

# Response to Scottish Civil Courts Review: A Consultation Paper.

By David Semple LLB WS

## **Professional background and general comments on litigation.**

I have practised law in Scotland for a period over 30 years, of which 20 years were as a specialist commercial property solicitor and 10 years as a corporate / commercial solicitor. I was accredited as a mediator in 1995 by CEDR. I have also attended a mediation course in Woodbury College, Vermont. I have always had taken a great interest in commercial activity and in 1997/8 was President of the Glasgow Chamber of Commerce. I retired from the legal profession in 2000 and now have various commercial interests, executive and non executive, which have enabled me to gain an outside perspective on what I had experienced from the inside.

I am chairman of Catalyst Mediation Ltd, a commercial mediation service provider in Scotland. Catalyst Mediation's subsidiary, Court Mediation Services Ltd, has been running the Mediation Pilot Schemes in the Glasgow and Aberdeen Sheriff Courts on behalf of the Scottish Government since March 2006. We run mediation training through a subsidiary, Catalyst Mediation Training Ltd.

My interest in mediation was stirred, during my legal practice, by long, consistent and frustrating experience of clients who had run into problems which were referred to "the court department". As a result, more often than not, the firm's clients found themselves less enchanted with the firm. This arose from a combination of:

- the difficulty of getting court lawyers to provide a general estimate of how much it would cost to litigate a matter, thus making it impossible for the client to budget;
- costs being run up without clients being kept informed of the scale of these, leading to nasty surprises;
- the operation of arcane legal procedures (particularly procedural steps) which, with the best will in the world, they could not understand, sometimes leading to unpredicted results which went against the client (particularly relating to the expense of individual parts of the procedure);
- rushes of activity at the last minute before each court hearing, widely separated from the previous one;
- late assessment of true strengths of a case – including relating to implications on the outcome of availability and reliability of witnesses, adequacy of contracts and so on;
- large amounts of management and legal time being required for a proof in researching events which sometimes took place years ago;
- demanding periods of stressful time being involved if the case came to proof;
- realisation that the case ultimately does depend on the judgement of an individual who may be prone to human failings;
- the unpleasantness of the dirty washing being done in a public arena;
- the inability of the judge to take into account matters which could not be proved to the court's satisfaction;

- the inability to extricate oneself during a court action without conceding total loss;
- the reality that the court has no option but to apply the law as it sees it, looking at the facts – always in the rear view mirror;
- the surprising length of time it takes for a civil matter to come to proof in most courts;
- the overall costs – even when the client won.

These are not all a commentary on the current court system – some on the way it was conducted by the lawyers and some on the inevitability that when things go wrong, sorting out the consequences can be painful. Nonetheless, very often the reaction was “If I had known what was going to be involved, I would have tried to find a better way”.

It seemed to me that there was one, in the shape of mediation. It dealt with a large number of the points they had been making.

- It could be set up quickly and would last a limited length of time and therefore the costs could be easily budgeted for and there were no nasty surprises on that account;
- The procedures are simple and easily explained;
- Control of the outcome remains entirely with the client;
- Advisers are required to assess the true strengths and weaknesses of the case at an early stage – and to address them;
- Management time is limited to the mediation (provided it is successful);
- The matter is disposed of quickly, leaving management to look forward to running the business;
- It is conducted in privacy;
- There is empowerment, not least, in that there is no compulsion to stay in the mediation;
- The decision made by the client depends not only on the law and the facts but, as importantly, on the true interests and needs of the client at the time;
- If it appears that it is manifestly going to be unsuccessful, it is easy to walk away.

Hence my interest in mediation. I have not been disappointed.

Mediation is not a soft option for the parties. It is demanding because it requires parties to look hard at where they are and to take their own decisions about their strengths and weaknesses and to measure these against where they wish to get to, in their true interests at that time. It provides an opportunity to communicate in a regulated atmosphere with their counterpart before resorting to and, sometimes after the commencement of, court action. The general satisfaction levels with mediation I have been involved in and those which have been reported across the world with the outcomes of mediations provide, for me, sufficient evidence that early resolution of disputes is in the interests of the parties who are engaged in these disputes.

I have been attracted by the sentiments expressed by A M D Willis, in his article in the Hume Papers on Public Policy Vol 7 No 1, 1999 (which Lord Gill will recollect - as one of the contributors). Following Willis’ line of thought, the key points appear to me to be (using some quotations from that paper):

Settlement and compromise as Primary Aim: Lord Chief Justice of Tanzania “.....The process of settlement of disputes in society.....must depend more on the people than the State” and “ .....There is now a need to remove a significant part of the disputes from the Courts and to return them where they properly belong.” and

Willis: “Mediation is the key: Mediation is endlessly suitable for cases large and small, for simple two party cases and multi-party cases, and in relation to almost all forms of dispute. It is not a panacea but it is very powerful”. He has many other persuasive points to make.

My experience of mediation does not reflect the response of the cynics (most of whom cannot have experienced the reality) who assert that personal injury/ damages claims are all about money. In many such mediations in which I have been involved, the majority of time has been spent by the parties in seeking to find out what really happened, to speak to the parties responsible, to receive assurances that things have been done to ensure that the same thing does not happen to others, sometimes to receive an apology – and then, almost as an aside, dealing with the quantum of the claim – often surprisingly quickly after the other issues have been dealt with.

I would observe that, although most of my submissions to your review relate to mediation, I am not suggesting that mediation is the answer to every maiden’s prayer nor that it is the only route open as an alternative/ precursor to the court.

## **Chapter 1**

### ***Questions for discussion***

1. *Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?*

In light of my experience, narrated above, I do believe that the civil justice system should be designed to encourage early resolution of disputes, preferably without resort to the courts.

2. *Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review’s recommendations? Should they be supplemented by other factors?*

I do agree broadly with the principles and assumptions made in these paragraphs. I do not think however, that they represent the full picture. The word I would question is “proportionality”. I accept that this is an important word when it comes to public policy on finance and the running of the courts in a way which utilises the whole resources of the courts in a sensible commercial manner, taking into account the value of the matter being litigated. The further simple point I make is that, if one focuses on the litigant, early resolution of disputes is beneficial for *any* party who has a dispute. I fully accept that, in all communities, situations arise where an adjudicator is required to settle differences between parties. Nonetheless, it appears to me that it is in the interests of the community that the number of parties requiring such adjudication should be reduced to a minimum and that all routes available to achieve this should be facilitated by the justice system. This is aside from the affordability of the system for the State.

In addition, it is clear that the resolution of many multi party and high value disputes have been resolved by mediation. (vide Willis above and the experience of CEDR and also Scottish commercial mediation service providers.) There are many and varied reasons for which the parties may have sought to resort to mediation. Uncertainty of outcome may be high on the list. It is, however, by no means clear that if only the test of proportionality had been applied in such cases, that the parties would have considered the mediation route. It would, in my view, be useful for all parties to be encouraged to explore early resolution *even where the proportionality test is not obviously met.*

3. *Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?*

No

## Chapter 2

### Questions for discussion

1. *What contribution can public legal education make to improving access to justice?*

A great deal at all levels – particularly in the schools. I believe that modules might be incorporated into the schools' curricula. I was involved in the preparation and design of such modules in the early 1970s and have no idea how far that initiative went. It appeared to be valuable at the time. It was a collaboration between the Law Society of Scotland and the Curriculum Body. (I was involved as a volunteer on behalf of the Law Society on the technical side of the preparation of the courses). The principle seems no less relevant now than it did then. Disappointingly, the word "law" does not, however, appear in the report of the Scottish Curriculum Review Group published by the Scottish Executive in 2004 <http://www.scotland.gov.uk/Resource/Doc/26800/0023690.pdf>.

3. *To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?*

My sentiments in listening to Sheriffs in the Small Claims and Summary Cause Courts have been of sympathy a) for the parties in trying to deal with an intimidating atmosphere in the court and to understand the requirements of the relatively simple (compared to Ordinary Cause cases) steps/procedures involved in running such a case and b) for the Sheriffs, in showing great patience in talking the parties through what is required. As a retired lawyer, I recognise fully the reasons for which the rules of procedure are necessary and have developed in an adversarial system. It seems to me that unless there is some really radical thinking, it is difficult to envisage that rules can be evolved which will, realistically, enable party litigants to conduct cases in a rational way without disrupting the operation of the courts in an unacceptable way. This, of course, contrasts starkly with the simplicity of the procedure in mediation.

4. *What contribution, if any, can (a) "self-help" services for party litigants and (b) court based advice services make to improving access to justice?*

I am not optimistic about the degree to which this is likely to be widely successful in providing help for party litigants. Access to web sites is not universal. Understanding them sometimes needs a teacher or, at least, a guide. The [washingtonlawhelp](http://www.washingtonlawhelp.org) site is valuable for

information but the forms and explanations of what to do would be difficult for *me* to follow without a lawyer to help. As a mediator in the Edinburgh Mediation Scheme from its inception I experienced the in court adviser working. It appeared to me that she was very effective and performed a useful service. I was never clear what the boundaries of her remit were. Clearly it did apply to Small Claims but how much higher, I was not clear. In other words, in an informal kind of way it seemed to make a valuable contribution. In setting up a new system, I am not clear what the boundaries might be.

*6. Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?*

To follow the logic of what goes before, it seems to me that if the intention is to keep smaller cases within the fold of a strict legal process, it is difficult to design a system which will not, sooner or later become quite complicated. If the intention would be to keep things simple, and to look after the interests of the consumer in small cases, then the idea of developing a series of civil tribunals which do not need to be strict about the application of detailed legal rules, but with appeal to the courts, has real attraction.

### **Chapter 3**

#### **Questions for discussion**

No comment.

### **Chapter 4**

#### **Questions for discussion**

*2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business? and 4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?*

Looking at the question from the point of view of a user, I would very much prefer a judgement to be made by a person who understands the nature of the problem because he/she has some knowledge of the area of commerce concerned. Interestingly, although parties often prefer a mediator with some knowledge of the subject matter, specialist knowledge is of less importance, as the mediator is not making any judgement. Modern commercial legal practices which have specialist lawyers dealing with their areas of expertise are flourishing because the users are going to them (and paying well) for advice. It seems even more important that judgements are made by judges who have some degree of specialist understanding of the topic before them. This would seem to point towards greater specialisation of Judges appealing to the users.

*11. Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?*

See Chapter 2, answer 6 above.

### **Chapter 5**

## Questions for discussion

1. *Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?*

I think that it is important that an objective or statement of philosophy should be put in place. I was recently (2008) at a seminar in the Faculty Training facilities chaired by a Senator of the College of Justice. In response to a question from me as to what he thought about my contention that the parties should be asked by a Judge whether or not they had put themselves in the position of being able to make an informed decision about whether or not to try mediation, he responded that once a case had come before him, it was “not in my job description to seek to find out whether another way of resolving the dispute was appropriate”. This response was understandable but summed up for me the fundamental need for change. If the position of the Judiciary is that when a case comes before it, it is their job only to deal with the case and come to a judgement, then an opportunity to improve the position of litigants and, generally, the community may be lost.

My little story does not chime with the points in paras 5.9 and 5.10 of the Consultation document which would appear to indicate that the Court, on occasion, does look for ways to expedite the process of litigation. It also does not tie in with my experience with the Mediation pilot schemes in Glasgow and Aberdeen where it is taking some time to overcome resistance from the Bench to the use of mediation – even in small cases. In this regard, the responses of four Sheriffs Principal to the Sheriff Court Rules Council Consultation on ADR was less than encouraging – indeed negative. The response of the Sheriffs’ Association was also anything but positive. Where support has come from the Bench for use of the scheme (by the Sheriff encouraging parties to mediate) it has usually been from Sheriffs who have had some experience of the Edinburgh scheme, which has been running for many years.

The key issue which appears to be missing from the criteria listed in para 5.4 is that relating to the encouragement and facilitation of early settlement on terms which are mutually acceptable to both sides. I understand that the other criteria are impliedly intended to enable this to come about, but there is no express declaration of this end, which it seems to me is desirable and, indeed, necessary.

2. *Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?*

I share the view that, whereas it is not desirable to make mediation compulsory, it is an option to consider. My experience as a mediator is that if a party is set against mediation, and is forced by the Court to attend a mediation, this often does not move the matter forward. It can increase resentment. This is not always the case and if it is seen to be in the interests of the exchequer that a lower proportion of a large number of mediated cases which settle is better than a higher proportion of a materially lower number, then there may be advantages in this. It is apparent that the compulsory mediation rules introduced in Ontario, Canada have led to a steep decline of cases being tried in court since 1999. I understand that it is felt in England that mandatory mediation may breach the terms of Article 6 of the ECHR.

It should be said, however, that my experience is that so long as the parties attend the mediation of their own will – whatever the motivation, even if it is only fear or worry about cost, as opposed to a real active desire to negotiate, then the chances of a mediated settlement are great. So, what is my preferred alternative?

I do feel that it is *necessary* and *desirable* that the Court be subject to a rule which requires the Court to ensure that the parties, along with their advisers, have taken reasonable steps to make an informed decision as to whether or not to mediate the case and encourages them to go down that route. It is *necessary* because: parties may not be aware that to achieve settlement in their case, mediation may provide an alternative to litigation. They should be able to consider the opportunity presented by mediation in reaching a view as to how best to proceed in their case. To include a rule would prompt the legal profession to ensure that their clients are provided with an opportunity to review this choice and make an informed decision. It is *desirable* because: it demonstrates that in the twenty first century the Scottish civil legal system recognises the range of dispute resolution mechanisms successfully in use in other major countries. It also lies comfortably with the findings of the Final Response of the Civil Justice Advisory Group of the Scottish Consumer Council, Nov 2005 (the CJAG Report).

*Encourage.* I believe that it is not the role of the court to compel parties to seek resolution by any one particular means. Mediation is a voluntary process and research of schemes in Canada which compelled parties, suggests a low rate of settlements being agreed, probably because of the compulsory nature. Evidence from the London Court Mediation scheme also seems to confirm this experience. I also have experience which shows that if parties feel compelled to mediate, they are reluctant to negotiate and, often, make only a nominal attempt to do so. If, however, there is a disincentive not to mediate (such as may be created by pressure via expenses), this does not appear to have the same effect.

The Court should be *required* to receive such assurance (that the parties have taken reasonable steps to make an informed decision about mediation), because research indicates (The Management of Civil Cases - DCA research 9/05 in November 05) that the experience in England is that most judges have little experience of ADR (mediation) being used. There seemed to be little enthusiasm for it and even real resistance to its use. Judges were reluctant to order its use due to a lack of facilities and resources. The conclusion I draw – and I am not alone – is that unless there is such requirement for active intervention from the Bench, the legal profession as a whole is unlikely to advance the use of mediation. The only scanty evidence we have in Scotland is that there is no sign to the mediation providers in Scotland that the mention of alternative dispute resolution in the rules of the Commercial Courts in

Glasgow Sheriff Court and in the Court of Session have produced any meaningful upturn in the number of mediations from these sources.

Requiring the Court to determine whether the parties, with their advisers (where there are advisers) had taken reasonable steps to make an informed decision as to whether or not mediation would be a better option *in their case*, would, I believe, strengthen the role of the Court in highlighting settlement options, without the Court being seen to compel the parties to choose one option vs. another.

Low risk activity. It is worth making the point that mediation can be seen as a relatively low risk activity. Why? It is (unless the Court requires it) voluntary. Accordingly any party can bow out if and when they perceive that nothing is being achieved. The mediator (provided the facilitative model is accepted) has no powers of judgement or enforcement. It is confidential. It is without prejudice. It can be arranged quickly. Some claim that it increases front loaded costs. It can – but this depends on your view of how much preparatory/ research work should, in any event, be done prior to an action being raised.

Mediator privilege and confidentiality. This is an area which does concern me. I only conduct mediations where there are privilege and confidentiality clauses written into the agreement to mediate. I understand that there is doubt as to the full efficacy of such clauses and that they may be subject to challenge. If there is to be a wider use of mediation in Scotland as a result of the Review, may I respectfully suggest that steps should be set in motion to clarify this issue by legislation. If this were done, it would put Scotland in a better position, from this point of view, than many other jurisdictions.

3. *If so, how should this be done and at what point or points in the progress of a dispute?*

If the concept of Overriding Objective were adopted, then the approach of the pre-action protocols might be considered. This would be intended to have the effect that if either (any of) the parties had not taken reasonable steps to make an informed decision on the use of mediation, the raising of an action would be premature and the offending party would bear the expenses to date. The power should be used to stress the importance of a proper consideration of the use of mediation. Unreasonable conduct could then be defined as not seeking adequate or independent advice on the potential of mediation. On a wider scale, the professional position of an adviser who does not supply adequate information about mediation in advance of a court action should be considered. There is a case to be made (and it has been suggested by a senior English Judge) that solicitors who do not inform their clients adequately about the mediation option should be guilty of providing inadequate advice.

In addition, if at any time in the course of an action, it appeared to the Judge that mediation might be a sensible route, then it seems to me that it should be made “within his job description” to encourage the parties to consider mediation at that stage. I would explain that I have mediated cases before an action had been raised in court; cases which were about to be raised (pleadings drafted); cases which had recently been raised; and cases which were approaching proof. There are no rules for the appropriate time for mediation and these cases usually finish in a mediated settlement. Judges will be familiar with cases which are immensely difficult to decide – often where there is little right or wrong – often where they see that little good will come out of the judgement – often where they recognise that a rear view mirror approach is not suitable and that the parties would do well to take stock and perhaps try a negotiation. Mediators are well used to this kind of situation and are trained to try to assist the parties to come to an accommodation.

4. *Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.*

Most cases settle without a final court order. Mediation is a way to bring about that settlement more quickly and less expensively. Thus, most cases are suitable for mediation. Nonetheless, it should be recognised that mediation may not be appropriate where:

- there is a desire to establish a legal precedent;
- a party needs a summary decree or rapid interdict;
- a party wishes to enforce an award;
- there is a need to compel and examine witnesses;
- a party wishes to make a public statement on some matter; or
- there is no genuine interest in settlement.

Even in these cases, mediation may have a role at some stage.

5. *What form should mediation or other methods of dispute resolution take and how should this be funded?*

It appears to me that this can conveniently be considered in 3 categories: Higher value; medium value; and lower value.

In the higher value category, it seems to me that the market will regulate itself satisfactorily as it does in the legal market currently, with mediators and mediation providers gaining reputations on which their futures will rely. Sophisticated judgements will be made by advisers as to what kind of mediator and mediation they wish for particular clients/ cases. Providers’ web sites also provide plenty of information on which to base choice.

At the other end of the spectrum, it is almost certain that mediation will not be self sustaining financially at the Small Claims level and that State funding will be required.

This can be viewed from two perspectives: The mediation organisation (provider) and the mediators.

The organisation issue is touched on in the response of Catalyst Mediation following their experience in Glasgow and Aberdeen Sheriff Courts.

As regards mediators, their remuneration, or lack of it, has been mentioned increasingly in relation to the Edinburgh Sheriff Court scheme. The evidence, however, is that there remains a sufficiently large and committed group of mediators (and it changes as circumstances change) who are prepared to do this on a pro bono basis. Having been in this position myself and having spoken to many who are doing this work in Glasgow and Aberdeen, I believe that there is likely to be a continuing supply of emerging mediators who are eager to practice and hone their skills wherever they can. The area of Small Claims is often seen as a good arena for this. The concern about continuing supplies of volunteer mediators has also been expressed in the United States (my area of knowledge is Vermont and Maryland) but their experience is as I have expressed – namely that the supply is not yet drying up and so long as it keeps coming, use it! This may not be a satisfactory strategic response, but it may be a pragmatic interim partial answer to the funding problem until it ceases to work.

As to the medium value category (now including Summary Causes) an element of pragmatism may, again, be required. The graduated pricing of mediations according to financial value may provide a useful mechanism to encourage competition between any State provided mediation service and private providers.

6. *In what respects can modern communications and information technology be harnessed to improve access to the civil courts?*

I have no observation other than the self evident one that ICT has increased communication to a level undreamt of a few years ago and that increased accessibility to the courts must recognise this. This means that funding of ICT must be fully recognised in any changes proposed. I am aware that there has been considerable criticism by Judges of the Courts Administration in England about the inadequate level of funding attributed to this area, leading to frustration on their part.

7. *To what extent should the court control the conduct and pace of litigation? and 8. What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?*

It appears to me that unless lawyers are put under pressure to move cases forward, they will do it at their own pace. This has been my consistent experience – long periods of inactivity followed by panics at the last minute to prepare for the next judicially appointed stage in the proceedings. This often relates not to the interests of the client – rather, a combination of the court routine and the busy-ness of the lawyer.

Accordingly the court should take more of a role in pressing cases forward. Nonetheless, the Judges should be obliged to do this against the background of the Overriding Objectives and the principle that the court should be the last resort.

## Chapter 6

### Questions for discussion

1. *What are the advantages and disadvantages of pre-action protocols?*

Without these, it may be difficult for Judges to satisfy themselves that the parties have taken the Overriding Objective seriously and that litigation has been seriously viewed as a last resort.

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