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Welcome to the September edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out about the Court of Appeal Mediation Scheme

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The Court of Appeal Mediation Scheme - the way forward?

This fifteenth issue of *Insight* focuses on the new Court of Appeal Mediation Scheme and the effect the Scheme might have on the future of mediation and alternative dispute resolution in the English courts.

Background to the Scheme

The Court of Appeal Mediation Scheme ("the Scheme") is an extension of a voluntary pilot mediation scheme that was introduced in April 2003 which was extended to apply to all contract and personal injury claims up to the value of £100,000 for which permission to appeal has been sought, obtained or adjourned. The Scheme has applied to qualifying claims since 2 April 2012 and is set to run for a year.

The Scheme was developed with the stated aim of reducing the number of claims below £100,000 reaching the courts in order that more court time can be devoted to larger disputes.

Lord Justice Rix LJ led the working group that was set up by the Master of the Rolls to revitalise the Scheme. He explained the rationale behind the Scheme in the following terms:

"Judges regularly see cases in the Court of Appeal which could easily have been resolved at an earlier stage through the use of mediation. Parties may not be poles apart, but litigation can have a corrosive effect for which mediation can provide a balm. Mediation in the Court of Appeal can save a great deal of money and anxiety."

How does the Scheme work?

The Scheme is managed and monitored by the Centre for Effective Dispute Resolution ("CEDR"), a London-based mediation and alternative dispute resolution body founded as a non-profit organisation in 1990 to encourage the development and use of alternative dispute resolution and mediation in commercial disputes. CEDR's evaluation of the Scheme will be considered by the senior judiciary.

Qualifying cases will, unless the judge orders otherwise, be recommended for mediation to CEDR. If the parties agree the recommendation to mediate, a mediator from the court-approved panel will be appointed by the parties. If agreement cannot be reached as to the mediator's identity, a mediator will be appointed from CEDR's own panel. The role of the mediator is to bring the parties together with a view to reaching settlement. If no settlement is achieved, the case will be referred back to the Court of Appeal for determination.

Will the Scheme be used in practice?

The key question is whether the Court of Appeal judges and the parties will abide by the spirit of the Scheme and order and agree to mediation respectively.

Until relatively recently, the Court of Appeal's reaction to the Scheme was uncertain. This is because the recommendation to mediate is not mandatory and the judge may therefore direct that the Scheme should not apply. A further unknown is whether there will be any adverse consequences for a party who chooses to ignore the court's recommendation to mediate.

Two recent Court of Appeal cases have shed some light on the uncertainty.

The Faidi case

Faidi v Elliott Corporation [2012] EWCA Civ 287 related to the enforcement of a covenant in the lease of a flat for reasons of neighbour noise. Judgment was handed down on 16 March 2012, slightly in advance of the Scheme being introduced.

Even at that early stage, Lord Justice Jackson's comments about the way in which the litigation had been conducted by the parties were instructive and he fully endorsed mediation as the recommended approach:

"This case concerns a dispute between neighbours, which should have been capable of sensible resolution without recourse to the courts. During the course of his submissions in the Court of Appeal, Mr Pearce for the Claimants observed that this may not be an 'all or nothing' case. A moderate degree of carpeting in flat 8 might (a) reduce the noise penetrating into flat 6 and (b) still enable the occupants of flat 8 to enjoy their new wooden floor. This is precisely the sort of outcome which a skilled mediator could achieve, but which the court will not impose.

Of course, there are many cases where a strict determination of rights and liabilities is what the parties require. The courts stand ready to deliver such a service to litigants and must do so as expeditiously and economically as practicable. But before embarking upon full blooded adversarial litigation parties should first explore the possibility of settlement. In neighbour disputes of the kind now before the court (and of which I have seen many similar examples) if negotiation fails, mediation is the obvious and constructive way forward.

In the present case a mediator would not have been concerned about the interaction between the various leases and the licence to carry out works. Nor would he have been concerned about the other interesting points of construction, which first the county court judge and now this court have been called upon to decide.

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Instead he would have been helping the parties to find a sensible resolution of the practical problem which had arisen. I have little doubt that such a mediation would have been successful. The points of law upon which the litigation has turned are not easy ones and at the time of the hypothetical mediation neither party could have been confident of victory.

As it is, neither side wrote to the other proposing mediation until shortly before the hearing in the Court of Appeal. By then huge costs had been incurred."

The Ghaith case

Judgment in *Ghaith v Indesit Company UK Ltd [2012] EWCA Civ 642* was handed down on 17 May 2012 (around six weeks after the Scheme was introduced) on which date the Court of Appeal provided the first insight into the level of support that it would provide to the Scheme.

The case was a work-related personal injury claim. The employer was found to be liable for a back injury that was suffered by its employee during a stock take. The employee issued proceedings claiming £60,000 and the employer refused to mediate.

In providing permission to appeal, Lord Justice Toulson recommended the Scheme to the parties. At that stage, Indesit's advisers took the view that the costs already expended were greater than the value of the claim (as is common in claims of this size) and that mediation would not be cost-effective. Indesit sought to limit any further expenditure and so declined to mediate.

Even though the appellate judges allowed the appeal, they criticised Indesit's refusal to mediate. In his closing remarks, Lord Justice Longmore added as a postscript that:

"It is a great pity that Indesit did not pursue the option of mediation rightly encouraged by Toulson LJ when he gave permission to appeal. Mr Peebles informed us that it was not pursued because the costs had already exceeded the likely amount in issue. This is an inadequate response to the Court's encouragement of mediation, since a full day in this Court will inevitably result in a substantial increase in costs. Indesit's reaction is all too frequent and the Court has, since April of this year, decided that any claim for less than £100,000 will be the subject of compulsory mediation. It is devoutly to be hoped that such mediation will mean that these comparatively small claims will not have to be adjudicated by this Court so frequently in future."

In the same case, Lord Justice Ward LJ added:

"I fully endorse Longmore LJ's postscript. When this Court grants permission to appeal, it does so because there is a real prospect of success. That does not mean that the appeal will succeed, but it does mean that the appeal is by no means hopeless. That should tell both parties that there is still all to play for. If they have any sense, they will therefore heed a recommendation to mediate because the costs of mediation are likely to be exceeded by the costs of the appeal by a significant margin. It is not enough, as Mr Peebles [counsel for Indesit] suggested that there had been some attempt in the correspondence between solicitors to settle the case. The opening bids in a mediation are likely to remain as belligerently far apart as they were in correspondence, but no-one should underestimate the new dynamic that an experienced mediator brings to the round table. He has a canny knack of transforming the intractable into the possible. That is the art of good mediation and that is why mediation should not be spurned when it is offered."

Conclusion

As can be seen from the *Faidi* and *Ghaith* cases, the early indications are that the Scheme has the full backing of the Court of Appeal which has little sympathy for those parties who decline to mediate when mediation is recommended. Its commitment to tackling litigation cost by advocating mediation is clear, so if in doubt, you should mediate.

Some might find the Court of Appeal's enthusiasm for mediation surprising. This is because a number of cases that come before the Court of Appeal may well have had failed mediations previously (provided, that is, that mediation was proposed by one of the parties) and for such cases the positions of the parties might have become too entrenched for mediation to be successful. However, this has not proved to be the case. Studies have confirmed that the Scheme has actually achieved a settlement rate of 66 per cent since its inception in 2003 and the message seems to be, therefore, that it is never too late to mediate.

It remains to be seen what impact the Scheme may have on litigation cost. In the *Ghaith* case, the appeal was allowed and the matter was referred back to the County Court for a decision on the level of damages that should be awarded. Therefore, no costs were awarded as a result of the parties' failure to adhere to the recommendation to mediate. However, the discretion to award costs remains and it will be interesting to see how costs will ultimately be allocated by the County Court which may take Indesit's failure to mediate into account when it considers the question of costs.

Looking at the Scheme overall, its purpose is to reduce litigation cost and increase the certainty of any final result (i.e. by agreement as opposed to imposition by the court) and therefore it has to be welcomed.

For further information about mediation, please see *Insight* issues 9 and 10.

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