

RESPONSE TO THE SHERIFF COURT ALTERNATIVE DISPUTE RESOLUTION CONSULTATION

by CATALYST MEDIATION LTD

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Catalyst Mediation Ltd are mediation service providers in the commercial arena. Since June 2006, we have also been running the Glasgow and Aberdeen Sheriff Court Mediation Pilot Schemes through our subsidiary company, Court Mediation Services Ltd.

We have pleasure in responding to the Sheriff Court Rule Council consultation paper as follows:

RECOMMENDATION ONE

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 Rule 33.22 of the Ordinary Cause Rules 1993 (OCR) would thereby be superseded.

2.4 The Committee after long consideration came to the view that in Scotland some greater recognition is now required in the sheriff court rules of the role which mediation and other forms of ADR may play in resolving disputes. The court should encourage rather than compel parties to seek resolution of matters in dispute between them by ADR or by negotiation before committing themselves to litigation or during the course of proceedings. A resolution of their differences by judicial decision of the court usually produces a winner and a loser.

Q.1a Do Consultees consider that such a rule is necessary or desirable?

Both.

Q.1b Please provide comments to explain your reasons.

Necessary: 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. Including 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.

Desirable as 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)

2.5 The Committee reached the view that a rule in mandatory terms would be inappropriate or even ineffective since ADR is a voluntary process. However, to leave matters as they currently stand with no rule in place concerning ADR would be unsatisfactory in the twenty-first century and the right note for the sheriff court in Scotland would be struck by giving the court power, on its own initiative if not at the request of a party to the action, to require parties to consider resolving their differences by some means other than court proceedings. If none of the parties to the action seek leave to refer the matter to ADR the court would consider whether the particular dispute appeared suitable for resolution by some other means and if so it would require the parties to consider it.

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?

Encourage

Q.2b Please provide comments to explain your reasons.

We 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. We 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 pressure via expenses), this does not appear to have the same effect.

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.

We believe the Court should be placed in a position of being able to determine what it might regard as “reasonable consideration”. Requiring parties to consider mediation and come to an informed decision on whether it would be a better option *in their case*, would, we believe, strengthen the role of the court in highlighting settlement options (see also Recommendation 4), without the court being seen to compel the parties to choose one option vs. another.

To “consider” implies the Parties have reviewed / discussed information concerning ADR and its potential as a resolution process in *their* case vs. the realistic expectations of proceeding with litigation. We believe that an informed decision could be made from information available to parties either through Court leaflets or from their advisers (or both).

The court should be put in the position of being able to satisfy itself that the parties themselves have given consideration and come to an informed decision. Where the party is advised by a lawyer, this should include checking the information supplied by the lawyer.

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?

Probably not, provided that the court is satisfied that adequate information has been conveyed to the party and that the party has considered this information with their adviser, where they are advised.

Q.4b Please provide comments to explain your reasons.

The reasons for agreeing or not agreeing to mediate are difficult to provide rules for. The only absolute in mediation is that there are no absolutes. Were reasons to be required (e.g. point of principle; too much emotion; difficult point of law etc), that reason is as likely to be invalid as valid. What matters, in our view, is that the parties have obtained information about mediation and considered carefully the possibility of using it in their case.

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?

We agree with the Committee’s opinion. Mediation should not take longer than the normal court process. Indeed it would normally be considerably shorter. Court Mediation Pilot schemes often set an 8 week date for the next hearing, within which the mediation would take place and in most cases, the terms of

settlement are completed. Catalyst Mediation mediations can be (and sometimes are) arranged within days, given willingness and availability of the parties.

2.7 The Committee recommended that where the court considers that the dispute in question appears suitable for another means of resolution as opposed to litigation, and parties to such an action cannot agree that the disputed matter(s) or some of them should be referred to ADR, the basis on which one or more parties had elected to withhold agreement might in due course become a ground on which an award of expenses could be made.

It therefore included a reference to the court's consideration of "any unreasonable conduct of any party" in dealing with a motion for expenses in the draft rule. The rationale for its suggested inclusion is that its presence would act as a "flag" to remind those considering whether matter(s) in dispute should be referred to mediation or some other form of dispute resolution that such a power exists in the court and might be exercised in appropriate circumstances. The arguments for its exclusion are that a "flagging up" of a power to award expenses carries with it, at least arguably, an undesirable implication that mediation is intended to be a procedural "default option" and that the court already has such an inherent power in any event (for which reason reference to such a power does not generally appear in other rules of court). Questions may also arise as to how "unreasonable conduct" falls to be interpreted.

Q. 6a Do Consultees consider it appropriate to have an express reference in the rule relative to the awarding of expenses?

Yes. However, this should be reserved for cases where a party refuses mediation and cannot satisfy the court that he/ she has received and carefully considered information about ADR.

Q. 6b Please provide comments to explain your reasons.

The power should be used to stress the importance of a proper consideration of the use of ADR. 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.

Q. 7a Is it appropriate to include a reference to ADR in each set of court rules namely

- 1) Ordinary Cause Rules 1993
- 2) Summary Applications, Statutory Applications and Appeals etc. Rules 1999
- 3) Summary Cause Rules 2002
- 4) Small Claim Rules 2002?

Q. 7b Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.

Not being lawyers, we shall not comment on detailed 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.

2.8 During its deliberations the Committee noted that currently the only reference to mediation is contained in rule 33.22 of the Ordinary Cause Rules 1993 (OCR). This rule relates to referral to family mediation in a family action in which a court order in relation to parental responsibilities or parental rights is in issue and would appear to empower the sheriff to refer such an issue to mediation without the agreement of the parties. If the proposed all-encompassing rule in relation to mediation is accepted, this arguably would mean that OCR 33.22 should be superseded as involving an element of compulsion.

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?

Yes

Q. 8b Please provide comments to explain your reasons.

We do not have adequate experience of family mediation but, applying the rules above, it appears sensible to delete this provision. For the same reasons as Question 2b – compelling parties to enter a voluntary process may reduce the likelihood of the process producing a workable agreement.

RECOMMENDATION TWO

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

"(5A) An article of condescence 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 other 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.

2.9 The Committee accepted that in some cases the parties to an action may already have considered and/or taken steps to resolve the dispute with a view to avoiding the need for an action. The Committee recommended that at the outset of an ordinary action the initial writ should indicate any steps taken in the articles of condescence. Similar terms would be placed in each of the other sets of civil court rules.

Q. 9a Do Consultees have any comments to make in relation to this recommendation?

We would support this idea in a modified form. To follow the line taken above, a statement should be included that one or other party has obtained information about the mediation option, considered it carefully and rejected it OR that ADR (specify what kind) had taken place and failed.

Q. 9b Please indicate, with reasons, whether this reference provision should be incorporated into:

- (a) All or
- (b) Some or
- (c) None of the court rules.

Q. 9c If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

We see no reason why this should not be included in all court rules.

RECOMMENDATION THREE

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 courthouses of Edinburgh, Glasgow and Aberdeen.

2.10 Points 1(c) and (d) of the Committee's remit asked that it consider to what extent the court should facilitate mediation or other forms of dispute resolution and if so by what means the court should facilitate the use of such procedure. The view formed by the Committee was that where practicable and the costs of providing such procedure could be met, the use of such procedure should be facilitated in relation to disputes at all levels by the provision of an in-court mediation service such as is currently being piloted in Edinburgh, Glasgow and Aberdeen.

Q.10 Consultees are invited to provide comments on the terms of recommendation three.

Facilitation could be at two levels.

Level one, the simplest, could be by providing independent information on mediation and or a link to a source of mediation providers or a list of such providers, able to provide free consultation to the Parties and their advisors on the potential for mediation in their case. This could facilitate the effectiveness of our recommendation relating to parties obtaining information and making a considered decision.

Level two would take this one step further by providing an in court mediation service, as both the source of free advice to parties and of mediators whose quality can be assured through the contract with the service provider.

A key issue in the success of any mediation is the quality of mediators. The Edinburgh pilot makes no allowance for fees to be paid to mediators, while both Glasgow and Aberdeen do have this potential. In court schemes with purely volunteer mediators may run the risk of attracting relatively unskilled mediators wishing to develop their skills. Were more experienced mediators to withdraw from unpaid court based mediations, this could have a negative effect on the reputation of such schemes.

We would be of the view that, for cases which can be mediated without subsidy (basically other than Small Claims and Summary Causes), direction of such cases to an in-court service such as is being piloted in Glasgow and Aberdeen may restrict competition. We would consider this not to be desirable. In other words, for ordinary cause cases, parties should be given the option of choosing the in-court service or another provider.

RECOMMENDATION FOUR

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.

2.11 It appears from anecdotal evidence that many sheriffs feel uncomfortable about being expected to act as a negotiator and that difficulties can readily arise if a sheriff, having assumed that role without success, is then required to hear the case and adjudicate upon it. On the other hand there is anecdotal evidence that many sheriffs have no problem or difficulty with assuming the negotiator's role nor with thereafter adjudicating upon the case and in any event there exists in many courthouses the possibility of handing the case on to another sheriff for adjudication should that be required after an attempt to negotiate a settlement has been tried and failed. It was apparent also that one of the chief difficulties in persuading parties to consider and then move to any settlement is the fact that the negotiation has hitherto had to be conducted in open court often before many onlookers where many litigants are unwilling or unable to contemplate open discussion of the strengths or weaknesses of their position with consequent loss of face. Against this background the Committee took the view that the impetus for the sheriff to seek to achieve a settlement should for the time being be preserved, as originally envisaged, but that there should in addition be provision to permit the sheriff to hold discussions with parties in private in order to meet the chief difficulty so far encountered in practice.

Q. 11a Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both:

- 5) Rule 8.3 of the Summary Cause Rules 2002 and
- 6) Rule 9.2 of the Small Claim Rules 2002?

It appears to us to be perfectly legitimate for a justice system to provide for justice to be purveyed in various different ways. A sheriff's role as an "early neutral evaluator" should be acknowledged and could provide the parties with valuable advice and comment which could stimulate a settlement. Were the sheriff to be seen as a "negotiator", we would be concerned that his/her independence could be seen to be compromised.

Were the sheriff to go on to adjudicate the case, the issues would seem to turn on the perception in the minds of the parties of the openness, lack of coercion, and impartiality of the person who ultimately makes the decision. This response echoes the views in the CJAG Report.

The skills of a mediator are learnt and do not lie naturally with the duties and training of a judge. Therefore without adequate training in mediation, Judges should not, in our view, be asked to be or represent themselves to be a mediators.

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?

DRAFT RULE

Proposed Rule

CHAPTER 9A

ENCOURAGEMENT OF PARTIES BY COURT TO RESOLVE MATTERS IN DISPUTE

9A.1 The sheriff and parties shall seek to secure the speedy and efficient resolution of all matters in dispute.

9A.2 . (1) In any defended action the court may, at any stage of the action where it considers it appropriate to do so or on the motion of any party, make an order requiring the parties within such period as may be specified in the order to consider together settlement of the dispute or referral to mediation or to another form of dispute resolution.

(2) An order made under paragraph (1) shall not affect any requirement for a party to comply with any other provision in these rules or any order of the court.

9A.3 . (1) Where an order has been made under rule 9A.2 for consideration of referral to mediation or to another form of dispute resolution, the parties shall after such consideration indicate to the court by lodging a notice in Form 011 whether or not they each consent to such a referral.

(2) Where all parties indicate their consent thereto, the court shall forthwith make an order referring some or all of the matters in dispute to mediation or to such other form of dispute resolution as has been agreed.

9A.4 . (1) Where an order is made under rule 9A.3 (2), the court may sist the action for the purpose of such referral for such period as may be specified.

(2) The court may, at any time where it considers it appropriate to do so after hearing parties or on the motion of any party, recall the sist and any referral made by order under rule 9A.3 (2).

9A.5 In considering any motion for expenses, the sheriff may take account of any unreasonable conduct of any party in relation to the provisions of this rule.

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.

The detailed drafting of such a rule is not for us. As indicated above, the rule should give the courts adequate powers to satisfy itself that the parties have informed themselves about mediation and taken an informed decision about whether or not to use it in their case.

4 Form of Notice

Proposed Form of Notice
FORM 011 Rule 9A.3(1)

The pursuer [AB] (*or* defender [CD]) having considered the matters ordered by the court to be considered in terms of rule 9A.2(1) of the Ordinary Cause Rules 1993 states to the court that he [*or* she] consents/does not consent* to the dispute(s) between the parties being referred to mediation or another form of dispute resolution for the reasons given below.

Reasons:-

Date (*insert date*) (*Signed*)

Q. 13 Do Conslutees 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.

Define "considered" with reference to information from the Court or discussions with mediation providers etc i.e. the actions taken by the parties.

Catalyst Mediation Ltd.,
Aspect Court,
116 West Regent St.,
Glasgow.
G2 2QD
Tel: 0844 800 0206
Email: david@catalystmediation.co.uk
www.catalystmediation.co.uk

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