RESPONSE BY

FORUM OF INSURANCE LAWYERS (FOIL)

TO THE SHERIFF COURT RULES COUNCIL CONSULTATION PAPER ON THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

The Forum of Insurance Lawyers (FOIL) exists to provide a forum for the exchange of information between Lawyers acting predominantly or exclusively for insurance clients. Accordingly FOIL's interest in the Consultation Paper arises predominantly in respect of personal injury claims and other insurance related claims.

FOIL's response to the recommendations made and questions posed in the Consultation Paper is as follows:-

RECOMMENDATION 1

That there be incorporated into each set of rules applicable to the conduct of civil business in the Sheriff Court a new rule concerning mediation in the terms set out in the draft rule below (Section 3) or in terms similar thereto adapted as necessary to the context of the set of rules in which it appears. Rule 33.22 of the Ordinary Cause Rules 1993 (OCR) would thereby be superseded.

Q.1a

Do Consultees consider that such a rule is necessary or desirable?

Yes.

Q.1b

Please provide comments to explain your reasons.

FOIL supports the use of any procedure that results in the swifter and more economic resolution of reparation claims and, in particular, personal injury claims. It is accepted that ADR/mediation has a role to play in the resolution of some claims. However a number of points ought to be borne in mind. First of all, there exists in Scotland a voluntary pre-action protocol, the purpose of which is to put parties in a position where they may be able to settle cases without litigation. The protocol is primarily designed to apply to personal injury cases where the value of the claim is £10,000 or less. However there is nothing to prevent parties dealing with higher value claims under the protocol by agreement. Indeed, a number of claimant's agents and insurers have expressed a desire to deal with higher value claims under the protocol. The protocol encourages the exchange of information between parties in relation to both liability and quantum and provides an opportunity for the parties to consider whether a claim is capable of settlement. Accordingly, in cases that have been dealt with under the voluntary protocol it is likely that consideration will already have been given to settlement of

the claim. It is therefore more difficult to see how any form of ADR/mediation will resolve this category of claim. In any event, it is essential that proper consideration be given to the costs that are likely to be incurred in any ADR/mediation process. In cases where there is no realistic prospect of settlement, the use of ADR/Mediation may simply add an extra layer of expense onto the judicial expenses and outlays already incurred by parties. The costs of ADR/mediation should also be proportionate to the value of the claim. It may not be in the parties' interests for costs of several thousand pounds to be incurred in attempting to mediate a low value claim. In addition, FOIL's opinion is that the proposals for the incorporation of a new rule regarding ADR/mediation ought not to be looked at in isolation. The proposals ought to be looked at in conjunction with the proposals for reform of the procedural rules relating to personal injury actions in the Sheriff Court. These rules, if adopted, will require parties to have a Pre-Proof meeting, not later than 4 weeks prior to the date assigned for Proof. The Pre-Proof meeting is in itself a form of ADR/mediation. In the spirit of encouraging ADR/mediation there may be scope for requiring parties to have a Pre-Proof meeting at an earlier stage of the litigation – perhaps within say four weeks of the deadline for submission by the Defender of a Statement of Valuation of Claim. The members of FOIL consider too that it is important to distinguish between mediation and other forms of ADR. Mediation entails the instruction of a Mediator, which could have significant cost implications for parties. Other forms of ADR may result in the cheaper and more proportionate (from a costs point of view) disposal of a claim.

Q.2a

Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?

Yes.

Q.2b

Please provide comments to explain your reasons

There is no basis for compelling parties to engage in ADR/mediation. FOIL agrees with the Committee's view that a rule in mandatory terms would be inappropriate or even ineffective. ADR/mediation is an entirely voluntary process.

Q.3a

Should the Court have the power to require parties to an action to consider ADR?

Yes.

Q.3b

Please provide comments to explain your reasons

There may be cases where either one or both parties have not considered the possibility of resolving their dispute by ADR/mediation. Therefore it makes sense for the Court to have the power to require parties to at least consider ADR. Such a power is consistent with the approach adopted in other jurisdictions and is in keeping with the view that the purpose of the judicial system is to resolve disputes between parties, ADR/mediation being one possible means of dispute resolution.

Q.4a

Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?

Yes.

Q.4b

Please provide comments to explain your reasons

It should be a relatively straightforward exercise for parties to give notice in writing as to whether or not they consent to a referral to ADR/mediation. For the reasons outlined earlier in this response there may be cases in which ADR/mediation is not appropriate. There may be cases in which attempts at resolving a dispute by ADR/mediation have already been made. There may be cases in which the costs of ADR/mediation would be disproportionate to the amount of money at issue. Of course, all of these explanations as to why ADR/mediation would not be appropriate within the Court Process may have already been ventilated prior to the raising of the proceedings. However FOIL can see no difficulty in a party being required to specify in writing whether ADR/mediation will work. Indeed, if the procedural rules for personal injury actions in the Sheriff Court are altered as anticipated, it may be appropriate to provide for a deadline for parties to submit a notice stating whether or not they consent to a referral to ADR/mediation in terms of the timetable issued in the proposed rule XX.6(1)(b). That said some members of FOIL consider that there could be problems in requiring parties to give notice in writing of their reasons for agreeing to or refusing mediation/ADR as there may be reasons unconnected with the litigation why parties do not wish to participate in ADR/mediation.

2.6

The Committee were of the opinion that consideration of settlement or referral to dispute resolution should take place within the constraints of the current Court timetable, i.e. the

timetable which applies at the stage in the action when parties are considering the settlement of the dispute or referral to dispute resolution.

Q.5

Do Consultees have any comments to make in relation to this part of the recommendation?

FOIL agrees that consideration of settlement or referral to dispute resolution should take place within the constraints of the current Court timetable.

Q.6a

Do Consultees consider it appropriate to have an express reference in the rule relative to the awarding of expenses?

No.

Q.6b

Please provide comments to explain your reasons

There is no need to make express reference in the rule to the awarding of expenses. Such a reference is unnecessary and potentially confusing. The Court already has a very wide discretion in determining questions of expenses. There already exists, in the context of monetary claims, a mechanism whereby one party can offer a sum of money to the other, i.e. the tendering process. The tendering process allows the Court to penalise the Pursuer, who has refused an offer made in the course of the litigation. It is difficult to see how the Court could have regard to parties' conduct in relation to ADR/mediation when considering the issue of expenses. How could the Court determine that ADR/mediation would necessarily have produced the same result?

Q.7b

Please indicate with reasons whether the reference should be incorporated into all, some or none of the Court Rules.

Q.7c

If you think that the reference should only be incorporated into some of the Court Rules, please indicate, with reasons, which set(s) of Court Rules.

The reference to ADR/mediation should be incorporated into the Ordinary Cause Rules. FOIL has no comment to make on incorporation of the reference into the Summary Applications, Statutory Applications etc. Rules as the majority of Summary Applications, Statutory

Applications etc. are outwith the experience of FOIL members. The incorporation of a reference in the Summary Cause and Small Claims Rules is more difficult. For the reasons expressed earlier, FOIL considers that any consideration of ADR/mediation must have regard to the likely costs of ADR. The costs must be proportionate to the value of the claim. Accordingly, it may well be that ADR and certainly mediation will not be economic in Summary Cause/Small Claim actions for personal injuries. For these reasons FOIL doubts whether ADR/mediation has a role to play in Summary Cause/Small Claim personal injury actions. Indeed for the reasons expressed earlier in this response it may be appropriate to fix a monetary limit in ordinary cause cases, below which mediation is not considered appropriate for economic/proportionate costs reasons.

Q.8a

Do Consultees consider that Rule 33.22 should be deleted from the OCR in the event of the all encompassing rule being introduced?

Q.8b

Please provide comments to explain your reasons

FOIL has no response to make to these questions insofar as they are concerned with family matters.

RECOMMENDATION 2

That a new para (5A) be inserted into OCR 3.1 in the following terms:-

"(5A) An article of condescendence shall be included in the Initial Writ averring the steps taken by the parties prior to the raising of the action by other forms of dispute resolution (whether by way of mediation, negotiation or otherwise) with a view to avoiding the need for litigation."

A similar provision should be inserted into each of the others sets of rules applicable to the conduct of the civil business in the Sheriff Court, adapted as necessary to the context of the set of rules in which it appears.

Q.9a

Do Consultees have any comments to make in relation to this recommendation?

It is unclear what the purpose of a rule requiring parties to make averments about previous attempts at ADR/mediation is. In any event, it is submitted that there is no need for such a

rule if parties are required to give reasons in writing why they consider ADR/mediation to be appropriate/inappropriate.

RECOMMENDATION 3

That, subject to questions of cost and practicability, the use of mediation or another form of dispute resolution should be facilitated in relation to disputes at all levels by the provision of an In-Court Mediation Service in the manner piloted in the Sheriff Court Houses of Edinburgh, Glasgow and Aberdeen.

Q.10

Consultees are invited to provide comments on the terms of recommendation 3

There is no objection in principle to the provision of an In-Court Mediation Service. However, the questions of cost and practicability require to be addressed in detail. It is unclear whether the provision of an In-Court Service would be free or whether there would be charges and, if so, what those charges would be. The quality of the service provided would be a material consideration too. For example, FOIL would be anxious to ensure that mediators dealing with personal injury claims had experience of working in that area of the Law and, in particular, of resolving disputes in personal injury cases.

RECOMMENDATION 4

That Rule 8.3 of the Summary Cause Rules 2002 and Rule 9.2 of the Small Claim Rules 2002 should be amended by the incorporation into each of a new paragraph in the following terms:-

"8.3(2A)/9.2(2A) In carrying out the duties referred to in paragraph (2)(B), the Sheriff may hold discussions in private and not in open Court."; and that otherwise the said Rules 8.3 and 9.2 should remain for the time being unaltered.

Q.11a

Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both – Rule 8.3 of the Summary Cause Rules 2002 and – Rule 9.2 of the Small Claim Rules 2002?

Q.11b

If you think that the reference should only be incorporated into one set of the Court Rules please indicate, with reasons, which set(s) of Court Rules.

Q.11c

Do Consultees have any views on the recommendation that Rules 8.3 and 9.2 should otherwise remain for the time being unaltered?

FOIL considers that there is no need to alter the Rules in question. For the reasons already expressed it is doubtful whether there should be any reference to ADR/mediation in the Summary Cause/Small Claim Rules, at least in relation to personal injury claims. In any event, if a notice procedure is adopted it is difficult to see why there should be any conflict for Sheriffs. If parties are required to specify in writing whether they consent to ADR/mediation, the Court will presumably pronounce an Interlocutor referring a matter or matters to ADR/mediation if parties consent. If they do not consent the action will presumably proceed as normal. For these reasons FOIL would not be in favour of an amendment of the Rules allowing Sheriffs to hold discussions in private.

Q.12

Do Consultees have any comments about the proposed rule as drafted? It should be clear to which part(s) of the rule the comments relate.

For the reasons already expressed part 9A.5 of the proposed rule should be deleted.

Q.13

Do Consultees have any comments to make on the proposed form of notice? It should be clear to which part(s) of the notice the comments relate.

No comment.

10 October 2006