

**Response**

**by**

**Sheriff Derek Colin Wilson Pyle**

**to**

**Sheriff Court Rules Council**

**Consultation**

**on**

**The Sheriff Court and Alternative Dispute Resolution**

**July 2006**



## **Introduction**

I have been a full time sheriff since 2000. I am a sheriff of Grampian, Highland and Islands at Inverness. Before 2000 I was a solicitor in private practice in Edinburgh, specialising in commercial litigation – principally in the area of construction law. I was a solicitor advocate and appeared regularly in the Court of Session Commercial Court from its inception.

## **Question 1a**

No

## **Question 1b**

It is possible in this answer to deal with virtually all matters arising from the Consultation Paper, as there are a number of basic issues of principle which ought, in my view, to be addressed.

This is a very radical change to the practice and procedures in non family actions. It is therefore necessary to analyse what are the problems in the present rules, such that it is considered by some that such a radical change is necessary.

There are, in my view, only two inherent problems with litigation: a) the cost and b) the delay.

A subtext of the problem of cost is the risk arising from the uncertainty of outcome. Thus, when in private practice, I used to liken litigation to a bet on, say, the 3 o'clock at Newmarket. It always struck me as strange why a client who would never dream of putting money on a horse would be prepared to risk vast – and unlimited - sums on the uncertainty of a successful outcome of a court action.

There is nothing in ADR which properly addresses the problem of cost. Indeed, the employment of a professional mediator – unless wholly funded by the State – will add considerably to that cost. It is self evident that an action may not be necessary if pre-litigation mediation is used, but that ignores the fact that the process of mediation itself will be expensive. At the very least, the Council should be advised on a proper comparison between the cost of mediation pre-litigation and the cost of litigation which might be resolved before there has been incurred the expense of a proof. (I should urge caution in accepting statistics produced by those in whose interests it is to promote the use of ADR.)

The answer to the problem of cost is radically to alter the role of the court by introducing a system in all forms of actions which adopts the better aspects of the commercial court

procedures allied to the concept of an early hearing in the same vein as the child welfare hearing which has been a huge success in curtailing family litigation. Such a change would allow the court to be the mediator where that was appropriate and at no cost to the parties. It would also ensure that the true issues in the dispute would be identified and discussed at the earliest stage.

Again, there is nothing to suggest that ADR addresses the problem of delay. In fact, most sheriff courts can offer parties diets of debate or proof at short notice. In my experience, it is not the court, but the parties or their agents, who wants matters delayed. ADR can of itself be a lengthy procedure involving several meetings to which the parties will want their agents' attendance. Delay can result in finding dates when everyone is available.

The Committee infers that there is another important reason for ADR, namely that judicial decision "usually produces a winner and a loser". In my view, this is a fallacious argument. First, it ignores the fact that the vast majority of cases never reach the stage of a judicial decision at all. Secondly – and perhaps more fundamentally – it seeks to argue that the creation of a winner and loser is, ipso facto, a bad thing and therefore to be avoided. I see no reason in principle why the normal rules of life and competition should be suspended just because the courts are involved. In my experience, a client always wants to be a winner. It is the role of the professional adviser to explain to the client that in any litigation it is virtually impossible to win everything – even if only in the expense of the extra-judicial element of the adviser's fees. It is also the role of the court to emphasise that point – indeed the argument about cost is a major weapon in the armoury of the court in encouraging parties to reach a settlement, but that is still their choice to make.

It might well be in the public interest that there is a winner and a loser, particularly where a consumer decides to take on the economic might of a large corporate institution. I should have thought that the interest groups that form the consumer lobby would not wish that opportunity to be undermined in any way.

#### **Question 2a**

No

#### **Question 2b**

In my experience, it is invariably the case that parties spend a considerable amount of time and money on a dispute before it reaches court. To insist on ADR beforehand would simply increase that cost. The answer is to create a framework of rules which encourage parties to have their dispute brought before the court at the earliest stage, in the knowledge that the court will ensure that the real issues are identified at the earliest stage and accordingly that there is the greatest opportunity for the parties to understand their

own respective strength and weaknesses, the identification of which will be the major factor in effecting a compromise between them.

**Question 3a**

Yes, but the court should not avoid its own responsibility to identify the issues and to attempt, where appropriate, to broker a settlement.

**Question 4a**

No

**Question 5**

Yes

**Question 6a**

As I understand it, the English experience is that a rule in similar form has resulted in compulsory mediation, which is wholly undesirable. One can envisage a circumstance where a powerful public or private body would prefer in its own interests – and contrary to the interests of the other party, as well as the general body of consumers – that a dispute is resolved in private and away from the glare of publicity. The proposed rule would greatly assist the interests of the powerful against the weak.

There is also a more esoteric argument – that the development of Scots Civil Law requires judicial determination. Ultimately, that is a role for the appellate courts, but it is often the case that important cases start off in the sheriff court. Anything that compels parties to litigate in private will undermine that process.

**Question 7a**

There is no reason to differentiate among the individual forms of action, although in my view there should be a radical revision of sheriff court procedure to reduce available forms of action to one form of ordinary action and a simplified small claims procedure.

**Question 8a**

No comment.

**Question 9a**

No comment, in the light of my earlier responses.

**Question 10**

There is no reason in principle why an in-court mediation service should not be available, but a comprehensive and effective scheme would be very expensive. It seems to me to be a waste of public funds when the court itself is already publicly funded and ought to be used to do the very tasks which ADR seeks to do.

**Question 11a**

Discussions should be in private.

Qd