

**Memorandum of Comments by the
Civil Procedure Committee of the Law Society of Scotland
on the
Sheriff Court Rules Council Consultation on the Sheriff Court and on
alternative dispute resolution**

The Civil Procedure Committee (the Committee) of the Law Society of Scotland welcomes the opportunity of contributing to the consultation by the Sheriff Court Rules Council on The Sheriff Court and Alternative Dispute Resolution. The Civil Procedure Committee represents all areas of practice for solicitors in Scotland. In relation to Civil Court work these areas are many and diverse and this is also reflected in the large number of bodies who have been consulted by the Sheriff Court Rules Council.

The Committee recognises that Alternative Dispute Resolution will have more relevance in some areas of civil practice than in others. This response does not therefore deal specifically with every question nor does it cover the differing views of practitioners involved in different areas represented on the Committee.

The Committee has three principal concerns;-

1. Mediation should not be compulsory. The essence of mediation is that it is a voluntary process requiring the consent of both parties to enable it to work.

2. The Committee was disappointed that at no point in the consultation is there any reference to who should meet the cost of mediation.

3. The Committee considers that parties should not be penalised in any finding of expenses if they have not tried to resolve their dispute by mediation or, if the mediation has been unsuccessful. In a great many cases a requirement to attempt mediation would lead to increased costs rather than reduced costs which could inhibit access to justice. Without any proposals for public funding of the mediation process the whole cost including the mediator, the hire of premises to conduct the mediation and the cost of legal representation that the parties may wish to have will all have to be met by the parties themselves. As the Committee say in answer to Recommendation 3 the Committee feel that there is no realistic prospect of public funding for these additional costs.

The Committee went on to consider the specific recommendations and respond 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.”

The Committee has several concerns with this proposed new rule. In particular the Committee are of the view that it is unhelpful to include such vague phraseology as “speedy and efficient resolution of all matters in dispute” in Rule 9(A).1 of the Rules of Court. The Committee consider that there will be too many variables for this to be operated in a meaningful way. The Committee can envisage situations in which actions are raised towards the end of a prescriptive period in which aspects of liability and quantum still require considerable further investigation. The Committee consider that Rules of Court should be specific and not be aspirational.

The Committee noted that the draft Rule 9(A).2-(1) states that “In any defended action the Court may, at any stage of the action where it considers it appropriate to do so 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” This Rule is difficult to reconcile with the proposal, in Recommendation 2, that a pursuer be required to make averments in relation to the steps which have been taken to resolve matters by alternative dispute resolution before a writ is warranted.

Rule 9(A).5 refers to “unreasonable conduct”. The Committee has already commented that the consequences of failure to attempt to resolve matters using Alternative Dispute Resolution should not result in a penalty on expenses. In addition the Committee considers that the phrase “unreasonable conduct” is too vague and is open to a wide variety of interpretations. The Committee are firmly of the view that any Rule of Court should provide certainty, should have a clear meaning and should be capable of being understood.

Recommendation 2

“That a new paragraph(5A) be inserted into OCR3.1 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.”

It is unarguable that agents settle disputes by negotiation and the Committee considers that they can continue to be trusted to so. It is both unnecessary and undesirable for a creditor, who wishes to recover monies through the Sheriff Court to have to make averments to include the steps taken prior to the raising of the action to resolve the dispute by other forms of dispute resolution when the claim relates to a failure to make payment on behalf of the debtor at least until it is clear that there is a dispute.

The Committee is strongly of the opinion that it should be unnecessary for the pursuer to include averments with regard to the attempts which have been made to mediate the claim in the writ prior to receiving a warrant. The Committee are aware that the majority of actions which are raised in the Sheriff Courts in Scotland proceed on an undefended basis.

It is inappropriate for such a requirement to be inserted into the Ordinary Cause Rules and even less appropriate for such a provision to be included in relation to the Rules for Summary Causes or Small Claims.

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 matter piloted in the Sheriff Courthouses of Edinburgh, Glasgow and Aberdeen.”

The Committee considers it wholly unrealistic that the Scottish Courts Service would have or be given the resources to fund in-Court mediation services in relation to all disputes at all levels. This recommendation seems to be out-with the powers of the Sheriff Court Rules Council to implement.

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”

The Committee is concerned that a specific Rule inviting the Sheriff to hold discussions in private and not in open Court is inconsistent with the role which should be exercised by the Sheriff and may be perceived to be at odds with the Shrieval Oath. A proposal whereby a Sheriff meets with the parties in chambers may give rise to a perception that the Sheriff may be biased in his or her opinions and creates the potential for unsuccessful parties to question the impartiality of the Court.

As matters currently stand the Sheriff has discretion to speak to agents together in private but the role of the Sheriff is to provide a decision for two or more parties who are in dispute rather than to act as their mediator. If a Sheriff were to conduct private sessions that could have an impact on the impartiality of the Court if he or she then required to determine the issue between the parties in a formal finding.

In conclusion the view of the Committees regard to the consultation is that;-

1. The use of alternative dispute resolution by parties who are in dispute should be consensual rather than compulsory.
2. The failure to use ADR should not have a penalty on costs and
3. There should be no formal requirement for a party to make averments with regard to the attempts that they have made to use alternative dispute resolution prior to obtaining a warrant on there writ.