Response by Renfrewshire Council to Consultation on Alternative Dispute Resolution

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

[Response 1a - No.]

Q.1b Please provide comments to explain your reasons.

[Response 1b - The proposed rule is not necessary or desirable. The occasions when the Court would ex proprio motu impose mediation on parties will be rare. Actions can already be sisted, usually on the motion of the parties. If parties share the view that the possibility of a settlement might be explored, they can already seek a sist.

If the Draft Rule is to be adopted, I suggest that the Rule might be expressed so that any time after the Mediation order until the conclusion of the Mediation process shall be left out of account, rather than the existing proposal:

"9A.2(2) An order made under paragraph (1) shall not affect any requirement for a party to comply with any other provision in these rules or any order of the court."

I suggest that the Order for mediation should interrupt the normal timetable, in a similar way to the sisting of a cause (Rule 10.2): "Where a cause has been sisted, any period for adjustment before the sist shall be reckoned as part of the period for adjustment."

It might appear inconsistent for a party to be negotiating and at the same time strengthening his case. While a legal representative would readily understand that there was no inconsistency, Party Litigants appear in all forms of court procedure, and particularly in the Small Claim and Summary Cause court.]

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

[Response 2a - Yes]

Q.2b Please provide comments to explain your reasons.

[Response 2b - Compulsion would be impracticable.]

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

[Response 3a - Yes, making the distinction between the parties having to consider ADR and the parties having to initiate ADR]

Q.3b Please provide comments to explain your reasons.

[Response 3b - ADR and Mediation is a <u>voluntary</u> process. At present there is no sanction on parties if they do not discuss matters. The Court is entitled to assume that, if parties have reached Court, then they have <u>already</u> exhausted the possibility of settlement.

While there is no reason why the Sheriff might not enquire of parties if they have discussed the dispute, and give them further time if necessary, it should be no more than what happens already in a Summary Cause First Calling under Chapter 8. If the parties are asked by the Sheriff if there is any possibility for agreement, and they both say 'no', then that should be the end of the Court's responsibility. It remains open to the parties to ask the Court for a sist or continuation or the discharge of a hearing if they can jointly agree that there is a possibility to be explored.]

Q. 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?

[Response 4a - Not in the general case]

Q.4b Please provide comments to explain your reasons.

[Response 4b - There would be no value in such requirements. In the vast majority of cases there would merely be formal statements as there often are about prorogation agreements and pending proceedings e.g. "The Pursuer/Defender believes that there is no reasonable prospect of negotiation leading to a settlement of the dispute."]

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

[Response 5 - see response 1b]

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

[Response 6a - No]

Q. 6b Please provide comments to explain your reasons.

[Response 6b - See Response 12. Expenses consequences should only arise if first the Court has stated that the case seems suitable for ADR, and invited parties to agree. If parties agree, but ADR then fails to achieve a settlement, the existence of ADR is irrelevant, and the Court should not later consider the question of expenses in the light of the parties' respective contributions to settlement negotiations, e.g. the Court should not entertain the party who says "I was prepared to settle, but the other side wasn't, so all the expenses incurred after ADR should fall on the other party."]

Q. 7a Is it appropriate to include a reference to ADRin 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?

[Response 7a - Yes, except for SAR]

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

[Response 7b - With Statutory Appeals, there is little room for negotiation. The Council or other authority has made a decision, and the question for the Court is whether or not the decision is flawed. Given that "Summary Application" procedure is used, the "Summary" nature of the appeals is not enhanced by the delay of ADR]

Q.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.

[Response 7c - see Response 7b]

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

[Response 8a - Yes]

Q. 8b Please provide comments to explain your reasons.

[Response 8b - It would be logical if an all-encompassing procedure is introduced]

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

[Response 9a - See Response 4b]

Please indicate, with reasons, whether this reference provision should be incorporated into:
(a) All or
(b) Some or
(c) None of the court rules.

[Response 9b - This change should not be made to any Rules. See previous responses]

Q. 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.

[Response 9c - n/a]

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

[Response 10 - Renfrewshire Council has no experience of those other Courts where trial schemes operate]

Q. 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?

[Response 11a - yes, incorporate in both sets of rules. There will be practical difficulties in excluding the public from a busy court, and allowing them back in, on a case-by-case basis.]

Q.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.

[Response 11b - n/a]

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

[Response 11c - No]

Q.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.

[Response 12 - See previous comments, especially about 9A.2(2).

On expenses, what is the "unreasonable conduct" referred to in 9A.5? Either a party wants to use ADR, or he does not. If a party declines ADR, and the litigation continues, why should he be penalised for not adopting ADR?

There are three possible outcomes to the litigation:

(1) the declining party wins - A Pursuer seeking payment or another remedy should not have his claim delayed just because someone else thinks that ADR might have proved fruitful. The decision on expenses is made at the end of the case, so the Court has already determined the merits of the case. Can the anyone contradict the party who says 'I declined ADR because I did not want my just claim delayed' ?

(2) the declining party loses - similarly, assuming that the party had a stateable defence, his choice in declining ADR is entirely understandable; it is only with the benefit of hindsight that it can be said that he ought to have negotiated and compromised. The question of the reasonableness of the party's actions should be judged at the time of the actions - at that time he believed that he had a stateable defence.

(3) there is divided success - how can it be in the interests of justice to speculate on the possibility that ADR might have led to <u>any</u> settlement, let alone a settlement equivalent to the eventual outcome of the Court action?]

Q. 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.

[Response 13 - No]