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SCOTTISH LAND COMMISSION
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Mediation in the Tenant Farming Sector

Lessons and Feedback from a Pilot Scheme

This publication discusses some of the lessons learned about mediation in the tenant farming sector through the trial of four pilot mediations supported by the Scottish Land Commission. It provides information on the mediation process and includes feedback from some of the participants.

Details and outcomes of individual mediations are not provided in this report in order to ensure that observations cannot be linked with particular disputes or participants.

1. Summary

Recognising that the benefits of mediation are little tested within the farming sector, the Scottish Land Commission decided to gain experience in mediation by funding a pilot service in 2018. The mediation service was intended for landlords and tenants of agricultural holdings in cases where the Commission considered resolution would be in the public interest, and where both parties were willing to engage with each other to explore the best opportunities for reconciliation. The Commission's pilot sponsored four mediations by funding the third-side mediation activity, but with the parties meeting their own costs, and those of any advisers.

Mediation was recognised as being particularly suitable as much of the agricultural sector involves family concerns and long-standing business relationships which can easily be damaged by litigation. One of the strengths of mediation is its ability to address the maintaining and rebuilding of relationships between the parties, making it uniquely appropriate in comparison to other forms of dispute resolution.

The four pilot mediations involved a mix of concerns and interests and held the potential for improvement in the longer-term relationships between the parties. While it may be too soon to say if this objective has been met, the early indications have been positive in this regard.

Although this pilot project has illustrated the power of mediation in addressing difficulties with deep roots, it would be unfortunate if situations had to reach an impasse before mediation is considered. The provision of early dispute resolution, making use of mediation skills, has the potential to avoid relations between tenant and landlord deteriorating over many years, and making more widespread use of mediation could go some way towards meeting the government objective of promoting good relations between landlords and tenants. The Scottish Land Commission has recognised the potential for this by creating opportunities for mediation to intervene earlier in (potential) disputes in its [new mediation scheme](#) for the tenant farming sector.

2. Four Pilot Cases: The Process

2.1. Introduction to the Mediator

The tenant or landlord in each of the four pilot mediation cases had initially contacted the Tenant Farming Commissioner (TFC) seeking advice relevant to their situation. After discussions with the TFC, the parties subsequently agreed to try mediation in an attempt to deal constructively with the impasse they had reached.

The Scottish Land Commission's team introduced the landlord and tenant to the mediator via emails; this was sometimes done through the parties' legal adviser or agent. It was important that both parties were contacted at the same time and treated in the same way to avoid one party being seen to be in a 'lead' position. The mediator then made initial contact with each party by phone, usually through their legal adviser, to make arrangements and outline the mediation process.

2.2. Planning for the Mediation Day

In all cases, the parties involved were provided with a mediation information pack which explained the mediation process. After the mediation process was explained and the basis for the mediation agreed, planning for the mediation day took place. Preparations varied depending on how parties wished to make arrangements.

In some cases, a conference call was held between the mediators and legal advisers, with no involvement of the landlord or tenant and their other professional advisers. In other cases, meetings were held separately in person with the tenant and the landlord, and some cases involved a combination of on-farm and telephone meetings. During these meetings, the mediators learnt about the background to the dispute from all parties involved.

These pre-mediation meetings also covered confidentiality, identification of issues, and exchange of information, as well as practical details such as agreeing a venue and who would attend the mediation day(s). One of the pilot mediations was held online, so additional preparation for facilitating and operating the virtual meetings was required.

In one case, a good deal of time was required for negotiations with and brokerage between the parties to find an agreed basis to proceed to the mediation day. In other cases, legal advisers were able to simply prepare detailed information including summaries of facts, plans of the holdings, and notes of issues, which were exchanged between parties, adjusted, and agreed in the lead up to the mediation day. In all cases, parties completed an agreement to mediate prior to the mediation day itself.

2.3. Mediation Day

All of the pilot mediations involved two mediators, a landlord party, and a tenant farmer party. The landlord and tenant parties each comprised between two and six people – this included the tenant farmer (and family members) and landlord, plus previously agreed trustees, factors, lawyers, land agents and agricultural consultants. In some cases, it was also agreed that other members of the party (usually trustees or legal advisers) could be consulted by phone during the mediation.

The mediators ensured that parties were balanced in terms of their size and representation on the day, taking individual preference into account: in one case, and at the request of one party, there were no legal advisers involved in the mediation day. In another case, while one party had their legal adviser present on the mediation day, the other party chose to have access to legal advice by phone.

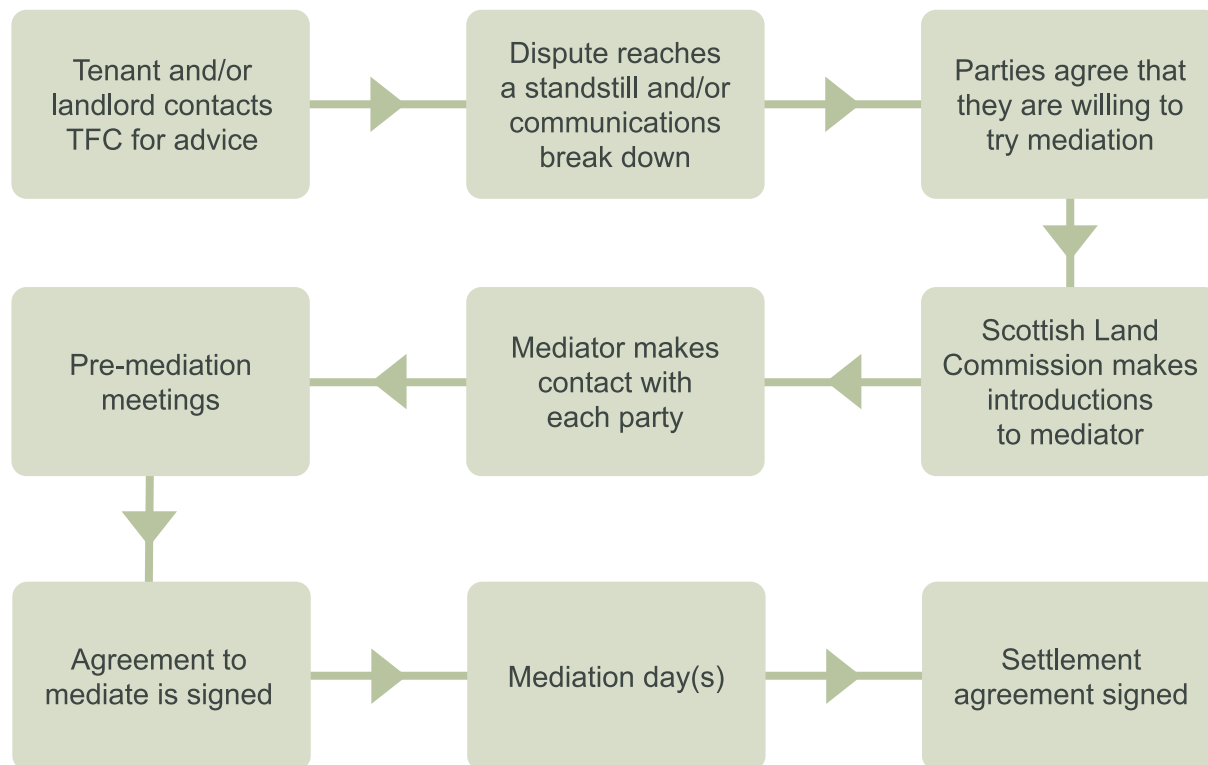
The mediations were held in neutral venues at locations convenient to both parties – three were held in hotel meeting rooms and one was conducted online. For the in-person mediations, usually three rooms were hired, one for each party and one for the joint sessions. At the online mediation, four virtual rooms were in use, one for each party and one for the joint sessions, with an extra room providing space for ‘breakout’ discussions.

The mediations in this project lasted between eight and 21 hours in duration. The longest of the pilot mediations was held online over two days, with a gap of two days in between sessions.

In all four cases, the difficulties of the past were addressed in a comprehensive way, with a settlement agreement drawn up at the conclusion of the mediation. In one case, one aspect of the settlement agreement was provisional and required approval of a trustee body, and it was necessary to reconvene the mediation by tele-conference the following week to produce a final settlement.

Notice in Figure 1 below how much of the process involves discussing and agreeing the mediation. These preparation stages are perhaps the most important steps of the mediation process.

Figure 1: Scottish Land Commission Pilot Mediation Process



3. Lessons Learned from the Pilot Mediations

3.1. Sustainable Outcomes and Building Relationships

In all of the pilot mediations there was tough talking and uncompromising bargaining during the course of the mediation days. The stances and behaviours initially taken were drawing on a history of disagreeable relationships between the parties, sometimes going back generations.

This intractable demeanour changed during the mediated dialogue, and without exception each negotiation became respectful, constructive, and less presumptuous in tone. In some cases, the parties even engaged in what might be described as negotiation with an air of creativity to arrive at solutions. As the outcomes had the potential to affect the prospects of their descendants in the future, mediation provided opportunities for engaging the parties in long-term thinking about resolving the dispute for the benefit of posterity on both sides.

The issues considered during mediation were multi-faceted and through the course of the discussions topics sometimes arose which parties had not foreseen during the mediation planning meetings. As the parties realised the opportunity presented by a mediated resolution, they became more receptive to widening the field of negotiation. Given the nature of the outcomes, this led to agreements which were in the parties' longer-term interests, which, it is hoped, will add to the enduring value of the settlement agreement and the success of the mediated negotiation.

Although it may be unrealistic to expect relationships to be wholly mended in one day of negotiation, the participants now have more awareness about the relationship and have recognised a spirit of willingness by both parties to build on the improvement in relationships made during the mediation day.

The experience of achieving settlement through respectful dialogue should assist the parties to engage in future dealings in a more constructive way than had been their experience in the past. Almost all parties were directly involved in securing a way forward, meaning that even if the parties do not experience a significant positive change in relationship going forward, they remain likely to follow up post-mediation with more awareness of each other's situation. In feedback to the Commission, participants noted that landlord and tenant relationships had generally improved, as the decisions made during the mediation were their own, and not imposed by a third party.

“The most positive step forward after the mediation has been the regard in which both parties now hold each other, so much so that we are now having six-monthly meetings with one of the Trustees and their agents and are able to lift the phone and speak to them as required.” Tenant Farmer

“Whilst not all of the items agreed have come to fruition yet, hopefully we will continue to have a better working relationship with the estate.” Tenant Farmer

3.2. Creative Settlements

A range of issues were presented by the disputes, including:

- Resolving landlord-tenant obligations
- Negotiating rent review
- Agreeing compensation for tenant improvements
- Agreeing landlord improvements
- Compensation for land resumption
- Negotiating land sale/purchases
- Agreeing a lease
- Establishing communication arrangements for the future.

Each mediation included several of these, if not at the beginning, at least by the end of the day. It was common for new matters to be raised and receive consideration during the process of mediation. At the point of settlement, looking back on the ‘burning issues’, there was sometimes little relationship between the parties’ priorities for resolving their problems at the start of the mediation to the position they arrived at when they had found a way forward. For example, a dispute over the obligations of the respective parties under the terms of tenancy can be resolved when the resolution is an adjustment of some other aspect of their respective responsibilities. This flexibility would not have been possible in seeking a court settlement. Rather than relying on the judgement of a third party, as in court, mediation actively engages participants in the process as they are directly responsible for reaching mutually acceptable agreements.

In some of the pilot mediations, the parties came away with something more than they went into the dispute with. This is because additional benefits that were not previously realised came to light during mediation. One participant said that the outcome couldn’t have been achieved in a court process as there were a number of things that needed to be addressed and in a non-linear fashion. Another said that the outcome couldn’t have been predicted, and new issues came in as part of the discussion.

“The pilot mediation in which I was involved was extremely successful. Mediation can be invaluable in resolving legal disputes, especially where there has been a breakdown in continuing relationships such as between landlord and tenant, or within families or partnerships.” Landlord’s lawyer

3.3 Saving Time and Costs / Avoiding Litigation

The four pilot mediations dealt with several matters which were already being litigated or where litigation had been threatened. The mediations resolved some disputes where Land Court actions had been separately lodged, and at least four potential Land Court actions were avoided. The timescales for mediation were significantly less than litigation timescales, which would have tied up the parties, their advisers, and the courts in many days of preparing evidence and attending court hearings.

“The mediation resolved some long-standing issues which otherwise would have been heard in court.” Tenant Farmer

In our pilot cases, the mediators were usually involved for between eight and 14 weeks from first introduction to settlement. In one case, it took 21 months to reach settlement, but the mediation was put on hold to allow the parties to negotiate between advisers. Once the decision was taken to proceed with the mediation, it then took 15 weeks from the restart to settlement.

The average cost of each mediation was £3,400. This would normally be split between parties, but for these pilot mediations the cost was funded by the Scottish Land Commission. This cost included mediators’ fees and venue costs but did not include professional fees incurred by individual parties. The costs of mediation for each party can therefore be estimated at a few thousand pounds, whereas the costs of litigation may have involved tens of thousands of pounds.

“As a process, mediation is far preferable to the Land Court and any process which encourages discussion, face to face, between the landowner and the tenant has got to be encouraged as most issues can be resolved face to face.” Tenant Farmer

It is also important to bear in mind that one party in a court case, as well as being unsuccessful in their claims, is also liable to meet the other party's costs. The losing party in a case that is taken to the Land Court may lose everything they claimed against the other party, but in mediation both parties are likely to come away with something if they settle, even though that may mean being prepared to compromise.

“Having been to the Land Court in the past and now having taken part in mediation, I would recommend that all parties attempt mediation prior to being heard in Court.”
 Tenant Farmer

3.4 Equal Access to Dispute Resolution

For some participants, engaging the Land Court was not a realistic or a preferred option – mainly due to the cost. Mediation therefore provided equal access to a fair basis for dispute resolution where no party had an advantage over another.

3.5 Confidentiality

Mediation is conducted under an obligation of confidentiality, and this was explained and agreed with participants at the outset. Participants stated that confidentiality was an essential part of the process and was professionally managed. Although the Tenant Farming Commissioner was instrumental in suggesting mediation, he was not part of the confidentiality agreement, meaning that he neither participated in, nor had any say in, the mediation proceedings or outcomes. As a learning point, one participant has suggested that the TFC should have been part of the confidentiality agreement in order to follow up on the outcomes.

3.6 Support and Oversight of the Tenant Farming Commissioner

Participants commented on the support and influence of the Tenant Farming Commissioner (TFC) in the pilot mediation service. Having the oversight of the TFC gave some participants the confidence to take part in what was an unknown process, and the support of the TFC provided reassurance in mediation as a worthwhile approach. The TFC's referral was therefore useful in providing a respected third party overseeing the process, and participants valued the ability to speak in confidence to the TFC for reassurance.

Interestingly, referral by the TFC also created an expectation that participants should behave constructively. The endorsement of the TFC therefore not only provided confidence in mediation as a process but created an expectation that parties should behave well and do their best to reach an outcome. In this way, the TFC provided the 'third side,' an invaluable presence which focused parties on being reasonable and constructive: it was subtle but made a tremendous difference.

“I do consider that agricultural and partnership disputes would benefit from mediation and the support of the Tenant Farming Commissioner/Scottish Land Commission is important in encouraging the participation of parties who might otherwise be sceptical of the potential benefits of mediation.” Landlord's lawyer

3.7 Involvement of Professional Advisers

Professional advisers were of assistance to the mediation process, supporting their clients in participating and helping to find appropriate outcomes; those that had experience of mediation also helped their clients to understand and buy into the process. Where this was the case there was a common understanding of what mediation could achieve, and professional advisers helped in the use of non-confrontational language. Valuers, land agents and agricultural consultants were of particular help due to their understanding of the nature of farming responsibilities and brought a sense of practicality and objectivity into negotiations.

Building trust with a mediator is an important aspect of mediation. Not only was it important for the mediator(s) to build trust with professional advisers, but it was also necessary to build trust directly with the parties themselves. The mediators found that putting in time into the preparatory stages of mediation with the parties proved valuable during the course of the mediation day. The parties' ability to trust the mediator to remain impartial throughout is a key factor in the mediation process.

“The professional attitude of the advisers and lawyers were very important in making the mediation a success.” Tenant Farmer

4. Further Information

If you are interested in finding out more about mediation or seeing how mediation works in action, the Scottish Land Commission filmed a [mock mediation](#) with the Agricultural Law Association and Scottish Mediation that covers a fictional dispute between a landlord and a tenant farmer trying to resolve a waygoing from an agricultural holding. The mock mediation is fictitious but is portrayed by professionals who are all experts in their fields. Crispin Agnew QC sums up the process at the end of the [Day 2 video](#) (starting at 1:59:07) and discusses the benefits of mediation compared to litigation. The mock mediation is available to view for free on the Commission's website: landcommission.gov.scot

Following the success of the four pilot mediations, the Scottish Land Commission launched a new mediation scheme for agricultural landlords and tenants to help them resolve disputes as an alternative to seeking resolution through litigation. The scheme has three elements:

- A Tenant Farming Commissioner gateway – to ensure parties are suitable and ready for mediation and to enable access to TFC support and reassurance if required
- An approved panel of mediators – to provide easy access to experienced mediators
- A contribution from the Scottish Land Commission of one third of the total cost of the mediation process (payable to mediators on the panel) up to a maximum of £1,000 (+VAT).

Full details of the scheme and how to apply can be found on the Commission's website: landcommission.gov.scot



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