

# Call in the experts

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## Kevin Woudman and Jon Rowling discuss the alternative dispute resolution paths available to keep cases out of court

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The number of dilapidations disputes going to court is very small, due in part to the effects of the [Civil Procedure Rules](#) and, in the case of damages claims at the termination of a tenancy, the [Dilapidations Pre-Action Protocol](#) .

However, disputes do still occur, whether during a lease term or at expiry, and where these are unable to be resolved by negotiation, there are alternative means of determination or settlement that may offer distinct advantages over litigation, such as speed, privacy and confidentiality, informality of proceedings and cost.

[RICS](#) is launching a method of alternative dispute resolution (ADR) designed specifically for the resolution of lease-end dilapidations disputes.

The [Dilapidations Dispute Resolution Scheme](#) is based on independent expert determination (IED), which is used frequently to resolve rent review disputes. The principle underpinning its structure is to put both parties on an equal footing, allowing disputes to be resolved relatively quickly and economically, and enabling the parties still to be represented by their usual advisers.

In brief, the timetable is:

- both parties sign up to the scheme, in advance or in the early stages of a dispute
- the landlord, or their advisers, prepares and publishes the Schedule of Dilapidations and Quantified Demand in the usual way
- the parties or their advisers attempt to resolve the dispute in the usual way, normally by negotiation and the tenant typically will issue a response and/or Scott Schedule
- if the dispute is unresolved after 9 months following lease expiry, either party has the right to refer the dispute to an independent expert for a binding determination
- both parties can make representations to the independent expert but are not obliged to do so
- the independent expert reviews any representations and uses their expertise to make a decision as to the cost of remedying the tenant's contractual breaches, taking into account the landlord's intentions for the demised premises. Advice can be taken from third parties such as lawyers or engineers
- the figure is published to both parties as a non-binding neutral evaluation. It is essentially this stage that differentiates the scheme from more standard IED
- the parties have a period of time to use that information to attempt to settle the dispute without further involvement from the independent expert
- if the dispute remains unresolved, the independent expert then considers valuation and loss (probably via third party) and publishes a binding determination setting out the tenant's liability
- the tenant has a contractual obligation to pay that sum to its former landlord
- within the determination, the independent expert will consider the reasonable costs

of preparing and serving the Schedule of Dilapidations and their own professional fees. Other costs are not included.

Where the parties to a dilapidations dispute are signed up to the scheme, they and their advisers may be more inclined to settle in advance of the 9 month trigger to keep costs down. For landlords and tenants, signing up enables them to demonstrate early compliance with the Dilapidations Protocol which indicates that the parties should consider and attempt to agree a form of ADR.

When agreeing to participate, the parties can record the name of a preferred independent expert, or leave the President of RICS to make the appointment on their behalf, which, as with other appointments made in this way, would attract an administration fee payable to RICS.

IED is well suited to disputes where issues are straightforward, or where relatively small sums of money are at stake. However, for much larger or complex dilapidations claims, some parties may consider arbitration more suitable as a means of final determination. This allows the evidence of witnesses of fact and expert witnesses to be tested by cross-examination, and submissions on points of law to be made.

Mediation is also becoming a popular means of resolving dilapidations disputes and the RICS Dispute Resolution Service offers chartered surveyors with considerable experience in acting as independent expert, arbitrator or mediator.

## **Arbitration**

The arbitrator's function is to decide disputed facts using the evidence adduced by the parties, or by inquiry. The arbitrator then applies the facts to the rules or laws applicable to the parties' contractual relationship.

The [Arbitration Act 1996](#) changed what had, historically, become a rigid and costly process. Now, it is quite common to find relatively straightforward dilapidations disputes concluded within 3 to 4 months of an arbitrator's appointment, sometimes less if the arbitration is conducted on the basis of written representations only.

Under the Act, the parties are given control of most aspects of the proceedings, although the arbitrator will generally ensure that the most cost-effective procedures are adopted for the particular case. In dilapidations disputes, the parties also have the benefit of presenting their case to a chartered surveyor arbitrator with experience in the field.

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Preliminary or discrete issues can be determined very quickly by arbitration, for example, the interpretation of a particular lease covenant, or whether the nature of the damage or deterioration brings the condition of the subject matter below the standard contemplated by the covenant. Often, the determination of a preliminary issue by an arbitrator, by way of award, enables the parties to resolve the remainder of the dispute by negotiation.

An arbitrator can also, if required, deal with the question of costs, both liability and quantum. Their decision, by way of Award, is final and binding, although there are limited rights to appeal to the courts.

## Mediation

There are several factors that make mediation different from other forms of dispute resolution. No decision or determination can be imposed on the parties by the mediator, nor will they express any personal view on the dispute unless the parties request this, which often occurs when there is an impasse. The mediator manages the framework of the mediation, while the parties retain responsibility for the resolution.

During a process, the parties are able to freely discuss the strengths and weaknesses of their case with the mediators on both sides without prejudicing their position should a settlement not be reached and the dispute proceeds to litigation or arbitration. Furthermore, because attendance is voluntary, parties can leave the mediation at any time.

A mediator will encourage the parties to generate and consider their options, and to develop them to viable courses of action. But the mediator can often suggest ways in which other people have dealt with similar situations or indicate the different approaches that the courts have taken, adding new ideas which may be relevant to the particular case. The development of options is an intrinsic part of the problem-solving approach that characterises mediation.

The costs of mediating a dispute are usually considerably less than pursuing the matter through the courts. However, parties cannot be certain of getting a result. Notwithstanding this, the thought that has gone into deciding what the issues are, and where the parties' interests really lie, is likely to make it easier to reach a solution.

It is generally accepted that the mediation process is ideally suited to resolving multi-party dilapidations disputes where there are many interlocking issues.

## Early neutral evaluation

Early neutral evaluation sees an independent person, experienced in the subject matter of the dispute, investigate and give their opinion on any matter referred to them by the parties. The instructions can also be extended to consider the evidence adduced by both parties and give an opinion of the potential outcome should the dispute proceed to litigation. The evaluations are non-binding, but can be extremely useful to assist parties in reaching a settlement, or narrowing the issues between them.

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## Further information

- To contact the RICS Dispute Resolution Service, call +44 (0)20 7222 7000
- Surveyors who would like to consider training and accreditation in any dispute resolver role should contact Raj Sohal of RICS Dispute Resolution Services
- Related competencies include: [Conflict avoidance, management and dispute resolution procedures](#)

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