Cross-fertilisation

Beverly-Ann Rogers considers what civil commercial mediators can learn from family mediators, and vice versa

Beverly-Ann Rogers is a barrister mediator at Serle Court

'Family commercial disputes share with matrimonial disputes the high-octane mix of money and emotion, and none more so than trust and estate disputes.'

Take two couples: Janet and John and Peter and Penny. Both couples have been together for over 12 years. Each of them has a family home, a holiday home, a substantial business in which they have an equal stake and investments derived from the business. Both couples have difficulties in their relationships and both have been to Relate for counselling, but to no avail. Each couple has decided that they must separate permanently and face real challenges in disentangling their emotional and financial involvement. They want the parting to be as amicable and quick as possible and have heard that mediation might help to achieve that. Although they face similar problems and have similar objectives, there is one crucial difference: Janet and John are married and Peter and Penny have never formalised their relationship. Quite apart from the difference in the legal landscape against which they will negotiate, Janet and John and Peter and Penny will find themselves in very different mediation landscapes.

The likelihood is that Janet and John will beat paths to the doors of matrimonial lawyers, whereas Peter and Penny will consult private client/chancery lawyers. The lawyers, in turn, will recommend mediation and a mediator, and there the similarity will end.

Two different paths

Janet and John will have a series of meetings, usually an hour and a half in length, with the mediator over a number of weeks or months. On average, three to six meetings will be necessary to fashion an agreement. During the mediation Janet and John will each fill in Form E or a similar form setting out their assets and liabilities and their income and expenditure, both historical and anticipated. As the mediation progresses, they may clarify financial information, for example by obtaining valuations of key assets. The mediator will conduct all the mediation sessions with both Janet and John present throughout. The mediator will not see or communicate with either of them privately. Indeed, if one of them communicates with the mediator privately, the mediator cannot keep that confidential from the other. The negotiations in the context of mediation are confidential and without prejudice, save for the financial disclosure, which is open and may be used in court if the parties do not reach a negotiated settlement. The lawyers will not be present at the mediation or have any contact with the mediator, although Janet and John will probably keep their respective lawyers informed and consult them between sessions. They may be helped in doing so by an interim report from the mediator, which will comprise an open financial statement setting out the financial disclosure to date and a privileged and without-prejudice memorandum of understanding. This will set out the interim proposals for agreement, as discussed in the mediation, and highlight what remains to be discussed and what further information would aid those discussions. If the mediation ends in a proposal for settlement that both Janet and John can agree to provisionally, there will not be a binding settlement at that stage. The provisional agreement will then be referred to their respective lawyers, who, with the aid of a final financial statement and memorandum of understanding from the mediator, will draw up a binding agreement for their clients to sign. Before doing so they may seek other expert advice from accountants or tax advisers.

Peter's and Penny's mediation will take a different course. Rather than a series of sessions, the mediation will

be conducted in one go and usually completed in one day. This makes it vital that all relevant financial information is collected and exchanged in advance. It requires the lawyers, with the help of the mediator as necessary, to anticipate what the sticking points might be and, where appropriate, arrange valuations, either jointly or individually. There will usually have been solicitors' correspondence identifying the key issues, possible hindrances to settlement and any further information or clarification needed. Peter's and Penny's lawyers will prepare and exchange without-prejudice mediation statements setting out their clients' positions, and usually including a wish list of what they would like by way of settlement. The whole of the mediation is without prejudice and confidential, so financial information given at or for the purposes of the mediation cannot be referred to in court if there is no settlement. The day of the mediation will be unrecognisable to a family mediator. Peter and Penny will attend with their lawyers (solicitors and/or barristers), maybe their accountant or tax adviser, possibly an expert valuer if the issues require it, and maybe a relation or friend for additional moral support. There is a tradition of a joint meeting to start the mediation, but it is not a necessity, and Peter and Penny may not meet at all during the day. Whether they meet or not, they are likely to spend much of the day cloistered in their own private rooms with their supporters, with the mediator speaking to each of them in confidence and seeking to help them find resolution through shuttle diplomacy. The aim is to identify a settlement which will be reduced to writing and be signed on the day so that the mediation ends with a legally binding agreement.

Now, let me declare my position in this. I am, by background, a chancery lawyer and civil commercial mediator. I have conducted numerous mediations which I describe as family commercial, by which I mean a business or financial dispute involving family members, whether they be siblings, parent and child, step-parent and children, or personal partners. Those disputes share with matrimonial disputes the high-octane mix of money and emotion, and none more so than trust and estate disputes. It seemed to me that there must be much to be learnt from mediators who were at the cutting edge of that mix, namely family or matrimonial lawyers. I was fortunate to have the opportunity to learn from Henry Brown, who is experienced in both family and civil commercial mediation, and who runs a civil commercial to family mediation conversion course for the ADR Group. These are my personal reflections on what I will take from that experience to contribute to family commercial disputes and, more tentatively, what family lawyers might take the other way. I group those reflections under the main differences that I perceive, namely openness of financial disclosure, confidential discussions, private meetings versus joint meetings only, and staggered sessions versus one-off mediations.

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Financial disclosure

In divorce, the obligation of complete financial disclosure is sacrosanct, and for obvious reasons. In the commercial sphere the opposite is true: complete financial disclosure is anathema. In particular, one party may be sensitive about its financial position, fearing that knowledge of it would give the other party commercial leverage. That perception tends to have an adverse effect on the degree of openness and, hand-in-hand with that, the degree of trust, in family commercial mediations. That, in turn, means that parties are often reluctant to mediate until after disclosure or after evidence has been lodged. I wonder if, in appropriate cases, there is scope for financial information to be exchanged on an open basis. The open nature of the disclosure would both concentrate the mind of the party giving it, in making sure it was accurate and, most importantly, give it credibility in the eyes of the other party. How often in Inheritance (Provision for Family and Dependants) Act 1975 cases do we see income needs change as the case progresses, and depending on whether the needs are stated in 'without prejudice' negotiations or in evidence. Open financial disclosure (maybe even adopting a modified Form E) might encourage earlier mediation to the benefit of all, particularly in relatively small estates where the legal costs will detract from the money available to make provision for the beneficiaries, or potential beneficiaries, of the estate.

Confidential discussions

Confidential discussions (ie with one side only) are an essential element of the civil commercial model, but are non-existent in family mediations. In the confidence of the private meetings the parties are able to share their concerns with the mediator, discuss options and plan how to engage the other side constructively, while the mediator is able to challenge and probe to help them make informed decisions. This could be equally useful in matrimonial mediation, and there is nothing to stop the parties to a family mediation agreeing to confidential meetings and, if necessary, the attendance of lawyers.

Private meetings v joint meetings

I confess that mediating for an hour and a half between a 'divorcing' couple, with no opportunity for the time out which private sessions afford, is an edgy experience. Like a matrimonial version of *Groundhog Day*, the parties will replay over and over the issues that led them to divorce, with all the attendant emotions from anger to grief. There is the same need to acknowledge and respect each party and their differing viewpoints and emotions as in a commercial mediation, but the family mediator does so in full view of the other and on a knife-edge so far as neutrality is concerned. Still maintaining rapport, the mediator has to be firm in guiding parties out of the seemingly never-ending cycle of disagreement and recrimination into devising a constructive way forward. Despite the challenges for both the parties and the mediator, joint meetings offer opportunities which the safe

model of private meetings and shuttle diplomacy deny. Role-playing the wife of a divorcing couple in a joint meeting and haranguing 'my husband' for casting me off after 20 years like an old shoe without any concern for my needs, there was a poignant moment when he looked at me across the table and said 'You have a point there, and I am concerned for your future.' No message conveyed by the mediator would have had such power. Although the insulation of private rooms protects the parties, it also deprives them of the opportunity for exchanges that may help them let go of the past and move forward emotionally.

However, there is also a place for the private session. In role-play, hearing my about to be ex-husband express continuing concern for me brought up a sense of loss and grief which I was unable to express in front of him. Instead I masked it with more anger. It was the moment for a private meeting. This is an area in which learning from the family model can enhance civil commercial mediations and vice versa. More courage in commercial mediations to ride out the discomfort in allowing parties to voice their conflict face to face could be of benefit, as could some flexibility in matrimonial mediations in permitting private sessions.

One-off v staggered sessions

In any mediation there is a tension between maintaining momentum and going at a pace which allows the parties time to come to decisions which are their own and which they can live with. That is particularly true where there has been a close relationship between the parties, whether personal or professional. They need time to look at all the options, to weigh them carefully, to change their minds if they wish to do so, and to come to terms with the loss of the former close relationship. The staggered sessions of the family model of mediation give more space and time to allow the parties to make that journey within the mediation process, but I suspect that it can engender frustration, particularly if one party has difficulty with decision-making. On the other hand, I can think of some commercial mediations where there has been a former close relationship between the parties and settlement has not been possible on the day of the mediation precisely because one of the parties has needed more space and time to come to a decision. Although those cases usually do settle with follow-up, it is frustrating, as the mediator, that one tends to rely on the lawyers to help their clients complete the journey. The input and support of the lawyers is, however, key in successful commercial mediation, not just their support and advice on the day. The reason why it is possible to mediate a dispute in a single session is that the lawyers have carefully prepared their clients, exploring the options and desired and possible outcomes well in advance, and because the clients come with the expectation of committing to a binding agreement. The so-called golden rule in commercial mediations is not to let the parties leave without signing an agreement. However, the more mediations I do, the more I become convinced that there are exceptions. As a rule of thumb, if the lawyer is not comfortable with their client signing on the night, or if I would not be comfortable if I was the lawyer, it is better to allow some breathing space, but always with a time limit to maintain the momentum. There are various ways of doing that: holding an offer open for acceptance within a specified period; signing an agreement which will be binding unless either party notifies the other that they withdraw, again by a specified date; or simply by fixing a further half day's mediation if settlement has not been achieved by further negotiation between the lawyers. If there is to be an adjournment of the mediation, it is important to record the discussions to date, the proposals for settlement and any further steps, such as tax advice, to be taken before a binding agreement can be concluded. I like the family procedure of preparing a memorandum of understanding as that record, and have recently used it to good effect in a family commercial mediation.

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Hybrid models

Perhaps inevitably the most effective model, and one advocated by Henry Brown, is a hybrid model that permits joint meetings and private confidential meetings as appropriate and may take place over a series of meetings with clients on their own, or with lawyers and other advisers present as needed. I can attest to the benefits of such a process in a substantial multi-party international trust dispute with clients in a number of different locations. The mediation I refer to took place over two days. About two weeks before the mediation, I met the lawyers (and in one case the client) privately and confidentially, heard their individual concerns and looked at possible structures for resolution. With the authority of each party, I was able to iron out some of the preliminary concerns. The day before the mediation I met the clients I had not met previously and had a lawyers-only meeting to agree how we could approach the issues most constructively. We had almost every imaginable combination of meetings during the mediation: a joint meeting of everyone, client-only meetings with various combinations, lawyers-only meetings for some parties or all parties, and lawyers from one party meeting another party and their lawyers. One and a half days later we had an agreement in principle, and after several hours of collaborative drafting we had a signed agreement. We could not have achieved that in two days if it had not been for the pre-meetings and the flexibility of the process adopted. This may sound expensive, but with careful planning, using lawyers and other advisers as needed, it may be cost-effective, as well as the most effective route to resolution. What it does take, and what was undoubtedly present in the example I have cited, is familiarity with the process of mediation, and real trust between the mediator and the lawyers and between the lawyers to use the process creatively. ■