standards and guidance in this area. It also offers a Dispute Resolution Service covering early-stage mediation, formal arbitration, expert determination ? for example, on issues such as boundaries ? and provision of expert witnesses. The service provides RICS-accredited training and preparation for the Chartered Institution of Arbitrators' diploma.

Since the [Civil Procedure Rules](#) were introduced, ADR has been embedded in court procedure and in its Scottish equivalent, [Sheriff Court Rules](#). Many civil procedure pre-action protocols are specific to the property sector, including:

- damages relating to the physical state of commercial property at termination of a tenancy (that is, the Dilapidations Protocol; see also "Determination gets you through" on p.29 of this issue)
- construction and engineering disputes

- housing disrepair cases
- possession claims by social landlords
- possession claims based on mortgage or home purchase plan arrears.

The court expects that in these and all pre-action protocols, the parties should consider whether some form of ADR would be more suitable than litigation, which should be the last resort.

Where it is apparent that the parties have either not attempted ADR or unreasonably rejected a settlement reached through this route, it is likely that costs will be ordered against the party that failed to engage.

There had been potentially valid reasons for refusal set out in [Halsey v Milton Keynes General NHM Trust \[2004\]](#) but undue reliance on these is dangerous and after [PGF II SA v OMFS Co. 1 Ltd \[2013\]](#) the courts will look beyond the reasons given in Halsey, which were seen to be unduly weighted in favour of the uncooperative party.

The consequences of failing to participate in mediation may be seen in [Garrett-Critchley v Ronnan \[2014\]](#), where the defendant eventually accepted a ?10,000 offer from the claimant to settle, but was ordered to pay ?131,000 costs as a result of failing to engage in mediation.

Tribunals

The tribunal system operates in a similar way throughout the UK, but there are different bodies in Wales, Scotland and Northern Ireland.

Beyond ADR but outside the court system, many property disputes are dealt with in tribunals, which have a degree of formality, but the theory is that parties should be able to represent themselves without unduly complicated and intimidating procedures. The [Tribunals, Courts and Enforcement Act 2007](#) introduced a 2-tier tribunal system from November 2008, as outlined below, although there are many specialist tribunals outside this system.

The 1st-tier tribunal has 7 subject areas, although some are broken down into sub-groups:

1. General Regulatory Chamber: this deals with such issues as appeals by estate agents banned from practising, or letting agents who have been fined for failing to sign up to a complaints scheme, failing to display fees or failing to have smoke and carbon monoxide alarms fitted.
2. Property Chamber: this settled in its [current form](#) in 2013. Its jurisdiction includes residential property, covering rent increases, leasehold disputes, [Housing Act 2004](#) improvement notes and prohibition orders, disputes over licences for houses in multiple occupation and council house right-to-buy refusals. It also covers land registration and agricultural land and drainage issues.
3. Social Entitlement Chamber.
4. Health, Education and Social Care Chamber.
5. Tax Chamber.
6. War Pensions and Armed Forces Compensation Chamber.
7. Immigration and Asylum Chamber.

Courts

References to specific courts that sit below the Supreme Court relate to England and Wales only.

With regard to dispute resolution, the civil courts ? the County Court and High Court ? have not substantially altered their jurisdiction for some time, although as previously stated, civil procedure has undergone a substantial review.

When aiming to resolve disputes, practitioners should keep the edict of the pre-action protocols firmly in mind ? litigation should be a last resort...

The main court dealing with property disputes is the [Technology and Construction Court \(TCC\)](#) , which has been part of the Queen's Bench Division of the High Court since 1998 and succeeded the Official Referees' Court. The TCC deals with property matters ranging from construction to breaches of repairing covenant, neighbour disputes and various claims by and against engineers, architects, surveyors, accountants and other specialised advisors.

Commercial property disputes that do not get resolved through ADR will go to these civil courts. With commercial property, many areas will have dispute resolution mechanisms included in the lease, such as the appointment of an independent surveyor as either an arbitrator or independent expert.

Appeals

The procedure for 1st tier tribunals is as follows:

- the Property Chamber appeals to the Upper Tribunal (Lands Chamber)
- the General Regulatory Chamber appeals to the Upper Tribunal (Administrative Appeals)
- the Upper Tribunal appeals to the Court of Appeal
- the Court of Appeal appeals to the Supreme Court.

The Supreme Court represented a fundamental constitutional change when it replaced the judicial function of the House of Lords in 2009. It separated the judiciary, both physically and doctrinally, from the legislature ? Parliament ? and the executive ? the government and civil service ? when it moved to the new court building in the Middlesex Guildhall in central London. Supreme Court judges are now referred to as Justices of the Supreme Court, rather than Law Lords.

Relevant points of law may still be referred to the European Court of Justice, as they have been since January 1973; developments on this front are awaited. Reference of cases to the [European Court of Human Rights \(ECHR\)](#) is not connected with EU membership and will be unaffected by Brexit. The UK was a founding member of the [Council of Europe](#) that signed the [European Convention on Human Rights](#) in 1950, with the court formed in 1959, long before the UK joined the EU.

Property issues referred to the ECHR are normally those relating to the quiet enjoyment or protection of property, famously drawn on in an unsuccessful argument against the principle of adverse possession in [JA Pye \(Oxford\) Ltd v United Kingdom \[2007\]](#) .

When aiming to resolve disputes, practitioners should keep the edict of the pre-action protocols firmly in mind ? litigation should be a last resort ? and guide their clients accordingly.

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Further information

For RICS professional guidance, visit www.rics.org/guidance :

- [An overview of comparison of dispute resolution processes in the UK](#) , information paper, 1st edition, 2011
- [Boundaries: procedures for boundary identification, demarcation and dispute resolution](#) , guidance note, 3rd edition, 2014
- [Mediation](#) , guidance note, 1st edition, 2014
- [Conflict avoidance and dispute resolution in construction](#) , guidance note, 1st edition 2014

Related competencies include: [Conflict avoidance, management and dispute resolution procedure](#)

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