

Presentation to

..... 2013

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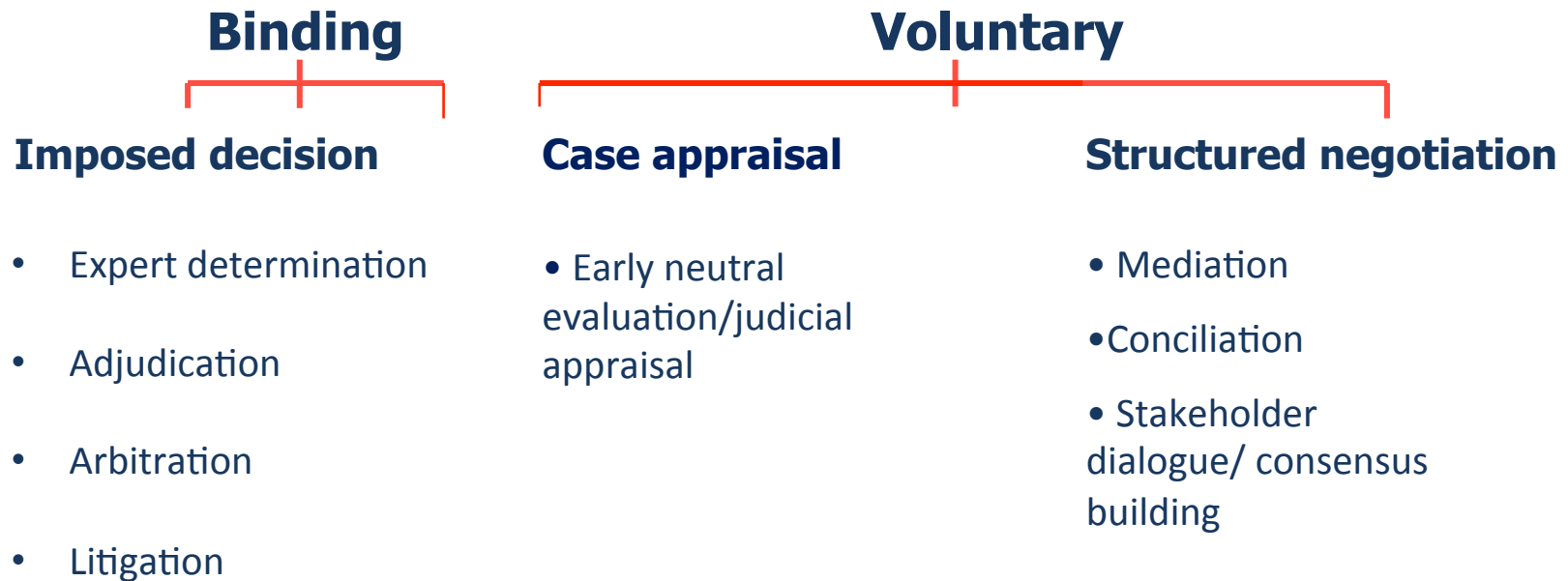
Mediation

Mediation for commercial and residential property disputes: its uses and benefits.

What is mediation?

“A voluntary, without prejudice and strictly confidential dispute resolution process lead and managed by a trained neutral facilitator who actively helps the parties in a disputes to reach a negotiated and legally binding settlement which is documented at the end of the process.”

Dispute resolution spectrum



Comparison between litigation and mediation

Litigation

- Adjudicative
- Compulsory/binding/Rules
- Rights focused
- Retrospective
- Lawyer-centred
- All or nothing
- Maybe years
- High Cost

Mediation

- Facilitative
- Consensual
- Voluntary & flexible
- Interests focused: now and in the future
- Client-centred
- Range of options
- Weeks – not years
- Low cost

Facts, figures and examples

(Statistics from CEDR's Third Mediation Audit
published November 2010)

- 70.83% rise in civil and commercial mediations between 2003 and 2009.
- 81% of mediating parties came to the mediation by mutual consent, rather than through court intervention
- 94% of mediations lasted just one day
- 75% settled on the day and another 14% shortly afterwards = 89%

Core principles of mediation

- Consensual
- Confidential
- Without prejudice
- Interest-based
- Forward rather than backward looking

Which cases may not be suitable for mediation?

- Need for an injunction
- Complicated case/need more information
e.g.- expert's report- timing issue
- Direct negotiations are satisfactory
- Public policy is involved or a precedent is required
- BUT remember there are very few, if any, cases which are plainly not suitable for ADR

Which cases are suitable for mediation?

- Precedent could be dangerous
- Direct negotiations have reached impasse
- A quicker/cheaper conclusion is required
- Publicity is to be avoided
- Reputational issues are involved
- Continuing relationship between the parties
- Litigation should be a matter of last resort

Examples of “dispute/case types” which are suitable for Mediation (1)

- Commercial litigation
- Property litigation
- Rights of way disputes
- Agricultural disputes
- Judicial review
- Defamation
- Employment – ET/CC

Examples of “dispute/case types” which are suitable for Mediation (2)

- Employment – workplace mediation
- Personal Injury and
- Directors, partners and shareholder disputes
- Merger facilitation
- Harmonisation post corporate acquisition
- Public Bodies

Myths and concerns about mediation (1)

- “It’s just horse-trading”
- “....but my client wants his day in court....”
- “I risk revealing too much”
- “It will prevent me using litigation or arbitration”

Myths and concerns about mediation (2)

- “I do it all the time anyway – I’m a good negotiator”
- “It’s a sign of weakness to suggest it”
- “It will just waste more time and money”
- “This case is too complex for mediation”

Reasons for encouraging mediation (1)

- Compliance with CPR/Protocols
- Parties can still have “their” guaranteed “day in court”!
- The process is informal and non-technical
- Parties can thus regain control of their own case (even from their lawyers!)
- The process can itself confer inherent benefits e.g. narrowing issues.

Reasons for encouraging mediation (2)

- Outcomes can be negotiated of a type which a Judge could never order
- The process is virtually risk-free in a cards-on-the-table quasi litigation environment
- Relationships can be preserved for the future – e.g. employer/employee, contracting businesses, patient/hospital, surveyor/client.

CPR and the Pre-action Protocols

- The CPR (Pre-Action Conduct Direction) requires the parties to:-
 - “Consider whether some form of ADR would be suitable and, if so, to agree which ADR procedure to attempt, and...
 - provide evidence, if required by the Court, that ADR was considered”
- CPR 1.4 – Judges to encourage ADR
- CPR 1.3 – Parties too must help Court further in the overriding objective.
- CPR 26.4 – Stay of proceedings for ADR to take place.
- Form N150 – latest version published November 2011 – see preamble to Section A.

Duty to advise on ADR

- Burchell - v- Bullard [2005] EWCA CW 358 and Cowl - v- Plymouth City Council [2002] 1 WLR 803
- Rule 2.02 (1) (b) (Client Care) of the Solicitors Code of Conduct 2007
- Form N150

Unreasonable refusal to mediate = adverse costs orders

- Dunnett -v- Railtrack Plc [2002] EWCA Civ 302
- Dyson and Field -v- Leeds City Council [1999] WL 1142459
- Cowl -v- Plymouth City Council [2002] IWLR 803
- Neal -v- Jones (t/a Jones Motors) [2002] EWCA Civ 1731
- Leicester County -v- Coates Brothers plc [2003] EWCA Civ 290
- Virani -v- Manuel Reventy Cia SA [2002] EWCA Civ 107
- Burchell -v- Bullard & others [2005] EWCA Civ 358

Reasonable refusal to mediate = no adverse costs orders

- Halsey -v- Milton Keynes NHS Trust [2004] EWCA Civ 576
- Hurst -v- Leeming [2002] EWHC 1051 (ch)
- SITA -v- Watson Wyatt: Maxwell Batley [2002] EWHL (ch) 2025
- Valentine -v- Allen & Others [2003] EWCA. Civ 915
- Corenso (UK) Ltd -v- Burnden Grange Plc [2003] EWHC Civ 1805
- Steel -v- Joy & Halliday
- The Wethered Estate Ltd -v- Davis & Others [2005] EWHL 1903
- Allen -v- Jones [2004] EWHC 1189

Other Cases

- “*Not all neighbours are from hell. They may simply occupy the land of bigotry...*” Hameed Faidi and Inam Faidi -v- Elliot Corporation Court of Appeal – 16th March 2012 – [2012] EWCA Civ 287
- Conduct during mediation – Earl of Malmesbury -v- Strutt & Parker & others [2008] EWHC 424 (QB)
- Enforceability of Mediation clause in a commercial contract – Cable & Wireless -v- IBM UK Ltd [2002] EWHC 2059 (Comm)
- Government party failing to mediate despite “H.M.Government’s pledge” to do so – Royal Bank of Canada Trust Corporation Ltd -v- The Secretary of State for Defence [2003] EWHC 1841

The Role of the Mediator

- Manages the process (and if needs be tightly!)
- Create the right environment for constructive negotiations
- Not judgmental: nor evaluative
- Facilitative
- “Must not build the proverbial bridge.....instead identify and offer the parties the bricks to build it”

The Mediator's Skills (1)

- Assimilation of facts
- Identify key issues
- Identify key deal breakers
- Identify potential deal makers
- Authority
- Manager
- Listener
- Reality Tester

The Mediator's Skills (2)

- Summariser
- Honest Broker - must command respect and trust
- Deal Facilitator (not Deal Maker!)
- Energy
- Ability to instil:
 - Realism
 - Optimism
 - Energy into the process

Mediation: The Process

- Finding a mediator
- Preparing for the mediation day
- The day itself
- The Compromise Agreement - recording the settlement on a contractual basis.

Use of Mediation by Surveyors and Property Managers (1)

- Property litigation (e.g. Dilapidations claims)
- Property Management (e.g. lease re-gearing)
- Insurance disputes
- Agricultural disputes
- Rent Reviews
- Public Bodies
- Acquisition facilitation

Use of Mediation by Surveyors and Property Managers (2)

- Employment – ET/HC/CC
- Professional negligence
- Directors, partners and shareholder disputes

Case Study 1

- Landlord's dilapidations claim: onerous lease is disclaimed in respect of future liabilities only.
- £100,000 claim for doing works and loss of rent.
- s18 LTA 1927 – how does this apply?
 - Repair
 - Decoration
 - Alterations
- Is the guarantor liable?
- Would mediation be advisable?

Case Study 2

- Tenant serves a break notice terminating its lease.
- The lease requires the tenant to keep the property in full repair.
- The break option is conditional upon the tenant 'materially complying' with its covenants.
- There are some minor repairs outstanding – how does this affect the validity of the break option.
- Fitzroy House Epworth Street (No 1) Ltd v Financial Times.
- Court's test: what is the effect on the LL's ability to re-let or sell the property.
- Can mediation provide the answer?

WE WOULD MUCH WELCOME THE OPPORTUNITY OF HELPING YOU OR YOUR CLIENTS

with any thoughts or aspects arising from this presentation whether it be in relation to dispute resolution or transactional business.

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