Seeking common ground

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Philip Meade explains the background to a new RICS guidance note on rural arbitration

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When it comes to settling disputes, whether they concern consumers or construction, commercial or international, there has been a huge shift in recent years from litigation towards mediation, arbitration and adjudication.

However, the trend for settling smaller rural disputes has actually seen a significant movement away from arbitration. This is partly due to escalating costs, as well as the potential impact that arbitration can have on long-term relationships between parties. This is unfortunate, because, when managed properly, arbitration provides a quick and cost-effective way of resolving disputes, including those of relatively low value.

When a dispute is heading for arbitration, it can focus the minds of the parties on what the issues and priorities are. In some cases, expert witnesses may be involved, and if they understand their roles properly, and are encouraged to meet and consider what can and cannot be agreed, usually in the form of a joint report, areas of disagreement will be significantly reduced and cases can often be settled quickly and cost-effectively.

RICS? Dispute Resolution Service has been working with the Dispute Resolution Standards Working Group to try to address this move away from arbitration in the rural sector, which we believe is to the detriment of clients.

In addition to launching the Simplified Arbitration Scheme, RICS has published a guidance note on rural arbitrations .

Intentions

In preparing the guidance, there were 3 intentions:

1. to advise on best practice
2. to provide a comprehensive guide for those operating in the rural sector, particularly younger members, who may have viewed arbitration as fraught with traps and a significant risk of costs and dented professional reputations
3. to show those outside the profession what to expect when dealing with arbitration in the rural sector.

The guidance note is structured in 2 parts, the first aimed at the practitioner and the second at arbitrators. That is not to say that practitioners should not read part 2, as this provides insight into the challenges and issues facing an arbitrator, as well as guidance on how an arbitrator ought to deal with practical matters. Arbitrators might also benefit from reading part 1.

For the practitioner

Most important for the practitioner in this guidance note, perhaps, is the realisation that while arbitration is adversarial it does not have to be bitterly fought or contentious.

The overriding theme of the Arbitration Act 1996 is party autonomy; that is, it is for the parties to tell the arbitrator how they want their arbitration to be run. The arbitrator can and will step in if the parties cannot agree, for example on procedure, or if one of the parties refuses to participate or acts unreasonably. But if both parties act sensibly and reasonably, then the arbitrator?s role will be to guide the process and make an impartial decision to reach an agreement.

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Part 1 of the note is written to guide someone who may be relatively new to arbitration through the process, explaining the various stages as well as any language that may be unfamiliar. It sets out the best practice at each stage, so it is hoped that surveyors who are apprehensive about running an arbitration for their client will be encouraged to get more involved, especially in the lower-value, less technical arbitrations such as farm rent reviews.

The stakes can, of course, be significantly higher if a notice has been served that threatens the security of tenure on a farm, such as a notice to remedy or notice to quit, and the individual practitioner will have to make a judgement on whether they are confident enough to deal with this. There is, however, enough information and instruction in the guidance to give most practitioners the confidence to manage arbitrations themselves where the stakes are lower.

Key issues

Issues discussed in detail in the guidance note include:

- setting out the duties of the arbitrator and the parties to an arbitration
- what to do if certain fairly common scenarios arise
- the powers an arbitrator has and how they can be asked to exercise them
- what to expect at a preliminary meeting and what to prepare in advance
- what to expect at the interlocutory stages, that is, the run-up to the hearing
- what to expect at the hearing itself.

The duties of the parties in arbitration are set out in section 33 of the 1996 Act , for the arbitrator, and section 40 , for the parties themselves. The arbitrator is described as the 'tribunal' throughout the act, but that term includes 'arbitrator'.

Section 33 obliges the arbitrator to act fairly and impartially, and give each party a reasonable opportunity of putting their case, dealing with that of their opponent and avoiding unnecessary delay and expense.

This is self-explanatory, but it is one of the key principles of the act. When considering anything that may arise during an arbitration, before or during a hearing, an arbitrator will

always revert to their duties under section 33. This is explored in much more detail in the guidance note.

While an arbitrator must not allow unprofessional or incompetent behaviour, they have a duty under section 33 to 'give each party a reasonable opportunity of putting [their] case and dealing with that of [their] opponent' and this will include assisting in an impartial way any party who is unsure of the processes involved

Similarly, the parties have a duty under section 40 to act properly and expeditiously, which means acting reasonably and complying with procedural and evidential directions that are either agreed by the parties or made by the arbitrator.

Again, what a party to an arbitration can do if the opponent does not act in this way, or indeed if the arbitrator does not appear to be complying with their duties under section 33, is explored in the note.

Such scenarios can include one party refusing to cooperate or constantly delaying matters. A party may also become concerned that potential costs are becoming out of proportion to the matter in dispute. These scenarios can be dealt with by the arbitrator either of their own volition or at the request of one of the parties, and guidance on how to deal with these circumstances is included in the note.

The hearing

There is no need for a competent practitioner to be overly wary about the hearing or the preliminary hearing. While an arbitrator must not allow unprofessional or incompetent behaviour, they have a duty under section 33 to 'give each party a reasonable opportunity of putting [their] case and dealing with that of [their] opponent' and this will include assisting in an impartial way any party who is unsure of the processes involved. Younger or inexperienced practitioners should not therefore be discouraged from getting involved in arbitration, and indeed should be encouraged to ask the arbitrator to clarify anything that may be unclear in terms of directions or processes being applied.

It is critical that any surveyor adheres to the other RICS guidance notes and professional statements relevant to all forms of dispute resolution, such as Surveyors acting as expert witnesses and Surveyors acting as advocates . As long as these are followed and the surveyor acts professionally and within their duties as a representative of one of the parties under section 40, then arbitration should not hold any fears.

If you look back to rural arbitrations from the 1960s to the early 1980s, when the 1984 rent formula in Schedule 2 of the Agricultural Holdings Act 1986 came into being, they were often held around the farmhouse kitchen table between 2 local surveyors acting as advocates and a third, perhaps not so local, surveyor as arbitrator, especially when it came to rent review arbitrations. After the hearing and maybe some lunch, they would all walk the farm and the arbitrator would go away and determine the award. Not a solicitor was in sight, and it was all conducted at relatively low cost.

There is sentiment in the rural profession that it would be good to return to those days, especially for rent reviews, and this guidance note should encourage all rural surveyors to familiarise themselves with arbitration and the Arbitration Act 1996 and have the confidence to get involved.

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Further information

- Download the RICS guidance note: Rural arbitration, 1st edition
- Related competencies include: Conflict avoidance, management and dispute resolution procedures , Landlord and tenant
- This feature was taken from the RICS Land journal (November/December 2017)
- Related categories include: Agricultural and rural disputes , Arbitration