



SHEPHERD+ WEDDERBURN

Response to Sheriff Court Rules Council
Consultation
on

The Sheriff Court and Alternative Dispute Resolution

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 Rule 33.22 of the Ordinary Cause Rules 1993 (OCR) would thereby be superseded.

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

Yes.

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

As a firm we increasingly use mediation as a way to resolve disputes. Our experience is that in general mediation results in speedy, less expensive resolutions for clients; we therefore encourage all lawyers to consider mediation in all the disputes they are handling. In light of our experience we support those initiatives that will widen and encourage the use of mediation/ADR in Scotland. We therefore agree with the Committee that greater recognition should be given to mediation/ADR in the sheriff court rules.

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?

No.

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

We are not persuaded that a rule requiring parties to use ADR before litigation would be helpful: in many cases the right option for a party is to raise proceedings (time bar for example), some disputes will not be suitable for ADR (particularly at an early stage), and in some cases what is actually required from the court is a decision on a legal issue. Over and above that, we do not consider that parties should be under any compulsion to use mediation/ADR as this is inconsistent with the voluntary nature of the mediation/ADR 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.

In our view giving the court this power is entirely appropriate and could well be of significant benefit in a contested litigation, for example where parties may not wish themselves to suggest mediation/ADR. Limiting the power of the court to requiring parties to consider mediation/ADR is wholly consistent with the fundamental voluntary ethos of the process.

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.

The advantages of requiring parties to provide reasons are twofold. Firstly, this will provide a basis from which the court can assess a contested motion for expenses based on unreasonableness (per. 9A.5). Secondly, this should ensure that parties focus fully on the issues in contention and whether those are capable of being resolved through mediation/ADR.

Q. 5 Do consultees have any comments to make in relation to this part of the recommendation?

We are happy with the recommendations, subject to comments we make (below) on the content of the draft rule.

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

Yes.

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

In our view stating explicitly that unreasonable conduct might attract an adverse award of expenses is consistent with the overall purpose of the rule. This element of the rule underpins the provision requiring parties to provide reasons for not consenting to mediation/ADR; the possibility of an adverse award of expenses should mean that parties consider their position fully and carefully before rejecting a referral.

We have had considerable discussion on whether the expense of a mediation/ADR should be recoverable, in the normal way, as part of a judicial account. This is not dealt with directly in the rule or the consultation materials. Where the mediation/ADR had been unsuccessful and one party went on to succeed in the litigation in the normal way would the mediation/ADR costs/outlays form part of the judicial account as an expense in the litigation? We consider this to be a matter of some importance; on one view the cost of mediation, as an essentially voluntary process, should not form part of a judicial account and parties to mediation/ADR should not feel that they might be penalised in expenses if the mediation did not succeed. On the other hand, there may be types of action (personal injury for example) where given the cost constraints on individuals, there will be understandable reluctance to take part in a procedure, the costs of which will not be recouped in the event of success. This might result in parties to certain types of action not taking up the option of mediation/ADR purely on cost grounds. Although it is arguable that the order referring the dispute to mediation/ADR through rule 9A.3(2) has the effect of making the mediation /ADR part of the judicial process (allowing recovery in expenses following success) the position is not clear.

We have not reached a concluded view on the best approach, and it may be that the question of whether expenses are to be recoverable should be left to parties themselves. It would be helpful if the Committee gave some guidance on this issue.

Q. 7a Is it appropriate to include a reference to ADR in each set of court rules namely
. Ordinary Cause Rules 1993
. Summary Applications, Statutory Applications and Appeals etc. Rules 1999
. Summary Cause Rules 2002
. Small Claim Rules 2002?

Yes.

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

All court rules. We can see no rationale for excluding the provision from some 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.

N/A

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?

We do not conduct family litigation as a firm and therefore have no direct experience of rule 33.22. However, given that rule 33.22 is directed specifically to family actions (and the proposed new rule 9A does not take account of this aspect) we would think it would be best not to abolish rule 33.22.

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

As above.

2. Recommendation Two

*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 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.

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

We are opposed to this recommendation. The Committee explains the reason for this proposal by observing that in some cases parties may have already taken steps to resolve the dispute. However, *the actual purpose* of requiring prior attempts at resolution to be averred is not clear. For example, these averments would not, as matters stand, have a direct relationship to expenses: expenses by virtue of the proposed new OCR 9A will be relevant in a question of a party's unreasonable conduct, but unreasonable conduct only in relation to the provisions of that rule. Over and above that, if prior attempts to resolve the dispute are

relevant then they are likely to be relevant in an application under the new OCR 9A; presumably this information would, at that stage, be put before the court. Furthermore, it is arguable that putting this type of material in the pleadings will not assist in the speedy resolution of cases because it opens up an additional (and fundamentally irrelevant) basis for dispute; what parties did or did not do prior to proceedings being raised in many cases will itself be contentious. It would be helpful if the Committee clarified in more detail the rationale for proposing this rule to enable the proposal to be evaluated fully.

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.

None, for reasons provided in answer 9a.

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.

N/A.

3. 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.

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

We have limited experience of the service so are unable to comment fully.

4. 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.

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?

We support this proposal with one caveat. It should, in our view be made clear in any new rule that any discussions in private should be in the presence of both parties; sheriffs should not be entitled to discuss matters with one party in attendance only.

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.

N/A

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?

N/A

5. Draft 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.

We have comments on two aspects of the draft rule.

The first is 9A.1, imposing a requirement on the sheriff and parties to "secure the speedy and efficient resolution of all matters in dispute". It is in keeping with the nature of the Ordinary Cause Rules for this requirement to be placed on sheriffs; so far as parties are concerned the position is potentially more complicated. There may well be instances where a speedy resolution is not in a particular client's interests; at present so long as there is no abuse of process the solicitor (as agent of the party) is entitled to act accordingly. Arguably the proposed 9A.1 cuts across this. In our view it would be helpful if the Committee would explain the scope of 9A.1: if it is confined to resolution of disputes under 9A then there is less of a problem. On the other hand if it is designed to impose a requirement in relation to the rules overall then the rationale for including the provision should be explained fully.

Secondly, we are not persuaded that the order envisaged under 9A.3(2) is either necessary or helpful. If parties are in agreement that the dispute should be referred to mediation/ADR then surely all that is required is for the sheriff to sist the action, or make any other order thought necessary to facilitate that? We can see no need for the sheriff to order a referral; in most cases all that will be required is an interlocutor allowing the parties time to do that. No explanation is given for why the Committee thinks an order is necessary, and clarification of the Committee's thinking would be helpful. A particular theme of our response has been to emphasise that the rules should reflect the essentially voluntary nature of mediation/ADR; in our experience this is where its real attraction and usefulness lies. Requiring court orders for mediation/ADR really is inconsistent with this; given that orders are not necessary for the process we would urge the Committee to re-draft this part of the proposed rule.

6. Form of Notice

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.

We have one comment only on the form of notice. In our view it is unnecessary for parties to have to explain why they *consent* to mediation/ADR. There is no obvious reason for this and in the context of how the rule works, the requirement seems wholly unnecessary.