

## Integration in Mediation

*In recent years there has been a growing awareness by professionals of the opportunities offered by mediation. This has been supported within the RICS by the training of what has become known as RICS Accredited Mediators. However, this awareness noticed in the professional field is not so noticeable with regards to the general public, whose first port of call, when in dispute, is still likely to be the legal profession.*

So how can the surveying profession turn the public psyche to ensure surveyors are considered as their first choice in land & property related disputes?

Grant Vincent explains:

Anyone who is considering litigation is likely to need a large wallet and plenty of time and patience. Even if these essential ingredients are available then often, the assured likelihood of success in the early days pre-trial, are frequently replaced with uncertainty. Stress levels build, relationships are likely to founder and, if in business, opportunities will certainly be lost. Initial exchanges of solicitors' letters tend to be provocative and therefore harden positions which make resolution of any dispute more difficult.

To quote Lord Justice Mummery [2008] *“Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both”*..



Since completion of the Lord Woolf reforms in 1999 the judiciary have been looking at reducing the workloads within the Court system. His review led to what is known today as the Civil Procedure Rules (CPR). Many of us will be aware of these rules through our expert witness activity. However, an important element of the changes introduced in the last 10 or so years is the requirement for the legal profession to consider – Alternative Dispute Resolution (ADR). This is a means of resolving disputes prior to going to Court or indeed even after litigation has started; as the Court is able to ‘Stay’ the Court process whilst ADR is considered as a potential solution.

## Independent ADR

ADR has been well established in the United States for over 30 years but is still considered to be relatively 'new' within the UK legal system. Whilst land & property disputes are ideally managed by the professional surveyor it seems that the legal profession has established itself as a leader in this respect, as lawyers perceive ADR as just another extension of their activity.

This current status is evident from the very limited number of 'legal independent' ADR practices within GB.

My practice was established to try to turn the tide in this respect but the story of King Canute comes to mind! The Dispute Mediation Consultancy provides truly independent advice as regards land and property disputes through its affiliation of independent RICS professional surveyors, mediators and adjudicators. Our wide skills base is not only applied to land related issues but to the property profession as a whole due to the extensive scope & quality of our panel's competencies.

By joining and working together, and with support of the RICS Dispute Resolution Service, I feel that there is at least a chance of the survey profession breaking into the ADR property arena. This offers us the possibility to at last challenge the current dominant status of the legal profession.

Whilst recognising the current situation I feel it is also important to stress that we as a profession must act and work together with our legal colleagues to ensure that the public get the best advice & help.

Many of the surveyors who have worked in the expert witness field of activity will empathise with the following:

*Woe betides the Surveyor who believes that they are qualified to give the legal advice which may be so often required for fair resolution of a dispute.*

This statement is equally true when practising in the field of alternative dispute resolution.

## What can the survey profession offer

For the survey professional to be actively involved in ADR, we need to ensure that the legal profession is aware of our skills within the property arena and highlight the benefits that this can bring to their clients.

Whilst we recognise that the surveyor is unlikely to have the comprehensive legal skills necessary to resolve a dispute, it is equally highly unlikely that the solicitor will possess the professional survey skills necessary to ensure long term success of any land & property legal agreement. Lord Justice Mummery, recognised this in his recent Court of Appeal judgement stating:

*“greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution”. Bradford –v– James [2008] EWCA Civ 837*

## How CPR can help surveyor led mediation

The use of ADR is now an ‘*overriding objective*’ of the Civil Procedure Rules. As shown earlier, the Judiciary have actively encouraged the legal profession to use surveyors to aid the mediation process, particularly within neighbour boundary disputes. The inclusion of ADR as an overriding interest therefore only increases the opportunities for surveyors.

## Opportunities for all surveyors in Mediation but beware

The land surveyor can offer expertise in mapping & land survey and frequently in addition have photogrammetric experience; thus many are expert in aerial photography interpretation. They are likely to have a high level of land registration knowledge and would be able to supply new title plans to enable the proper recording a registration of any newly agreed boundary with the Land Registry under ‘Boundaries’ Section 60 of the Land Registration Act 2002.



It should therefore be expected that a Chartered Land Surveyor could meet most if not all of the above requirements; although other survey disciplines, may have difficulty in representing themselves as an expert in this capacity. Such surveyors who may wish to work in the boundary dispute arena would need to fully consider their scope of activity v their skills base so as not to compromise their PII cover & RICS professional practice rules.

When considering qualifications to carry out work, the legal profession are unlikely to be skilled in the mapping, survey and aerial interpretation areas, and are therefore likely to be highly disadvantaged if they proceed to mediation or litigation using their legal skills alone. It is here therefore that the surveyor should publicise their capabilities and should be able to show the legal profession how surveyors can work with them to the advantage of their client; this may be as an Expert Witness, Mediator or Mediator Advocate. The latter is a growing opportunity for surveyors and it is interesting to see that many are now members of the Standing Conference of Mediation Advocates (SCMA), which helps support surveyors who wish to act for one party alone in a dispute, as a mediator advocate.

## Mediation in ADR

So, given that the surveyors have now made their skills known to the legal profession, how can we help? It is not a pre-requisite for the mediator to be knowledgeable of the subject to which the mediation is required. However, particularly in boundary disputes, it is often very useful for the legal advisers to have the mediator knowledgeable in land & property issues; particularly as regards to land law and the Ordnance Survey mapping, related to the Land Registry title deed process. Land surveyors are used to looking closely at real world features such as fences, walls and hedges and, coupled with their knowledge of the mapping process and land law, we can be of significant help in resolving such disputes.

## Benefits of Mediation

The Dispute Mediation Consultancy's aim is to keep disputes out of the Courts by providing a local surveyor-led mediation services that offer clients the opportunity to resolve disputes in a fair and amiable manner; whilst saving them considerable money in potential legal costs. The latter is a key motivator for gaining business as it has been shown that over 70-80% of mediations are successful. Even in cases that do not get resolved and result in litigation, costs can be shown to be reduced as a result of mediation, as many of the issues that would have been taken to Court have been resolved.

### *Key benefits of the mediation process are:*

- ❖ Quicker resolution
- ❖ Less stressful
- ❖ Significantly cheaper than going to litigation
- ❖ Parties retain control of the settlement
- ❖ The provision of flexible solutions

## The Courts, Mediation process, and bureaucracy

*All Courts in England & Wales referring cases to mediation now have to use the UK National Mediation Helpline (NMH) for small value cases under £50,000. The UK NMH have a list of mediation provider companies and practices that have gained Civil Mediation Council (CMC) Accreditation; The Dispute Mediation Consultancy is one such practice.*

The CMC accreditation scheme is operated separately from the NMH. Neither the NMH, nor the Ministry of Justice (MoJ), has any influence on the accreditation criteria or punitive fees set by the CMC. However, the Ministry of Justice uses only the CMC accreditation scheme to ensure that providers wishing to join the NMH scheme are 'vetted' and meet their minimum standards. Although this system improves the likelihood of the parties getting quality

mediators it is my opinion that this is an unnecessary constraint on practice. Ideally RICS should campaign to be recognised as a ‘best practice’ accreditation organisation and seek to obtain direct access for its accredited members to the NMH.

### **NMH historical background**

When court-based mediation began to be introduced in some of our larger court centres (such as Central London and Birmingham), it was targeted at cases in the fast and multi tracks, where parties are generally represented and legal costs likely to be significant.

In developing court based schemes, Her Majesty's Court Service (HMCS) worked in partnership with a number of commercial mediation providers to set up time-limited and relatively low cost mediation services. Under these schemes, mediation was provided on court premises between the hours of about 4.30pm to 7.30pm. However, it became clear that only the largest courts would be able to establish their own mediation schemes – many courts were simply too small to be able to provide the administrative support necessary to manage a court-based scheme. Therefore, the NMH now provides an administrative support service to the courts by taking the burden off court staff to arrange mediations. This ensures there is a standardised approach and parties have access to low cost time limited mediators<sup>1</sup>.

### **National Mediation Helpline & RICS**

Since 2004, all court referrals for mediation are now administered through the NMH. However, parties are free to make their own arrangements and do not necessary have to go through the NMH.

It is interesting to note that the recent publication of the 2010-11 NMH providers list included two practices with ‘RICS Accredited Mediator’ panels in addition to the RICS DRS; although, of the two independent practices, only the Dispute Mediation Consultancy has land surveyors as part of their panel. This is surprising but probably due to the limited number of land surveyors that are currently trained in mediation. However, the inclusion on the list does show that surveyors are at last getting penetration into this growing activity and are integrating at the heart of the mediation process.

### **Can the RICS influence the future?**

Earlier this year, along with the Dispute Mediation Consultancy, the RICS Dispute Resolution Service became accredited by the CMC and both are now listed on the NMH. RICS accredited mediators therefore have an opportunity for greater integration & representation in this field of activity.

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<sup>1</sup> Ministry of Justice 2010

Possibly in the future, mediation providers with RICS Accredited mediators would not need to jump through so many hoops to get NMH listed, as the RICS rules of professional conduct are more comprehensive than those of the CMC. An argument could therefore be made for RICS to accredit RICS practice panels as well as individual members, in a similar manner as the 'Registered by RICS' scheme.

**Grant Vincent is the founding member of the Dispute Mediation Consultancy in the Isle of Wight and a member of the RICS Accredited Mediators Group**

*info@dispute-mediation.co.uk*

[www.dispute-mediation.co.uk](http://www.dispute-mediation.co.uk)

Web reference sites:

National Mediation Helpline: [www.nationalmediationhelpline.com](http://www.nationalmediationhelpline.com)

Civil Mediation Council: [www.civilmediation.org](http://www.civilmediation.org)

Standing Conference for Mediation Advocates: [www.mediationadvocates.org.uk](http://www.mediationadvocates.org.uk)

OS and LR: [www.ordnancesurvey.co.uk/oswebsite/site/contact/boundaries.html](http://www.ordnancesurvey.co.uk/oswebsite/site/contact/boundaries.html)