

Reply to (1) The Law Society of Scotland and (2) Sheriff Court Rules Council Mediation Committee on Sheriff Court Rules Council Consultation on the Sheriff Court and Alternative Dispute Resolution.

I refer to the question numbers of the Consultation paper prepared by the Sheriff Court Rules Council and comment as stated.

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

Yes.

1b Please provide comments to explain your reasons.

As stated by the Committee of the Sheriff Court Rules Council (the Committee) it is not appropriate to impose ADR on parties due to its voluntary nature. All parties must be willing. An indication(or even an instruction) from the Bench that parties might consider ADR is an appropriate way to proceed. Some Sheriffs and Judges have made comments of this nature over many years now. It would be foolish of any party not to at least consider seriously comments made from the Bench. Alternatively, one party might have felt unable to suggest ADR (for fear of showing weakness or for other reasons) but might feel better able to make the offer in court which might put some pressure on other parties agreeing to same.

2a Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?

The rule should encourage rather than compel – but if the parties are already in court they have already resorted to litigation (albeit at an early stage).

2b Please provide comments to explain your reasons.

See 1b.

3a Should the court have the power to require parties to an action to consider ADR?

Yes.

3b Please provide comments to explain your reasons.

The court should be able to require the parties to consider ADR. Having done so, the parties may not agree to settle by these means resulting in the action coming back to court. Otherwise this is covered at 1b.

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 yes.

4b Please provide comments to explain your reasons.

Without requiring parties to give notice with reasons in writing whether or not they consent to a referral to mediation, matters could drag on, further bog down the courts (thereby negating the whole point of ADR) and play into the hands of any party who is not really genuine about settling or who may simply wish to delay matters indefinitely.

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

I have noted the Committee's views and agree with them. It will be open to each Judge or Sheriff to determine what is "unreasonable conduct".

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

Yes – as drafted.

6b Please provide comments to explain your reasons.

It is necessary and desirable to have some incentives placed upon the parties. See also 4b.

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 to Ordinary Cause, Summary Cause and Small Claims. I am not sure about Summary Applications, Statutory Applications and Appeals.

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

Certainly so far as Ordinary Cause, Summary Cause and Small Claims actions are concerned, if these can be settled outwith court so much the better. The parties can hopefully have more of a "win – win" result and attempt to appreciate the views of the other party or parties. In Small Claims and perhaps even Summary Cause actions it may be necessary to provide resources within the court process (and within the court building) and at public expense to have these settled by mediation as the

sums or other matters in dispute would not induce the parties to spend money on a commercial mediation.

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.

No (see above).

8a Do consultees consider that rule 33.22 should be deleted from the OCR in the event of the all-encompassing rule being introduced?

No.

8b Please provide comments to explain your reasons.

I think that family actions may require to be treated differently where the interests of the children are paramount. Any element of compulsion as existing in family actions at present should remain. All other ordinary actions can and should be dealt with differently.

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

I agree with Recommendation Two.

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.

I would favour the provision being incorporated into all of the court rules. Separate consideration may require to be given to family actions.

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.

Not applicable.

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

I agree with the Committee recommendation (see also 7b).

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?

Agreed. As is stated, many Sheriffs feel uncomfortable about acting as negotiator whereas others have no difficulty. The rule envisages that the Sheriff "may" hold discussions in private and not open court. Those Sheriffs who feel comfortable about doing so will do it and those less comfortable will either not, or do it only occasionally and reluctantly. I think this is a satisfactory way to proceed meantime and be reviewed in the future. Hopefully other facilities may be available to the parties for mediation.

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.

No.

11c Do consultees have any views on the recommendations that rules 8.3 and 9.2 should otherwise remain for the time being unaltered?

Not applicable.

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.

Nothing to add.

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.

Nothing to add.

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