Reforms: cases for the defence

David Lee hears how courts are, in the main, working effectively and rising to the challenge of increasingly complex legal actions

The Edinburgh trams inquiry, headed by Lord Hardie, above, involves many advocates. Picture: Lisa Ferguson

Scotland's court processes must be simpler, quicker and more cost-effective. That was the clear message delivered by Lord Carloway, the Lord President, at the Law Society of Scotland's annual conference in September.

Case management should be better, with judges and sheriffs more involved, and the adoption of new technology had to pick up pace, he insisted.

However, one senior advocate cautions against painting an overly negative picture and says his firm's experience is that the courts are working effectively and rising to the challenge of complex litigations.

Alastair Duncan, stable director at Axiom Advocates, says: "In one of our core areas, commercial litigation, the system is working very well. It is reasonably streamlined and there is an effective level of judicial case management.

"In both commercial law and public law, the volume of work is holding up and, if anything, becoming more complex. That is a welcome challenge."

Duncan uses three major cases to highlight the ability of the courts to cope with added complexity, including the £130 million SSE v Hochtief Solutions case, over a tunnel collapse at the Glendoe hydroelectric power scheme near

LITIGATION

Fort Augustus. The judgment, delivered just before Christmas last year, rejected the main claim on the basis of evidence gathered in hindsight but awarded SSE "low availability damages" for Hochtief's failure to return to repair the tunnel.

"The case lasted many months and its scale was one the court had not seen for a very long time," says Duncan. "There was a vast number of counsel involved [seven from Axiom] and innovative use of technology, and it worked very well."

Axiom was also involved in the minimum unit pricing of alcohol case, where the Scottish Government's stance was backed by the Scottish courts, only to end up in the Supreme Court in London after a challenge by the Scotch Whisky Association in the European Court of Justice.

The ECJ said the legislation might break EU law if other tax options would prove as effective but said it was "ultimately for the national court to determine" whether they did. The Supreme Court heard arguments earlier this year and judgment is awaited.

"The case took Axiom to the Supreme Court and it is hard to think of a more high profile or complex case," says Duncan, who also highlights an "unusually complex" case of alleged investment fraud to show what the Scottish courts can do. "They are rising to the challenge, showing themselves to be flexible and able to work with all parties," he says.

"We do need further discussion to make sure technology works for everybody [and] whether it's effective and how much it costs.

"I and many colleagues use iPads routinely, rather then physical documents, but the risk is there is an even greater volume of digital [than traditional printed] material. However, by and large, the move to a greater use of technology is working."

Axiom is involved in the Edinburgh trams inquiry but Duncan stresses it manages many "short, straightforward" cases too.

And as Axiom celebrates its 10th anniversary, he believes the stable system has worked well in Scotland: "We were at the vanguard of change in terms of how advocates provide services to the people of Scotland. We saw clear benefit in organising in stables, based on practice interest.

"We started with 29 members, and now have 26 QCs and 23 juniors. The model is working well." Duncan feels the courts have shown flexibility in offering alternative dispute resolution avenues: "Not all cases proceed to judgment. The court will often expect and sometimes order the parties to mediate. Clients and their solicitors are finding this an attractive approach."

He is less enthused by a move towards arbitration: "The faculty has placed a lot of faith in arbitration. We see the benefits but shouldn't overstate its importance.

"For our commercial clients and instructing agents, the core form of dispute resolution remains litigation, especially through the commercial court of the Court of Session.

"We are still seeing a number of cases shaking down from the financial crisis. We have seen a number of complex, high-value professional liability legislation cases which need to go to a judgment.

"Those cases have benefited from the management of the court, including meetings between parties, and we see little benefit in adding in the cost of arbitration."

Leading mediator John Sturrock, chief executive of Core Solutions Group, suggests the enthusiasm for arbitration in Scotland is not necessarily shared globally: "The drive towards arbitration is due to a general awareness that litigation is not working in terms of speed, cost and uncertainty.

"In other jurisdictions, mediation has a greater part to play as an effective first step before arbitration need be considered. Involving a third party can add value, innovation and creativity they might not have found working only with each other."

Sturrock welcomes Lord Carloway's interventions on the need for quicker, more cost-effective justice and says: "His comments recognise the fact that the courts, as constituted, cannot meet the needs of those trying to resolve a dispute or problem."

However, he believes court reforms have introduced greater understanding of how disputes can be resolved: "We are increasingly seeing a recognition that modern problem-solving is not one-dimensional and lawyers are much better equipped to deal with a variety of options.

"Mediation, which has perhaps been seen as something peripheral, is now recognised as more central and much more suited to resolving problems – for private companies, public sector organisations and ordinary people who are having to spend so much on resolving disputes.

"Disproportionate amounts are spent on cases which are nowhere near the final stages of resolution, and those costs can become a real impediment to resolution.

"Even where there is a resolution, a large amount might go to legal costs and expenses, which can leave claimants frustrated and disappointed.

"That isn't a criticism of lawyers, but of a system which requires energy and money to be spent on taking adversarial positions." Sturrock says this adversarial approach often misses underlying issues – personal, commercial, reputational and time-related – which must be addressed if the dispute is to be resolved.

However, while awareness of mediation is higher among lawyers, with many hundreds having used it in Scotland, he is concerned that only a relatively small number of cases which could come to mediation actually do so.

"I'm still surprised by the number of times the offer of mediation is declined or seen as inappropriate for a particular case," says Sturrock.

"Having conducted hundreds of mediations, I still see mediation refused when it should fit the problem at hand fairly and squarely.

"There is still something of an inbuilt reluctance in this and other jurisdictions to fully understand mediation as part of the dispute relation spectrum."

Sturrock argues that, by bringing in an independent mediator, lawyers and clients can "take control of decision-making, process and cost".

He has seen an upturn in mediation being used in complex negotiations between employers and trade unions influenced by reduced resources and changes like the removal of public sector pay restraints.

Mediation is also being drawn on more by private claimants seeking redress from professional advisers, especially where the amount involved would not necessarily justify a full court action. ■

BRIEFING

Mediation

John Sturrock QC
Chief executive and senior mediator, Core Solutions Group

The Civil Justice Council of England and Wales recently issued its Alternative Disputes Resolution (ADR) working group's interim report, ADR and Civil Justice.

It observes: "The acknowledged background is that most disputes are resolved by agreement in commercial and everyday life, without proceedings and usually without the intervention of lawyers.

"The vast majority of cases that enter the Court system are resolved by settlement...

"Until 30 years ago the English legal system largely treated settlement as the accidental by-product of an efficient adjudicative system.

"... dispute resolution professionals now appreciate that it is in the interest of all parties for a conscious effort to be made to explore and discuss settlement and that very particular skills and techniques are available to assist in that effort. In many cases parties will benefit from outside help in achieving that result."

In that context, the group concludes: "Mediation can be regarded as the pre-eminent non-adjudicative dispute resolution process conducted in parallel with litigation.

"It is common for cases to be stayed (sisted) for mediation on the route to trial."

For us in Scotland, what more can we do to ensure that fewer clients achieve settlement where costs and time expended are disproportionate to the outcome?

One answer is to use mediation much more. ■