

Business

How mediation can help family businesses avoid the courts to solve disputes

Family firms can benefit from mediation to solve adversarial problems that arise between members, writes Rosemary Gallagher

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Disputes can arise for a variety of reasons in any business, and boards of directors will inevitably disagree at times. But if it is a family firm at the centre of a conflict, the ramifications can be more severe and unrest harder to resolve. The knock-on effect on the family – including their mental health and future relationships – on their employees, and even on the local economy can be devastating.

One of the most recent high-profile examples of a “family business” facing clear divides is the Royal Family – also known as “The Firm”.

Whatever the reasons, Prince Harry and his wife, Meghan, have decided to go their own way and are trying to earn a living independently of the House of Windsor.

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On the other side of the Atlantic, the hit US comedy-drama TV series *Succession* puts the spotlight on the trials and tribulations of a fictional and very large family business.

Closer to home, John Sturrock QC, founder and senior

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mediator
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Group, a

mediation firm in Edinburgh, has advised family businesses in Scotland on a range of issues.

He says: “I recall one family business where two brothers had fallen out after the death of their father. As a result, they had been running bits of the business separately. Now, the next generation was affected. The brothers’ children, cousins to each other, wanted to do things differently but the hard feelings in the previous generation had filtered down to them. There was stalemate.

“Mediation was the key to enabling the two generations to work out a way forward, by saying the things that needed to be said and also understanding each other’s perspectives. They were able to develop their options in the safety of a structured conversation and release the younger family members to take the business forward.”

Such mediation can often be a good solution for dealing with disputes and can help avoid families being dragged through courts and sensitive issues being made public.

But experts agree that it is better to have measures in place to try to avoid any falling-outs having a negative impact on the whole business in the first place.

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With
family

businesses of all sizes making a significant contribution to the Scottish economy, and often being the biggest employer in a town, it is important to try to avoid disputes.

Some of the country's most famous food and drink brands, for example, are family-owned and form a substantial proportion of the country's exports.

Research by Family Business United, which represents the sector, found that the top-100 family firms in Scotland collectively generated more than £1 billion in profits and supported over 100,000 jobs.

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UK survey last year found while 85 per cent of firms that took part in the research plan to remain family-owned for the foreseeable future, almost half have

concerns over profitability and sustainability.

The other top-five concerns were: recruiting, retaining and motivating staff; the economic climate; regulation, red tape and legislation, and balancing the needs of the family and the firm.

While Scottish family businesses are often very successful and well-run, lawyers and mediators can be called open to help them rise to a range of challenges.

Leonie Burke, a family law partner at legal firm Aberdeen Considine, says she might advise someone in a business where another family member has introduced a new spouse to the relationship that any implications of this development need to be carefully considered, for example in terms of where control lies.

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She says
that is
why it is

important to have everything properly documented, or the entire company could be adversely affected. In such cases, she points out that pre-nuptial or cohabitation agreements can be put in place to protect assets.

Diane Cairney, partner and head of dispute resolution and litigation at solicitors Miller Samuel Hill Brown, says: "Family businesses have exactly the same challenges and issues as any other businesses, but they can be unique because of the dynamics and the way

they have evolved over generations.”

According to Sturrock, disputes can be between generations and about a whole range of things, such as the future direction of the business, investment plans, decision-making and how to allocate property, funds and resources.

“If left unresolved, relationships can quickly break down, the business starts to perform less well and assets can lose value. Everyone becomes unhappy and the whole enterprise can be placed at risk,” he warns.

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In terms
of

succession, Sturrock says disagreements can make it more difficult for the business and property to be passed on with confidence. “Resentment can get in the way and animosity can blur clear thinking about the future.”

There are many measures a family business should consider to avoid disputes, or at least limit their impact.

Ross Webb, a partner in dispute resolution at Aberdeen Considine, says: “It’s important to have a clear contractual document in place that governs the business. That can protect the family relationships at the end of the day. And it’s important to make sure that any document that governs the relationship

between parties is updated on a regular basis.”



should be reviewed on a regular basis to take account of changes in relationships.”

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Burke
adds that
it is vital
for

individuals in a business to get holistic advice which includes a family law perspective, alongside the likes of tax planning from accountants, so that all bases are covered.

Cairney agrees that having documents and agreements that are not updated is a common pitfall. “Quite often we find that when we’re involved with a family business, we look at the structure of agreements that have been put in place and they are either not there or they are really historic and are not really the proper vehicles to take forward a modern business,” she says.

“It can be hugely disadvantageous if you’re trying to deal with issues and there’s nothing that actually sets out how they should be dealt with. For avoiding conflict, communication and being proactive about taking advice on structure and agreements are worth

their weight in gold.”

She recommends the creation of family constitutions, also known as family charters, where everyone sits down to get a clear view of a whole range of matters.

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“It’s
more
personal
than you
would
get with
Articles
of

Association,” Cairney says. “You can sit down and plan what you want to get out of the business, where you see it going and you can deal with succession. If this doesn’t avoid conflict, it usually makes it easier to deal with.”

In the case of a dispute developing, many family businesses are now considering mediation to find a resolution and only going to court as a last resort, according to experts.

Cairney says that mediation can be a good way ahead for family firms, adding that it can be useful if there is a time-critical issue to deal with, such as a buy-out offer on the table from a purchaser and there is only a narrow window in which to reach agreement.

“When mediation works it can be very successful. Court is a stressful and expensive process for most people,” says Cairney.

“Most mediation is done on a confidential basis so in some respects there’s not really anything to be lost

from doing it. If it doesn't work, you know where you stand and have a stronger basis for taking the next step, which could be court.”

Sturrock adds: “A mediator can help family members take stock in private, reflect on what is important, remember the overall objectives, listen to each other, get under the surface, recognise hurt, explore realistic options, test possible solutions and come up with long-lasting ways forward.

“It is remarkable what can be achieved in a short period of time with a skilled, independent, facilitator to help.”

Familial concern agenda

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