

# Kluwer Mediation Blog

## Shh... a good news story!

Charlie Irvine (University of Strathclyde) · Saturday, January 12th, 2013



Edinburgh is one of the world's top tourist attractions. To quote its own website "*Edinburgh is an multi-award-winning, world-class tourist destination. A must-see cultural capital. From stunning skylines to sandy beaches, festivals to fireworks – the city has something for everyone, day and night.*" So, it can hardly have been good for business when, during 2009 and again in 2010, the city's flagship tram project ground to a halt in the midst of construction thanks to 'contractual disputes' (for a detailed explanation, see [http://en.wikipedia.org/wiki/Edinburgh\\_Trans](http://en.wikipedia.org/wiki/Edinburgh_Trans)). As a frequent visitor to the city I could see dozens of streets and kilometres of track lying untouched, week after week, month after month. And if you mentioned the dreaded trams to an Edinburgh resident you would get an apoplectic reaction. High hopes had been replaced by grim despair, as it became clear that huge cost of the project (£600million and rising) was only matched by the even higher cost of scrapping it. One prominent journalist called it a "*standing embarrassment*" (<http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-12342581>).

I want to tell the story of how this national fiasco came to be resolved for two reasons. First, this is a good news story about mediation and its deceptively simple capacity to unlock complex and tightly-woven disputes (this one also involving German, Spanish and Scottish players). But secondly, this tale illustrates the difficulties created by the doctrine of confidentiality, or at least by its current interpretation. I suggest that there is a degree of muddle surrounding confidentiality, for which a solution needs to be found.

The story itself is a familiar one to those who read this blog (see, for example,

<http://kluwermediationblog.com/2013/01/09/hockey-promotes-mediation/>). Following years of contractual battles, dealt with by the conventional methods of adjudication and arbitration, the parties had fought each other to a standstill. Public confidence was zero. Finally, Edinburgh City Council called in a mediator. Over a 5-day period in March 2011 a resolution was reached on all outstanding issues, and by May that year work recommenced. Work hasn't stopped since, whatever the difficulties, and people are now talking of a completion date, for at least the first phase of the project, but the end of this year.

How do I know this? Mediation is, after all, confidential. All the parties, including the mediator, will have signed an agreement to mediate, preventing them from speaking publicly about the process. And here's the rub. This is a very public dispute, with very public consequences. Hundreds of millions of pounds of taxpayers' money was at stake. The reason we know at least something about the mediation is because Edinburgh City Council is a publicly accountable body and keeps minutes of its meetings. We know that the mediator didn't come from Scotland but was selected for his experience of major infrastructure projects throughout the world. His name is Michael Shane, and he should be a hero for the Scottish capital city and its residents just as much as Scott Beckenbaugh is for ice hockey fans.

Following the mediation, not only did the work re-start, but a public consultation led to genuine changes such as re-scheduling the work to avoid disrupting Edinburgh International Festival. The City's Development Director was able to say: *"The mediation process has resulted in a significant change to the joint working relationship amongst the Council, Tie and the infrastructure contractor, reverting more to the project planning ethos of mutual cooperation set out in the main body of the original contract. In future this will mean closer working relationships across the key parties...This approach will allow for savings to be made in project management costs."* On a much more tangible note, you can now see completed track on Edinburgh's main thoroughfare and, this Christmas, they even had a wee test run (<http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-20774654>).

Why isn't this a bigger story? Here we had a national embarrassment, ground to a halt and going nowhere, now back on track (pun intended). This may have saved us tens or even hundreds of millions of pounds. Had this been the subject of litigation, our news media would have pored over every detail. Even the advocates would have been public figures (as happened with the enquiry into a not dissimilar debacle over the building of the Scottish Parliament).

Of course I know we mediators must offer our clients the cloak of confidentiality. This allows them to have the kind of frank conversations which are the absolute core of our work. But I fear we sometimes muddle process and outcome. Yes, the public does not need a blow-by-blow account of who said what to whom. Nor is it helpful for public bodies if their constituents can see what concessions they made or what offers they rejected. However, the outcome is of huge public interest. Why should this remain hidden? If the mediation produces publicly visible results, why not make an announcement? Is it simple modesty?

Perhaps we have got so used to the mantra 'mediation is confidential' that we have failed to recognise that it too has limits. Mediation's critics are quick to highlight the risks of dispute resolution that is hidden from view, where there is no scrutiny to ensure that the norms of fairness and justice are being applied. But does it have to be? Perhaps mediators can learn from politicians (there's a surprising suggestion!) When talks have gone on through the night in Brussels or Washington or Rio de Janeiro, and a deal is finally struck, politicians always have time for the

inevitable press conference. The terms of the agreement are announced and journalists ask questions. There may even be a round of applause. No-one needs to know who said what, or how many compromises, backslaps and hard swallowing went on to get there. It is the good news that matters.

In workplace mediation it is now common practice for mediators to prepare their clients for this phenomenon. We ask who needs to know the outcome, who will be interested in or affected by a resolution, and what are the wider systemic consequences for the whole organisation. We then help parties to hone the exact wording so that the agreement is fit for public consumption and leaves no hostages to fortune. I hope this practice can now spread into other areas. If a matter is of great public interest, let's not leave it to speculation. Commercial disputes have sophisticated players with huge experience of handling the media. Why not enlist their help in drafting the public announcement?

I don't know Michael Shane, and I'm sure he is too modest to blow his own trumpet, so I will do it for him. Here in Scotland, one of the more mediation-sceptical jurisdictions in the Western world, the process worked its quiet magic and helped some very experienced organisations to save face, solve problems and move on. I just wish there had been a press conference.

\* My thanks go to Ruth Duffin of the Scottish Mediation Network for her work in researching this case.

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