The growth of mediation in practice

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The author discusses growth of mediation in practice in light of the current economic climate.

Introduction

One of the core benefits and attractions of mediation is that what happens in a particular matter which goes to mediation and, indeed, the fact that mediation has taken place at all, is confidential. Parties and the mediator sign an agreement undertaking to keep discussions private. There are exceptions of course and parties can agree to waive that undertaking but generally privacy is preserved.

The disadvantage of this is that very little information about mediation is generally available to enable parties and advisers to make choices about whether, when and how to use it. As use increases, individual advisers and participants are able to rely on previous experiences and, in Scotland, that is certainly the case for a growing number of lawyers and their clients. However, it is useful to pause and to try and capture some of the overall trends in mediation, in the hope that actual and potential users will have an even better understanding about, and confidence in, the process.

This article is an attempt to take a snapshot of developments in the past two years. We have taken approximately 130 of the mediations in which Core Mediation (a division of Core Solutions Group) has been engaged over a period of just over two years between January 2007 and January 2009 and sought to break down the statistics, anonymously, into various categories in order to provide a summary of what is happening. We accept that this is merely a broad impression based on the experience of one mediation service with a particular vantage point and location in the marketplace. Nevertheless, we hope that it is a useful contribution to understanding an important development in Scottish legal practice in recent years.

Lawyers' involvement

In that two year period, we estimate that 72 law firms have been involved in mediation, bringing the total over the past six years to around 120. More than 200 individual solicitors have participated, with the six year total being over 360. Many firms and solicitors have been involved on a number of occasions. Our records for the past several years show that at least a dozen firms have used mediation on more than 10 occasions, with several approaching or exceeding twenty. Four individual solicitors have used it a total of 47 times. In the past two years, nearly 30 counsel have been involved in over 20 mediations. Counsel can often add real value by bringing a different perspective to a difficult case in an extension of the traditional role of counsel as adviser and advocate.

As in day to day business, the majority of mediations are conducted by solicitors, many of whom exhibit excellent techniques, deploying the modern approach of principled and constructive interest based negotiation rather than the more traditional posturing of positional bargaining. We would comment that this enhancement in skills, and a more collaborative approach, is a notable trend in recent years. Many of the proponents of this effective approach have themselves trained in mediation skills. Many are aware that clients are now actively looking for legal advisers who are able to utilise mediation knowledgeably and competently. This is significant also for in house counsel, many of whom are well versed in mediation techniques. We estimate that nearly all of the top 30 law firms have conducted in house awareness raising on mediation or have arranged for senior practitioners, usually at partner level, to undertake mediation training.

Lawyers have been involved in the majority of mediations conducted. We estimate that 23 mediations occurred without solicitors present. These are commonly (although not always) workplace disputes, involving in house HR departments or managers, and differences between several staff members, perhaps in a team, or conflict between two individual employees, sometimes at very senior levels. Sometimes these involve senior executives between organisations. Mediation in these matters can take place over two, three or more occasions. Preparation, continuity and ongoing support are often essential, alongside close involvement of the HR team. In some of these matters, solicitors suggest mediation but do not participate actively.

Other examples of situations where lawyers are not involved include boardroom discussions and other senior management negotiations where legal issues are not prominent and the parties feel confident about their ability to negotiate without the support of an adviser.

Categories, causes and clients

We estimate that around 30 mediations dealt with employment issues (including discrimina-

tion, bullying, harassment and unfair dismissal) and that 25 can be categorised as addressing management problems, with some overlap between these two categories. In reality, the legal or factual categorisation of workplace disputes often identifies symptoms but masks the real problem. One of the real values of the approach in mediation is that it helps to identify the underlying personal or systemic causes.

We find that, very often, disputes arise through lack of, or failure in, communication, with the initial cause being an apparently minor incident. As we "reverse engineer" conflict in an attempt to understand it and its causes better, we discover that misinterpretation, misperception and misunderstanding lie at the heart of nearly every difference that escalates into dispute, not just in the workplace but more generally. It might be speculated that the future of dispute management is likely to lie in better diagnosis and avoidance of escalation rather than in determination of rights at a later stage or in resolution of conflict once it has been allowed to ferment.

We estimate that approximately 250 parties (or clients) have engaged in mediation in our snapshot two year timescale. Approximately 70 per cent of these are businesses or organisations, usually represented by chief executive, finance, HR, legal or other director level decision maker; the remainder being individuals. Businesses and organisations include many of the major corporate interests in Scotland and many professional firms. Clients have also come from Australia, the USA, the Netherlands and France as well as other parts of the UK and Ireland. In over 40 mediations, one or more public bodies or not for profit organisations have been involved. The public bodies include local authorities, health trusts, emergency services, government funded agencies, sporting bodies and higher (and other) education institutions.

Insurers have been involved in over 20 per cent of cases, most of these involving allegations of professional negligence against a variety of professional advisers (including, in about a third of these cases, lawyers) and other contractors. Mediation offers an appropriate way to address these sorts of claims as research indicates and experience shows that claimants in these situations often want (and need) explanation, reassurance, acknowledgement and, where appropriate, apology, for what they have experienced, in addition to discussing the financial consequences.

Commercial disputes have featured in over 80 mediations, with more than half of these having to do with contracts of one kind or another. One of the advantages of the forward looking nature of good mediation is that parties are regularly able to look afresh at commercial arrangements and renegotiate deals and projects to take account of the reality of changed economic or business circumstances. This has encouraged a few clients to use mediation not just as a dispute resolution process but as a dispute prevention or risk management tool, to nip emerging problems in the bud before they escalate — or indeed to carry out a kind of due diligence with the help of a mediator in the course of establishing new commercial or partnering arrangements in order to anticipate problems before they occur.

Property, construction and conveyancing issues arose in over 40 mediations. Some major disputes arising in construction projects have been addressed in mediation, with some innovative approaches to dealing with the underlying issues, such as completion of a project, in addition to or in anticipation of examining the claims which arise. The appointment of a project mediator who is available throughout the currency of a lengthy building project has occurred in Scotland and remains one of the areas of potential development in that industry, in order to provide real time resolution of emerging difficulties.

There is a significant use of mediation for residential property developments, particularly involving individuals and families who find themselves in dispute with architects, surveyors, engineers and building contractors (and their insurers). In some instances, these lay parties have spent considerable time in pursuing their claims and some have incurred expenses which have escalated into six figures and exceed the apparent value of their loss. The benefit of mediation in offering a mechanism to identify the core problem and find ways of addressing a claim quickly cannot be under-estimated in many of these cases.

Timing and litigation

The challenge in the future will be to bring these cases to mediation earlier without parties incurring the disproportionate expense involved in litigation along the way. Sometimes, clients will need persuading that this is to their benefit and not a sign of weakness. This is where changes to the rules and approach of the courts to bring about active encouragement of mediation in all appropriate cases would signal a significant and beneficial shift. That said, a significant number of matters (we estimate up to 40

per cent) were mediated before litigation was commenced or in circumstances where litigation would not be contemplated.

This trend seems likely to grow as clients (and their lawyers) become more accustomed to and motivated by the need to retain control and to achieve early management or, indeed, avoidance of disputes. In other countries, there is movement towards the use of mediation in the process of negotiation where there are no disputes as such, alongside the development of conflict audits and conflict avoidance systems within organisations and the appointment of in house Ombuds who act, effectively, as an internal mediator. Generally, therefore, mediation in non-contentious work is likely to rise.

Of the mediations conducted when litigation has already been commenced, these have occurred at all stages: from shortly after the issuing of an initiating writ, through the adjustment and finalisation of court pleadings, prior to, during and after proof or trial, and during an appeal stage. It is often said that the earlier a matter can be mediated, the better. That is true, subject to proper preparation and risk analysis having been carried out. However, disputes are mediated successfully at all stages. Facing the alternatives further down the line can be salutary, just as seeking to nip things in the bud at an early stage can be sensible.

Particular examples

Other issues which mediators have helped parties to deal with in this period have included agricultural and farming interests, intellectual property rights, partnerships, and personal injury. Some specific illustrations, carefully anonymised, include:

—a dispute over the provision and functionality of software for use in the delivery of an important online service to customers

— the purchase and sale of a professional practice where differences arose over an oral agreement reached and the valuation of the business and where one partner had continued to run the business

— questions about ongoing losses suffered by an agency providing services to a major distributor of products to the household marketplace, where the agency agreement had been terminated

— a joint venture property initiative where ambiguity in the commercial contract caused a difference of view about allocation of profit

—a dispute over an estate following the death of a landowner where various properties were in use by family members and existing relationships were uneasy

— claims for payment by a contractor on a construction project, with counter claims by the developer, and differing views about the involvement of third party contractors, with a concurrent need to complete the works utilising the skills of those involved in the dispute

— a serious difference between two colleagues in senior management in the health sector leading to tension and appraisal difficulties

— a dispute over completion of a housing project, with remedies sought in court and arbitration, costs escalating beyond the value of remedial work and years of uncertainty for a house owner and contractor

— an unresolved claim involving a local authority and a maintenance contractor for cleaning services

— a dispute over the value of professional advice given to a development project where the principals subsequently elected to use other services

— claims by a senior employee for salary and other remuneration and bonuses after termination of employment

— serious personal injuries suffered in an accident with disputed issues about fault, causal link and quantification of damages

— financial provision in a divorce case where assets were uncertain and difficult to ascertain

— allegations of professional negligence directed against architects, solicitors and other professional advisers

— differences between governing bodies in sport causing serious problems for its development

— claims arising from warranties and deferred payment arrangements following a share purchase

— a planning application in which objections were made on the grounds of the effect on a profitable local business which had no alternative location owing to the nature of the business.

Geographically, approximately 72 mediations have occurred in the Edinburgh area, 25 in and around Glasgow, 10 in Aberdeen and surrounding area, and 15 outside Scotland (mostly

England and Ireland), with the remainder in other parts of Scotland, north, south, east and west.

Duration and outcomes

Over the two year period, mediations occupied approximately 181 days. The majority of mediations, around 75 per cent, have taken place over one day. While legend tells of mediations continuing into the night in the fashion of corporate deals, in reality we find that nearly all of the one day mediations conclude in the late afternoon or early evening. It is true that, even after resolution is reached, the terms usually need to be encapsulated in an agreement drafted by the parties' advisers. This can take time but, nowadays, good solicitors are working on the possible terms of a resolution agreement throughout the process and certainly in its latter stages. Apart from shortening the time needed for drafting later, this approach helps to inform decision making and clarity in the closing stages of negotiations. It should also be mentioned that, in the majority of mediations, an initial meeting or at least one conference call takes place between mediator and parties and/or their advisers as part of the critical preparation phase. Mediation is a continuum from the moment of first contact with the mediator, not a one off event.

From the moment of the first approach to discuss the possibility of using mediation to the conclusion of the process, the time taken varies from as short as 48 hours to a few months, depending on urgency, parties needs' and the availability of key participants. Mediation will nearly always involve parties as decision makers and their convenience is paramount. Generally, it can be said that an average time for setting up mediation is between three and ten weeks. But the key point is flexibility and responsiveness to commercial, organisational or personal need.

As mentioned above, it is helpful in some workplace mediations to spend more time reflecting on issues and often there will be a preparatory stage and other meetings rather than one set piece day. In other instances, the complexity, number of issues, number of parties or need for more information means that trying to shoehorn the whole matter into one day does not make commercial or negotiating sense. Then a second, or further days, may be essential. In more than 10 per cent of mediations, there were more than just two parties involved. In one example in our two year period, where there were six parties and multiple issues and interests to take into account, four days were set aside. Successful settlement was said to save the parties millions in costs which would otherwise have been incurred.

"Success" in mediation is much heralded around the globe as being in the region of 75 per cent 80 per cent or above. Our statistics back that up. However, we need to be intelligent about what we mean by "success". Usually this will be defined as an overall conclusion to the dispute. On other occasions, the mere ventilation of the problem and discovery of the real issues will be a significant gain. At other times, the opportunity to identify the core of a dispute and to narrow the issues is all that is possible — or appropriate.

It is well known that, in matters which do not resolve on the day, a significant proportion are settled in the weeks or even months after, and nearly always those involved will specifically attribute that outcome to the occurrence of mediation. And, of course, in some instances, the decision of the court will be required on a particular point, before or after mediation. A less recognised benefit of mediation is as a complement to the court process to help to focus and narrow issues for resolution by a judge. In reality of course, as statistics show, once a dispute is mediated it is very likely that all issues will be resolved. And that is surely a good thing if that is what the parties wish. There may rarely, if ever, be a justification for excluding the opportunity to mediate on the basis that there may be some ulterior benefit to the courts or the public interest in having a definitive decision, which will be lost if parties succeed in resolving their differences amicably.

Conclusion

In the current economic climate, the availability of mediation as a viable, tested means of helping many people and businesses to resolve disputes relatively quickly, with the associated cost, time, commercial and relationship benefits that regularly result, is likely to lead to its greater use in Scotland. In this and other jurisdictions, the evidence is emerging of a strong drive by clients to cut or avoid dispute risks and costs, just as they seek efficiency in other areas. In a sense, in its tendency to reduce the need to use scarce judicial and other resources, mediation also contributes to a more economically sustainable approach to dispute resolution. The fact that, in this snapshot over two years in Scotland, it has been used almost always by choice and not imposed by a third party may differentiate the Scottish experience from elsewhere. That may add to mediation's growing acceptability and validity in this jurisdiction.