The Secretariat
Sheriff Court Rules Council
Scottish Executive Justice Department
Civil Court Procedure & Sheriff Court Jurisdiction
2 West
St Andrew's House
Edinburgh EH1 3DG

Our Ref: RCC

E-mail Address: craig.connal@mcgrigors.com

18 September 2006

Dear Sir

SHERIFF COURT RULES COUNCIL
RESPONSE ON THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

We write to comment on this Consultation Paper. While we endeavour to address the specific questions raised, it may assist in an overall understanding of our approach if we set out first some general points.

1 This firm is committed to encouraging the most appropriate method of dispute resolution for each individual client and individual case. That inevitably means that we are also firmly committed to including ADR in the range of options to be considered and/or pursued in any particular instance. We accordingly very much welcome careful consideration of the issues which arise at the interface between the Courts and ADR to which the Consultation Paper is a valuable contribution.

2 In some cases a form of ADR may best fit with the client's needs and objectives. That is not necessarily true of every case. We note in passing our concern that some of the claims made for mediation, in particular by commercial providers, (and we note with concern the presence of a representative of one such provider on the Committee) seem to us to be overstated.

3 We would like to raise the question of why the Sheriff Court (one form of dispute resolution system) should positively encourage customers to use a different system. There may be issues of resources or cost or others we have not considered, but we suggest this is a logically prior question to those raised in the Paper. Some attempts to move disputes from formal court mechanisms have had unexpected effects, for example, the collapse of numbers of High Court actions in England (unlikely all to have been resolved amicably so presumably now being determined through some form of dispute resolution procedure other than the court) or the introduction of adjudication into construction disputes which has proved satisfactory in some ways but unsatisfactory in others (and led to an entirely new "industry" of legal challenge to adjudicators' decisions). We express no concluded view, but one argument might be that the primary objective should be to make the Sheriff Court an attractive, user-friendly and efficient forum for the resolution of disputes.

4 When ADR is spoken of it is generally assumed to mean a mechanism by which parties are brought to an agreement (for instance mediation) as opposed to those where a third party takes a decision. Mechanisms such as mediation generate significant pressure to settle – to meet somewhere "in the middle". They emphasise pragmatic factors, for example, cost and time over the rights and wrongs of the dispute. They operate at their best where one party wants paid (but recognises he will not get all he wants) and the other recognises he will have to pay (and recognises he may have to pay a little more than he feels is ideal). However, many disputes are much more black and white, win or lose – requiring a decision one way or another on a factual or legal or combined issue. Any perception that the court naturally favours ADR may be capable of creating an undesirable pressure on the parties in such cases. A litigant who, if his case proceeds, is entitled either to decree or absolvitor as the case may be, should not feel he is under attack if he presses on with that objective.

5 Most systems of ADR bring with them cost (which may be irrecoverable) and no guarantee of a result (thus with the prospect of having to return to a more formal mechanism in due course). Accordingly there is always the risk of adding to rather than diminishing the burden on litigants. This also needs to be weighed in the balance.

6 We understand that statistics reveal that over 90% of Sheriff Court civil actions are undefended – most of those being debt recovery in one form or another. When any procedural approach is considered it seems to us logical to avoid imposing unnecessary requirements on that vast bulk of cases (especially when the modern trend is away from unnecessary formality toward more simple and flexible procedures).

Turning now to the questions raised in the Paper:-

1. We agree with the view that "encourage not compel" should be the correct approach. The question then becomes whether a rule of court is necessary simply to enable a Sheriff, where he considers it appropriate, to suggest to parties that this is something they ought to look at. At present we remain unconvinced that a formal rule is required for this purpose and we comment further on the wording set out in relation to later questions.

2. We have dealt with this above. There should be no element of compulsion. Parties should be free to use the court system if they wish and should not feel that they are forced to go down some other route first.

3. No. The issue may be one of semantics but a "requirement" to consider ADR could create an undesirable pressure on a litigant who is entitled to a legal remedy.

4. No. There may be many and varied reasons why a party does not believe ADR is appropriate. Not all of these are ones which parties will wish to expose publicly. There likewise may be factors bearing on any decision making process which the party will be particularly reluctant to disclose to their opponent. In addition, a provision of this nature installs ADR as an obligatory first option and appears to impose a burden on those embarking on court procedure to justify that procedure.

5. On the assumption that matters proceed, we have no comments on this.

6. No. We agree with the argument for the exclusion of such a power. In any event, the court already has adequate powers in general terms for regulating the costs of proceedings if it appears that the time of the court has been wasted. By way of example, if a technical witness, giving evidence, immediately conceded several of the opposition's points, that could be reflected in expenses because clearly that could have been done beforehand. However, the reason would not be that there had been a failure to negotiate – it would fall within the court's general control of the use of the court resource.

7. In principle it seems to us that if such a rule is to be adopted it should appear in all the various rules (although its application in the context of summary applications, which frequently involve statutory appeals of one form or another against notices, may be problematic).

8. We agree for the reason indicated in the Paper.

9. We disagree both for the reason previously indicated based on an analysis of business in the Sheriff Court's civil department and because it appears to install ADR as an essential prior option whereas we would favour the encouragement of ADR in appropriate cases.

9B Logically it should appear in all rules if it is to appear at all.

10. We can see considerable logic in what is proposed. Whatever the theoretical discussions, we have felt for some time that one of the weaknesses of commercial mediation is that it is too expensive to deal with those smaller disputes which are the very ones where the cost of proper legal assistance on each side will swiftly outweigh the matters at stake. A focus on the smaller disputes seems sensible.

11. The terms of this proposal seem to envisage a rather different situation from that envisaged in the earlier rules. The earlier rules suggest that the potential decision-taker, i.e. the Sheriff, should indicate in an appropriate case to the parties that they should give serious consideration to some form of ADR and let him know in due course what their view is. This rule appears to envisage a further step in which the Sheriff would take some active part in the actual negotiation or indeed engage in debate with parties about the rights and wrongs of such an approach. We question whether that is compatible with the decision-taking role of the court. The step of taking matters in private is a relatively dramatic one not normally countenanced. If the policy view is taken that the Sheriff should engage in such discussion, it seems to us that there are wider issues which need to be considered.

12. We have a number of detailed comments:-

9A.2(1) – We note the use of the phrase "an order requiring" and refer to our previous comments. We also note that this requires the parties to consider "together" which may be an unnecessary complication.

9A.3(1) – We think it may be unnecessary to go to the detail of "referring" which is a process giving the court an overt role or indeed specifying precisely what is being referred.

If the parties are content for the moment that the litigation should not proceed, the action should simply be sisted.

9A.4(1) – See above.

9A.5 – See previous comment.

13 – See previous comment.

We trust the above is helpful.

Yours faithfully

R CRAIG CONNAL QC