

# Finding and adding value through mediation

By David Bone, Head of Energy & Natural Resources at the Maxwell LLP and one of Scotland's leading renewable energy lawyers

By John Sturrock QC, Chief Executive and Senior Mediator at Core Solutions

"You have to experience mediation to really understand it and appreciate its value." These words from a well-regarded litigation solicitor sum up well the conundrum which many advisers still face.

The very significant number of lawyers who now make use of mediation are aware of its benefits and can elect if, when and how to use it. They are sometimes frustrated by colleagues who have yet to engage fully with the idea and who may be unsure of how and whether it will work for a client. "We're keen to promote mediation in this case," they will say, "but the other side is unwilling."

Fortunately for many clients and their advisers, there is now extensive experience of the use of mediation in Scotland in commercial matters in the broadest sense. More than ever before, all sides are willing to explore the mediation option. Not all of the experience will be good – mediation is not some kind of universal panacea – but, for most, the words of one litigant will bear out its usefulness: "for this case, the process was more suitable and much more speedy and efficient than court proceedings".

As one solicitor observed: "I am convinced that a proof would have meant that at least one of the parties would have been very upset indeed... Mediation, when you see it in action has to be something that all lawyers need to consider in cases like this one."

It is perhaps best to illustrate the point with examples from a range of topics.

Take a PFI contract, with a large construction project for the public sector:

The procuring public body has a number of disputes with the private sector developer which have dragged on for many months. The failure of a critical sub-contractor has not helped. There are real issues as to where responsibility lies for defects and question marks are being raised by

investors. It's a complex picture and one which could take months or years to untangle in court. No party wishes to devote resources, management time and money to the litigation process but they are stuck. The principal clients have lost trust in each other. It's a familiar enough scenario.

This sort of problem is ideal for the meetings between principals (advised by their lawyers) which mediation offers. There is, after all, likely to be an enduring relationship after this dispute is resolved and re-engaging with your opposite number, rebuilding trust and improving lines of communication is valuable in itself. Careful exploration of what actually has gone wrong will often reveal gaps in one or both party's knowledge and a different perspective from that adopted in the adversarial setting necessitated by claim and counter-claim in court pleadings.

**The very significant number of lawyers who now make use of mediation are aware of its benefits and can elect if, when and how to use it. They are sometimes frustrated by colleagues who have yet to engage fully with the idea and who may be unsure of how and whether it will work for a client.**

More than this however, there is the opportunity to assess risk, to identify what will happen if...the case goes to court, the parties are stuck for several months, investors get anxious, the politicians begin to ask questions, the facility itself is not in full use, and so on. This ability objectively to analyse the realities of various outcomes in the privacy of this confidential process is of enormous value to parties, even if they decide that they cannot resolve matters here and now. The opportunity is there to make informed choices, advised by their lawyers, in the light of the many factors present in the problem-solving matrix.

Or a banking situation where a local business-man was expanding his business when the 2008 crash occurred:

Bank lending was curtailed. It's taken years for him to get back in his feet again. There are issues about the obligation on the bank to continue to extend lending facilities as before, about the borrower's obligations to make repayments on time, and about what would have happened in any event if the bank had continued at the anticipated level. Then, there's causation. Given that there was a severe downturn, to what extent, if at all, can it be argued that any failure by the bank caused loss? Would it all have gone pear-shaped anyway? And what is the extent of any loss? The problem may be that to push this all the way to a final court decree could in any event amount to a pyrrhic victory for the bank if the borrower meantime goes bust.

Again, this will be a familiar scenario to many readers. I have seen a range of outcomes in these situations in mediation, from the bank paying nothing (and the borrower accepting that outcome) to the borrower receiving a substantial payment. The point is that the opportunity exists to explore not only the legal and factual disputes but also to assess the risks on each side of a litigated solution against an agreed outcome, taking account of many issues outside the legal analysis which are nevertheless relevant in a commercial setting.

Take another topic very much of current interest in the hi-tech world in which we live: intellectual property rights:

Software had been designed to improve the performance of a piece of everyday equipment. The inventors had sold the invention with the associated rights to new investors. It was agreed that, upon sale of a certain number of goods incorporating the innovation, payments would be made. A dispute arose over whether or not the goods sold actually incorporated the software and how many units had been sold in a changing marketplace. There are issues about the interpretation of the purchase agreement. The technology is highly complex.

Experts struggle to agree on the question of the incorporation of the technology, such is its sophistication. There is risk on both sides. It transpires that there is an accounting error on the sales numbers which influences the whole claim. All of this can be addressed in one day of negotiations in which, ultimately, the principals require to face each other and reach an acceptable arrangement.

In the employment field, there is often conflict between colleagues working in stressful circumstances:

Mediation in such a matter will need careful handling. It is usually helpful to meet with the various players individually initially to find out about the underlying issues, build confidence and scope out the process. This can be done in a series of meetings in which the parties feel able to express themselves honestly and openly knowing that it will go no further.

Then, by agreement, a further series of meetings can be held on another day, in various combinations of the parties. This can be a painful process of reflection, self-awareness, getting unspoken messages across and being heard. This may result in major decisions being taken about the future disposition of the team and its working practices. These are, by agreement, reported to the senior management who had initiated the mediation process and who can be expected to take matters forward. Hard work but infinitely preferable to a drawn out disciplinary or complaints process.

In the sporting world, disputes can arise around funding, selection, representation, coaching, ownership of assets and so on:

A female athlete had been selected for a high performance programme. However, over a period of time, her results have ebbed and flowed and a decision is taken by the sport's governing body to discontinue her funding and focus on other athletes. This means that the level of support to which is accustomed falls away and she no longer has the money or the input to help her regain her place. Her family has been very committed to her sporting career and this has ramifications for them too. There is the prospect of a major and very public row at a time when energies should be focused on forthcoming competitions.

Mediation enables the athlete and her family to explain how they feel and the impact it has on them all. The performance director and senior coach of the sport in question are able help the family understand what has occurred and why and the limitations of, and criteria for, funding. Because of lack of communication between them, this has not happened previously. A creative solution is found with the athlete accepting the support she needs to attempt to regain her place on the funding programme.

Looking ahead, how can good advisers ensure that all concerned make best use of mediation?

Prepare well: mediation is not a forensic exercise in the traditional sense. You need to know your legal and factual positions, and strengths and weaknesses, of course. But it is also important to expand the problem-solving pie to account for costs (primarily those to come in the future as those already paid out are effectively "sunk"); time; loss of other opportunities; reputation and publicity risks; effect on morale and general inconvenience; and impact on other commercial relationships. And always try to identify what the real underlying needs of the client are.

**Mediation in such a matter will need careful handling. It is usually helpful to meet with the various players individually initially to find out about the underlying issues, build confidence and scope out the process. This can be done in a series of meetings in which the parties feel able to express themselves honestly and openly knowing that it will go no further.**

Encourage the client: this is his, her or their problem. They need support and advice on how to make the best of the opportunity. It is helpful for them to be reminded of risk and choice, to be enabled to make fully informed decisions, and to be encouraged to engage with the other party, even if there is a history of distrust.

Be constructive: however acrimonious the situation and the previous correspondence or communings, more will be achieved in nearly every situation using measured language and avoiding inflaming the situation or others. The most effective "advocates" in mediation use skilful communication techniques to get their message across. They will acknowledge other points of view, accept that there may be another perspective, offer reassurance that they seek to find a solution and explain clearly what their client's position is. They will be careful in negotiation to avoid "bottom lines" and ultimatums. They will seek to add value.

After all, that is what mediation is really about: finding and adding value.

[www.core-solutions.com](http://www.core-solutions.com)