Fenwick Elliott

MEDIATION IN CONSTRUCTION DISPUTES: AN INTERIM REPORT

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The use, and in particular the effectiveness, of mediation in construction disputes is usually based upon anecdotal evidence. In order to address this problem, an evidenced-based survey commenced on 1 June 2006. This funded project is being conducted by King's College, London.[1] The research is being conducted not only with the support of the Technology and Construction Court, but also with their assistance. The aim of the research is to:

1 Reveal in what circumstances mediation is a real alternative to litigation, in other words a value-added alternative that settles the dispute;

2 Assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and

3 Identify which mediation techniques are particularly successful.

Survey forms are issued to all of the participants of litigation in the TCC, which has concluded after 1 June 2006. The survey is, therefore, almost at its halfway point. This article is merely a summary of the interim report based upon the data collected in the first quarter of the survey period.

The Survey

The representatives of each party that has settled, resolved or received a judgment from the TCC after 1 June 2006 has or will receive a survey form. Form 1 applies where a case has settled. Form 2 applies where a judgment has been given. Both surveys enquire

[1] King's College, London gratefully acknowledges the Society of Construction Law, the Technology and Construction Solicitor's Association, Her Majesty's Judges of the Technology and Construction Court and Fenwick Elliott LLP for research funding, ongoing support and guidance. The research is being undertaken on a daily basis by Aaron Hudson-Tyreman. Thanks must also go to Carolyn Bowstead, the TCC Court Manager, for her ongoing assistance.

whether mediation was used, the form that it took and at what stage in the litigation process the mediation occurred. Specific details about the dispute resolution process are then collected.

Interim Results

During the first six months, a response rate of 25.5% was recorded. An initial analysis of the responses shows that 32% of those disputes that settled were as a result of a mediation. This is more than had been anticipated. Of the remaining 68%, 61% settled by conventional negotiation while 7% settled as a result of some other process.

The nature of the cases dealt with is also interesting. A noticeable proportion of the cases related to defects (28%), design issues (15%) and professional negligence (15%). A survey dealing will similar categories of disputes arising from the Technology and Construction Court some ten years ago revealed that the majority of the issues leading to litigation in the TCC, were those relating to payment, variations, delay and site conditions.[2]

During the past ten years there has been a reduction in the number of cases commencing in the TCC. Some of this in part relates to the introduction of the pre-action protocols, also in part to the increase in mediation, but undoubtedly, due also to the increase in adjudication. Perhaps it is the case that time- and money-related issues, often prevalent in construction disputes, are now being dealt with by way of adjudication, and during the pre-action protocol process, while defects, design and negligence are remaining within the court's domain. This might be because those issues are frequently not only more complex, but often multi-party and therefore not easily suited to adjudication.

Respondents were asked to identify at what stage litigation settled or was discontinued. This is particularly interesting as many will often have an anecdotal view as to the time at which disputes settle. Anecdotally, many believe that most settlements are reached on the court steps. Clearly, this is not the case. There are a variety of "pinch points" in the litigation process. According to the respondents, those pinch points are:

- During exchange of pleadings (33%);
- During or as a result of disclosure (14%);
- As a result of a payment into court (10%); and
- Shortly before trial (24%).

Of the settlements reached, 81% were reached at one of the above stages. The remaining 19% occurred somewhere between the issuing of the claim form and the issuing of the judgment.

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[2] Gould, N. and Cohen, N. (1998) "ADR: Appropriate Dispute Resolution in the UK Construction Industry" *Civil Justice Quarterly*, volume 17, April, Sweett & Maxwell.

Of the mediations undertaken, 81% were as a result of the parties' own initiative, just 5% as an indication of the court, and 14% as a result of an order of the court. Barristers (48%) and construction professionals (38%) were the most frequently encountered mediators, with solicitors only represented by 14%. No other professionals were represented. No judges had been appointed as a part of the court settlement process according to the respondents. This analysis is only based on the first quarter of the survey period, so the final results may of course reveal a different picture.

Many of the respondents believed that costs had been saved as a result of mediation. In effect, the financial amounts saved represented the point in the litigation at which the dispute is settled. Some suggested that the cost savings were between £200,000 and £300,000. No doubt, those reflected the disputes that settled early during the pleadings stage, whilst those who suggested that the savings were £25,000 or less perhaps represented those disputes that settled shortly before trial.

Conclusion

Mediation is clearly being used successfully in construction disputes. A limited number of mediators are being used repeatedly by those parties that have commenced or are responding to litigation in the Technology & Construction Court. The mediations that are being undertaken are on the parties' own initiative. However, mediations are not occurring at one particular point in the litigation process, but at several distinct points, namely: pleadings, disclosure, payment in and shortly before trial.

These results are only a snapshot, based upon an analysis of the first quarter of the research period. The research continues and will conclude in the summer of 2008. A more detailed report will be available towards the end of 2008.

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