

MEDIATION MOVES INTO THE MAINSTREAM

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“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expense and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

These words of Abraham Lincoln, from over 150 years ago, find resonance daily in the work of litigation and others lawyers who strive to find practical solutions to their clients' disputes. Their goal is to find a satisfactory outcome as quickly and cheaply as possible while preserving future relationships between the protagonists wherever possible, usually with the minimum of publicity. As the preferred option to achieve these outcomes, mediation, once closely associated only with family law, is being chosen in a growing number of other civil and commercial disputes in Scotland. Coupled with recent announcements and recommendations by the Scottish Executive and the Scottish Parliament, along with research showing the detrimental side-effects which conflict has on businesses of all sizes, Scotland's business and public sectors are embracing more consensual methods for managing their differences. And lawyers, understandably sceptical at the outset, are finding that there is “business enough”; indeed, increasing business from clients who are able to work creatively with their legal advisers to achieve cost-effective outcomes.

Why Mediation Adds Value

As one legal practitioner recently said of the gradual shift from confrontation to collaboration: “If clients really found out about this, it would take off”. His perception is well founded. BDO Stoy Hayward, the accountancy firm, recently published research¹ into the cost of disputes to businesses. The research focussed on both financial and non-financial costs. It found that, on average, disputes cost small companies (defined as those with less than 50 employees) £75,000, while for medium and large companies the figure could up to £500,000.

75 per cent of CEOs advised that they were personally involved in the dispute. This rose to 81 per cent in the case of small companies. 87 per cent of CEOs stated that disputes took up too much management time, 41 per cent of respondents claimed that disputes affected their ability to meet targets, staff morale was affected in 31 per cent of cases and 22 per cent of respondents claimed that disputes had a negative impact on their business reputation. For lawyers, these results provide useful insight into clients' needs and concerns.

Research by Genn and Paterson² shows that most litigants and others in dispute wish to resolve matters by agreement. The majority of disputes within the court system settle. Many of these disputes can take up a considerable amount of court time and public and client money before resolving. Mediation offers a way to bring some of these cases to an earlier conclusion.

The advantages of using mediation are not only the time and cost savings, but the fact that parties maintain control over the process and can get the key people around the table within a confidential and voluntary setting. With the assistance of the independent mediator, and in most cases ably supported by legal advisers, communication can be restored between the parties and working relationships renewed with the result that a forward-looking, creative solution can be forged as a matter of agreement by all concerned.

In England, senior judges have been among the leading supporters of the appropriate use of mediation. In *Dunnett v Railtrack* [2002] 2 All ER 850, Lord Justice Broome stated that: “*Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and the courts to achieve...When the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences,*

¹ Commercial Disputes Survey 2003, BDO Stoy Hayward.

² Genn and Paterson, *Paths to Justice*, Hart Publishing

it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.”³

Parties to mediations conducted in Scotland by Core Mediation have reported that mediation was *“infinitely preferable to the legal process which we had already been through as part of our dispute. To us the real benefit of mediation was the fact that we were totally involved in the process – the exact opposite of what we had experienced in our legal case.”*

A legal adviser commented that the benefits included: *“Time saving, cost saving and an opportunity for the client to personally express grievances and concerns in a non-court setting. It avoided wasting management resources in preparing for lengthy litigation, and secured confidentiality as opposed to the public domain.”*

The saving of one party in a recent mediation was estimated to *“be around £200,000. In management terms, even greater. In litigation, we would have required precognitions and attendance from witnesses mostly no longer with the organisation, including from abroad.”*

Growth in Scotland

The confidential nature of the process means that it is not easy to establish how many mediations have been carried out in Scotland in the commercial and non-family civil sector in recent years. However, it is clear that the number of mediations taking place is rising, and has been rising for the past three years.

Core Mediation, established in 2000, has seen a significant rise in the number of cases being referred to its mediation service. Between 2001 and 2002, the number of mediations carried out by Core’s panel of mediators, throughout Scotland, rose by 43 per cent and in 2003 the number rose again by over 70 per cent. In early 2004, mediations were occurring at an average of one every week.

These mediations have come from a variety of sectors and involved many different issues. Mediations in the private sector have accounted for 68 per cent of the total, insurers being participants in about half of these. The remaining 32 per cent have come from a mixture of local authorities, public bodies and government agencies. Many occur before litigation has commenced and others at various stages during the court process.

The disputes have arisen in fields as diverse as building and construction, property and land, health, commerce, management and employment. The issues involved have been equally diverse, showing the flexibility of the process. These have included professional negligence claims, contractual disputes, partnership disagreements, intellectual property rights and education and special needs issues.

Government Support

The advantages of using mediation over litigation in the public sector have been highlighted in a recent report by the Department of Constitutional Affairs⁴. The report shows that the number of UK Government disputes in the financial year 2002 - 2003 where a method of consensual dispute resolution was used or attempted was 617 - an increase of over 1200 per cent on the previous financial year. 89 per cent of the cases referred to consensual dispute resolution by government departments last year settled without recourse to a hearing.

Speaking at a Conference in November 2003, David Lammy, MP, Parliamentary Under-Secretary for the Department of Constitutional Affairs announced that over £17 million had been saved across government departments since 2001 as a result of the government’s commitment to using mediation and other forms of consensual dispute resolution. He stated

³ per Lord Justice Broome p853, para c

⁴ Monitoring the Effectiveness of the Government’s Commitment to Using Alternative Dispute Resolution (ADR), August 2003, Constitutional Affairs Department

that, *“The success of mediation, and other forms of ADR, in resolving disputes is not in question. The issue is about the proper relationship between ADR and the courts. We have had a journey to travel. The Government is now seriously committed, putting money into court-based schemes around the country, to using ADR for its own disputes. The engine is on and we are moving into a new dawn, to solve disputes in a more harmonious way”*.

The Scottish Executive has echoed the UK government’s policy on the use of mediation and other forms of alternative dispute resolution in a document issued by the Scottish Procurement Directorate in October 2003. It advises that *“ADR will be considered and used in all suitable cases and litigation should usually be the last resort.”* Usefully, it acknowledges that *“there may be cases that are not suitable for settlement through ADR, such as cases involving intentional wrongdoing, abuse of power, public law, Human Rights and vexatious litigants. There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle”*⁵.

In clarifying the Executive’s policy on ADR in civil disputes to the Justice 1 Committee of the Scottish Parliament, the Civil Justice Department stated that, *“The Executive supports the use of ADR where appropriate and is keen to encourage the use of methods of dispute resolution which offer advantages over court-based processes in terms of speed, cost, reduction in conflict and the preservation of relationships.”*⁶

The Deputy Justice Minister, Hugh Henry MSP, recently stated in a parliamentary debate on legal advice, information and representation that, *“mediation and dispute resolution have a substantial role to play and can be developed much further beyond what we currently provide.”*⁷

On 12th November 2003, the Justice 1 Committee of the Scottish Parliament heard evidence on the use of alternative dispute resolution in civil and commercial matters. The debate included discussion on the benefits of the mediation process, the use of mediation in Scotland, England and Wales, Europe and the United States, training, regulation, standards, resources and funding, court rules and schemes, and the effect of using confidential processes on the setting of future legal precedents. The Justice 1 Committee responded to the European Commission’s Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters and said that, *“The Committee was struck by the potential benefits of mediation and other forms of dispute resolution.”* It concluded that, *“During this short inquiry it has become evident that ADR could offer substantial benefits and savings for the people of Scotland, commerce and public bodies if utilised consistently throughout the country.”*

Challenges and Opportunities

And that surely must be the aim. Mediation has proved itself to be a suitable and effective way of resolving differences in many business, professional and personal settings. The challenge is to continue to raise awareness of the benefits of mediation, and other consensual dispute resolution processes, within the commercial, legal and public sector communities. Once clients begin to appreciate the full benefits of collaborative approaches to resolving differences and disputes it seems likely that the demand for mediated solutions will grow fairly quickly.

Anticipating this trend, it is perhaps not surprising that more and more legal professionals in Scotland are seeking training that will allow them to advise their clients of the increasing number of options available to resolve disputes and enable them to go on to represent their clients in mediation if required. Other professionals who are regularly involved in disputes, including accountants, architects, quantity surveyors, human resource managers and medical professionals are doing the same, and learning the skills involved in mediation by training to become mediators themselves. Consideration is being given to the formulation of court rules,

⁵ Scottish Procurement Directorate: Alternative Dispute Resolution Guidance, SPD2, October 2003, para 2

⁶ Letter from Paul Cackette, Head of Civil Justice Department, Justice Department, Scottish Executive to the Justice 1 Committee of the Scottish Parliament, 3rd November 2003

⁷ Scottish Parliament Official Report, 3rd December 2003, Column 3874

in addition to those which exist already in family matters and in sheriff court commercial causes, which would enable judges in Scotland to encourage the greater use of mediation where appropriate. Court involvement is a vital component in developing this option.

Mediation gives the legal and other professions in Scotland the opportunity to consider new and practical ways of safeguarding and pursuing clients' priorities, aims and interests (and to market these as part of their repertoire of services). It represents an opportunity to develop new skills in new areas of work and to embrace a culture of collaboration which, expanding on existing approaches, can put Scotland among the world leaders in providing a creative, efficient and cost-effective dispute resolution service to its citizens and those who do business here. Abraham Lincoln would have approved!

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