

Green's Property Law Bulletin

Mediation in Property Matters

Introduction

There is a myth about mediation. Many believe that mediation is only appropriate for disputes which have reached the later stages of litigation and where the parties have staked out their position in court pleadings. In fact, there is a much more extensive role for the independent facilitator who acts as a mediator. He or she can add value wherever differences occur which are difficult to resolve. This is perhaps especially so in property matters.

Examples

Take the example of a property development where problems have occurred over the installation of a key facility which does not work to the satisfaction of the employer and he refuses to pay. The main contractor argues that it has been installed according to the terms of the contract and refuses to do more on site. There is an argument about whether or not the contractual terms were varied and, if so, at whose request. The matter could be contested with claim and counterclaim which would involve a contest in court over legal rights and losses. However, what is really required is for the facility to be operating as quickly as possible so that the development can be completed. This is where the involvement of a mediator may bring benefits for all concerned.

The mediator will help the parties to focus on the real commercial and contractual issues. Together, they can design a process for dealing with these, including completing the contractual work and addressing the claims. In such a situation, it is likely that the first round of meetings with the mediator will address what can be done to complete the development, with the parties' principals and experts engaging in dialogue on an action plan. Thereafter, with renewed confidence, in a second round of meetings the parties can address the consequences of an unclear contract, a complex project and the difficulties in assessing loss. The mediator will help them to take a realistic commercial approach which avoids the cost, time and reputational risk to both parties of a prolonged unresolved dispute. Throughout, the involvement of skilled, business-like lawyers will be essential to bring matters to a conclusion.

Or take a new housing project. There is potential for differences between and among a number of stakeholders throughout the currency of the project. Resources are limited, everyone is working at the margins and corners may be cut. Contractors, professional consultants, the developer and sub-contractors all have concerns. An independent facilitator can help to nip these potential problems in the bud and to build structures to enable difficulties to be dealt with speedily. Indeed, in the United States, dispute avoidance mechanisms are utilised regularly in order to enable differences to be dealt with in real time. These provisions may include dispute resolution boards, rapid response facilitators and project mediators. In Scotland, this approach is now in place in at least one major public sector housing project, where the mediator can be called upon to guide or meet with stakeholders should a dispute or difference arise which would benefit from outside facilitation.

“Deal Mediation”

A growing trend is towards what is described as “deal mediation”. When a commercial contract is being negotiated, there are many potential sticking points. Some of these can seriously

compromise the conclusion of the contract. An opportunity may be lost. Or uncertainty may result. Having a third party on hand at this stage to help to address concerns, needs, ambiguities and aspirations, while building or rebuilding trust between the negotiating parties (or their agents!), may be crucial. Imagine if this facility was available in the negotiation of complex missives.

Planning and Lands Tribunal

In planning matters, there is scope for involving a mediator at many stages. The writer was recently engaged to facilitate discussions between a developer and objectors. Over a period of four hours, the developer was able to explain its proposals and plans while the objectors could articulate how they believed the development would adversely affect their business interests. This process of constructive engagement enabled clarity to be achieved, a real understanding of each side's aspirations and concerns to be gained and a plan for addressing these to be explored. The presence of the mediator provided structure and discipline, while enabling a frank exchange of views without loss of control or dignity, and a continual focus on moving forward and identifying what was actually contentious. This provided a platform to enable parties to reassess their positions and look at a range of options. This may have been the first time that those involved had had an opportunity to address together what really mattered.

The Lands Tribunal of Scotland has encouraged applicants and respondents to consider using mediation in appropriate matters. These might include applications to vary land conditions where objections by neighbours could easily lead to tensions and friction. Often, the legal determination of the matters in issue will not address the real needs and concerns on the ground and underlying problems may continue for years. The scope of mediation means that issues which may not be relevant in the legal process can be discussed openly.

More Examples

Of course mediation occurs where matters have become more contentious and indeed litigious. Another recent example involved a house building contract where the nature and extent of perceived defects left the new house-owner with such a level of dissatisfaction that he raised a number of court actions and an arbitration. The cost of these procedures exceeded the cost of remedying the unsatisfactory work. When the matter came to mediation, with the help of thoughtful and resourceful legal advisors on each side, the matter was resolved within ten hours. The job of the lawyers was to prepare with their clients beforehand so that they could negotiate with strength and imaginatively and, throughout the mediation day, to guide and advise their clients on strategy and presentation. Indeed, because of discomfort between the clients, the lawyers met frequently with the mediator and then alone to craft the terms of a creative and detailed agreement covering remedial work, payment of costs and expenses and dispensing with ongoing litigation.

Occasionally, it is beneficial to employ two mediators acting in a team. In a large value case concerning development and planning issues in a residential site, there were significant legal issues about the approach to quantification of the claim and also issues about the approach planners would take to differing development proposals. The two mediators had legal and surveying backgrounds respectively. They worked closely together to enable both parties to be in the best possible position to reach a commercial deal, holding separate meetings over two

days with a variety of experts, often running in parallel. This enabled momentum to be sustained and a successful conclusion to be reached.

Professional Negligence

An area where mediation is used extensively is where claims of negligence are made against a variety of professionals, including surveyors, architects, engineers and lawyers. The benefit here is that non-monetary issues can be addressed, such as the need for acknowledgement of the consequences of a mistake, error or other misfortune, an explanation for what happened, expressions of regret, or a reassurance provided that steps have been taken to remedy any systematic failure. Or perhaps an explanation will be provided for why no payment or other restitution can be made. All of this can be done privately and without prejudice to any rights of the parties unless they reach an agreement.

For example, a claim alleging professional negligence by a solicitor arose out of the conveyancing undertaken to divide the title of a farm. The farm contained a courtyard and, because a servitude right of access over neighbouring land was not obtained, the courtyard effectively became inaccessible for vehicular use. The neighbouring farm owners had refused to allow access over their land. A day of mediation produced a settlement which was satisfactory to both parties.

Separately, a failure by a solicitor to obtain a schedule of conditions for an industrial unit resulted in the tenants becoming responsible, at the expiry of the lease, for all the works which the landlords considered were appropriate. The tenants were unable to rely on the condition of the property at the time of entering into the lease as a means of reducing their liability. There were issues about the relative advantages and disadvantages of tenant repairing leases, the actual cost of the necessary works and early termination. Two separate days of mediation – with several weeks in between to enable further reports to be obtained – resulted in an agreed solution.

Looking forward

The use of mediation in property-related matters is likely to continue to grow, both where litigation is underway or contemplated and where there are difficult negotiations or other situations in which having an outside facilitator to help open effective communication channels is useful. There is a perceptible shift in the mind-set of many of those involved in advising and representing clients, both lawyers and others. Clients are much more aware of the options now available to them for speedy, cost-effective and constructive management and resolution of differences and disputes.

Both the Sheriff Court and Court of Session seem poised to follow the direction signalled by judges in England and many other jurisdictions by encouraging greater use of mediation. For those in receipt of legal aid, the Scottish Legal Aid Board has issued guidance that refusal by a legally aided party to enter into mediation will be a relevant consideration for the Board both at the stage of deciding whether or not it is reasonable to grant the party legal aid and in deciding, once granted, if it is reasonable for legal aid to continue in place.

Recent research by Dr Bryan Clark of the University of Strathclyde into lawyers' attitudes has confirmed that nearly two thirds of those respondents who have experienced mediation have

used it again; that mediation is used in a wide range of disputes, with settlement rates approaching 80% - and higher if "partial" settlement is included; that there is a high level of satisfaction with mediation, and that many lawyers see mediation as a new business opportunity in whose growth they seek to have a prominent role.

Authors: Pamela Lyall and John Sturrock
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