

“You’re the first lawyer to get me a result”

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It is 5.15 in the afternoon. After eight hours of frank and rigorous discussions, the parties' solicitors have sat down to draft a detailed specification of the work to be carried out.

Their clients have reached agreement on how to resolve a dispute that has so far cost each of them more than the value of the outstanding work and has involved three court actions and an arbitration. The sense of relief is palpable.

The mediator is able to leave the solicitors to bring the matter to a conclusion. He recalls a previous dispute in which a relieved party had said to her solicitor, “You’re the first lawyer to get me a result”. In that matter, after several years of court actions and considerable cost in personal and business terms, a day of mediation had seen parties find a way to end their multi-million pound claims.

Where mediation is being used

The growth in the use of mediation in Scotland in commercial, business, professional and organisational disputes has continued to be very significant. Major users include insurers and leading banks. An increasing number of board room and management issues are being mediated in order to prevent escalation. Many claims of professional negligence continue to be settled using mediation, while engaging mediators in disputes involving senior professionals in the health sector and other service industries has enabled long running difficulties to be addressed. Some of the most challenging disputes

arise in the employment area and mediators are frequently invited to assist in trying to resolve these in order to avoid the pain and cost of a tribunal.

Recent examples of mediation in Scotland include partnership level differences in law firms, senior management differences in the hotel industry, complaints about customer service in the financial services sector, joint venture partnering in the construction industry, environmental pollution, property development and boundary issues, biotechnology and research contracts, landlord and tenant differences, post-divorce property matters, issues about victimisation, harassment and racial discrimination in employment, intellectual property rights in a bespoke computerised system, and commission payments on major commercial transactions.

The vital role of legal advisers

Encouragingly, many Scottish law firms and other organisations now have first hand experience of mediation in the commercial field. A number of law firms are undertaking training and promoting specialist skills in mediation which they can offer to their clients. Many senior solicitors and advocates have undergone in-depth training in mediation over several days and can now confidently advise on its use. As one senior practitioner commented: "To be an adviser to a party in mediation, it really helps to have experienced what it is like sitting in the middle", even in a simulated setting. Given developments in the courts in England and the increasing awareness of Scottish judges of the potential for cases to be referred to mediation, this commitment seems prudent and worthwhile.

One mediator recently had this to say: "The involvement of solicitors was crucial. They understood the dynamics of positive engagement and were able and prepared to

negotiate constructively, looking for solutions rather than yet again reinforcing the polarised positions of the litigation. They were able to guide and advise their clients so that they seized the opportunity of an outcome which brought matters to an end. It was a good example of professionalism at its best.”

Making mediation work

Recently, those engaged in mediation have identified several factors which enhance the likelihood of success in the process—and some which might hinder it. Effective lawyers prepare well. They consider commercial, reputational, business, cost, time and other elements, as well as carrying out a legal risk analysis. Often the factors in a decision whether to settle or continue in court are varied: “From a litigation perspective, I could advise you to press for more, but from a human point of view, given your business and career prospects, I can see why you would wish to bring this to an end now” was how one lawyer put it to a client. Keeping the big picture in the forefront and remembering that continued unresolved conflict carries significant opportunity (as well as direct) cost, enables lawyers to assist clients to assess what is in their best interests.

Effective lawyers are open and prepared to discuss issues frankly; they will seek to find out as much as they can about the other side’s needs and concerns. They will seek to work with advisers on the other side and avoid having fixed ideas about the outcome—or about their opposite numbers. Effective lawyers are courageous, being prepared to absorb their clients’ frustrations and helping them to make tough decisions. One solicitor apologised openly to a client on the other side for the effect that a letter from his firm had on that client. This exemplified the integrity and honesty which characterises the profession at its best. It was also a turning point in the dispute.

Mediation is less effective when lawyers cannot move from fixed positions and when they reinforce the positions adopted in litigation. An unwillingness to disclose information, aggressive language, a surfeit of paper and a one-dimensional focus on legal issues can all tend to stand in the way of progress. Although it is said that lawyers are risk averse, the fear of appearing to let the client down can inhibit imaginative thinking.

What makes mediation work was recently summed up by an insurance claims manager:

"The case that we mediated had been outstanding for 7 years. The issues were not just contained to the evidence. There were two other significant factors we had to deal with – emotion and expectation, both of which ran high. At the outset the parties were about £250,000 apart. This was not a straightforward case. Traditional methods of negotiation had failed. The next stop was the court room. We agreed to try something different – mediation. It worked! But why?"

- *The parties attended because they wanted to find a solution and settle. We were focused.*
- *We were prepared – and that involved recognising the value (at either end of the scale), the risks, the costs of not settling. Of course that is all common sense and should be standard practice but sometimes it takes something to prompt us to do it.*
- *The decision makers were all there and were involved, not just spectating.*
- *The mediator acted as a voice of reason and, when needed, poured oil on waters – and sometimes that was needed. The value of this independent voice of reason can not and should not be underestimated."*

Making creative use of mediators

Use of mediators and facilitators at early stages of projects and contracts seems likely to be a growing trend. Recently mediators have been involved at the outset of a major construction project assisting the contracting parties, consultants and clients to build effective lines of communication from the start. While use of mediation at later stages of a dispute can pay dividends, early intervention is likely in many cases to be cost-effective. For example, it seems likely that financial and other organisations will engage mediators at early stages to manage customer complaints effectively and quickly.

In some matters the services of two mediators are being utilised, specifically to add strength to the process. These will be difficult cases, perhaps with multiple parties, or several complex issues, or where particular expertise is useful allied to strong process management skills. For example, in a large value case concerning development and planning issues in a residential site, two mediators with different sector experience and skills worked closely together to enable both parties to be in the best possible position to do a commercial deal. Separate meetings with a variety of experts, often running in parallel, enabled momentum to be sustained throughout the two days.

In another matter involving European, English and Scots law, wide-ranging facts and very experienced solicitors and parties, and limited time, the two mediators were able to plan each stage strategically and often to work simultaneously with the parties in different rooms. Progress was faster and more sustained, often enabling lateral approaches to be adopted briskly and effectively. These examples show how parties who are considering mediation and selecting mediators can be sophisticated and benefit from departing, where appropriate, from the standard approach.

Recent developments

The increased use of mediation can be attributed to a number of factors. One of these is the revised rules for commercial actions, introduced by the Court of Session in January 2005, which focus on pre-litigation communications between the prospective parties' legal advisers and on consideration of whether all or some of the dispute may be amenable to some form of alternative dispute resolution.

At a policy level, the draft EU Directive on Mediation in Civil and Commercial Matters, issued in October 2004, is currently the subject of consultation across Europe. It states: "The value of increasing use of mediation rests principally in the advantages of the dispute resolution mechanism itself: a quicker, simpler and more cost-efficient way to solve disputes which allows for taking into account a wider range of interests of the parties with a greater chance of reaching agreement which will be voluntarily respected..."

The Scottish Legal Aid Board issued guidance in 2005 that refusal by a legally aided party to enter into mediation will be a relevant consideration for the Board both at the stage of deciding whether or not it is reasonable to grant the party legal aid and in deciding, once granted, if it is reasonable for legal aid to continue in place.

In England, the judges have continued to take a fairly robust approach. Refusing to mediate on grounds that the matter is too complex for mediation is "plain nonsense", according to Lord Justice Ward (in *Burchell v Bullard* [2005] EWCA Civ 358). Here, a small building dispute was par excellence the kind of dispute which lent itself to ADR. The defendants could not rely on their own obstinacy to assert that mediation had no reasonable prospect of success. The earlier case of *Halsey* ([2004] EWCA Civ 291) was referred to:

"Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate." The later case of *Vahidi v Fairstead House School Trust* ([2005] EWCA Civ 765) is important for those engaged in employment matters. Here the Court of Appeal expressed the view that "as the courts have settled many of the principles in stress at work cases, litigants really should mediate" such cases, whether before trial or before appeal.

More recently, the 41st update to the English Civil Procedure Rules (April 2006) has further reinforced the importance of considering alternative dispute resolution, including mediation, in all cases before proceedings are issued, with a warning that the court must have regard to failure to do so when determining costs.

Initiatives and encouragement of this sort from the courts will free up time to deal with cases which only judges can address and, at the same time, enable businesses and individuals who have disputes to get these resolved quickly and efficiently.

Looking ahead

How far the Scottish courts will be prepared to go, or indeed will need to go, remains an interesting question. For now, with the significant developments over the past year, there is reason to expect that mediation will continue to play an increasingly major part in the resolution of disputes in Scotland.