RESPONSE BY SHERIFFS PRINCIPAL BOWEN, DUNLOP, LOCKHART AND TAYLOR
TO
THE SHERIFF COURT RULES COUNCIL'S CONSULTATION PAPER
ON
"THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION"

Preamble

In the spring of this year the Justice Minister announced that there is to be a complete review of civil procedure in Scotland. In our submission any radical alterations to civil procedure such as the introduction of mediation should not be embarked upon at this time. To do so might be thought to pre-empt the civil procedure review. We are opposed therefore to any change to the Rules at this time.

The introduction of mediation is premature for another reason. The Scottish Executive Legal Studies Research Team concluded their paper (Research Findings No 50/2004 "The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence") by saying:-

> "Finally, the available evidence suggests a need for further research and external monitoring of any services, including long term investigation of whether mediated settlements and client satisfaction endure, to inform strategy and policy in relation to mediation".

We are unaware of any such research having been carried out. Thus until it is carried out the Rules Council should not introduce the concept of mediation to the rules of procedure for litigation in the Sheriff Court.

Should such an approach not commend itself to the Council in our submission the Council should before introducing a change to the Rules, have a very clear idea of why there is a need to effect any change. What is the mischief or failing in our present system which requires to be addressed?

Mediation has been introduced to other jurisdictions, such as certain states in America and England, for particular reasons. For example, in America the volume of litigation was so high that the only way the courts in some states could cope with the number of cases was to restrict access to the courts by requiring that parties endeavour to mediate their disputes. In most states in America the successful party does not recover his/her expenses from the unsuccessful party. Hence the volume of litigation is very much higher than in Scotland. In England there were at least two considerations. Prior to the Woolf Reforms the delay in being able to get a case to trial was unacceptably long. There was also an issue with regard to the expense of litigation.

The foregoing difficulties are not nearly as acute, if at all present, in the Sheriff Court. The number of ordinary civil actions is reducing. In 1993 there were 166,393 ordinary actions raised in the Sheriff Courts throughout Scotland. In 2002 that figure was 115,326. The trend continues in a downward direction. In Glasgow Sheriff Court in June 2006 the rolling average for the number of ordinary actions warranted per month was 886. The rolling average in June 2005 was 947. The waiting time in Glasgow Sheriff Court is about six weeks for a proof and seven weeks for a debate. There are no delays in issuing judgments. At 31 July 2006 there were only six cases at avizandum in Glasgow Sheriff Court, the oldest of which was from early June 2006. The remaining five were all cases in which the hearings had concluded in July 2006. It is considerably less expensive to litigate the same issues in Scotland than in England. The principal reason for this is that the concept of "discovery" is completely different south of the border than it is in the north. Thus the main reasons which drove the Woolf Reforms are absent in the Sheriff Courts of Scotland. The mischief which requires to be addressed in Sheriff Court litigation is not immediately apparent. We oppose the introduction of mediation to the Sheriff Courts of Scotland just because that concept has solved a problem in another jurisdiction, which problem does not exist in this jurisdiction. More problems can be thereby created than resolved.

The present Rules (Chapter 40) provide a further means by which resolution of disputes in commercial actions can be speedily achieved without requiring parties to bear the additional cost of mediation. Research by Edinburgh University on behalf of the Scottish Executive disclosed that in Glasgow Sheriff Court 71% of defended commercial actions are decided or settled within six months and nearly 90% within nine months. That is achieved without any additional cost to the parties. In Glasgow a pilot is now underway which applies the lessons learned from commercial actions to personal injury actions. Should that be successful then similar statistics might well be available in a different area of litigation.

Few would doubt that there are a limited number of cases in which mediation can serve a useful purpose. Such situations are principally where the parties have to continue in contact with each other after the dispute has been resolved. Disputes between neighbours are prime examples. Family disputes are also good examples but these are already catered for in the Rules of Court (33.22) and in the widespread approach at child welfare hearings which encourages parties to reach their own decision rather than have a decision imposed. That service is provided to the parties free of charge. Solicitors are sufficiently aware of the concept of mediation that they can refer to ADR such limited cases that are suitable without the need for a specific rule.

Question 1

Do consultees consider that such a Rule (encouragement of parties by the court to resolve disputes by means of mediation) is necessary or desirable?

In our opinion a Rule such as is proposed should not be introduced. It is neither necessary nor desirable. The role of litigation is to define the respective rights and obligations of the parties and then apply the appropriate remedy. ADR is a totally different dynamic based on the express premise that negotiation and compromise can and should take place without any meaningful examination of the parties' rights and obligations. ADR is not a surrogate for litigation. It is a business solution based on commercial priorities. The concept of mediation is now well known yet it is not used to

any material extent in this jurisdiction. Most lawyers are slow to recommend it to clients. The reason is probably quite straightforward. The present system, although not perfect, operates reasonably well as can be seen from the preamble to this response. But there may be another reason for the reluctance to use mediation. Evidence suggests that there is no reduction in the legal bill received by a client who embarks on mediation. That was acknowledged by the mediation team from Maryland, USA which visited Scotland in about 2003. It was confirmed by Professor Gwynn Davies, Academic Director and Socio Legal Researcher at Bristol University who gave a presentation to the Sheriff Court Rules Council Working Party on mediation. If there is no reduction in the client's legal bill and, in addition, the client requires to pay for the services of a mediator (and sometimes the hire of a suite of rooms) it is axiomatic that the client must be financially disadvantaged. It is sometimes overlooked that a Sheriff's time is free to parties. This facilitates access to justice.

It must also be recognised that there is no guarantee that mediation will bring about a resolution of the dispute. The proponents of mediation claim it to be successful in no more than 70/80% of cases. Should mediation be tried and it fail, the litigants will require to continue with their litigation through the normal channels. The end result will be a very much larger legal bill after the court has determined the issue. The Rules Council should not do anything which might impose an additional financial burden on parties and, in so doing deny or discourage parties from having their dispute resolved by one of Her Majesty's Sheriffs. It would be very interesting if research could address how many of the cases which it is claimed were resolved by mediation were settled not because of a genuine desire to compromise, but because a party had spent so much on the mediation process that his resources were thereby exhausted and the litigant was forced to compromise for financial reasons.

It is submitted that the imposition of mediation is seen by some as an obstacle to obtaining justice. Ian Latimer, the President of the Association of Chief Police Officers Scotland and Chief Constable of Northern Constabulary, when asked to explain why the process of obtaining an anti-social behaviour order took so long, was quoted in "Scotland

on Sunday" of 13 August 2006 as saying "You need to gather the evidence and jump through all the hoops, like trying mediation even when you know it won't work, because there's a worry that when you get to court the sheriff asks why you didn't try it. So you finally take it to court, and if it's defended it takes longer." We are not sure that the Chief Constable is correct in thinking that mediation must first be attempted before obtaining an ASBO. But the introduction of a Rule such as proposed will certainly render the quotation apposite.

Question 2

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

In our submission barriers, and particularly expensive barriers, such as mediation, should not be erected which restrict an individual's access to justice through the courts. Thus if there must be a Rule regarding mediation it should only be to encourage. It must be questionable if any Rule which compels parties to mediate would survive a challenge in terms of Article 6 of ECHR. Furthermore the aforementioned Scottish Executive Research Findings into mediation stated that ADR "should usually be voluntary and arise through informed choice".

Question 3

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

For the reasons set out in Answers 1 and 2 the court should not have power to require parties to an action to consider ADR. Furthermore, in our submission, such an order is unenforceable. What is meant by considering ADR? Presumably an order to consider ADR is not satisfied by one of the parties spending ten seconds considering and rejecting ADR. If the court makes an order and one party considers the other to be in breach of it the former can make complaint to the court. How is the court to determine whether the latter is in breach of an order requiring him to consider ADR? The court would have an

almost impossible task. Thus the order of the court would be unenforceable. Any Rule which gives rise to an unenforceable order is in our submission a bad Rule.

Even if the Rule might be considered enforceable its application will give rise to huge variations in its interpretation and application. These variations will apply both within and between Sheriffdoms and Sheriff Court districts. Any lack of consistency is likely to bring the law into disrepute. This should be avoided.

If the court did consider there to be a breach of such an order what penalty is to be visited upon the party in breach? An answer might be to reflect the court's disapproval in the final award of expenses. In our submission this should be avoided. If the party in breach subsequently lost the litigation it will almost certainly have an award of expenses made against it in the normal way. There would thus be no penalty. If the party in breach subsequently won the litigation then its refusal to submit to ADR would be demonstrably correct. Its rights have been vindicated. In order for ADR to have succeeded the subsequently successful party would almost certainly have required to compromise those rights which were vindicated by the court. The Court of Appeal in England managed to get itself into a real tangle when grappling with the issue of when a successful litigant should have its entitlement to judicial expenses restricted because of an earlier refusal to submit to ADR (*Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002). At paragraph 28 of the judgment it is said that the burden of proving there was a reasonable prospect that mediation would have been successful is on the unsuccessful party. At paragraph 19 one finds the following said:-

> "The fact that a party *unreasonably* believes that his case is watertight is no justification for refusing mediation. But the fact that a party *reasonably* believes that he has a watertight case may well be sufficient justification for a refusal to mediate."

How is a court to determine whether the successful party's belief was reasonable? The court might require evidence to resolve such an issue. That might be thought to be

absurd but nonetheless realistic should this approach be adopted. It is difficult to see what material or evidence could be placed before the court by the unsuccessful party. From a consideration of what is said in paragraphs 50 to 54 of the judgment it is difficult to avoid coming to the view that in virtually all cases the successful party who earlier declined to submit to mediation will be able to recover its judicial expenses. There will thus be no sanction for refusing to submit to ADR. A Rule which enables an order to be made which has no effective sanction should it be breached might be thought to be a bad Rule.

Thus any Rule which compels parties to submit to ADR will not be ECHR compliant and if the Rule only requires the parties to consider ADR it has no sanction should such an order be made and breached and is thus a bad Rule. Accordingly there should be no reference to ADR in the Rules.

Question 4

Should 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?

No. We have an adversarial system. In recent years Rules have been introduced which properly require litigants to disclose the basis for their action or defence. We have in mind the introduction of notes of argument in terms of Rule 22 and the Rules for commercial procedure to be found in Chapter 40. However it must be accepted that a litigant is entitled to retain as private the tactics which it seeks to deploy in a litigation. In the context of an adversarial system this is right and proper. The introduction of a requirement to give written reasons would traduce that present entitlement.

Question 5

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

We have no comment to make.

Question 6

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

We refer to our answer to Question 3.

Question 7

Is it appropriate to include a reference to ADR in each set of Court Rules?

For the reasons already given there should be no reference to ADR. However there might be an argument for the Rules for Small Claims containing a reference to ADR. In an ordinary action litigants require to instruct a solicitor. Every solicitor will now know about ADR and can advise their clients on the merits and demerits of mediation. Small claims are frequently contested by party litigants who may not know of the existence of ADR. The court may thus have an obligation to advise on the availability of ADR.

Question 8

Do consultees consider that Rule 33.22 should be deleted from the OCR in the event of the all encompassing Rule being introduced?

The question is based on a false premise. Reference is made to the reference to mediation in Rule 40.12.(3)(m). This Rule was introduced in March 2001 as part of the Chapter of Rules dealing with commercial actions in the Sheriff Court. No designated Commercial Sheriff in Glasgow, where the bulk of commercial actions are litigated in the Sheriff Court, has ever referred a case to mediation. The Commercial Sheriffs in that jurisdiction see no point in the Rule existing. However if, contrary to the views expressed in this response, an all encompassing Rule is introduced it would be consistent that the references to mediation in Chapters 33 and 40 of the Rules should be deleted.

Question 9

Do consultees have any comments to make in relation to Recommendation Two (a requirement to include an article of condescendence averring the steps taken by parties prior to the raising of the action to resolve the dispute by other means)?

For the reasons already given there should be no such requirement. The impression should not be created that the Sheriff will expect parties to submit to ADR or compromise their position before raising court proceedings. It is a mark of a civilised society that the State provides to its citizens access to a forum which will determine that citizen's rights and obligations. That right should not be fettered. Any such Rule should not be incorporated into any set of Court Rules.

Question 10

Consultees are invited to provide comments on the terms of Recommendation Three (the provision of in-court mediation services).

The pilot schemes in Aberdeen and Glasgow have only started. Both the Aberdeen and Glasgow pilots differ from the Edinburgh scheme in that in Aberdeen and Glasgow parties are expected to contribute to the cost of the mediator. In Glasgow if the sum sued for exceeds £750 litigants are expected to contribute to the cost of the mediation. In Aberdeen it is only in ordinary actions that a contribution is required. It may be thought a little ridiculous to initiate a pilot scheme and before they have been evaluated, recommend that identical or similar schemes should be set up throughout Scotland. Why bother with a pilot? Presumably a pilot was considered appropriate because, for whatever reason, there was doubt as to the viability of some aspect of the scheme. The Glasgow scheme has been operating for such a short period (since June 2006) that any such doubts could not possibly be assuaged. This question is thus premature.

What would be of considerable benefit to litigants, in our opinion, is the provision of an in-court advisory service for party litigants in small claims and summary cause actions.

Such exists in some courts for actions for recovery of heritable property. A pilot scheme has also operated in Dundee. Such schemes are valuable.

Question 11

Please indicate, with reasons, whether a new paragraph, in the terms outlined above, permitting discussion in private as opposed to open court in small claims and summary cause first callings at which stage the Sheriff has a duty to promote settlement (should be incorporated into both Rule 8.3 of the Summary Cause Rules 2002 and Rule 9.2 of the Small Claims Rules 2002).

In principle there is nothing wrong with the present Rules although we believe that the stage at which a Sheriff requires to promote settlement is misguided. The Sheriff is expected to promote settlement at the first calling of the case. It is at that calling that the pursuer hears the defence for the first time. In many cases the defence either directly or indirectly gives rise to the conclusion that the pursuer is being untruthful. Such can invoke a feeling of indignation, at the very least, on the part of the pursuer. The first calling is thus not the optimum time to seek to bring about a settlement. It is suggested that a more appropriate time might be before the full hearing or proof commences. A further reason why the first calling is an inappropriate time for settlement to be promoted is that in many courts the number of persons sitting in the public benches at the first calling of small claims and summary causes is considerable. The atmosphere is not conducive to bringing about a settlement. Again just before a full hearing or proof is scheduled to commence usually provides an opportunity for a discussion to take place in a relatively deserted court room.

In some courts it may be possible for there to be a discussion in private. However in the busy courts such as Glasgow there simply would not be time during the first calling of small claims or summary causes to allow the Sheriff to retire and to conduct settlement discussions as is envisaged by what is proposed. To introduce such a Rule would inevitably require additional shrieval resources.

Presumably any discussion in private will always be with both parties present. If that assumption is incorrect then for a further reason we would not be in favour of the Rule.