



# Referee!

Court action is not for the faint of heart or wallet.  
Perry Gourley explores the increasingly used mediation option

**T**HEY may make for a great read, but as several Scottish businessmen have found out recently things can turn very nasty when commercial fall-outs reach the courts.

Cases such as that involving Aberdeen-based Balmoral Group – where allegations arose that a claymore was brandished – and the bitter dispute involving Sir Tom Hunter and Chris Gorman over the collapse of the Gadget Shop chain demonstrated that court action is not for the faint hearted or those with shallow pockets.

Well before a dispute reaches a judge, any business or personal relationship between the parties has often been lost as both sides seek to shore up their respective positions.

According to Len Bunton, a chartered surveyor who specialises in dispute resolution in the construc-

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Len Bunton

tion industry in Scotland, the cost of failing to manage business relationships when disputes arise cannot be overestimated.

"I quite often see cases where there is a complete breakdown in communication and people have become totally entrenched to the point where they don't want to even see each other again never mind work with each other."

Even where things have not reached that stage, the nature of the litigation process means parties become increasingly polarised as time rolls by.

"The closer to court you come, the attrition wears people down and relationships suffer," says David Scott, partner in McGrigors' contentious construction and engineering team.

While a decision by a court may be desired or needed, for many disputes it is a costly, time consuming

resort which more often than not wipes out any hopes of a future business relationship.

And while legal costs can run into tens or hundreds of thousands of pounds, the drain on business resources involved in fighting a case can be even more expensive.

"I think perhaps the biggest factor for businesses is the sheer amount of management time taken up and the effect that has on the company," says Scott.

While there has long been a range of so-called alternative dispute resolution methods available, in practice very few are in use.

Although there are industry-specific procedures, such as adjudication which is widespread in the construction industry, alternative dispute resolution has increasingly come to mean mediation.

A survey carried out by Dr Bryan Clark, of the University of



Strathclyde's Law School, found that many lawyers had never even heard of some of the more marginal dispute resolution methods such as 'mini trial' and early neutral evaluation.

"Alternative dispute resolution as a term is fairly redundant now and mediation is effectively the only method in use in Scotland," comments Clark.

Under mediation a third party examines the issue using a procedure agreed by both sides and helps them try to reach an agreement which each considers acceptable. By working through the issues involved and finding where agreement or compromise can be reached, settlements can often be achieved within a day.

Although widespread in England, the process has taken time to catch on in Scotland. But it is now witnessing significant year-on-year growth, albeit from a low base.

A small group of pioneers is credited with much of the work done to raise awareness of the process, particularly among lawyers.

A perception among some that the legal profession may have been reluctant to consider recommending mediation to clients because of the potential loss of fees from a court case seems to be largely unfounded.

However, Clark's survey, which sought to look at attitudes and experiences of commercial litigators, seems to show otherwise.

"There has been suspicion for some time that the legal profession as a whole has blocked mediation for that reason or seen it as a threat to their business, but on the survey's evidence, that is not the case," he says.

"I think many lawyers see it as an opportunity to add a string to their bow and have the attitude that mediation is going to take off anyway so they might as well be involved."

John Sturrock QC, of Edinburgh-based mediation firm Core Solutions, argues that the continuing growth in the use of mediation in the absence of the court encouragement which has



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John Sturrock,  
Core Solutions  
(above)

existed south of the Border is a positive sign.

"It suggests mediation in Scotland has had to prove its value and stand on its own two feet and to be genuinely innovative in order to attract work," says Sturrock.

"I think we're now past the tipping point and have got a critical mass of people who have successfully used mediation."

The courts in Scotland are increasingly aware of mediation and perceived scepticism about the process among judges steeped in litigation appears to be waning.

Judges in commercial actions have started suggesting parties try mediation in cases which come before them.

The expected introduction of new rules in the Sheriff Court will also see the encouragement of mediation before and during litigation with the risk of an expenses sanction for those who fail to do so without good reason.

While court encouragement of mediation is largely welcomed by its advocates, moves towards compulsion would be seen as against its ethos, according to Alan McMillan, a dispute resolution partner at Burness and also an accredited mediator.

"One of the attractions of mediation is that it is voluntary. People go into it in good faith and with an open mind and they are able to do whatever they want during the process – they can resolve their problems or kick over the table and walk away, but it is up to them.

"If we introduced a compulsory element that potentially would mean people were coming to the table because they had to rather than because they wanted to."

While there may still be cynics in the legal world, the reported success rates for mediation will raise eyebrows among even the most enthusiastic litigator.

Figures quoted anecdotally by those involved in mediation have long suggested high success rates. Clark – who admits to some scepticism about whether such figures would be reflected in his survey – found a reported settlement rate of 78.5 per cent. Cases where a partial settlement had been reached took the figure up to 84.4 per cent.

Most of those involved also gave a favourable response to how they found the process. Where mediation failed to broker a settlement, client factors such as bad feeling and polarisation were almost always the cause.

Even in cases where mediation doesn't succeed in resolving a dispute, many argue that the process is still worthwhile.

"Parties often feel they get enough benefit from the process to get to the nub of a dispute and resolve a lot of the peripheral issues which people can get hung up on in litigation," says McMillan. "Even if they don't settle they often clear the way for it to happen in the future."

Kirk Ramsay, chief executive of the Glasgow Science Centre, is about to embark on his second mediation involving the centre and also believes its potential benefits make it worth pursuing even if it is not successful.

"If you do go to mediation and get a resolution then that's a great result compared to the time and costs involved in a full blown court action," he says. "Even if mediation fails and you end up going to court





anyway, you haven't really lost anything by trying and if mediation is approached in the right way there is a high chance it will succeed."

Ramsay took part in a mediation last year to try and resolve a long running, complex dispute involving a number of contractors.

"We had to find a way to cut through and resolve the issues so that everyone could move forward. We wanted pragmatic resolutions not contractually based, legally stated ones."

Ramsay admits that after the first day of the mediation session he was frustrated it wasn't moving faster.

"We hadn't appeared to have made much progress because there was a lot of positioning going on, but I later realised that you do need to give people opportunity to position themselves and that it is an important part of the process.

"These things are always about personal relationships – it is people who do deals at the end of the day."

Overall, Ramsay believes the whole process proved to be more reasonable than going to court.

"It has taken a bit longer to deal with the legal drafting to make sure what was agreed at the mediation will be delivered on, but there is no question we would not have resolved this without a major court battle had we not gone to mediation."

Success seen by businesses and organisations which have used mediation is increasingly leading to clauses being written into commercial contracts that parties will try the process before going to court should disputes arise.

A significant part of the growth in mediation in Scotland is also being driven by businesses that have been involved in the process for many years south of the border.

Trevor Goddard, who handles professional indemnity claims for Royal & Sun Alliance in Glasgow, had ten years experience of mediations in England before moving to Scotland in 2005 and has since been involved in more than 20 cases.

A keen advocate of the process, he presented a session at the latest



Law Society of Scotland's annual conference titled *Mediation: Friend or Foe?*

"The point I made was that whichever way you look at it mediation is a friend, but it has to be the right case," he says. "We don't just see it as a panacea and say that every claim has to be mediated. Some cases are not suitable for mediation.

"If fundamentally there is no interest on the part of claimant or insurer in settling a case because we can't agree on liability, then mediation probably isn't going to work."

While mediation is building a reputation for being a cost effective and relatively speedy process to resolving business disputes, McMillan argues it should not be seen as a soft option.

"People sometimes think mediation is a 'happy clappy' process where you sit round, have a chat and agree everything. But some of the most difficult times I've had in my professional career have been in mediations.

"It is a really tough process, because you're condensing what could have been a dispute which has been running for two or three years into perhaps two days of mediation.

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David Scott,  
McGrigors  
(above)

"Emotions run high, the individuals involved are often angry and there can be a lot of money at stake.

"Mediation is about getting a deal done and that is not a soft process and harder than litigation in many ways."

According to Bunton, although mediation is starting to catch on in the traditionally litigious construction industry, it is often turned to at a late stage in a dispute.

"It seems to come into play after parties have started down the route of arbitration, adjudication, or court action – but it really should be the first port of call to try and resolve issues."

He believes mediation can play a vital role in maintaining long term business relationships.

"If you were a major Scottish contractor arguing with a major Scottish developer, then the cost of it escalating into a major dispute could be huge in terms of lost business opportunities and if that can be resolved without going to court then the better for everyone."

Sturrock believes the future development of mediation in Scotland will see a trend towards much earlier involvement of third party facilitators for finding resolutions to a dispute and to see its use extending much further than avoiding court.

"A third of our business is not litigation disputes but in areas such as boardroom issues, family succession planning in companies and employment issues where getting in early can prevent the need to go to an employment tribunal."

He argues that the potential benefits of mediation in resolving issues or disputes should be viewed in the same way as successful companies and organisations approach other business issues.

"Successful companies are always looking for more efficient and cost effective ways of going about things and that should apply to disputes as much as any other area of what they do." ●

*Perry Gourley is a freelance business journalist.*