



Scottish Land Commission
Coimisean Fearainn na h-Alba

Issued by the Tenant Farming Commissioner

A GUIDE TO – The use of Alternative Dispute Resolution in the Scottish agricultural holdings sector

This guide outlines some of the ways in which the use of Alternative Dispute Resolution (ADR) can be used in order to resolve disputes without going to court. It provides information on which ADR process to choose and when to seek further assistance.

Users of this guide are advised, however, to obtain independent legal advice relevant to their particular circumstances before acting upon any of the information contained in this guide.

INTRODUCTION

Tenant farmers and landlords involved in a dispute know that it can be overwhelming and difficult to find an acceptable outcome. This can lead to or exacerbate problems in maintaining strong and constructive relationships, important to the tenant farming sector.

With this in mind the Tenant Farming Commissioner (TFC), who is responsible for promoting and encouraging good relations between tenants and landlords, has commissioned this Guide on Alternative Dispute Resolution (ADR). It provides you with an outline of some of the ways in which you can resolve disputes without going to Court. This guide includes two appendices: the first provides a list of organisations and other references for further information; the second covers some frequently asked questions about mediation.

Scottish agricultural holdings legislation is complex. The Land Court is the ultimate decision maker when things go wrong. In addition, the Tenant Farming Commissioner has issued Codes of Practice, designed to encourage good practice. Landlords and tenants have legal rights. It is very important that you enter any dispute resolution process with full knowledge of those legal rights and that you take advice. Otherwise, you may lose out on claims of value to you.

Alternative dispute resolution processes are evolving all the time. The following shows an outline of the main options currently available:

1. Arbitration

Arbitration is sometimes described as a “private version” of going to Court. It is a mechanism whereby the binding determination of a dispute is entrusted in a third party, who for all intents and purposes acts as a private judge. The arbitrator will hear both sides of the dispute before making a decision which the parties agree to accept as legally binding. This means you cannot subsequently take Court action and there are very limited avenues for appeal of an arbitral award, except to enforce the award itself. This limits the duration of the dispute and any associated liability. The arbitrator’s decision is confidential and cannot be made public without the agreement of both parties.

Scottish legislation currently governing arbitrations contains a set of mandatory rules establishing the framework for the arbitration which cannot be contracted out of or varied by the parties and a set of default rules which will apply unless the parties agree to vary or contract out of them.

Example: Use of Arbitration

The landlord and the tenant have had some discussion about reviewing the rent of a 1991 Act tenancy but are some way apart as to the appropriate level of rent. There are no other on-going disputes between the parties and their relationship is reasonably good. They may decide to appoint an arbitrator they both have confidence in to make a decision for them as to the rent for the next 3 years which will be binding on both the landlord and the tenant.

2. Expert Determination

In expert determination, parties agree to appoint an independent expert to determine an issue or issues in dispute between them which may require technical or specialist involvement. The expert will be recognised as a professional expert in the subject matter of the dispute and a person with whom both parties have confidence in to make an informed decision. The expert will look at both sides of the case and then make a decision which is legally binding on both parties. Expert determination can be best for deciding technical areas of a complex disagreement and may be used on its own or as part of another dispute resolution process. The expert determination does not necessarily result in a finding in favour of one party or the other though acceptance of the determination may have that result.

Unlike arbitration, there is no legislation governing expert determination. There are some rules for some surveyors taking on the role of expert. Parties can agree the terms of the expert's appointment by contract.

Example: Use of Expert Determination

The landlord and the tenant are at an advanced stage of discussing the repairs and maintenance necessary for the holding in circumstances where the 1991 Act tenancy has been held for many generations and there is limited paperwork. They are making good progress using the Code of Practice on the Maintenance of the Condition of Tenanted Agricultural Holdings. However, a technical question has arisen as to whether a barn was provided in a condition suitable to the holding at the lease commencement, whether the tenant adequately maintained it, or whether it has always been subject to a latent defect. The parties agree to bring in a specialist building surveyor as an independent expert, to look at the barn and provide them with a report as to its condition and likely reason for it now being in disrepair, to help them conclude their negotiations.

3. Negotiation

In many cases, disputes can be resolved through discussion between the parties directly or via agents appointed by each party by correspondence and/or face to face. Sometimes it may assist for agents to attend with their clients and try to find an outcome at a meeting or series of meetings, in a conciliatory approach.

Example: Use of Negotiation (solicitors acting for each party)

A tenant wishes to pass his lease interest onto his son using the lifetime assignation provisions of the Agricultural Holdings (Scotland) Act 1991 legislation. The existing lease is unwritten which has certain disadvantages for both tenant and landlord. On the tenant's solicitor writing to the landlord's solicitor in connection with the assignation, the landlord's solicitor suggests a new written lease and the discussion develops as to its terms from there with full involvement of both landlord and tenant.

4. Mediation

Mediation involves the parties to the dispute appointing a third party, the mediator, with no vested interest in the outcome or decision making role, to help reach a mutually acceptable outcome. The intended outcome is one that both parties can live with which is better than the alternative either might expect to achieve in litigation. It is not a case of winning or losing.

Mediation can address legal and non-legal issues and can evolve as the process develops to find more imaginative solutions. It encourages parties to think differently in order to find an acceptable outcome utilising an interests-based rather than a rights-based approach.

Mediation works because both parties are heavily engaged in the process and take responsibility for trying to resolve their dispute. It is however flexible and voluntary, so either party can walk away if at any point during the mediation process it feels that an outcome cannot be reached. If this happens the discussions held at mediation are without prejudice which means they cannot be referred to in litigation or other ADR processes to follow. This is rare once mediation actually commences and parties see it working at a practical level.

Different mediators have different styles and will adjust the process to suit the parties and/or the dispute. Usually, a mediation will be hosted at a neutral venue with a number of rooms available. There will be a private room for each party (and their advisers if they are attending) and a larger room where parties can meet together with the mediator, should they wish. Provided that the parties feel able to do so, normally there will be a number of joint sessions in which grievances are aired and proposed solutions discussed, with the ability to move to private sessions with the mediator to consider next steps before returning to a joint session to conclude if a satisfactory outcome is found.

Even when an outcome is not reached, mediation can lead to a greater understanding of where the other party is coming from, leading to a narrowing of issues to be determined by a Court or other form of ADR and/or lessening the personal animosity between the parties. Some frequently asked questions about the mediation process are included in the appendix.

Example: Use of Mediation

A tenant has been in occupation of two fields for cattle grazing since 2002 and paying an annual rent. He has been advised that he holds an unwritten 1991 Act tenancy. The landlord says that occupation between 2002-2003 was under a grazing let and that a Limited Duration Tenancy (LDT) has since emerged, due to a change in the law from 2003 onwards. The landlord thinks he has good evidence to prove this in Court and has indicated his willingness to do so. This has unsettled the tenant who up until now believed that he had a protected tenancy.

The landlord thinks he is likely to secure planning over one of the fields for a sale to a housing developer. He wants to maintain the other field in agricultural use.

The tenant and his son want to continue farming the two fields, either by purchasing them from the landlord or continuing as tenant.

Litigation could resolve the question of the type of tenancy in existence. The landlord will not be able to resume for development from an unwritten 1991 Act tenancy and would need to secure planning and wait at least a year to resume from the LDT if that is what the Land Court decides is in place.

Neither party wants to go through the stress and cost of litigation and there are risks to both in respect of the final outcome.

Mediation could enable parties to reach a more imaginative resolution. For example the tenant might agree to renounce their interest over one field in exchange for a sale at a discounted price of the other; or to give up some land in exchange for a fixed tenancy or a confirmed 1991 Act tenancy of the remainder secured in writing; or the tenant might agree a buy out of the whole or the parties may agree to a split of future development value of part. Mediation would enable the parties to discuss the options freely, without prejudice to their legal rights and preventing both suffering the stress of an ongoing litigation with uncertain results for both over which neither has control.

WHICH ADR PROCESS SHOULD I CHOOSE?

Choosing the best ADR process will depend on the circumstances of each dispute. Sometimes you might use one or two different processes to help unlock different aspects of the same dispute.

Cost and time are often important considerations.

The time it takes to resolve a dispute and the cost of the ADR process depends on complexity of the dispute and charge out rate of the professionals involved. Professional arbitrators, experts and mediators will charge for their time and will usually provide a costs estimate prior to instruction or on receipt of papers, before the process commences. In addition parties may have other professional fees to cover (such as their solicitor's fee) if they are represented.

In the majority of cases each party will meet their own professional fees and split the cost of the arbitrator, expert or mediator 50/50. It is possible for the parties to agree that one party will meet the full costs of the whole process, a contribution up to a cap, or a higher percentage share of the charge for the arbitrator, expert, or mediator.

ADR can be very helpful but that does not mean you should always rule out going to the Land Court. The Land Court is a practical Court and has more flexibility than other Courts. It is also committed to assisting parties in reaching an outcome, albeit the Court itself is of course restricted as to the type of solution it can order in terms of legal rights.

Disputes take time and effort to resolve regardless of the process (or processes) used. ADR usually offers a quicker and cheaper means of reaching an outcome than litigation which does not mean that it is inexpensive particularly in a more complex dispute. Where parties take greater responsibility and ownership of their disputes, they are more likely to be satisfied with the outcome.

The table below offers an approximate guide to the different ADR processes depending on what your priorities are.

At a Glance: What Can Each ADR Process Deliver

Priority	Arbitration	Expert Determination	Negotiation	Mediation
Binding decision by a third party	✓	✓	x	x
Confidentiality	✓	✓	✓	✓
Direct involvement in process	x	x	✓	✓
Mix of rights-based and interests-based outcome	x	x	✓	✓
Helps to resolve personal differences	x	x	✓	✓

APPENDIX 1: FURTHER REFERENCE

ARBITRATION

The Scottish Arbitration Centre website has further information about the arbitration process and a list of arbitral appointment referees:

www.scottisharbitrationcentre.org

Arbitral Appointment Referees are as follows:

Agricultural Industries Confederation Limited:

www.agindustries.org.uk

Chartered Institute of Arbitrators:

www.ciarb.org.scotland

Dean of the Faculty of Advocates:

<http://frds.advocates.org.uk/members.asp>

Institution of Civil Engineers:

www.ice.org.uk/disputeresolution

Law Society of Scotland:

www.lawscot.org.uk

Royal Incorporation of Architects in Scotland:

www.rias.org.uk

Royal Institution of Chartered Surveyors:

www.rics.org/drsscotland

Scottish Agricultural Arbiters and Valuers Association:

www.saava.org.uk

The legislation setting out mandatory and default rules for arbitration is:

The Arbitration (Scotland) Act 2010

EXPERT DETERMINATION

There is no current umbrella organisation for expert determination and no statutory rules on expert determination.

The Royal Institute of Chartered Surveyors has published Guidance, principally for its members acting as experts, available on their website:

www.rics.org

MEDIATION

Scottish Mediation, a charity which exists to promote mediation, support and facilitate the development of best practice and support mediators in Scotland, may be able to provide you with additional information. Their website includes a list of mediators who have met standards fixed by Scottish Mediation and they also have a free helpline.

www.scottishmediation.org.uk

Helpline: 0131 556 8118

SCOTTISH LAND COURT

The Land Court's website contains some very useful information, including some details about ADR within its DIY Guide to Litigation:

www.scottish-land-court.org.uk

The main legislation affecting agricultural tenancies in Scotland comprises:

The Agricultural Holdings (Scotland) Act 1991

The Agricultural Holdings (Scotland) Act 2003

The Agricultural Holdings (Scotland) Order 2011

The Land Reform (Scotland) Act 2016

APPENDIX 2: FREQUENTLY ASKED QUESTIONS ABOUT MEDIATION

1. What preparation and paperwork is required?

You should prepare for mediation as thoroughly as you would to go into Court or any other form of dispute resolution. You will need evidence of the points you wish to make e.g. records of key dates relating to the dispute.

You will be asked to sign an Agreement to Mediate before commencing mediation. This sets out the ground rules for the mediation process, such as who will attend and the fact they must all keep what is discussed confidential.

If the mediation results in an outcome acceptable to both parties it will be confirmed in a Settlement Agreement. This is usually signed by all parties at the close of the mediation, but in some cases will be signed after mediation or at a separate mediation session scheduled later.

Mediation can be hard work and often runs late into the evening. You should be prepared to engage in a difficult but rewarding process.

2. Why do we need a mediator there at all?

The mediator's main role is to assist the parties in reaching a mutually acceptable outcome. They are not a decision maker or judge, have no vested interest in the outcome (although the mediator of course wants the process to be successful and for parties to leave with an agreed outcome if possible) and are not there to represent either of the parties. The importance of this third side in dispute resolution can make a very real and important difference to the outcome parties could achieve themselves or via representatives acting for them. The mediator is able to view the dispute objectively and make suggestions to each/both parties in a way in which their own advisers or the parties personally cannot. The mediator will have completed special training in mediation and is focused on assisting parties in reaching an outcome.

3. Will I look weak if I offer mediation?

No. This is a very common misconception which is fortunately dispelling with the passage of time and the more that mediation is used and seen to produce good results. It is usual to mediate without prejudice to your legal position – in other words, if you don't reach agreement at mediation, you can go back to a Court case without anything said in the mediation being disclosed in the Court case (although discussion at mediation may narrow the issues to be resolved in litigation). Mediation is a form of dispute resolution that you both enter into, with its own process and rules. You are suggesting a different means of resolving your dispute because you think it may better resolve your case than an alternative.

4. Do I have to face the other party if we go to mediation?

No, you will have your own private space. Whilst in most mediations parties do meet at certain points during the mediation day you do not have to meet the other side or do anything that you do not want to and which you are not comfortable with. Sometimes parties unwilling to face each other at the start of a mediation will be willing to do so at or towards its conclusion if they are able to reach an agreement.

5. What happens if I don't like any of the options on the table at mediation?

You will be encouraged by the mediator to generate different options and/or to explain to the other party why the options currently on the table are not of interest. You will also be encouraged to really look at why they are not of interest and if anything can be done to change this. For example, mediators often use a best case scenario versus worst case scenario analysis to look at the possibilities for resolution (or not) going forward. This can be very hard work, but rewarding.

**6. If we reach an agreement at mediation is it binding?
What happens if the other side do not honour the agreement?**

Yes, if you reach an agreement on the mediation day (and you are not bound to reach such agreement) then it will be concluded in a legally binding contract enforceable like any other contract.

Occasionally contracts can be breached by one or both of the parties and the agreement itself may contain provision to deal with this and/or it may be possible to sue under its terms if there is a major breach. This is very unusual in mediation as the parties themselves have had so much input into the terms of the contract and usually have a very detailed understanding of what they have entered into as well as its implications, making it less likely that they will breach its terms.

7. How long does it take?

No two disputes are alike and the length of time it takes to conclude a mediation will vary significantly depending on complexity. It is not unusual for mediations to run late into the night or the early hours of the morning and once momentum gets going parties may wish to continue. It is possible, if this is foreseen, to schedule the mediation for two or more days, or to arrange for parties to return to mediation the next day, or some time later, if they are making good progress but unable to conclude in a single business day. It is equally possible for focused parties to reach agreement within a normal business day.

8. Where will the mediation be held and who can come with me?

A neutral venue is ideal. Some mediators can provide premises or suggest venues where hire fees apply. In some cases where one or both parties are represented by a professional adviser their office may be used (with consent of the other party) provided that they have separate meeting space and sufficient space for private and joint session meetings.

All parties in attendance must sign up to the Agreement to Mediate. With agreement of the other party, your partner may attend. It is usual, particularly in more complex cases, for your solicitor and/or other professional advisers (e.g. land agent) to attend also.

9. Does the mediator need expertise in agricultural holdings legislation?

There are different schools of thought as to whether it is better to have a mediator with specialist knowledge in the subject area of the dispute and it is generally a matter of personal preference for the parties. Most commercial mediators are however used to dealing with disputes in different and often complex subject areas and provided that they are fully trained and experienced mediators, a background knowledge in agricultural holdings is not essential. Some people feel that a mediator who does not have specialist knowledge of the area could be at an advantage, in that they could ask more open questions which might help the parties better understand their dispute. If you are represented at mediation your advisers can provide the necessary input on the technical areas as they arise.

10. Does it work?

No dispute resolution process can offer a cast iron guarantee as to success in advance. In the majority of cases mediation results in an agreement both parties are satisfied with and which both parties respect and implement. For example, research into pilot schemes in Aberdeen and Glasgow Sheriff Courts Small Claims Mediation Service found that 90% of cases referred to the pilot scheme mediation service resulted in settlement. [Ross, M. and Bain, D. (2010) Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Scottish Government Social Research, Paragraph 1.15].

Success can be measured in different ways – for example in some more difficult cases a partial agreement, with other points left for determination by another means, may be viewed by the parties as success in the circumstances of their dispute, particularly if it results in a better working relationship (or restores some sort of working relationship) for the future.



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This guide was prepared by Heather Bruce, Associate, Turcan Connell, who trained in mediation with Core Solutions Group in 2008 and was accredited by the Law Society of Scotland as a specialist in Agricultural Law in 2015.