Disputing in the Built Environment

Thesis

How to cite:

For guidance on citations see FAQs.

© 2020 Julian Silvano Sidoli

https://creativecommons.org/licenses/by-nc-nd/4.0/

Version: Redacted Version of Record

Link(s) to article on publisher’s website:
http://dx.doi.org/doi:10.21954/ou.ro.00012894

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online’s data policy on reuse of materials please consult the policies page.
Julian Silvano Sidoli BA (UCL), MSc & GDL (USW), MSc (Reading),
Bar Finals (Cardiff), Barrister (Inner Temple)

Doctoral Statement submitted in part fulfilment of the regulations for
the Degree of Philosophy by Published Work, The Open University

Disputing in the Built Environment – Critical Review and Appraisal

Aim: This PhD argues, in the context of conflict resolution in the built
environment, that negotiated settlements are a human good – and ergo are
worth pursuing in most cases – and that pragmatism, rather than ‘rights’
talk, is properly at the forefront of most decision-making in the private
law context. This challenges the dominant discourse, which sanctifies
rights, views court-based litigation as a panacea, and lawyers and binary
win–lose scenarios as ‘resolutions’. This thesis shows, through the
interaction of theory and practice, that the private law sphere is distinct
from the public law paradigm. Contrary to the orthodoxy of the theorists
criticised in the PhD, alternative dispute resolution works for the good of
the parties and for the common good. Grounded lawyers, with due
humility, can work with clients and opponents to reach honourable
compromises, encouraging people on all sides of many private law
disputes to move forward in their lives with a due sense of proportion.

Law

Date of Submission: 30th June 2020
Preface

This covering paper draws in some places on my own personal and professional interests, anecdotes and experiences. This might be somewhat unusual in terms of academic writing – although I would rather the term original – but it is far from unique. The primary justification is that the published works themselves do both. The publications draw on privileged lived experience and from examples from wide ranging sources of literature – both academic and non-academic. They form a narrative that illustrates relevant issues and persuades the reader. Further, a clear theme throughout is wishing to take a pluralistic and non-dogmatic approach to matters. Not strictly drawing an ‘academic’ versus ‘non-academic’ line is in keeping with this. Further, many sources cited in this covering paper use anecdote and so forth, for example, Hinshaw, Kennedy, Fuller and Twining. Finally, whilst not wishing to compare myself with such luminaries there are both very many academic authors - such as Dewey, Nozick, Agamben and Parfitt to name but a few – and notable judges who have used what amounts to anecdote and personal reflection to convey their meaning - most famously perhaps Lord Denning in *Miller v Jackson*. 
## Contents:

<table>
<thead>
<tr>
<th>Section</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Abstract</td>
<td>4</td>
</tr>
<tr>
<td>2. Publication details of each paper and summary of each publication</td>
<td>6</td>
</tr>
<tr>
<td>3. An outline of the interrelationship between the publications</td>
<td></td>
</tr>
<tr>
<td>3.1 Outline</td>
<td>15</td>
</tr>
<tr>
<td>3.2. Thesis aims and objectives</td>
<td>16</td>
</tr>
<tr>
<td>3.3 Methodology</td>
<td>18</td>
</tr>
<tr>
<td>4. Critical review and contribution to the field</td>
<td></td>
</tr>
<tr>
<td>4.1 Plural visions</td>
<td>21</td>
</tr>
<tr>
<td>4.2 Plurality and social ordering</td>
<td>25</td>
</tr>
<tr>
<td>4.3 Public or private?</td>
<td>34</td>
</tr>
<tr>
<td>4.4 The legal framework and the ADR movement</td>
<td>38</td>
</tr>
<tr>
<td>4.5 The critics of ADR</td>
<td>44</td>
</tr>
<tr>
<td>4.6 A Note of Caution</td>
<td>50</td>
</tr>
<tr>
<td>4.7 Empirical studies</td>
<td>52</td>
</tr>
<tr>
<td>4.8 Housing and human rights</td>
<td>55</td>
</tr>
<tr>
<td>4.9 Conclusion</td>
<td>59</td>
</tr>
<tr>
<td>5. Critical reception and originality</td>
<td>62</td>
</tr>
<tr>
<td>6. References</td>
<td></td>
</tr>
<tr>
<td>6.1 Works contributing to this thesis</td>
<td>66</td>
</tr>
<tr>
<td>6.2 Other literature referred to in this critical review and appraisal</td>
<td>67</td>
</tr>
</tbody>
</table>
1. Abstract

**Purpose** – The publications are individual studies in dispute resolution in the context of the built environment. The purpose of this thesis is to explore conflict management and alternative dispute resolution (ADR) within the contexts of housing and the built environment.

**Design/methodology/approach** – The publications in this thesis are based on a variety of research methodologies. The empirical publications are based on qualitative research primarily through face-to-face interviews with relevant subjects. The theoretical publications provide new knowledge by marrying and/or comparing existing theory to offer original positions.

**Findings** – These publications critically argue for, and provide empirical evidence of, the efficacy of alternative methods of dispute resolution within the context of the built environment. Further, they provide theoretical support for the development of a wider theory of dispute resolution to underpin practice in housing and the built environment.

**Research limitations/implications** – The publications cover several different aspects of dispute resolution in the built environment. The empirical publications are narrowly focussed and therefore deliberately small scale. There is, however, an inherent limitation in all empirical studies. The doctrinal/theoretical publications draw widely on a range of sources, some of which could not be fully explored because of word count limitation.
**Originality/value** – The publications in this thesis display significant originality. The empirical research publications provide new knowledge based on original data in areas that have not previously received great academic attention. The theoretical publications build on a number of different intellectual strands but are unique in suggesting the synthesis between plurality, ADR and the built environment.

**Keywords** – Built Environment, Housing, Alternative Dispute Resolution, Property and Construction Law, Mediation

**Paper types** – Empirical Research and Theoretical/Doctrinal

**Impact** – The works in this thesis have contributed to an ongoing debate on dispute resolution in the built environment. The works have received numerous citations from a variety of authors. A new book series, Studies in Housing Law, of which I was originally joint Series Editor, results partly from the works in this thesis along with the accompanying annual international symposium series.
2. **Summary of each publication**


   This publication focusses on the urban context of ‘law’ widely construed and the role that individuals play within it when opposed to the right of, and need for, privacy - that might inhibit their participation in democratic and social functions that ultimately give rise to law and social ordering. The paper considers the question of competing rights in the modern global city and how an individual can participate in the life and ordering of a city while also maintaining their privacy and hence their ontological well-being. This conflict – deemed circularity - it is argued is perhaps inevitable and is perhaps why the conflict between privacy and urban participation has not been considered in greater detail in the academic literature. A consideration of the boundaries of both and the trade off between them remains a matter of import and is vital to the creative tension of urban life.

This publication was an essay – deliberately placed at the end of a collection of papers by the editors - that sought to consider and present a view of housing ‘law’ and dispute resolution in an urban context. It presented a paradigm of the city as a place of flux and change and at the forefront of societal development and conflict. Drawing on a range of thinkers both legal and non-legal it argued that the challenges of the urban context that there are numerous forms of social ordering and informal housing within the contemporary urban city. It describes cities as at the forefront of change and considers whether these new norms are threats or opportunities.


This paper is an empirical study that examines how successful legislation under the Housing Act 2004 was in dealing with disputes between landlords and tenants over the deposit or bond. It featured a range of semi-structured qualitative interviews with letting agents in two distinct geographical regions. It found that agents, often at the centre of the issues, considered that the measures had been successful in that it was considered to be an appropriate form of resolution for tenancy deposit disputes given the often small monetary value of the disputes and the large volume of cases. Concerns were raised however over the heavy
weight of bureaucracy required by the scheme and on the perceived evidential burden on the landlord.


This publication examines a range of judicial decisions in the Netherlands and Germany that were concerned with the use of human rights arguments in eviction cases. The European Court of Human Rights requires that any person at the risk of losing their home should be able to have the proportionality of the eviction determined by an independent tribunal in the light of the relevant principles under Article 8. Consequently, member states of the Council of Europe are obliged to implement a minimum level of protection against the loss of the home. The publication found that while the Netherlands and Germany seem to comply technically with the requirements because of national built-in proportionality checks, it had made in reality very little difference to the outcomes of cases and that these requirements could be characterised primarily as a procedural hurdle that courts have to meet.

This publication argues that mediation is an appropriate and useful tool in dispute resolution within the conservation context. It argued that conservation conflicts are often complex and feature multiple parties and actors. Traditionally, solutions to these conflicts have been a series of ‘vertical’ processes, led by state and supported by their experts – a so-called top-down approach – leaving little role for those actually affected by the dispute. The publication presents a cautious critique of the top-down approach and presents an alternative model of a bottom-up approach grounded in both theory and practice based on a collaborative and facilitative use of mediation.


This paper examines the law of private nuisance and the seminal case of *Coventry v Lawrence* which rejected the strict “mechanistic” interpretation of the four-stage test of *Sheffler* and in particular its impact on the role of landlords and their responsibility for the nuisance of their tenant. Most importantly, it notes that injunctions to prohibit the offending nuisance are far less likely to be awarded in future and indeed damages may be the only remedy. This publication notes approvingly of the obiter of Lord Sumption that the whole area of private nuisance may well need to be
relooked at in the near future as its conceptual origins lie in a less crowded, less urban state.


This publication examines jurisprudentially the problem of the mandatory use of mediation in resolving civil law disputes. It explores a number of arguments against compulsory mediation and argues that, contrary to many other voices, including the judiciary, there is no inherent problem with mediation being compulsory in the private law context. It importantly distinguishes between compulsion to mediate from compulsion within mediation, the former being conceptually unobjectionable and the latter being problematic. Further, the publication argued that there are no Article 6 Human Rights concerns per se with the process within an overarching system of civil justice as proportionality, properly considered, provides clear support for its use.


This publication outlines the essential legislative framework governing the private rented sector in the Republic of Ireland. It then seeks to explore through the examination of a number of recent and
important cases within the jurisdiction. It also seeks to consider the question comparatively and within the context of consumer regulation. It raises questions about the efficacy of human rights legislation in the housing context in practice arguing that in reality the use of human rights is actually little more than a procedural hurdle for the landlord to overcome.


This publication is an empirical study based around a series of semi-structured qualitative interviews of the views of different participants within the context of the selective licensing scheme. This scheme introduced by the Housing Act 2004 sought to improve the property management function within typically deprived urban environments. It examines the roles of the scheme managers and found that there were frequent concerns about staffing levels when compared to the high workload and the great difficulty in tracking down and communicating with some landlords. The decision in *R. (on the application of Hemming (t/a Simply Pleasure Ltd)) v Westminster City Council* did not assist scheme managers as, due to the Services Directive 206/123/EC licensing authorities could not charge more for a licence than the actual cost of the authorisation procedure and therefore enforcement was uneven. Nonetheless satisfactions were good and
most thought that the legislation had brought about positive changes.


This publication argues that mediation has been hitherto conceived within the construction industry largely as a “problem-solving” mechanism. The value of mediation both in terms of the current practice of construction mediation and the way in which its success is measured then has been conceived too narrowly. This theoretical study of the potential benefits of construction mediation in practice argues that the focus on evaluative mediation and its outcomes are only some aspects of success in the process and that its ‘transformative’ characteristics need more attention. It contends that a wider approach to construction mediation is required. Drawing from the literature on “idealist” mediation an account of mediation as a developmental process is developed.


This publication was the first case study undertaken of the implementation and effects of the introduction of the selective
licensing scheme. This scheme introduced by the Housing Act 2004 sought to improve the property management function within typically deprived urban environments. It was a qualitative empirical study of the various stakeholders including managers, landlords and tenants. It found that despite initial scepticism the scheme had proved useful in, at the very least, drawing attention to local issues of concern even if there was not any evidence of objective improvement in housing standards.


This publication was an empirical study of the views of a range of commercial lawyers with regard to their views and attitudes regarding the use of mediation in property disputes. Although there had been previous studies of lawyers and others engaged in construction disputes this was the first UK study of commercial and chancery barristers. Given the fact that mediation had received official encouragement from the judiciary the study sought to examine the actual views and, in particular, the practice of lawyers on the ground. It found widespread resistance to its use for a variety of reasons, including ignorance about the process itself and concerns that mediation is not ‘real’ law along with concerns of the erosion of status of lawyers. Interestingly, concerns about ‘justice’ did not emerge as a particular theme in the responses quite unlike that of academic critiques of mediation.
All subsequent references to the above publications will be in the form of ‘Publication 1’, ‘Publication 2’ and so forth.

The main body of this thesis consists of twelve publications as identified above. All have been published. All have been subject to independent peer review, in most cases double blind. Publications 2, 6, 7, 10, 11 and 12 are all sole author. The other publications are joint or co-authored. I was responsible for at least 40% of the final version of Publication 1. I was lead author for Publication 3 contributing circa 70% of the final paper. Publication 4 was a circa 30% contribution. Paper 5 was a circa 40% contribution. Publication 6 was a 40% contribution. I was the lead author of Paper 9 and responsible for over 80% of the final paper. The total word count for the publications is circa 75,400.
3. An outline of the interrelationship between the publications

3.1 Outline

The publications are individual studies in dispute resolution in the context of the built environment. They are closely interlinked both in terms of subject matter – namely the built environment and alternative dispute resolution – and in terms of the approach taken. They all aim to explore disputes within various built environment contexts and suggest ways in which their resolution can be improved. They include empirical studies and doctrinal or theoretical works. What binds them above all – more than the obvious subject matter – is a conceptual underpinning. This is seen most clearly in publications 1, 2, 5, 7 and 10. Those publications argue for the value of mediation and other forms of settlement and social ordering. The other publications empirically explore specific dispute resolution contexts (publications 3, 8, 9, 11 and 12) or explore legal problems related to the built environment (publications 4, 6 and 9). Unlike some research programmes, which tend to be linear, while these publications are listed in reverse chronological order (most recent to least recent), they can essentially be read in any order. This is deliberate and goes to the heart of the philosophical approach that underpins the thesis.

There are two primary underlying assumptions to the publications that form this thesis. They are that settlement – in civil matters – is usually if not invariably a good and that pluralism is a reality, and a welcome one at that. The pluralism advocated here is in terms of both outcome and process and therefore informs the pro-settlement account. These assumptions are indeed underlying ones, rather
than being overtly stated throughout. In fact, if they were overtly stated, they might in effect undermine the open plurality that is being appealed to. The thesis does not then seek to provide the answer but rather an answer, accepting that there are many alternatives. This pluralism also has another philosophical or theoretical anchor. It is Humean in spirit rather than Kantian. It does not seek to create a system. Despite Pears’ (1991) book *Hume’s System* – which in my view is an outlier – Hume is better understood as a thinker who approaches a range of different problems, aiming to remove the ‘dogmatic slumber’ surrounding a whole host of problems but not seeking to shoehorn different problems into different solutions nor to create an all-embracing overall account. As Hume did not try to provide a universal account of life or causality, these publications do not seek to provide an overall or unified account of dispute resolution, or even dispute resolution in the built environment. Rather, a range of different problems – selective licensing, construction mediation, adjudication in tenancy disputes – are examined with the modest aim of making a contribution to the debate. These theoretical points are explored in greater detail below in section 4, demonstrating how the publications have emerged from and add to the current body of knowledge.

3.2 Thesis aims and objectives

The aim of this thesis is to explore conflict management and ADR within the contexts of housing and the built environment. Developing from this primary aim, this thesis seeks to argue that traditional litigation is not the
panacea often invoked in academic literature and that law in practice in the private law sphere is more often than not a matter of negotiation, compromise and settlement. It argues that these alternative methods of dispute resolution are positive and bring more real benefit than abstract discourse about justice or rights. The starting point, the hypothesis, for this work is that litigation (while often ultimately necessary) is not the only or always the most appropriate method of dispute resolution. Rather, given the nature of disputes in the built environment, alternative methods are often to be preferred. These ‘alternative’ methods include arbitration, adjudication, mediation and negotiation among others. The nature of the built environment must include in most cases numerous interested parties, the need to maintain relationships and the particular localised ‘patch of land’ or building where there is frequently an emotional attachment. This can be illustrated by an example from practice. The erstwhile dispute technically concerns a combination of serious and complex legal problems including rights of way, alleged constructive trusts, proprietary estoppel, planning and so forth. The underlying reality was that this was a family and neighbour dispute with emotional attachments to pockets of land, access points, and parking overlaid with alleged historical statements and bargains that bore no relationship to the formal or legal arrangement of the various buildings and plots of land concerned. It was either an extensive and expensive Chancery matter in the High Court or it was mediated. Fortunately, the parties took the second option.

However, the value of the research is wider than this. Disputes in the urban and built environment are exemplars of what continental lawyers categorise as ‘private law’. They are not criminal or public and have in most cases no wider interest although of course they can be all consuming to the litigants themselves. Private law thus understood is any area of law
where there is no state participant or actor, or typically no appeal to any
overriding human right. On this understanding, contractual disputes,
property disputes, disputes over contact and residency of children, private
nuisance and most torts are invariably private. It is this public–private
distinction that is key in the argument that follows. Crime and
constitutional matters and so forth have obvious public interest and demand
public settlement. Private disputes simply do not.

3.3 Methodology

It is perhaps only over recent decades that legal academics have paid much
attention to methodology. Until the 1970s legal academia consisted almost
entirely of doctrinal studies – the writing of textbooks and compendia of
laws and the like (Twining 1994, Cownie 2004). Legal research
acknowledges a number of distinct methodologies (see Chynoweth 2008).
Traditionally, legal research was simply doctrinal. This was concerned
with exposition and systematisation of the law. Legal research was perhaps
the bridesmaid with practice being the bride. This doctrinal aspect is
particularly important because of the nature of the common law where the
law is not contained in a unified code but rather in a myriad of statutes and
cases, many of which date back centuries and yet remain ‘good law’. Many
of the publications included in this thesis have clear doctrinal elements
(Sidoli del Ceno & Kenna 2014, Sidoli del Ceno 2015, Vols, Kiehl and
Sidoli del Ceno 2015). Extensive use of case law has been necessary to
piece together the law in action and to attempt to evaluate its implications.
Lines have been drawn demonstrating how the law has evolved, how
different considerations have been given appropriate weight and how
public policy coupled with pragmatism has informed decisions.
Socio-legal research has emerged over the past twenty or thirty years or so (Cownie and Bradley 2013). Socio-legal work is empirical in nature and seeks to utilise the methods and insights of social science in order to study, for example, the effects of particular statutes, the reality of legal practice and the operation of the courts and the effects, subjective and objective of law, on participants or ‘players’ in the legal system including litigants themselves. The empirical work contributing to this thesis are qualitative in nature and focus on particularised studies (for example, Sidoli del Ceno 2011, Sidoli del Ceno, Spencer & Kenna 2014). This accords with the wider philosophical underpinning of this thesis based around plurality and perspectivism. This plurality is naturally appealed to in the growing field of intercultural mediation (Mayer 2020).

Thirdly, the thesis includes substantial analysis of theoretical literature. Jurisprudence, sometimes called philosophy of law, is a well-established field of study. Indeed, until recent times this was one of the few widely taught subjects in a university law school that was not wholly doctrinal in nature. The thesis draws upon much from the intellectual vocabulary of traditional jurisprudence (Sidoli del Ceno 2014, Sidoli del Ceno 2016). It also draws from more contemporary approaches, for example, the sociological (Cotterrell 1984) and critical legal method (Minkkinen 2013) and legal pluralism (Twining 2010). As noted above, it places the particular ‘location’ (geographically, culturally, sociologically) at the heart of the resolution and, typical of critical legal method, it adopts an open textured and pluralistic approach to norm creation and enforcement.
It has been a deliberate decision to approach the central elements of this thesis from a variety of different methods in a form of intellectual triangulation. The social sciences tend to eulogise empirical work whereas legal scholarship tends to reify doctrinal study. There has been a relatively recent tendency towards cross-disciplinary and multi-disciplinary research. This is welcome. It remains relatively rare though where law is concerned. Work remains to be done, then, in terms of attempting to bring multi-disciplinarity to law and the built environment. Much work is needed to bring the reality of legal practice into sight. This thesis is a contribution to those tasks.
4. Critical review and contribution to the field

4.1 Plural visions

This thesis is predicated on both perspectivism and plurality, the former leading to the latter. If one believes that there are many ways of looking at the world, it must follow that there are a variety of human aims and human goods. From my earliest experiences in practice it seemed that there were competing versions of the truth and a variety of desired outcomes. Clients often create their own ‘truths’, live in a strange tension with others and where the ‘facts’ – however categorised – are invariably not only contentious but evolving. Innumerable times have I been told that something or other is a ‘fact’ and yet somewhere during the course of litigation it turns out that either there is no other evidence than subjective testimony to support it or, in fact, there is ‘objective’ evidence to the contrary. In practice you realise that people seek different ‘goods’ and are differently wired and motivated. Frequently, the goal is ultimately non-monetary despite the claim being an erstwhile one in damages.

The truth, though, is that perspectivism and plurality have been with me since as a teenager I first read Nietzsche’s Thus Spoke Zarathustra, although it perhaps truly blossomed when I first discovered my lifelong obsession with The Alexandria Quartet by Lawrence Durrell:

‘We live,’ writes Pursewarden somewhere, ‘lives based upon selected fictions. Our view of reality is conditioned by our position in space and time – not by our personalities as we like to think. Thus every interpretation of reality is based upon a unique position. Two paces east or west and the whole picture is changed.’

21
In this extract, Darley, the erstwhile first-person narrator, although not Durrell himself of course, is quoting the great novelist Pursewarden (himself a fiction), who only appears in the novel in the past tense and largely through snippets of his writing and the reminiscences of others. The Quartet itself in the first three novels tells essentially the same story but from different perspectives. It is remarkable how the ‘truths’ of Darley’s insights become no more than one personal account among many. Only the fourth novel in the series moves things on in a temporal sense. This multi-layered view of time and events seems to capture a deep truth about human existence.

Both perspectivism and plurality are influenced by the other unspoken philosophical pillar of this work: Humean scepticism. As an undergraduate at University College London, the analytic tradition held sway. Much of it was ultimately grounded in the works of David Hume, although Hume himself was relatively rarely discussed. It struck me that Hume was the most British of philosophers. An empiricist, he asked for evidence and sought to banish wild superstitions but realised that in much of life we must suspend our critical faculties to actually live. And it is living that is essential. Through Hume’s important discussion of induction (Lange 2011) our knowledge is frequently, indeed normally, inductive and this should elicit caution as the proof is not certain. This cautious, modest scepticism – more in the tradition of Cicero than the extremes of Pyrrho – runs counter to the all-encompassing systems of Descartes, Spinoza and Kant and other continental rationalists. The reason why Marxism or fascism had never been more than a truly minority interest in this country seemed obvious. Both are based on dogmatism and a central, all-encompassing idea. Both insist that all forms of human expression, including famously artistic expression, be subjugated to the central grand narrative. The state is
omniscient and omnipotent. All this is at odds with British scepticism about politicians and governance and indeed about ‘intellectuals’.

When studying law I quickly recognised the common law as being infused with this Humean spirit of pragmatism and lack of systemisation. It was evidently an organic entity developing through case law, statute and argument but it could not easily be understood in neat, logical categories. It was inductive – working from facts up to wider principles – but always aware of the vagaries of facts. The contrast with the civilian codes of Justinian, Napoleon and most Western European countries was stark. These systems are deductive. They start with abstractions and seek to apply them – force them I would say – onto unwilling facts. The shadow of Plato and the hand of Hegel were clearly evident in the attempt to create logical, deductive legal systems and overarching principles of organisation.

Dogmatic pluralism must argue that all goods and outcomes are of equal value. Sceptical pluralism is very happy to value different goods differently and to argue that some things are better than others. I will argue that Bartok is greater than The Beatles. I will accept that perhaps I cannot persuade you. In legal practice I will offer my advice and my views of what amounts to a ‘good’ result but accept that my client may take a different view. Individuals can be irrational and make poor choices in life as well as law. This is probably not surprising. Plato thought the response to this was a purely rational state guided by the guardians. For those who refused to agree with what was good for them, the penalty was often death. Some examples include theft from temples (854E), persistent atheism (909A),
impiety (910C-D), theft of public property (942A), the harbouring of exiles (955B), taking bribes (955D) and hindering a court’s judgment (958C)\(^1\).

All those who have advocated utopian societies based on the clear light of reason have envisaged swift justice for those who disagree. Popper (1945) exposed this Platonising tendency in both Hegel and Marx as well as Plato and contrasted it with what he termed the ‘open society’. Thus, it is useful to contrast this Platonising, absolutist tendency with the sceptical, empirical tradition which has found its home in these isles. Where continental Europeans, often the intellectual heirs of Descartes and Hegel, sought the ‘one’ answer, British empiricists urged caution, demonstrating that what we usually have is not certainty but probability. This should lead to an intellectual humility and a concern that ‘big’ ideas often lead to intolerance and dogmatism. Rather, one works with what one knows, attempting piece by piece to put the jigsaw together, always aware that one may not be completely right. A true account of dispute resolution must feature law as commonly understood but it must also feature alternative dispute resolution that appeals to this spirit of pragmatism and incrementalism. All of my publications rely on a sceptical account of dispute resolution. They all offer a ‘may’ rather than a ‘will’. They do not seek to replace ‘law’ with compromise but argue that alternative methods of settlement have an actual value rather than being only grudgingly accepted by some. These values I describe in Publication ten:

The process of mediation, separated conceptually from any outcome or settlement that it might achieve, allows for individual professional development, organisational development and industry change. Those active in construction education might wish to reflect on this fully and consider how it might influence their practice. Finally, it can be argued that modern ‘rights’ discourse that feeds the insatiable growth of litigation has gone too far. We must try to address this by creating the necessary foundations for achieving a

---

\(^1\) Plato ‘The Laws’ Project Gutenberg [http://www.gutenberg.org/ebooks/1750](http://www.gutenberg.org/ebooks/1750)
widder cultural change away from perennial conflict and towards a more conciliatory view of human interaction. (p 8)

4.2 Plurality and social ordering

The reality of perspectivism and pluralism means there must be many ways of ‘social ordering’ (Fuller 1978, Winston 1981). There is not one universal model of, for example, planning, design or regulation. Normative legal pluralism argues that neither should there be. The focus is instead on the micro, the local and the particular. This provides a justification for the empirical, qualitative studies in this thesis but also for a wider problem-solving approach in law and dispute resolution per se. The particularised, qualitative studies in this thesis provide insights into distinct issues within the world of housing and property. It is this localised, particularised approach that has coloured the empirical work undertaken in this thesis.

This point was noted much earlier in a theoretical way by Lon Fuller (1971 & 1978) who argued that there were many forms of ‘social ordering’ and that these were in essence complementary to one another. Fuller further pointed out that adjudicative methods have innate strengths and weaknesses, making them very effective in some types of dispute but less so in others. Fuller argues that adjudicative methods are least effective and least suitable where the dispute is polycentric, where the relationship between parties is web-like and multi-layered.

Fuller outlined an account of how a functioning society ought to be governed, or perhaps more appropriately ordered, for there is no necessity for ‘ordering’ always to be ‘top-down’ or pyramidal. This project that he called ‘eunomics’ (literally ‘good order’, frequently referred to by
Summers (1984) and others as the ‘principles of social order’) did not develop in a systematic way and was left incomplete at his death in 1978. The basic argument running through this project is that there are many ways in which we can and do order society and human interactions. Further, Fuller sees a worrying tendency to view all disputes as being within the true orbit of an infallible state that must then be subject – at every turn – to the aegis of the tribunal:

Now the tendency is to convert every form of social ordering into an exercise of the authority of the state, or, among sociologists, into a projection of ‘norms’ by an abstract entity called ‘society’. Legislation, adjudication, and administrative direction, instead of being perceived as distinctive interactional processes, are all seen as unidirectional exercises of state power. (Fuller 1971 at 339)

Legislation is one of them and adjudication another but there are others, including managerial direction, contract, and mediation. I would argue there are even more, including traditional authority. Traditional authority can be religious. In my book chapter, ‘Plurality in the city’, I contrast the fluid urban paradigm with a more stable rural one. It is an example of traditional authority:

I was in Italy, in the northern Apennines visiting my great-uncle and aunt with my grandmother. My great-uncle and aunt lived most of the year in New York but returned to the village of their birth every summer for a number of months. We met at their house, had some drinks and Uncle explained that he shortly had a meeting with Don Costa, the village priest. A little later we moved outside and walked down a path leading to a field. Uncle explained – in simple language – that there was a boundary dispute between himself and a neighbour. Both parties had spoken to Don Costa, who had agreed to arbitrate. In due course, the
neighbour arrived. A little later, Don Costa arrived dressed in a black cassock and bare headed. They all talked amicably for a few minutes and then Uncle and the neighbour moved into the field itself and started making their respective cases about the correct boundary. There were no fences or hedges or any other obvious markings. Don Costa listened for a few minutes and then effectively said, ‘Here is the line!’ and made a sweeping gesture with his arm. Both parties nodded consent and then we all headed off to the local café for a drink. (pp 133–134)

Adjudication is appropriate in many arenas but has its limits. Most notably, Fuller considered adjudication to be poorly suited to polycentric disputes and the coordination of collective activities. Fuller borrowing the term ‘polycentric’ from Polanyi (1951) used it to describe disputes with not only multiple parties – that the courts clearly can and do deal with (the ‘class action’ in the US context for example) – but disputes with a wide variety of participants. Participants (or stakeholders) are those with an interest in the dispute, not necessarily a legal interest or right, and who tend to represent numerous different perspectives, values and interests (Fuller 1978). This is a point made in a number of publications in this thesis; however, the important issue here is merely the recognition that litigation may not be the only way of exerting desirable social control.

The question of polycentrism is a complex one (Allinson 1994) and not fundamental for the present enquiry. What is more important and central to the subsequent discussion is Fuller’s argument that not all forms of social order require external authority. He states that this tendency is a ‘modern thought’ (Fuller 1971 at 315). He regards mediation, properly understood, not as something that aims to achieve conformity with external norms under the aegis of authority – state or otherwise – but
rather ‘toward the creation of the relevant norms themselves’ (Fuller 1971 at 308).

The theoretical underpinning of the thesis emerges then from this and argues for a horizontal view of justice whereby justice is in many cases created from the interactions of the participants. It is intellectually egalitarian. It does not appeal to the external expert in most cases. It does not suppose the state is the *fons et origo* of value. This view of justice tends to be opposed to the traditional positivist conception. This view is essentially democratic and opposed to a Platonic, top-down, hierarchical approach to law and knowledge. Traditional conceptions of law – often with ‘order’ tagged on – are invariably top-down. Whilst adjudication does give the judge considerable discretion it is nonetheless the judge as the expert or as lawgiver. There are many examples of this type of conception. Religious law either considered as directly revealed by the creator or mediated through a clerical class (or in Islam an overtly clerico-legal class) or both is a clear example of this. Positivism too derives its force from the sovereign, the law giver. A clear pyramidal structure is present. On the classical positivist position a la Hart, international law is not really law at all. Falk (1959) however argues that international law simply appeals to a horizontal paradigm.

This horizontal view often draws on legal anthropology and legal pluralism. There are many examples of horizontal justice that have been explored – frequently co-existing with vertical structures, occasionally existing largely separately (see Yazzie’s 1994 study of Navajo justice for example and Barkun 1968 for a wider study of horizontal structures). Legal anthropology (Nader and Todd 1978) acknowledges the fundamental role of culture in law and dispute resolution. Legal
anthropology can be both descriptive and normative. In other words, it both states how things are and argues that that is how things should be. Bussani (2011) argues that mixity is inherent in all legal systems irrespective of their degree or not of formal fusion. More recently this anthropological insight has sometimes been focussed on contemporary Western society (Leontidou 2010). Plurality operates in intercultural mediation (Mayer 2020). Pluralism operates through a variety of registers – racial, linguistic, cultural, economic – and diverse groups such as squatters and social centres (Finchett-Maddock 2010, 2017). This thereby creates a reality of legal pluralism on the ground in any given jurisdiction. Practice has shown me that this is how frequently informal law, or social ordering, operates in reality. I remember advising over a decade ago someone who had run a Bangladeshi takeaway for a number of years when he was suddenly evicted without warning by the landlord, another Bangladeshi. In conference he told me rather proudly initially that he did not have a lease on the takeaway, or need one, because he knew the landlord and he was his ‘brother’ (they were not brothers in the British sense and were not even loosely related) and so on. He described a relationship that was based on kinship, culture and honour. He was saddened that this relationship had had problems recently. His pride in the moral nature of their relationship took a much heavier blow when I told him that he had no cause of action in law and also no evidence to prove it in any event as all rent payments had strictly been in cash.

It is this on-the-ground legal pluralism that is explored in Publication two. This argues that there simply is – de facto – a wide variety of informal housing in existence in cities and densely populated urban spaces; that different ‘communities’, some of relatively recent arrival, occupy invariably shared space and often regulate themselves without recourse to
the formal law. It draws on the work of Fuller to argue that this is an example of different forms of social ordering. It further considers whether – depending on your perspective – this is a problem or it is not. The area itself remains, however, under-theorised. If we are accepting of genuine plurality in housing, including its regulation and dispute resolution mechanisms, then we must at least think about its implications. Are we moving towards an Ottoman-style ‘Millet’ system? This Millet system operated between 1453, following the conquest of Constantinople, and the eventual decline and collapse of the Ottoman Empire. It provided for non-territorial autonomy for different communities (Barkey, J & Gavrilis, G (2016)). The three ‘basic’ Millets were the Greek, the Armenian and the Jewish although the former in particular had in reality many subdivisions due to the large yet culturally and linguistically distinct Orthodox churches within the boundaries of the empire. Apart from autonomy in many private law matters, their leaderships engaged in a fairly continuous dialogue and negotiation with the Sublime Porte. A version of the same system can be seen in contemporary Lebanon where Article 24 of the Constitution allocates half the seats to Christians and half to Muslims. Beyond this though the unwritten National Pact always makes the President a Maronite Christian, the Prime Minister a Sunni Muslim, the Deputy Prime Minister a Greek Orthodox Christian and so on. Again, as in the Millet different religious confessions, and many including the Maronites would argue ethnicities, operate in a non-territorial autonomy within their own groups in terms of private law matters.

Is it desirable to do so in England and Wales? As in other areas of private law, Shariah marriages spring to mind: can or should a jurisdiction accommodate competing claims? This is perhaps where public interests
rub up against private ones. While it is easy to find a case that is genuinely wholly private, or conversely wholly public, there is a no-man’s land or perhaps a contested border between the two. Where this ‘border’ lies and how thick or thin it is are important questions. They are beyond the scope of this thesis. As an aside however it would appear obvious from what I have already argued that I consider this contested territory as narrow. The greater the importance one attributes to the human person, his or her freedoms, his or her autonomy, his or her values, then the more you will see the solution to a dispute to be private.

There has however been a wider crisis of values in much of the Western world over a significant period of the past 100 years or so. The earlier certainties of God, nation and objective order, including the law, have for many dissipated. Some scholars have identified the crisis of modernity (Del Noce 2013). The legal academy has been much affected by this new critical and sceptical mode of thinking (Unger 1986, Kennedy 1997). Much academic legal thought aims to develop the idea of power, perspectivism and irrationality in law, as in other aspects of human life. Perhaps originating in Nietzsche, it has found powerful advocates in Foucault and others (Golder 2012). It is probably the prime driver in the movement from a strictly doctrinal, encyclopaedic form of legal scholarship to the widely diverse models now in operation.

The rule of law is in crisis: on that point many scholars agree. On the one hand, it is imperilled by the resurgence in our politics of a Hobbesian conception of untrammelled sovereignty which insists that the state’s executive power should or must be given free rein in the treatment of those who are considered the nation’s enemies – that is, that the rule of law must be ignored by an executive power and
superior to it. 9/11, terrorism, security, immigration and refugees provide relatively familiar examples of the phenomenon. On the other hand, the rule of law is said to be imperilled by those many critiques, including post-modernism, relativism and post-colonialism, which have steadily undermined our belief in the orthodox assumptions of legal positivism, according to which rules and laws are clear, certain, objective and therefore capable of constraining such power. (Manderson 2012 p 2)

Given the crisis in law and authority that has emerged both in academia, for example through critical legal studies, and in practice, it is perhaps surprising that pluralistic forms of ordering have not received more academic attention per se. Mediation as one example, or rather a philosophy of dispute resolution that underpins it and accepts (even if it does not necessarily celebrate) the uncertainties of adjudication, of rights, the subjectivity and inter-relatedness of value judgments, is certainly at least an option for addressing this crisis. It recognises cultural values and differences (Leigh-Wai 1973, Chen 2002, Law 2009, Ntuli 2018, Price 2018) although cultural resistance sometimes needs to be overcome (Peters 2010). Its non-dogmatism and flexible remedy means that non-enforcement of norms is sometimes appropriate (Sabrow 2020).

These issues, realities and challenges of modernity are addressed in my two book chapters, Publication one and Publication two. The latter has already been discussed above. The former explores, again based on the factual reality of pluralism, the so-called ‘right to the city’ and the related questions of private interaction in public urban spaces and the right to privacy while participating in the political and social life of a city. The city landscape is inevitably a contested one and the paper concludes that
it is social norms – again a different form of social ordering – that
governs the vast majority of everyday interactions between participants
and not the black-and-white law.

It is these philosophical approaches that underpin the enquiries in this
thesis, which seeks to deal with the crisis of confidence, post-modern in
origin, that has law at its heart by saying there is more than one answer. It
is gently sceptical of rights discourse and sees the drawbacks in litigation.
This moderate path – which is only partly theoretical but also highly
practical and born out of the reality of the courtroom as much as the
insights of the academy – seeks to endow the human being with sufficient
wisdom, virtue, insight and the like to make practical decisions based on
long-established norms, customs and, indeed, laws. Judges will frequently
be educated and able individuals with practical sense – *phronesis* in
Aristotelian garb – and will very often find the best decision, although of
course not everyone will be satisfied. Time will also show that many of
their decisions, for example, upholding the legal ‘right’ of a slave holder
over his or her slave will be ‘wrong’ in a moral sense (i.e. will not accord
with the sensibilities of the current ‘legal community’). The ‘legal
community’ is localised and not universal and this too must be accepted as
a norm. We can engage in rational debate to persuade a different legal
community of the errors of their ways but we must be cautious and gentle
with our law-making and our evangelism. We could of course be wrong.
Time will make many of our current views and moral positions obsolete –
‘wrong’ in another time and place. As William Inge – who himself was
doubtless a man of his own time – said:

> Whoever marries the spirit of this age will find himself
> a widower in the next.
We must therefore urge for a gentler, less strident law, less of an insistence on rights, obligations, sanctions and the like and rather lean towards the softer side of ‘law’: compromise, apologies, communication, forgiveness (Shaffer and McThenia 1985). Mediation and ADR generally can fit in to this ‘sceptical’ account of law, emphasising the process of law, finding meaning and value in the doing rather than chasing after a forever out-of-reach sense of certainty, entitlement and the like.

4.3 Public or private?

But what of the public benefit of the law and what of the development of law through judgments – so essential to the common law system? Issacharoff and Klonoff (2009) contrast the typical personal injury and economic loss tort type case with cases where more fundamental matters are at stake. There may be, however, a rational reason why some cases settle and others need to be adjudicated on, quite apart from the public value of the case. The so-called Priest-Klein hypothesis (Priest & Klein 1984) argues that cases that go to trial are often the result of uncertainty in the law itself and that in areas where the law is established there is little need for court, thus promoting settlement:

A substantial body of legal and economic research addresses the settlement of claims in the shadow of the law. The foundation of such research is commonly known as the ‘Priest-Klein hypothesis’. Bringing a case to trial may involve considerable litigation costs, including the payment of attorneys, expert witness fees, and time. Consequently, the parties have an economic incentive to settle when possible. The Priest-Klein hypothesis suggests that the ‘easy’ cases (those where either a plaintiff or defendant victory is highly
probable) will settle because their outcome is relatively predictable. The cases that go to trial are the ‘close’ cases in which the trial outcome is highly uncertain. (Cross & Silver, 2006, pp 1894–1895)

The vast majority of cases fall into this second category. Indeed, there is an even wider circle of disputes that do not even get to the lower courts. Most disputes are settled by negotiation, compromise, capitulation or simply letting the matter drop. Cases proceed to court because of evidential uncertainty and legal uncertainty. Evidential uncertainty where the facts are strongly contested only very rarely will increase the public value of the settlement and does not itself advance the development of law. Unpredictable cases, those at the edges of the law itself, will usually find their way to the courts, usually the higher courts, and thus law will continue to develop. Those that settle usually settle because there was little doubt about the result and it was thus a rational choice to abandon court proceedings.

Quite simply, to suggest that every dispute has public value demonstrates either a lack of understanding of the everyday diet of the District Judge or a rigid dogmatism rooted in some form of idealism or formalism. It is surely easily possible to distinguish between cases of wider public benefit where some greater value is appealed to and cases which have an interest and a value to the parties alone. This occurs in any case with law divided into criminal, civil, family and the like. Further, each category is confidently divided further into other sub-categories. We have violent and sexual offences generally at the most serious end of the criminal law while many motoring offences feature rather lower down. On top of this, we have cases allocated to various courts or streams according to complexity, seriousness and the like. Some cases overtly claim an
infringement of a ‘human right’. Some advocates of mediation see a role for mediation even in matters of obvious public interest including criminal law. Ranjan (2020) explores the use of mediation in criminal contexts within the context of restorative justice. Laytham (2020) considers mediation’s use in the context of sexual discrimination and indeed sexual harassment. The focus here though remains very much on the private. Indeed compared to some more radical proponents of mediation the papers herein and the advocacy contained therein appear both modest and cautious.

Many scholars have found that there is no inherent problem with private settlement. For example, Weinstein (2009) argues – rather simply but wisely – that some matters simply are more suitable for litigation and others are more suitable for alternative dispute resolution. Even in areas where something ‘more’ or ‘higher’ appears to be at stake, there is support for the role of ADR to influence these norms. Cohen (2009) summarises the argument as follows:

As an empirical matter, it is therefore not at all inevitable that ADR erodes public values. Moreover, the claim that extrajudicial dispute resolution necessarily undermines state power is conceptually one-sided. Anthropologists and sociologists have long reminded us that informal dispute resolution operates within, not outside, systems of state law, and hence is better described on a continuity of overlapping ‘legalities’ rather than as simply an alternative to formal law and state regulation. (p 1146)

This thesis is predicated then on the fact that alternatives to litigation are often valuable in a range of contexts. It argues that not all disputes have wider public interest thereby requiring the adjudication of a judge.
Typically, family law is viewed as such an area. Most disputes concerning children and who they should live with and spend time with raise no concerns with the courts or local authorities. Most parents provide good care for their children. These disputes too are ‘private’ and indeed they are classified as such by the courts, as opposed to cases of ‘Public Law Children’, which involve local authority care proceedings. The courts actively encourage settlement in ‘private’ children disputes. Property is invariably private too. This is because in many cases there is a personal element to many aspects of the dispute. Commercial landlords may be bound to their tenants for a long lease. Litigation could kill any goodwill between the parties, leaving a decade or more of strained communication through lawyers. Likewise, neighbours remain as neighbours, in close physical proximity, throughout the litigation process. What alternative forms of dispute resolution offer is a way of resolving disputes without the cost of litigation. Forms of ADR such as arbitration and adjudication are alternative primarily in the speed and lower costs associated with them. Mediation is more radical. It does not propose a top-down solution. Rather it encourages the parties to reach their own mediated settlement. It prioritises the personal resources of the participants, compromise, creating a ‘win-win’ where both parties emerge from the mediation with their most important goals and expectations met. Despite the clear possibilities, mediation in this built environment context has received relatively little critical examination outside the works contained in this thesis. The works of those such as Ufkes et al (2012) are a notable exception.

Publication ten is one of the few works that seek to genuinely provide a theoretical basis for the practice of mediation in a given private law context. It argues forcefully – and optimistically – that rather than a mere ‘getting to yes’ (Fisher & Ury 1981), in other words a pragmatic
compromise, there are other, wider gains for both sides. It argues that mediation can be transformative, enlightening the parties, changing them into participants, improving their communication and their problem-solving and encouraging them to view a dispute not only from their own perspective but rather in a constantly revolving prism. Transformative mediation can further also be viewed as reflecting positively on human agency (Bush and Miller 2020). It argues that mediation is one of a number of ways of resolving disputes or indeed of ‘social ordering’ and as such has a natural range of issues to which it is well suited. It is further argued that this range extends well beyond issues usually considered appropriate for mediation and is, in principle, able to deal with contractual, employment and other civil matters. It can do this because it does not perceive a vertical conception of ‘justice’ to be all-pervasive. Rather, a horizontal, or particularised, conception of justice is appealed to.

4.4 The legal framework and the ADR movement

The subject of the work presented in this thesis is the management of conflict and dispute resolution in the built environment. There is a particular emphasis on housing as a contemporary paradigm of the urban built environment. The work draws on law and jurisprudence, empirical qualitative work and theoretical works on the nature of dispute resolution and bottom-up forms of governance and participation. The legal aspects draw especially on the legislation contained in the Housing Act 2004 ss 111–117 (Tenancy deposits) and ss 71–100 (selective licensing) (Sidoli del Ceno 2012 & 2015). This wide-ranging act is generally considered to be a good piece of legislation. It emerged from widespread consultations and
aimed to address a number of issues within housing. This type of low-level instrument seeks to make an immediate practical difference to the persons involved (the landlord and the tenant). The nature of the legislation is practical with clear sanction and implementation and can be contrasted with the wider-ranging human rights instruments, in particular Article 6 and Article 8 rights (Human Rights Act 1998) that seem to address wider normative concerns but frequently have very little practical impact (Sidoli del Ceno & Kenna 2014).

The substantive legal aspects of this thesis must be viewed through the prism of procedural law and the edifice of civil procedure. There has been discontent with the civil justice system in much of the Western world. This is quite apart from the wider ‘intellectual’ discontent discussed above. The discontent here featured more prosaic concerns such as delay and cost. These concerns though are real and palpable to the litigants involved. They have been drawn into even sharper focus with the current Covid-19 pandemic. This discontent resulted in England and Wales in the Woolf reforms of the late 1990s (Woolf 1998). The aim was to simplify the process, reduce costs and increase the speed of litigation. The ‘Overriding Objective’ (Civil Procedure Rules 1998 1.1) sought to ensure that justice was done but to manage the costs and length of the proceedings in accordance with the complexity and importance of the matter at hand. Coupled with this was an emphasis on negotiation, offers to settle under the Part 36 regime and on alternative dispute resolution as a means of resolving disputes without recourse to litigation.

At a conceptual level, ADR can in some sense be seen to be capturing the *zeitgeist*. It seeks to address both the practical concerns of litigants such as the delay, cost and the obtuse, over-professionalised legal profession with
more abstract or philosophical claims such as the rise of subjectivity and concerns over the economic or political motivations of notionally disinterested courts. ADR has an effective means of dealing with the crisis of authority and the wish to assert individualism by actually seeking to empower the individuals themselves to deal with the dispute. The story of ADR in the United Kingdom can largely be read as a narrative concerning the gentle but continuous encouragement of ADR in general and mediation in particular by policymakers and the judiciary. Mediations have become increasingly commonplace and the reasons for refusing mediation have been further scrutinised, and narrowed, in, for example, *Garritt-Critchley and Others v Ronnan and Solarpower PV Limited* [2014] (Sidoli del Ceno 2014)\(^2\) and more recently in *Lomax v Lomax*.\(^3\)

The reviews by Lord Justice Jackson, *Review of Civil Litigation Costs* (2010), in England and Wales and Lord Gill (2010) in Scotland both emphasised the efficacy of mediation as a speedy, cost-effective method of resolving disputes and proportionality loomed large. Here the idea was introduced that litigation, and the fairness of the process, must be balanced by an awareness of the costs involved and the need for proportionality. Explicitly it accepts that resources are finite and that choices and compromises must be made. It implicitly accepts that not all civil disputes are matters of fundamental civic importance that justifies huge private expense and huge public expenditure in the form of senior judges and many hours of court time. This position then supports the central underlying assumption of this thesis that the majority, almost certainly the vast majority, of private law disputes do not engage questions of wider public interest, human rights and the like, and that ‘justice’ in the sense of dispute

---

\(^2\) [2014] EWHC 1774 (Ch).
\(^3\) [2019] EWCA Civ 1467
resolution cannot in itself and in isolation demand infinite debate and speculation.

Woolf explicitly stated in the *Interim* report, that ‘the philosophy of litigation should be primarily to encourage early settlement of disputes’ (Chapter 2, para 7(a)). Adjudication, then, remains an option for disputants but it is not the only way in which a dispute must be settled. Further, as is well known by practitioners, law is not ‘developed’ in most cases. Interesting, novel and important cases emerge through the appellate system and funding is invariably found for them. Facts are at the heart of most disputes, not abstract principles of law. Facts that are not contested are settled, as liability is admitted, or are dismissed as providing no cause of action. Facts that are contentious can be settled of course by the courts but in many cases the ‘fact’ will come down to the memory or demeanour of the witness. The balance of proof in civil matters is of course only the *balance of probabilities*, in other words 51% or greater. There are many unhappy litigants who have discovered that the facts, or ‘the truth’ as they see it, did not emerge. Woolf tacitly accepts therefore that most cases are not of wider public interest and thus fees are capped at modest levels. In principle, this limits the lawyer’s ability to fully represent their clients’ interests. What can also be seen as emerging however is further support for the view that justice is not something ‘outside’ the dispute but rather part of it. The view of justice appealed to in these publications can be described as horizontal or bottom-up. This is explicitly argued in Publication five. The ‘right’ answer can be subjective. It can emerge from discourse and dialogue with differing parties. The ‘right’ answer can depend on a wide variety of factors: cultural, geographical, economic, moral. It rejects the unvarying, eternal standard of truth universally applicable in all situations. It begins with a *tabula rasa* and by listening works upward to a solution.
Again, this mimics practice. The client has a problem. The role of counsel is to attempt to address that problem. Sometimes the answer is simply, ‘go away and get on with your life. This is not a legal problem and therefore there is no legal solution.’ This approach is urgently needed to correct the recent contemporary trend – as noted by Lord Sumption in the Reith Lectures 2019 and subsequently published (Sumption 2019) – that sees law as the answer to every problem. Areas that were once solely the realm of politics are now increasingly seen as legal. The attempted prosecution of Boris Johnson for alleged misfeasance in public office while political campaigning is an example of this. The clamour of many seem to want to make every political expression or religious statement subject to the courts. As a pluralist and a Humean, this is deeply worrying.

It is trite to say that disputes in the built environment can have legal implications. Further, and equally trite, is the assertion that courts can settle such disputes. This is of course true but there is a cost. The cost is not simply financial in terms of lawyers’ fees and damages awarded. There is the human cost – the stress of litigation, the fracture of relationships. There is the business cost of distracting professionals away from their core duties of designing, building, maintaining and the like towards preparation of statements, obtaining of records and so forth in preparation for the court. There is, very importantly, the damage – usually irreparable – to the relationships between the parties to the dispute. This results in either the parties no longer working together or, if they remain bound together contractually, suspicion and wariness on both sides resulting in communicating through lawyers and the like. This is at the heart of a private law dispute. It involves private individuals and often matters of

---

great concern to these private individuals: not only their homes, their children, peace and quiet and their bank balances but also their sense of right and of being wronged. At one level these disputes are frequently simply about money; hence what is innately wrong with compromise? There is no moral or philosophical reason why a consenting adult cannot accept, say, £5,000.00 rather than the £7,500.00 he may have achieved at court. At another level there is some other non-monetary grievance but again what is wrong with the client – or the other side – providing a solution to it rather than the court? For example, there is the litigant – not uncommonly – who above all wants an apology even though this is not a legal remedy available through the courts but could of course be readily available through ADR.

Lawyers, though, have a somewhat chequered history in supporting mediation and alternative dispute resolution. In Publication twelve, it was found among other things that many lawyers considered mediation to be a ‘Cinderella’ – something that was not real law for real lawyers. Professional self-interest could be detected. Why spend thousands of pounds to become a solicitor or a barrister if ‘unqualified’ mediators could resolve the dispute more quickly and more cheaply? There was also ignorance of mediation as a tool as well as a failure to realise the benefits of it for lay clients and to actually advocate the same to them. This thesis as a whole is therefore partly aimed at resistant practitioners who doubt the efficacy or role of ADR or those who perhaps use ADR for tactical reasons such as avoiding cost consequences for failure to consider ADR by simply ‘going through the motions’ with no real or genuine attempt at reaching settlement. In the light of the Covid pandemic, though, it has been interesting, and wryly humorous, to note that many of the most combative members of the Bar, who have hitherto shown no interest in mediation or
the like, have now discovered their soft sides. Chambers’ websites are now flush with fresh profiles detailing their interest in mediation and the like. They may have come to realise that it is good for their clients and good for them, or they may simply be being pragmatic.

4.5 The critics of ADR

Critics of alternative forms of dispute resolution range from those such as Owen Fiss, who appears to condemn all forms of alternative dispute resolution out of hand, to those like Lord Neuberger (2010), who believe that mediation can play in reality nothing more than a role as a minor adjunct to the civil justice system. These various accounts seem to share two broad worries, which can be perhaps broadly labelled ‘theoretical’ or ‘jurisprudential’ on the one hand and ‘practical’ on the other. Jurisprudential concerns raise concerns that mediation in some way does not provide, or interferes with, ‘justice’ and that it is somehow either essential or very important for the state to police settlements even between private parties. The other worries feature more pragmatic or practical issues such as the inequality of bargaining power or that the benefits of mediation are overstated.

The most well-known critical account of ADR, which unsurprisingly deals with both concerns, is that outlined by Fiss (1984) in Against Settlement. Fiss is an extremely well-known legal academic, for many years a professor of law at Yale University, and therefore this paper has had a huge critical reception. The title is noteworthy as Fiss does not address himself to mediation in particular or indeed to any particular form of alternative dispute resolution. Rather he uses the term ‘settlement’ as an overarching term to include everything from the formalised procedures
of arbitration and procedures such as adjudication where there is still a clear ‘judge-like’ function through to conciliation, mediation and negotiation. The reason why he appears to do this is that he considers all these methods as ‘private’ as opposed to the civil litigation system which is ‘public’ in the sense of being state sponsored. It is this assumption that is addressed in Publication seven using ‘human rights’ in effect as a watchword for public interest. It argues that in the civil law context the disputes are almost invariably private and that therefore there is no need per se for state intervention through the judiciary.

Fiss’s argument perhaps revolves around the concerns that ‘settlement’ lacks authoritative consent (p 1078). In effect, only judges can deliver justice. Fiss then ascribes a large role to judges, one that extends to supervising the offending party post-judgment. He is clearly appealing to a vertical concept of justice where there is an objective, external standard against which the settlement can be assessed. What precisely does Fiss himself actually mean by ‘justice’ – a term that he uses freely in his writings?

Justice is a public good, objectively conceived, and is not reducible to the maximization (sic) of the satisfaction of the preferences of the contestants, which in any event, are a function of the deplorable character of the options available to them. The contestants are simply making the best of an imperfect world and the unfortunate situation in which they find themselves. There is no reason to believe that their bargained-for agreement is an instantiation of justice or will, as a general matter, lead to justice. (Fiss, 2009, 1273 at 1277)
It is a view that he does not defend in this or in related papers. It appeals directly to the idea that law has authority, but Fiss does not spell out where this authority emerges from or what it appeals to beyond a ‘collective wisdom’ enforced by the state. In this regard he operates as many legal practitioners do, including judges, namely assuming that it is either self-evident or else a question not worth asking. Most would agree that law, whether as a social reality or something more, has authority to some varying degree. The more important question is what is this unnamed authority that is appealed to? His examination of ‘settlement’ however does not appear to be based on the ‘reality’ of legal practice. He may be side-stepping the issue by adopting a Dworkinian ‘judge as hero’ position. Fiss’s approach can also be directly contrasted with the views I expressed in Publication five. For Fiss, justice is top-down, emerging from the judge herself. For me, ‘justice’ can and does emerge from the participants themselves. Justice is that which brings closure, resolution and harmony to the participants.

Fiss then makes frequent appeals to ‘justice’ and yet does not provide any clear account of what he is referring to or on what it is supposedly based. What is clear is that Fiss does seem to think that justice is the preserve of certain individuals, most notably judges, and that justice is in some sense ‘out there’. Justice is strictly vertical on Fiss’s account. Genn (2009) is equally sceptical. It is this scepticism, particularly with regard to any suggestion that there should be a compulsory element to settlement, that is tackled in Publication seven. This draws deeply on recent jurisprudence of the upper courts and argues that there is a confusion between compulsion to mediate and compulsion in mediation. The first is unobjectionable, the latter is not. It further argues that there is no breach of article 6 rights by such an approach and that in fact compulsory
mediation can happily sit alongside other forms of dispute resolution, including ultimate decision by the court, as reasonable and proportionate. It is implied that mediation is too often wrongly conceived of as a poor form of litigation and is evaluated and condemned as such. Rather, mediation is to be correctly viewed as a wholly different category of process, operating with a separate set of assumptions and norms and aiming at a fundamentally different kind of outcome. The debate on compulsory mediation continues with more and more jurisdictions putting in place various schemes with varying degrees of compulsion including the USA, Italy and Turkey (for example, see De Palo (2018) and Usluel (2020) which demonstrates the wider relevance of the publications.

ADR fundamentally appeals to a different notion of justice and does so both philosophically and in terms of its actual practical operation. It is horizontal or bottom-up as discussed above. The parties take centre-stage, the parties express themselves and communicate their thoughts, feelings and intentions, the parties come to an agreement (or not). There is no authority other than themselves\(^5\). The standard of justice is horizontal rather than vertical. ‘Justice’ then on this view is personal and flexible, but variable. Whether you can accept variability in some areas of the ‘law’ will tell us a great deal about one’s fundamental premises – ‘tell me how you classify and I’ll tell you who you are’ (Barthes, 1972, p 175). Those who cannot accept that some matters lie in the realm of the personal will not accept this view. Yet, as a society we are very inclined to accept subjectivity in many areas of life. Sexual behaviour is one of them. Outside of religiously based deontologists there are few who would

---

\(^5\) This can, of course, vary to some degree with regard to evaluative mediation where the mediator will make judgments regarding limited aspects of the issues to hand.
wish to increase regulation on private consensual acts between adults. While many sexual practices might seem unusual, unpleasant or more often a little silly we are happy to let them persist as long as we or others are not compelled to watch or participate. Few would argue with conviction that the law must intercede because private actions can affect public morals. The Hart-Devlin debate (Cane 2006) has been won by Hart by default not because of any irrefutable argument but merely by an increasing liberalisation in certain areas of life over the past four decades or so. We still, of course, have standards and norms but these are limited to areas largely either patrolled by the criminal law where we agree that there is clear public benefit or we have moral beliefs, cultural practices, standards of politeness and etiquette that are not considered legal in nature. However, that very little (if anything) is properly within the remit of consenting adults to agree to (including to forego some small element of compensation which they may have been awarded had the matter gone to court) seems very much to be against the zeitgeist where empowerment and autonomy of the individual are the watchwords.

What much of this criticism towards various forms of ADR fails to recognise is that settlement is more than simply commonplace: it is essentially the default. The great majority of negligence claims – which account for the bulk of civil work, usually under the guise of road traffic accidents with the attendant personal injury claims, but also claims for occupiers’ liability, employers’ liability, clinical and other forms of professional negligence – settle before trial. Drawing on my own personal injury and clinical negligence practice, almost none of my multitrack or High Court claims result in trial. Most settle through the Part 36 regime – either directly because of offers made and received or through the ubiquitous Joint Settlement Meetings (JSMs) which are almost always
budgeted for and approved by the courts at an early stage in the proceedings at Case and Cost Management Hearings (CCMH). Explicitly, the court is approving of the matter being disposed of without judicial intervention. The same is true of the common practice of Tomlin Orders and other at court or pre-court settlement. Even at court the judge does not need to approve the settlement and usually plays no part at all in the agreement or its terms. The only exception in the wide world of settlement is where minors, or others lacking capacity, are the recipients. Then the court does properly examine the proposed order, which in reality is invariably about how much compensation they will receive. It is clearly entirely appropriate for certain parties to be protected in this way. The fact that only they have this protection shows that in private law disputes the terms of the settlement are matters for the parties alone.

Even in the rarefied Chancery courts – so ably satirised by Dickens in *Bleak House* with the famous fictional case of *Jarndyce and Jarndyce* – notoriously populated with the brightest of the Bar (the author excepted) with seemingly arcane matters its usual business, ADR is very much to the fore. Proprietary estoppel is an example of this. It is increasingly commonly pleaded. Its frequency is perhaps an exemplar of the informality noted elsewhere in this paper. In these proprietary estoppel cases there is a realisation that settlement is highly desirable. This stems from two elements. Firstly, the very wide discretion available to judges in terms of remedy means that even if the equity is established then there is no certainty at all that the claimant would recover what he or she sought. Secondly, the contested nature of the facts often pieced together from alleged conversations and assertions, or sometimes even
behaviour or silences, means that the outcome is uncertain and the risks in terms of costs on both sides invariably tend to focus minds\textsuperscript{6}.

4.6 A Note of Caution

Mediation is not a panacea. This thesis does not seek to present it as such. As noted above, unlike some advocates of mediation, an argument is not presented for mediation to be used universally in every aspect of law or governance. Rather a careful line is drawn limiting mediation to the private sphere. Nonetheless even within this private sphere there are concerns.

For many there is a concern that mediation is in many respects unregulated. Many advocates of mediation conversely see this as a positive. Legally recognised lawyers (barristers, solicitors and legal executives) and many other professionals are regulated and carry insurance but many mediators do not. Many argue that there is a need for such regulation to protect consumers. Among the most trenchant criticisms are raised by Hinshaw (2016) who concludes his paper thus:

It is worrisome that the field feels little or no need to protect mediation’s integrity through regulation, but more troubling is the fact that consumer protection is of little concern to regulation’s opponents. This is especially so because the mediation field prides itself on its ability to understand and address other peoples’ concerns. Instead of taking an external empathetic approach to regulation, the field has focused inwards making the perfect the enemy of the good, thereby refusing to acknowledge the innate problems with a \textit{caveat emptor} regime of practitioner quality control. Simply ignoring consumer protection concerns closely resembles the inertia associated with perceived inconvenience and blind traditionalism rather than a principled argument against regulation. Sadly, with no external pressures to force the field’s hand, it is unlikely that mediators will be regulated any time soon. The field’s unease with regulation suggests that mediators want to have their cake

\textsuperscript{6} For a very recent discussion see ‘Remedies in Proprietary Estoppel Claims’ – William East, 5 Stone Buildings. Webinar 15\textsuperscript{th} June 2020.
and eat it too – they desire the privileges of professionalization but wish to do so without accepting its responsibilities. (p219).

Others see limited need for regulation in civil mediation although argue that regulation could be beneficial in other areas such as family (de Oliveira & Beckwith 2016). A criticism that is often linked to the question of regulation although is probably conceptually distinct is that of the lack of an agreed set of skills or an agreed curriculum for mediators. Others criticise the perceived lack of focussed on the need for the development of mediation ethics (Field and Crowe 2020). Bush (2019) interestingly links ethics within mediation with elements of pluralism. Wolski (2020) has raised concerns with regards to confidentiality and privilege and how they might adversely affect litigation. Cheevers (2020) raises issues with the concept of neutrality. Ali (2018) has explored in a number of comparative jurisdictions court-based mediation and found a range of concerns including confidence in the process per se and worries over how justice is perceived by the participants.

As discussed above, many scholars have raised concerns with mediation and indeed other forms of informal dispute resolution. These concerns in many respects echo the concerns of Fiss. This suggests not just that there remains a tension between informal settlement and public adjudication but that this tension is likely to remain. Recently critics have drawn attention to what is often characterised as the privatisation of justice. Rottleuthner (2020) has raised concerns with regard to mediation and other forms of resolution in relation to aspects of the criminal law where he sees pluralistic settlement in the context of religious or ethnic groups as concerning. Others argue that access to justice in reality must involve mediation. Nolan-Haley (2020) argues that the global ADR and access to justice movements have
in effect merged. Price (2018) argues that ADR has an important role in moving from traditional forms of dispute resolution to modern, adjudicative ones. Just as mediation is not in isolation the promised land so a world of unlimited public finding filled with brilliant lawyers is neverland.

4.7 Empirical studies

The empirical studies in this paper are infused with this pragmatism, incrementalism and the reality of practice. The empirical work has focussed on small-scale interventions in housing-related disputes. These range from studies of selective licensing (Publication 9) and adjudication (Publication 3). What unites them is a concern with seeking positive outcomes rather than enforcing a particular law, norm or value. The empirical publications in this study then draw on the lived experience of those who engage with housing and with the type of disputes that rarely garner public attention. They remain, though, issues of genuine importance from those who suffer them. They draw on particular issues of conflict or evaluations of legal instruments that propose to better regulate housing or the built environment. They also seek to explore disputes about the built environment from a pluralistic perspective, not looking primarily at vertical, top-down law as practised through the courts but law and social ordering as actually lived and experienced.

Publication 3 found a willingness by agents to engage with the scheme introduced in the Housing Act 2004 as an alternative form of dispute resolution. It found that rather than disputes centring on issues of human rights they revolved around generally small matters. The paper found that
there were collateral benefits in that the standard of management, record-
keeping and communication had gone up. Overall, this suggests that
focussing on dealing clearly, quickly and simply with a distinct problem
has actually improved the standards of housing in the private rented
sector with the inevitable well-being that goes with it. It is not part of a
grand narrative of ‘rights’ but rather simple and, ultimately, judged on its
own terms, successful. The facts of these disputes are – like many other
legal or potentially legal problems – at the heart of the matter. Here, the
emphasis on the process of paper-based adjudication is getting the
documentary facts out immediately in a do-or-die fashion. Quickly,
landlords and their agents in particular realised that to succeed at
adjudication they had to have documentary proof for all of their
assertions. It is perhaps no surprise that repeat players with economic
interests at stake learn to adjust to the rules and the requirements of a new
regulatory regime rather than many tenants who will aim to be tenants for
only a short period of their lives, often when they are, for example,
students and have other probably more exciting things on their minds.
There were no contested facts, or at least no contested facts that they
could succeed on. The starting point of course is that the deposit paid by
the tenant belongs to the tenant. Any deductions therefore claimed by the
landlord or agent had to be proved and with there being no witness
evidence, with its attendant baggage, the contested oral account of fact is
removed entirely from the picture.

Similar positive outcomes were found in Publication eleven and
Publication 9. Section 95 of the Housing Act 2004 seeks to put in place
additional measures that landlords must adhere to in certain areas where
there is a high incidence of anti-social behaviour in an attempt to drive up
management of properties in designated areas. This again then is a small-
scale intervention rather than a grand appeal to human rights or the like. It is again a sceptical Humean measure rather than a continental Kantian or Hegelian one. Again, the aims of selective licensing are modest and pragmatic. There is no ‘rights’ discourse or sense that this is the heavy hand of the law. In fact, it is a local measure applied and managed at the level of local authority. It can arguably be compared to ‘nudge’ theory. Yet the studies showed that residents felt a greater sense of personal value and worth because of the schemes. There was greater community engagement, an actual drop in (at least perceived) anti-social behaviour and a broadly supportive stance from landlords.

A private award of damages achieved through mediation still has a corrective effect even without an admission of guilt or the finding of guilt in the courtroom. If a company, say, makes a payment to a party for a substantial sum of money then this money still comes from the company and affects its profitability and ultimately its viability. It would be a foolish company, or a foolish individual, not to alter their future behaviour in order to avoid making further substantial payments to other individuals in similar circumstances. Mediation then maintains a corrective and educative function.

The errors and confusion about the nature of ADR are problematic and lead to widespread misunderstanding. There is, though, a further problem – one that is likely to find resistance amongst lawyers – namely, that the law is or should be ‘one’ and that there is, or should be, one unified harmonious system. There are pragmatic grounds for wishing to see consistency – like cases being decided in like manner – and with regards to litigation there is no reason to depart from this aspiration. However, the
rationality, uniformity and consistency of the legal system is, in any case, something of a mirage, especially to those who enter its muddy waters either as lawyers or clients. This problem can be assisted by a process-based view of mediation that operates horizontally rather than vertically. By doing so it removes the worry that mediation is in some way falling short of providing the ‘right’ answer or ‘justice’. The account advocated here stops well short of saying there should be no adjudication, no external intervention or the like – merely that not every civil dispute requires adjudication by a judge.

4.8 Housing and human rights

Housing law is itself a wide and diverse field (Cowan 2011, Sidoli & Vols 2018). Within those groups who study the legal aspects of housing in particular, the debate has been focussed on rights to housing or formal regulation (for example, Kenna 2008, Brits 2015, Macklem 2015). This approach tends towards universalisation and a top-down approach. Issues are framed as entitlement and economic. There is an appeal to ever improving ‘standards’ – whether this be standards of actual accommodation or standards of management. Real value to the tenant often lies outside such narrowly conceived categories. Dickinson (2015) asks us to reflect for example on the policy and process of eviction. Anti-social behaviour or more limited nuisance can greatly affect the quality of life and the ontological well-being of the resident way beyond the effects of, say, a draughty window. There are of course wider social implications too of more serious anti-social behaviour (Silva 2015). It is this social aspect of housing that has interested scholars such as Flint (2006) and Vols (2014a and 2014b).
My doctrinal study of nuisance (2015) explored the question of the liability of landlords for the nuisance of their tenants. The most interesting aspect of this, which will have wide implications for social ordering and quite possibly give greater momentum to non-court-based resolution, is the *obiter* comments of Lord Sumption, who stated at para 161:

In my view, the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will one day need to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not normally be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission.

This therefore looks to a time in the near future when injunctions will not be available so readily; indeed, in the urban context alluded to by Sumption they may not be available at all. Damages may not solve the problem. A creative, negotiated or mediated solution may well bring more dividends in terms of happiness and well-being than a compensatory payment in damages.

Much contemporary work in the field of housing law, and indeed housing more generally, has focussed on the idea of housing rights. Housing rights are usually conceived by most academic lawyers as emerging from various international instruments such as the European Convention on Human Rights or the European Social Chapter. In this sense they can be
seen to be a top-down mechanism, emerging from an external body that claims authority. This indeed is how most law is typically conceived, emerging from a positive model of Parliament or Executive issuing a law that is then enforced by the mechanisms of state. Housing rights such as these are typically thought of as ‘soft law’ – namely they cannot be relied upon in court in a fundamental sense. They are ‘second order’ and necessarily dependent on a given state having the economic strength to provide the homes that they aspire to. Many non-lawyers fail to understand this and do not conceptually separate these rights from, for example, a first-order right such as a ‘right to a fair trial’. They therefore see these international human rights to housing as justiciable in a signatory state. This is not the case, however. They are aspirational in just the same way that signatories to environmental treaties are. This is even the case where states have rights to housing confirmed in their constitutions. Rarely can an individual successfully bring a claim for the state to provide her with a home. Publication eight explores in the context of Ireland the resolving of housing disputes in the private rented sector. It outlines the various statutory interventions that have been enacted over the past few decades along with a consideration of Irish and English and international human rights cases. It found that rather than human rights legislation being a panacea for the tenant, it gave the courts great scope – through the concept of proportionality chiefly – to vary protections according to tenure and the like. This was developed in Publication 4. This is a comparative study of two major European civilian jurisdictions, the Netherlands and Germany, that both claim, and are usually thought to have, an advanced legal system and a mature and established human rights discourse. The paper examined in detail recent cases in relation to evictions and the use of human rights therein. The paper found that although human rights discourse is far more to the forefront than, for
example, in England and Wales, it concluded that compliance with ECtHR requirements was largely superficial and procedural rather than substantive. That this was the case in two such established European, and indeed EU states, is perhaps surprising at least superficially. Both jurisdictions are overt in their official support for human rights and the associated discourse. A sceptic might say that civilian judges are adept at framing decisions to make them human rights compliant. Because of this superficial technical compliance the actual situation ‘on the ground’ for tenants threatened with eviction has not then really been improved by legislation. The question of legislation and litigation versus ADR and settlement is in any event a false opposition. They do as a matter of fact already co-exist even if they are not yet symbiotic. Ray (2009), working in the actual area of housing rights, for instance, has argued that alternative dispute resolution can be part of a ‘hybrid’ mechanism operating alongside court-sanctioned action in the realm of socio-economic housing matters, thus combining the flexibility of ADR with the ability to create public norms and values.

Another feature of the housing rights discourse is the concept of adequacy. This has been so since its inclusion in the Universal Declaration of Human Rights in 1948. Housing must be adequate. This means it need not be luxurious but nor should it be of an extremely poor standard. What does this mean though? What is adequate for a Western European is doubtless different from that of someone from other parts of the world. Likewise, one’s expectations regarding housing vary because of cultural contexts. For example, gypsies and travellers in very many cases do not want to have settled housing even though this might, according to generally accepted standards, provide more adequate housing and a higher quality of dwelling. This demonstrates once again that ‘housing rights’, while undoubtedly a
useful tool for the advocate and useful as a conceptual mechanism, do not provide the answers that many assume they will. Housing rights often feature in constitutions too. There is however no necessary or clear link between constitutional housing rights and actual better provision of housing. Just like international instruments, they often seem to be no more than ‘soft law’ – aspirational but not justiciable. The limitations of law as a means of improving housing and reducing anti-social behaviour is again picked up in my 2015 paper (with Vols and Kiehl) discussed above.

4.9 Conclusion

The research in this thesis has drawn on a number of different philosophical insights and applied them in a number of related fields within the built environment. The de facto defence of ADR contained therein relies on this unique and original account of ADR theory that has not previously been applied to the built environment generally or housing in particular. ADR, arguably like any other practice, emerges from within the culture and values of a given society. It is both a reflection on society and part of its debate. It both expresses values and, unconsciously, seeks to change them. This thesis too, as part of intellectual discourse, both reflects premises, values, aspirations (and a whole host of other things) and seeks to engage, develop and change them. ADR does not exist then in a vacuum but is itself part of a wider discourse. Human rights are standards against which to judge law. However, societal norms change and the standards that we use to evaluate law, and therefore justice, also vary over time and place. There can then be few absolutely fixed points and these are to be found largely in the criminal law. As this is the case, to argue that ADR does not achieve ‘justice’ is almost contradictory unless we collapse back into a base positivism by arguing, for example, that the law compels damages of
£100.00 and that therefore must be enforced even though an apology is really what the claimant wanted. Finally, there is also, of course, the most basic objection that it is naive to assume in any case that a court case gives justice even under a simplistic positivistic conception. The inconsistency of law in practice, in particular in the county courts – with a whole range of variables including the skills of the advocate and the mood of the district judge – ought to offer caution to those with a fideistic view of law.

Reflecting on the ten years or so that this work has been in its making, I can see that, if I had had the luxury of writing a monograph at leisure rather than a series of publications against the temporal and time-pressured environment that featured REF and the demands of practice, I would have started with theory and then sought to apply it to practice. What I have done in effect here is the opposite, although deliberately organising my publications in reverse order mitigates this. I began with practical problems and issues and drew – partly subconsciously – on my philosophical views and my insights from practice. As time went by these theoretical concerns became more overt. What is pleasing to me is that – through happenstance of course but with a degree of serendipity – my practice-first approach is actually more empirical, more inductive, more sceptical and modest and more horizontal than if I had written a philosophically driven account first and then sought to force and fit examples within its philosophical schema – something that I have criticised others for doing.

Despite the passage of time I have not changed my views. Rather they have been reinforced. This may be because of their ‘rightness’. More likely it is because of my own limitations, including inevitably being someone caught in a particular place and time, early 21st-century Wales in my case. The scepticism of the profession noted in my earliest paper has lessened. The
judiciary *de facto* encourage settlement more and more. Covid and the new landscape we find ourselves in requires us to do different things in different ways.
5. Critical reception and originality

In summary I consider the corpus of work I have presented here contributes to knowledge in the fields of dispute resolution, property and housing law. Its originality, quite apart from new empirical material presented in a number of publications, lies in the fusing of a distinct approach to dispute resolution focussing on mediation and other related forms of dispute resolution in its application to the built environment. While there is idealism in the theory, the practical elements are grounded in legal practice. The idealisation of law found in parts of the cavalry of the legal academy are generally not shared by the infantry in practice. The simplest solution is invariably what the lay client wants and needs. There is no eulogising about the pleasure of trials – certainly not for the laity – apart from retired criminal silks reminiscing over port and cigars in the manner of Rumpole of the Bailey (Mortimer 1978) a portrait that bears more than a passing similarity to older members of the Bar! Originality then comes from a unique philosophical perspective grounded in the insights of practice.

One of the issues that I have identified in the housing and built environment world is a simplistic approach to normativity. That matters are straightforward, non-complex and can be approached in a universalised way. In other areas of enquiry, for example, literature, history and philosophy, subjectivity, the questioning of basic assumptions about method, a caution about grand claims, has been common for many decades. This has taken time to filter into this field. There are still general and wide assumptions made about the ‘truth’ of empirical studies for example. The claims put forward in this thesis are necessarily cautious. They do not seek to provide one global answer or approach. Rather they seek to address particular issues. They maintain that the world, the people in it and the
problems they create are complex and that the solutions are invariably plural.

Citations naturally vary between disciplines but even markedly within them. As noted above, dispute resolution in the built environment is a relatively small field with few active researchers. Nevertheless, works in this thesis have nonetheless been cited in the three leading recent English language works on mediation, namely Bryan Clark’s *Lawyers and Mediation* (2012), Penny Brooker’s *Mediation Law: Journey through Institutionalism to Juridification* (2013), and Andrew Agapiou and Deniz Artan Ilter’s (2017) *Court-Connected Construction Mediation Practice: A Comparative International Review*. They have also been cited in numerous recent studies including a number of PhD theses. These include but are not limited to Soaita, Gibb and MacLennan (2019), Baynham-Herd (2019), Moons (2016 & 2018), Morris (2017), Phillips-Alonge (2017), Gallié (2016), Girolamo (2016) and Gutiérrez et al (2016). One of the publications in this thesis has been translated into Arabic and another into Romanian. I have also been published in Dutch and Italian. I have given a number of papers overseas where there has been translation into the native language including Italian, Spanish, Portuguese and Hebrew. The publications also draw on research from wider jurisdictions than England and Wales and actually involve the study of legal mechanisms in Ireland, Germany and the Netherlands thereby bringing an international and comparative element to them. Publications 7, 10, 11 and 12 were entered into the last Research Exercise Framework (REF 2014) and were externally assessed prior to submission as overall 3*. Publications 1, 2, 3 and 4 will be entered into the REF 2021.
Further, two of the works included in this study were cited – and I was chosen as an interviewee – in a major study published this year by Jennifer Harris of Bristol University (Harris 2020). The broad tone of the study and its conclusions follow similar lines of enquiry and a broadly similar approach to dispute resolution showing the currency of my ideas. An earlier version of Publication seven won the Best Paper Award at the RICS COBRA Conference held in New Delhi in 2014.

The ideas contained within my published works caused me to be invited to sit on the board of *Juris Diversitas* and edit or co-edit their book series. I was involved in co-editing five books. I was also asked to co-found the Housing Law Research Network and instigated a book series that has so far published three volumes with more in the pipeline. I jointly edited the first two volumes and jointly authored introductions to both volumes.

I was appointed as an independent high-level advisor to Indecon’s (Indecon International Economic Consultants) ‘Assessment of the Feasibility of a Tenancy Deposit Protection Scheme in Ireland’ submitted to the Department of the Environment, Community and Local Government/Housing Agency and the PRTB based on my work in the field.

Finally, in terms of peer-recognition I have been a visiting professor at the Universities of La Sapienza, Rome, Maastricht, Groningen (three occasions) and Malmo (two occasions). I have also been the invited speaker at a number of academic events including the Fordham Urban Law Centre.
Post-script for COVID

At the time of writing, the Covid 19 pandemic still surrounds us. There is much we do not yet know but we do know of course that it has caused death and it seems likely that it has caused severe economic damage. Everything else is speculation at this stage. Courts have largely retreated from the fight. There are some glimmers that major criminal trials and some care proceedings will go ahead but civil hearings – those concerning property, construction, landlord and tenant, rights of way and so forth – have been abandoned, at least for the present. Fiss sees the judicial hand everywhere but on the day of writing, it is nowhere. In a few short weeks clients and their lawyers have had to re-think in many cases the next steps. The trial that was on the horizon has now slipped beyond it. Chambers on their websites and through their clerks are marketing their counsel as mediators or early neutral evaluators. Covid-19 may – like Spanish flu – be no more than a memory and then a note in the history books. Or it may change radically the way we interact with one another. It may be that legal practice will change too. If the small steps that have already quickly taken place under great pressure of necessity lead to creative and pragmatic settlements, then this is to be welcomed.
6. References

6.1 Works contributing to this thesis


### 6.2 Other literature referred to in this critical review and appraisal


Civil Procedure Rules 1998


logement et associations de locataires du Québec et Service aux collectivités-
Université du Québec à Montréal.


London.

conflicts: future research challenges’ in *Current Trends in Wildlife Research.
Springer, Cham.

Harris, J (2020) Alternative approaches to resolving housing disputes: The role and
potential of alternative dispute resolution in the UK private rented sector. UK
Collaborative Centre for Housing Evidence.
https://housingevidence.ac.uk/publications/alternative-approaches-to-resolving-

Härter, K, Hillemanns, C and Schlee, G (Eds) (2020) *On Mediation: Historical, Legal,

pp163-219.


Lange, M (2011) ‘Hume and the problem of induction’ in *Handbook of the History of
Logic, volume 10: Inductive Logic* (Edited by Gabbay, D, Hartmann, S and Woods, J),
Elsevier/North Holland, Amsterdam.

Industry Review of Procurement and Contractual Arrangements in the UK

Law, S (2009) ‘Culturally sensitive mediation: the importance of culture in mediation


