

Mediation in Commercial and Civil Matters in Scotland

John Sturrock KC

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Introduction

For 25 years I and others have been making the same or similar arguments about the way in which mediation could be better used in Scottish civil justice. It's fascinating to contemplate the journey Scotland has been on...

What is clear is that, for some of us, this is something of a Groundhog Day experience. I recall being part of a committee looking at Sheriff Court Ordinary Cause rule changes over 20 years ago. We paused that discussion as Court of Session rules were thought to be imminent and it was hoped to harmonise the two. It's been a long pause.

A pause punctuated by a number of opportunities, including the Report of the Expert Group which I had privilege to co-chair in 2019, which made a whole raft of proposals for Bringing Mediation into the Mainstream here in Scotland – the overall lack of progress with these feels a bit frustrating.

Indeed, for me, there is a sense of sadness that we in Scotland appear, with the exception of Simple Procedure, to have fallen further behind and perhaps haven't grasped the opportunities in the way that other jurisdictions have. It is interesting to contemplate why.

Today could be a real turning point therefore. I hope so.

In planning for today, we recognised that some folk may not be sure just whether, when and where mediation can be effective. My role therefore is to speak with encouragement, based on my own experiences as a mediator over these 25 years in commercial and civil matters in largely higher value cases, to inform and reassure about the nature and extent of matters which are suited to, and are regularly resolved by, mediation. Perhaps to reinforce, even repeat, some of the 'why' ideas already discussed.

And to illustrate that mediation is in fact well established and used right

across the civil justice field in Scotland in significant commercial and civil matters. We just need to see much more of it being available to parties who have disputes, whether already in court or not.

Examples

I start with three stories – the first involves a very successful family company where, for a number of years, an inter-generational battle had been fought following the decease of a senior family member. There was a Court of Session litigation, much expense and pain, no real progress and increasing animosity, undermining decades of good relationships.

The matter was resolved in 6 hours of mediation with excellent contributions by very senior lawyers. They and their clients needed this forum to find an outcome with which all could live. Even if the case had gone all the way to a court proof and decision, the underlying issues would and could not have been addressed by litigation.

The second is in fact two stories: both Sheriff Court Ordinary cause actions, both neighbour disputes in a sense but with serious complications including servitude and access issues, nuisance, development planning and so on. In each case, £ tens of thousands had been spent by the lay clients in pursuing claims and by the defenders, who both had corporate back up. Interim interdicts didn't address the underlying issues and even a positive court order, specific implement as it is called, would not have solved what was really going on.

Again, a day of mediation provided the forum for practical, creative solutions to be discussed and agreed. The sadness is that these cases had dragged on for years in the court system, incurring huge costs, dragging the parties down, clogging the courts – a pro-active approach to mediation by the court could have seen these cases go to mediation much earlier, with all the benefits that this could have brought. The cost of doing so would be miniscule against what was actually incurred.

More generally

Personally, I have been privileged to serve as mediator in many hundreds of mediations in Scotland, the majority of which have probably been the subject of litigation in the Court of Session and to a lesser extent as Sheriff

Court ordinary actions. All at different stages: very early in the process, when a case matures, on the eve of a court hearing, after determination by a court....

These mediations mostly involve solicitors and quite a few have counsel, members of the Bar, engaged, along with advisers, experts and others. They can be complex, multi party matters, with disputes to do with factual *and* legal issues. Value can range from small amounts to many hundreds of millions. They can emanate from the public or private sectors and often a mixture of both, if they involve for example major infrastructure projects, in several of which I've been involved as mediator. Government, local and national, and other public sector bodies have been parties.

They have involved large companies, partnerships and other business organisations. Very often, individuals are involved, with claims arising from accidents, alleged negligence by professionals, damage to reputation, employment issues (I note the pressure on Employment Tribunals), contractual disputes and so on.

Family business disputes, for example in agriculture and farming, are notable in my experience. Property (intellectual and real), shareholder issues, such as unfair prejudice, often with complex valuation questions, a multitude of matters relating to sport, banking and financial services, maritime and fishery matters, building and construction, succession and wills, landlord and tenant (often dilapidations), education and so on.

Many have involved insurance companies and other professional support organisations. The majority, for which a money claim is the only available (binary) remedy in a court, are in fact also or primarily about other needs that a court cannot fulfil – apology, explanation, alternative contractual or other innovative solutions as I mentioned earlier, restoration of a relationship, amicable ending of a relationship, and so on. “It’s not about what it’s about....”, as someone wisely observed.

And, unlike court, where the focus necessarily is on past actions and relevancy, a mediated solution can look forward – often in ways that the parties and their advisers may not have been able to do in the more positional approaches which can be, understandably, characteristic of conventional negotiation.

Most of these mediations resolve in a day of mediation – usually in person in my experience. Some take a bit longer. The success rate in terms of reaching a resolution is, in my experience, above 80%, although just getting together and providing a forum for narrowing the issues and enabling deeper understanding is, of itself, beneficial, even if a resolution isn't achieved.

For lawyers

Lawyers often say that mediation is the most enjoyable experience they have as professionals. Certainly, the best are able to negotiate rigorously for their clients and also provide the necessary independent counsel when needed within that safe structure of mediation - which enables the difficult conversations that conventional negotiation can't always provide. And of course this enables clients to make informed decisions for themselves. Party autonomy is for me a key point.

For many legal advisers, mediation is now at least a realistic option in the discussion about strategy. And many already use it, as I have illustrated. However, for all that I have said, the proportion of matters which find their way into the court system at other than Simple Procedure stage, and then find their way to mediation is, I believe, small in the overall picture of things and, I rather suspect, much less than in other jurisdictions.

Conclusion

The point is that any matter which might be negotiated is appropriate for mediation when conventional negotiation doesn't produce a solution. Remember we're discussing here the relatively small minority of disputes which do not resolve of their own accord and which end up in the court system.

Remember again that only about 5% of more serious matters in the litigation system ever reach final decision by a judge. But many, many of these get stuck in that system taking up time, incurring very significant cost and contributing to further polarisation of - and of course anxiety and uncertainty for - those involved. I suggest that this doesn't assist in achieving justice.

And so that's what we need to address. That relatively small number of disputes in the overall picture which sit at the apex of the civil justice system and unnecessarily consume a disproportionately large amount of public and private resource.

As Charlie has explained so well, advisers and clients respond to the encouragement which courts can give. Therefore, and in conclusion, I sense that mediation needs more of this encouragement and the examples we have heard from elsewhere point us in the direction of the greater role that the courts and the civil justice system, especially in Sheriff Court Ordinary Cause and Court of Session cases, can, in partnership with mediators and the legal profession, play to help support the increased use of mediation in Scotland.

The real question is: *how to do so - and what is stopping us?*