

**Sheriff Court Rules Council**  
**Consultation on The Sheriff Court and Alternative Dispute Resolution**

I support the use of 'Alternative Dispute Resolution' as a means of resolving disputes. Approximately, 80% of all civil cases are settled out of court and undoubtedly far more disputes are settled before the parties ever resort to litigation. If we want to make justice swifter, cheaper and in some instances mutually beneficial then we must incorporate 'alternative means' into the legal process.

I do, however, have a number of concerns with regards the consultation document *"The Sheriff Court and Alternative Dispute Resolution"*.

The Mediation committee was tasked with carrying out *"a review as to what the function of the court should be in relation to the use by parties to an action of alternative resolution procedures ...."* and have made a number of recommendations to the Council.

**1. Recommendation One – Mediation or ADR**

A primary concern lies with the mediation committee's attempt to differentiate between mediation and other alternative means of resolving a dispute and their clearly favouring mediation over these other forms. The wording of the proposed draft rule makes this perfectly clear – *'referral to mediation or to another form of dispute resolution'*. In a few words the committee has created a two tiered approach where mediation should be considered by the legal profession and the layperson (in particular the user of these services) as the preferred alternative to those, other, unnamed alternative approaches in the resolution of a dispute.

If this clause, as it stands, is introduced what we will see is the growth in the provision of mediation skills training and in the delivery of mediation skills services and, ultimately, its dominance over other forms of alternative dispute resolution. Such dominance might lead to it being used in the wrong situation where other alternative means may have been more appropriate.

Arbitration was once held as an alternative to litigation. However, it is routinely claimed that domestic arbitration, today, has become slow, cumbersome and expensive. These are charges that may, in the future, be laid at the feet of mediation, if mediation is deliberately given the prominence this draft clause would give it.

I would suggest that ADR is an umbrella term used to encapsulate a variety of alternative approaches (including mediation) to the resolution of a dispute via litigation. Under this umbrella is arbitration, adjudication, conciliation,

early neutral evaluation and the mini-trial. These are only a few of the alternatives available to the parties to a dispute. ADR offers the individual choice. Where mediation might be appropriate in one situation it might be wholly inappropriate in another. The individuals, with advice if necessary, can select which approach is most likely to satisfactorily resolve their dispute.

The court must not only be aware of these alternative means but be sufficiently familiar with these as to be able to make an appropriate recommendation as to which alternative form of ADR would be most suitable.

### ***Recommendation***

I would recommend removing from section 9A.2 – (1) of the draft rule the words *“mediation or to another form of dispute resolution”* and replace these with a statement that either allows the individual to choose from a variety of identified ADR approaches or refers simply to the umbrella term ‘alternative dispute resolution’ For example, *“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 an appropriate form/s of alternative dispute resolution”*

#### ***1a “...mediation or to another form of dispute resolution”***

The removal of the above words from the draft rule will remove the singular nature of the clause. The draft rule states that a dispute will be resolved through the application of only one of these alternative approaches. While this may indeed prove to be the case it should not be taken for granted. It is not uncommon for a number of alternatives to be employed in the resolution of a dispute. For example, negotiation, leading to conciliation, then arbitration with the parties always mindful upon the resource implications.

## **2. Recommendation Two**

The purpose of asking for such information should drive any reasoned response as to whether such a clause should or should not be inserted into OCR 3.1. Without being informed as to the purpose of such information it is difficult to take a position.

Where, for example, the purpose of this information is to assist the court in determining the next step in the resolution of the dispute then I support its inclusion. The parties may have tried negotiation or conciliation and therefore for the court to suggest either of these would be unsatisfactory.

Where, such information was to be used to alter attitudes and behaviour then I would not support its inclusion. For example, penalising a winning party because they refused to mediate their dispute before going to court. Each party must be given the freedom to choose what they consider the most appropriate method of resolving their dispute. To be forced to attempt to resolve a dispute via other means would be contrary to the voluntary process that the committee supports (section 2.5) and is a key foundation stone of ADR as a mechanism for resolving disputes.

For an informed decision to be made the committee must make clear their reasons for asking for such information.

### **3. Recommendation Three:**

Rather than an in-court mediation service it would be more beneficial to offer an in-court advisory service where those seeking resolution of a dispute can seek impartial advice about the range of alternative dispute mechanisms available.

The advisory service could hold and provide the parties with a list of organisations, institutions etc or suitably qualified individuals, who undertake such roles, being careful to maintain their impartiality.

### **Conclusion**

The key to what is being proposed is whether we accept that mediation is not only different but superior to those alternative dispute resolution mechanisms that sit under the ADR umbrella.

I would suggest it is not and that it is only one of many alternative forms of dispute resolution. The strength of ADR lies not only in its variety but to a greater extent in each mechanism's lack of universally accepted rules, regulations and procedures. Parties to a dispute can decide their own rules and regulations within a broad framework. For example, some individuals may consider the outcome of the mediation to be binding while others might not. Such a decision is dependent upon the individuals and their particular circumstances.

If the Council decides to accept the recommendations of the committee as they stand and raise mediation above the other forms of alternative dispute resolution they run the very real risk of setting in motion a chain of events that will see mediation losing its flexibility by becoming over regulated, cumbersome, slow and costly; leading us back to where we are today, searching for an effective alternative to litigation.

John McKinlay BA MBA LLM MCIPS ACI Arb  
Director  
Baines Ford Ltd  
Email – [john@bainesford.co.uk](mailto:john@bainesford.co.uk)