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Solicitor to the Council

Date : 10 August 2006
Our Ref: LAS/IS/SCA
Your Ref:

Sheriff Court Rules Council
St Andrew's House
Regent Road
EDINBURGH EH1 3DG

RECEIVED
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Dear Sir

CONSULTATION ON THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

I refer to your consultation paper dated 21 June 2006 and I would respond in the following manner:

Questions 1A and 1B

If the thrust of the policy intention is to encourage dispute resolution rather than a full contested litigation, then it is indeed desirable to have clear rules to guide parties should those parties desire to invoke the Dispute Resolution Rules. However, the proposed new Chapter 9A set of rules requires to be strengthened at least in the critical issue of at what point would it be appropriate for a Sheriff to make an Order requiring the parties to go to mediation. The new proposed Rule 9A.2, requires to be clarified in the sense that what would be the parameters that would guide the Sheriff in coming to the view that he/she "considers it appropriate to do so"?

Questions 2A and 2B

It would seem to be a strange notion if the Court could force parties into dispute resolution mechanisms against the will of either or both parties. It seems a contradiction in terms to speak of one party being dragged to the mediation table. Accordingly the rules should encourage rather than compel parties to seek resolution of disputed matters.

Questions 3A and 3B

There should not be a power given to the Court to require parties to consider dispute resolution. After all, parties, particularly commercial parties, would have invoked dispute resolution if they had thought that it would have been a speedier and indeed cheaper method of resolving difficulties. Commercial parties do not as a rule cavalierly plunge into litigation for obvious reasons. Accordingly, if parties feel that there is no option but to litigate then they should be allowed to litigate without any unnecessary distraction.

Questions 4A and 4B

If the decision is to proceed on the basis that the Court will not be given a power to demand that parties consider ADR, then it would be superfluous to demand the giving of a notice in writing as to the parties' position on the whole issue of mediation. Matters should be left on a very clear basis that either the Court considers it to be necessary that both parties be sent to dispute resolution (subject to the comments made above), or parties should be left to prosecute their cases with all vigour.

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Question 5

There are no useful comments that can be made.

Questions 6A and 6B

There ought not to be an express reference to the question of expenses. There is a distinct danger that the power and vigour of a litigation system, particularly in commercial matters, could be considerably weakened if ADR is pushed as the "appropriate" method of resolving disputes in Scotland. Were that to happen, it could be that our current litigation system would wither on the vine as undue pressure is brought to bear upon parties to use ADR in all circumstances. If one party to a litigation will not for any reason go to ADR, why should they be punished for an exercise of a free choice?

Questions 7A, 7B and 7C

It makes no logical sense whatsoever to pick and choose whether different forms of litigation in the Sheriff Court ought to or not have rules. If the decision in principle is that ADR is to be encouraged then it has to be encouraged across all of the different forms of process in the Sheriff Court. ADR is a philosophy and logically can and must extend to all matters justiciable in the Sheriff Court.

Questions 8A and 8B

There is no good reason in principle to make a distinction between the matrimonial rules and in particular Rule 33.22 in distinction from any other rule in the Sheriff Court. Rule 33.22 ought to be repealed and superseded by the normal new rules which would then apply to all matters in the Sheriff Court which require to go to ADR.

Questions 9A and 9B

There ought not to be a new Paragraph 5A inserted into the rules. Parties ought to be free to have the choice whether to go to ADR or not and that ought to remain a private matter between the parties prior to launching a litigation. There is no good reason in principle why any party should be forced to disclose pre-litigation matters as would necessarily happen if the new Paragraph 5A were to be inserted into the rules. It is difficult to see, in any event, what would be achieved if parties were forced to disclose pre-litigation history. Is the policy intention that if a party were to respond in the negative, then somehow or other this would be regarded as a "bad thing"? Equally, if a party were to disclose that ADR was sought and perhaps rebuffed, does this mean that the party then is to expect some advantage for such virtue?

Question 10

The provision of an all encompassing dispute resolution system within the Courts would be very challenging indeed. Mediators would require to be trained in a very wide range of subject matters and in particular one would wonder how the mediators would cope with highly complex technical cases which would require an in-depth professional knowledge of the expert as opposed to one trained in the psychological techniques of mediation. One is willing to concede that a well trained mediator would be able to cope with a wide range of cases but could not cope with every case that comes before the Sheriff Court.

Questions 11A, 11B and 11C

As a matter of principal, no Sheriff should conduct business as a regular matter of course in private. There are good reasons to argue that justice must be seen to be done and other than in very special circumstances the tradition of the Courts in Scotland is that all Courts are open and available to the public. In any event, it should never be the appropriate role of a Sheriff to act as the "honest broker" between two parties. The role of a judge is to judge and there can be an unfortunate blurring of those roles which leads to confusion in the mind of the public rather than being of assistance. The public require/...

require justice to be delivered in the shape of a clear and understandable decision at the end of a litigation which, of course, may or may not be the one desired. However, there can be misunderstanding of the outcome whereas there could be the very grave danger of resentment on the part of lay parties to a dispute who have enjoyed the Sheriff acting as a kindly arbiter who, if no resolution can be obtained, has to change gear both professionally and psychologically to turn into the impartial "judge" that the public would expect.

I hope that these comments are helpful. The completed Respondent Information Form is enclosed herewith.

Yours faithfully



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