AGRICULTUAL DISPUTE RESOLUTION

1. No doubt the vast majority of potential and actual disputes never reach the stage where the parties instruct barristers. Often we only get involved once a dispute becomes particularly intractable, and litigation is afoot. Nevertheless, because of the technical nature of real property law in general, and the law relating to the termination of agricultural tenancies in particular, we often get involved at earlier stages, where we are asked to advise on those technical issues in advance of a dispute flaring up.

2. So really there are at least two, quite distinct, phases of a dispute when barristers get involved. One is at an early stage when what is required is technical advice on legal questions such as those concerning estate planning, the creation and extent of rights of way over land, and the existence and termination of tenancies. Getting these technicalities right can sometimes help prevent a dispute arising at all.

3. Nevertheless, when disputes do arise, then they need to be resolved by one or another of the available dispute resolution mechanisms, as Mike has already discussed. I'd just like briefly to discuss three of those mechanisms a little further: Arbitration; Expert Determination; and litigation in the Courts.

Arbitration

4. Arbitration can be used as a dispute resolution mechanism either where the parties have agreed that, or where it is imposed by statute. The parties can agree it in advance by having a contractual clause to that effect, or they could agree after the event to use arbitration even though they did not agree to do so in advance.

However, in the Agricultural context, Arbitration is also imposed by statute as the appropriate mechanism for resolving certain kinds of dispute, such as rent reviews, consent to improvements, compensation claims, and, in the cases of Agricultural Holdings governed by Agricultural Holdings Act 1986, certain issues arising under notices to quit.

5. There used to be a self-contained code for Arbitrations under the Agricultural Holdings Act 1986, but since the implementation of the reforms proposed by the Tenancy Reform Industry Group, the Arbitration Act 1996 now applies to statutory arbitrations under the 1986 Act. The Arbitration Act provides a very detailed and well thought through process for dispute resolution.

6. Interestingly, one feature of arbitration awards is that they are more difficult to appeal from than decisions of the Courts, and so the statutory imposition of arbitration for these kinds of disputes means that they are more likely to be resolved by an appropriately qualified expert arbitrator, in a way which gives greater finality.

7. Where the arbitrator decides he'd be assisted by the input of a barrister, the act provides for him to appoint one as a legal advisor (unless both parties agree otherwise). In fact, [as Mike mentioned] Mike and I have been working together in just this way, in an agricultural arbitration where he has been appointed as Arbitrator, though as it is ongoing, I shall say no more about it.

Expert determination

8. Like Arbitration, expert determination can also be used where the parties have agreed to it in advance, by a clause in their agreement which provides for that to be the method of resolution of disputes. And, since the Deregulation Act 2015[1], it can also be used as an alternative to statutory arbitration under the Agricultural Holdings Act 1986. Since May 2015 the parties have had the option, instead of appointing an arbitrator, matter for "third party determination". This option is

[1] assent 26th March 2015; in force 26th May 2015

available for a number of different kinds of disputes, including in relation to the terms of the tenancy, fixed equipment, rent review, tenant's improvements, and claims on termination. The idea is to avoid a dispute, rather than resolve one in a way analogous to litigation in the Courts. Such a method of dispute avoidance may be ideal for certain kinds of dispute, for example ones turning purely on questions of valuation.

9. However, there are a number of potential drawbacks to expert determination. Unlike an arbitrator, the expert does not perform a judicial function. He does not have to receive written representations or evidence from the parties, unless the parties agree otherwise, and he will not have the power to order disclosure. While this has the potential advantage that the issue between the parties is resolved quickly and cheaply, it has the drawback that it may not be done on a review of *all* the material the parties consider is relevant. Moreover, an expert determination can only be appealed in cases of manifest error, again unless the parties agree otherwise.

10. And this draws attention to the important point that, if expert determination is to be used, very careful consideration needs to be given to the terms of appointment of the expert. This applies both where the expert is appointed pursuant to a clause agreed in advance, for example in a lease or overage agreement, and also where he is appointed after the event, under an agreement to use expert determination instead of arbitration (or the Courts).

11. Particular care needs to be taken over the sphere of expertise of the chosen expert. Many disputes involve legal issues, and careful consideration must be given to whether the expert will be in a position to deal with those. Careful definition of the nature of the dispute which the expert is to determine might avoid asking him to stray outside his area of expertise, but then you may well end up with an incomplete determination, leaving the legal questions unanswered.

12. Care also needs to be taken when drafting the agreement for the appointment of the expert over the procedural aspects of the determination. What will be the timetable? Will he receive submissions from the parties, if so, when? And evidence? Will there be a mechanism for disclosure? Will there be a hearing? On what basis will the parties be entitled to appeal. Thinking these things through carefully may mean that some of the pitfalls can be avoided, but of course, the more like an arbitration the process is made, the less clear it is that this method of dispute resolution has an advantage over arbitration, or litigation in the Courts.

Litigation: the Courts

13. Where there is no contractual or statutory provision requiring a dispute to be resolved by arbitration, or by the Agricultural Lands Tribunal, the dispute resolution mechanism of last resort is the Courts. This can often be the most expensive method, and it is often a long drawn out process. The threat of litigation can often be the backdrop against which one or other of the various kinds of alternative dispute resolution can be used, successfully, but if they don't work, then one may well end up in Court.

14. The Court has a very sophisticated set of procedural rules to enable disputes to be made ready for trial, and for dealing with such procedural and preliminary issues as may arise. And despite its drawbacks in time and expense, if nothing else works it can be a very satisfactory method of dispute resolution. This is particularly so if the other side is being particularly unreasonable, and refuses to settle the case on the basis of a realistic assessment of the merits. But it is still to be avoided if at all possible, and that brings me to another aspect of a barrister's role in dispute resolution, which is helping the client reach a settlement even after things have reached the stage of full-blown litigation. It is never too late to try to settle a case, even at the door of the Court, or part way through a long hearing. And our job includes giving the client a realistic appraisal of the legal merits of the case when asked, to help facilitate a settlement if at all possible. Sometimes one or the other

party is only willing to settle when the doors of the court are looming, and the parties counsel are able to help the negotiation by acting as go-betweens, and trying to take some of the emotion out of the situation.

15. But ultimately, like any other form of consensual dispute resolution at any earlier stage, both parties have to be willing to compromise if a settlement is to be achieved, and if that doesn't work, then they have to let the judge decide. The fact a judicial judgment is the end-result of a failure to compromise is what lends shape to attempts to resolve disputes by other means.