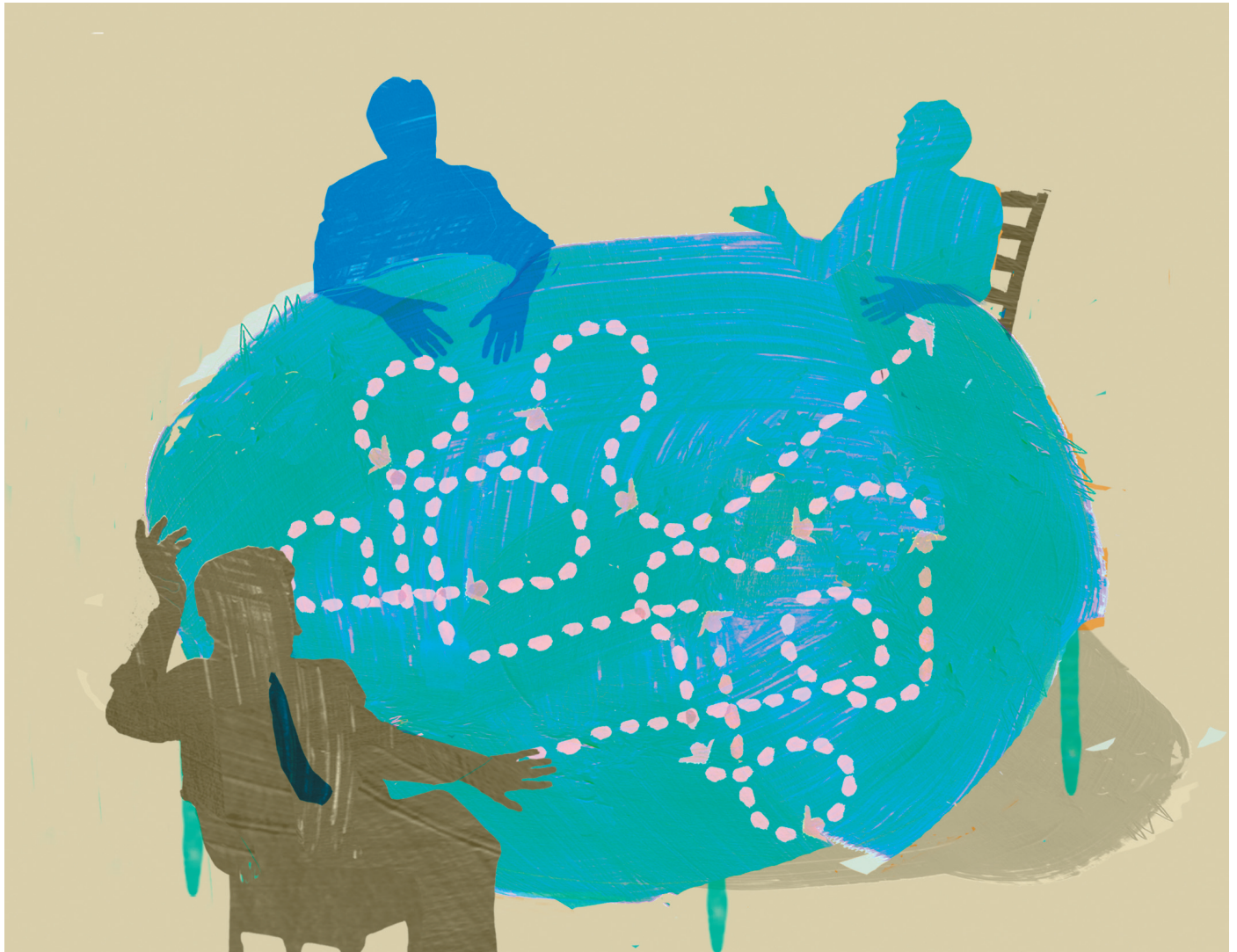


## A new direction

**Mediation** is enjoying a raised profile owing to recent legislative and judicial developments. In the first of two articles, *Stephen Shaw* considers their effect on dispute resolution. Illustration by *Simon Pemberton*



The merits of mediation as a form of dispute resolution are now regularly emphasised by the judiciary. There are particular reasons why property disputes are appropriate for mediation. It helps to maintain good commercial relationships and provides a forum for dealing with issues, including ongoing repairs or unhappiness with lease

terms, that may not have been strictly pleaded or directly part of the dispute, but which may in some way be fuelling or aggravating the conflict.

Many property disputes often require expert evidence, thus increasing costs; mediation minimises this expense. Personal attendance by all relevant parties is not

essential – save for the party with the authority to settle.

Some recent developments, one legislative, the others judicial, have raised the profile of mediation yet higher. The first will be of particular interest to those involved in disputes with a European dimension; the case law is of more domestic application.

### New directive

On 21 May, the European parliament and Council of the European Union adopted Directive 2008/52/EC. Member states must comply with the directive by formulating domestic legislation by 21 May 2011.

The directive is drafted to govern cross-border disputes (Article 1) in respect of civil and commercial matters. However, as will be suggested below, it may have wider implications for domestic mediation.

A cross-border dispute is defined as such when at least one party is domiciled or habitually resident in a member state other than that of any of the other parties. The power of domestic courts to invite parties to use mediation or attend "an information session on the use of mediation" in order to settle disputes is recorded at Article 5. Article 6 requires member states to ensure that the parties can request that the content of any agreement is rendered enforceable in a court of law in other member states.

Mechanisms will have to be established whereby the agreement is enforceable through a court order, such that once this takes place the agreement will be enforceable cheaply and effectively in any other member state. Thus, the laborious procedures now in place for enforcing foreign judgments will no longer be relevant. This could potentially increase the attractiveness and effectiveness of such agreements and will expedite their enforcement, if necessary.

Article 7 underlines one of the central features of mediation: confidentiality. It appears to be designed to buttress that confidentiality save in unusual circumstances and "unless the parties agree otherwise".

Article 8 requires member states to ensure that parties who choose to mediate are not subsequently prevented from initiating judicial proceedings following the expiry of a limitation period during the course of the mediation process. This will encourage local legislatures to provide, in limitation legislation, the formal recognition of an informal practice, that is to say that the running of the limitation period will be suspended while genuine attempts to mediate are taking place.

Article 9 encourages member states to use whatever means they consider appropriate to inform the general public of the mediation process, including who to contact and details of the organisations that provide the relevant services.

Many of those involved in mediation will be encouraged by these measures. As indicated, the immediate effect will be felt by parties involved in European international work. However, it seems likely that the legislature will take a firmer stance in encouraging, and perhaps even directing, mediation for domestic disputes.

The purists within the mediation field have always been uncomfortable with directions from the courts requiring parties to mediate because this would appear to impinge upon the voluntary nature of mediation. However, a distinction should be made between directing the parties to make a genuine attempt to reach a mediated settlement, on the one hand, and directing that a case must be determined at mediation and the court door is closed.

Most mediators would deprecate the latter approach, but the former would seem to be in line with many other directions given by courts in pre-trial hearings – disclosure and exchange of witness statements, for example. These in no way deprive a party of or remove the right to a trial; rather, they are requirements that the courts make of the parties before the trial takes place.

The directive is a welcome move for all those concerned with dispute resolution, and litigators who are involved in both European and domestic dispute resolution will no doubt be watching carefully for the enabling domestic legislation consequent upon the directive.

### When to mediate

Some interesting developments have also taken place in the courts. Two cases, both concerning property disputes are worthy of note.

In *Nigel Witham Ltd v Smith* [2008] EWHC 12 (TCC); [2008] TCLR 3, it was contended that the defendant should be penalised for having refused to mediate until late in the day, when the majority of the costs had been incurred. The judge refused to do so, holding that the right time for mediation had been missed by both sides.

However, he observed that it is a common difficulty in such cases to determine the best time for mediation.

Experience shows that, in most cases, mediation should be attempted at the earliest possible stage, before costs issues and hardening positions have rendered the prospect of settlement unlikely.

However, in a minority of cases a premature mediation (before each side's case has been properly formulated and quantified) can be counter-productive. The trick is to identify the happy medium.

That is the point at which the detail of the claim and the response is known by both sides but before the costs have reached such a level that the prospect of settlement is prejudiced. As part of the mediation process, both sides will be required to set out their position in a mediation statement. This will clarify, sometimes before proceedings have begun, the nature and quantum of the claim. In this way, time that would otherwise be spent at a mediation establishing precisely what the claim comprises could, in most cases, be avoided.

Fixing a date for mediation generally concentrates the minds of the parties and helps in the formulation of and response to the claim.

### Allaying frustration

The second decision involved that category of case that many property lawyers least relish: the boundary dispute between neighbours.

In such disputes, the amount and value of the land in question is often disproportionate to the time, costs and energy spent in litigation. Mummery LJ recently expressed his frustration in this respect in *Bradford v James* [2008] EWCA Civ 837; [2008] NPC 87:

There are too many calamitous neighbour disputes in the courts. 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. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for a court-based ADR and mediation scheme to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue.

This will be familiar to those who have been embroiled in such disputes, which can be draining, emotionally and financially. The downturn in the economic climate make his words all the more poignant in the context of litigation generally.

It may be that the time has come for parties and their advisers to ask not so much "Should we mediate?" but "Can we afford *not* to mediate?"

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