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Blog: Increased emphasis on ADR in commercial actions in Scotland

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New requirements for commercial actions highlight a change in emphasis for alternative dispute resolution in Scotland, writes ***Julie Scott-Gilroy****.*

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The Court of Session has issued *new requirements for commercial actions*. These requirements took effect from 27 March 2017 and highlight a change in emphasis for alternative dispute resolution in Scotland.

The new requirements only apply to commercial actions in the Court of Session. The definition of a commercial action is wide. Broadly speaking, a commercial action includes any transaction or dispute of a commercial or business nature. Construction disputes would usually be classified as commercial actions.

Under the Rules of the Court of Session, there is a *specific procedure governing commercial actions*. The purpose of this procedure is to streamline the court process to allow more management by the judge, which will hopefully result in a quicker and more cost effective resolution of the dispute.

What has changed?

The new Practice Note (*No.1 of 2017*) details the requirements parties have to meet when conducting a commercial action. The new Practice Note replaces the prior Practice Note (*No.6 of 2004*).

The key changes of note relate to alternative dispute resolution (ADR) (which includes *mediation* and without prejudice discussions or negotiations). In particular, parties are now required to consider ADR at an early stage and advise the court on the steps taken to achieve settlement. In most cases this will involve attendance at a joint meeting.

For example, in pre-action communication, parties are required to set out in detail their respective cases. The changes require parties to now:

"*...consider carefully and discuss whether some or all of their disputes may be amenable to some form of alternative dispute resolution.*"

This is very different to the previous Practice Note, which only stated that parties "may wish to consider" the same.

There are also changes in relation to what happens in advance of the first hearing in a commercial action, known as a Preliminary Hearing. The parties are now required to:

"*... consider and discuss whether resorting to alternative dispute resolution might be appropriate in respect of some or all of the issues.*"

There are also significant changes in respect of the second hearing in a commercial action, known as the Procedural Hearing. For example, in advance of the procedural hearing, parties should:

"*... consider and discuss whether resorting to alternative dispute resolution might be appropriate in respect of some or all of the issues.*"

At the procedural hearing before a commercial judge, the parties are now required to advise the judge:

"*... on the steps that have been taken to date to achieve an extra-judicial settlement and on the likelihood of such a settlement being achieved.*"

The judge will then also ascertain from the parties whether there are:

"*... any further steps that could be taken by court to assist in the resolution of the dispute.*"

Also, at the procedural hearing, the parties will be asked to:

"*... express a view on the stage at which any joint meeting between parties ought to be ordered to take place.*"

Commercial judges have the power to make such orders as they think fit. This power now extends to giving the commercial judge the express power to order parties to:

"*... hold a joint meeting with a view to exploring whether the dispute is capable of extra-judicial settlement or, alternatively, whether the issues requiring judicial determination can be restricted.*"

The Practice Note states that:

"*... it is likely that a joint meeting will be ordered in most cases.*"

Lastly, paragraph 39 of the Practice Note provides a reminder that the existing case management powers of commercial judges mean that any failure of a party to comply with a court order may result in sanctions, including a costs finding against the party failing to comply.

What is the impact of the changes?

In summary, there is now more emphasis on parties being able to show the court that there has been genuine consideration of ADR and attempts have been made to settle the matter out of court. The new requirements strongly encourage parties to go to ADR.

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The requirements of the new Practice Note mirrors the sort of case management powers that the English courts have under the Civil Procedural Rules, in particular, how the Technology and Construction Court's *construction and engineering pre-action protocol* encourages a without prejudice meeting of the parties or engagement in an ADR Process.

While there is now a greater burden on parties in advance of commencing a commercial action, on the whole the changes have been met positively. It is hoped that the fact that the court is pushing for settlement and ADR will avoid the unnecessary cost and risk of litigation by forcing parties to enter into genuine negotiations.

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