ANNEX B CONSULTATION QUESTIONNAIRE

Consultation question 1

Do you have any comments on the approach taken to splitting the Simple Procedure Rules into two sets of rules?

Comments

There is no requirement to create two sets of rules to deal with cases previously encompassed by the Summary Cause and Small Claims Rules. As the Gill Review observed the two sets of rules are virtually identical in their terms (Vol 1, Chapter 3, page 46) and the Simple Procedure Rules can "apply equally to housing cases, with some modifications" (Vol 1, page 136, para 136). The inclusion of mortgage repossession cases should make no difference since the intention is that the same rules will now apply to those as apply to social tenancy repossession cases. As the Gill Review observed "We consider that it makes sense for actions by creditors for recovery of possession of owner-occupied property to be dealt with by the same procedure as those by landlords for recovery of possession of rented property. We consider that the new simplified procedure, with certain modifications…should apply to all housing cases (Vol 1, page 139, para 153). The only material respects in which the two current sets of rules differ is in the separate Chapters at the end of the Summary Cause Rules encompassing actions relating to (1) actions for recovery of heritable property under Section 30 of the Sheriff Courts (Scotland) Act 1907 (Chapter 30); (2) actions for aliment (Chapter 32); (3) actions under the Child Support Act 1991(Chapter 33); and (4) Actions for damages for personal injury (Chapter 34). With the exception of actions for damages for personal injury which are about to feature more significantly in the Sheriff Court, these other actions form an insignificant proportion of Sheriff Court business. Indeed, the only special provision in relation to social tenancy repossessions is to be found in SCR 7.1 which makes provision for all such actions to call before the Sheriff irrespective of whether a Response Form has been lodged. It would be unfortunate if two sets of rules with so little difference between them were now to be replaced with another two sets of rules with largely the same content. That would appear to defeat the Gill Review concept of having one simple procedure applicable to all cases with the requisite modification in relation to social tenancy/mortgage repossession cases, the actions for damages for personal injury, and the other specialised but infrequent actions referred to above.

Consultation question 2

Are you content with the use of the following terms in the rules?

- ***Claim – for a standard simple procedure case***

Content ✓☐ Not content ☐ No Preference ☐

- ***Claimant – for pursuer***

Content ✓☐ Not content ☐ No Preference ☐

- ***Responding party – for defender***

Content ☐ Not content ✓☐ No Preference ☐

- ***Freeze – for sist***

Content ☐ Not content ✓☐ No Preference ☐

The term 'Responding party' does not accord with the Gill Review aim of using 'plain English' (Gill, page 131, para 127). If the language to be employed in the new rules is to be intelligible to party litigants it needs to be phrased in terms that are comprehensible in the popular lexicon. Whoever heard anyone say 'I've just been speaking with the responding party' ? At the Focus Group meeting it was suggested that 'Respondent' would be a better term but even that is hardly common in popular parlance. The use of the word 'opponent' would be comprehensible to all. Interestingly, it is a term used in the Gill Review (even if inadvertently – see, for example Vol. 1, page 201, paras 18, 21, 23). 'Freeze' is also an unhappy term suggesting a state of culinary permanence which is not intended to apply to sists. 'Unfreeze' is even unhappier. Why not 'defrost' or 'thaw' ? Preferable terminology in place of 'freeze' would be 'suspend' or 'halt' or 'pause' and its counterpart 'restart', 'recommence' or 'resume' none of which imply a state of permanency. Similar considerations apply to the term 'party' which is suggestive of a convivial event rather than an appearance in court. 'Person' would be comprehensible to all and where the word 'person' is currently used in the draft rules to refer to third parties, the term 'someone' or 'somebody' could easily be used in its place

Consultation question 3

Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules? No.

Consultation question 4

Is there any terminology remaining in the draft simple procedure rules which you think is unfriendly or difficult for the lay user to understand and, if so, what alternatives would you suggest?

Yes ✓☐ No ☐

Comments
Other than the comments in Q2 above I would only add that the term 'orally' (R 7.1) might be better replaced with the term 'verbally' for the same reasons as stated above.

Consultation question 5

Do you have any comments about the approach taken to the numbering and layout of the rules?

Comments
As discussed at the Focus Group meeting, the numbering of rules should follow the normal format for ease of reference in court and also for ease of recollection by practitioners. It is much easier to remember rule 35 than to recall different rules bearing the same number within different parts. The ratio for adopting the system in the draft rules is not persuasive. When rules have to be amended it is usually necessary to amend by way of addition and/or deletion of the particular rule in question rather than by simply tagging on a rule at the end of the relevant part. So the amendment of rules by way of introducing sub-clauses e.g. 39.1 and by way of adding new rules in the relevant section e.g. 14A as in the existing rules is likely to remain the normal method.

Consultation question 6

Do you have any comments about how, and where, the rules should be presented on the internet? No.

Consultation question 7

Do you have any comments on the approach to headings in the Rules? No

Consultation question 8

Do you have any comments on the approach taken to minimising the number of hearings?

Comments
The aim is to all intents and purposes no different from the aim that underlies the existing rules. The test will be whether it will work in practice. The other day in a summary cause proceeding for recovery of possession the defender was granted her 27th continuation albeit it was marked as 'final'.

Consultation question 9

Do you have any comments on the approach taken to alternative dispute resolution in the rules?

Comments
The Gill Review was firmly of the view that ADR had to be voluntary and there should be no sanctions for non-compliance. The draft rules reflect that recommendation. **Whilst the emphasis on encouraging ADR through the process is to be commended, for party litigants it is usually akin to shutting the stable door after the horse has bolted. They are normally so deeply emotionally invested in the result by this stage that compromise is a far distant planet. There should be at the start of the process information and local options for ADR.**

Consultation question 10

Do you have any comments on the proposed principles of simple procedure as set out in Part 1 Rules 2.1 – 2.5?

Comments
The principles accord with the recommendations of the Gill Review.

Consultation question 11

Do you have any comments on the proposed duties on sheriffs, parties and representatives?

Comments The proposed duties simply reflect the existing code of conduct amongst practitioners.

Consultation question 12

Do you have any other comments on the approach taken in Part 1: The simple procedure? No.

Consultation question 13

Do you have any comments on the approach taken in Part 2: Representation and support?

Comments It would appear that the lay representative is now to be authorised to see a case through to its conclusion and that is to be welcomed.

Consultation question 14

Do you have any comments on the proposed timetable for raising a simple procedure claim?

Comments It does not appear to differ significantly from current practice except that the parties' first appearance will be delayed until after the Sheriff's consideration of the case and the order that he elects to make. The advantage is that the Sheriff will be able to familiarise himself with the issue(s) before the case calls before him, a major improvement on current procedure.

Consultation question 15

Do you have any other comments on approach taken in Part 3: Making a claim? No.

Consultation question 16

Do you have any comments on the flowchart (at Part 4 Rule 2.4) setting out the options available to the responding party when responding to a claim?

Comments
The election that the responding party has to make is to all intents and purposes not dissimilar to that under current procedure. **The flow chart however does simplify the choice of options.**

Consultation question 17

Do you have any other comments on the approach taken in Part 4: Responding to a claim?

Comments
At rule 2.4 B1 makes reference to settling the claim before 'the last date for responding'. The terminology used elsewhere in the rules is 'the last date for a response'. This may not give rise to any confusion but it would be preferable if the same terminology was employed throughout.

Consultation question 18

Do you have any comments on the approach taken in Part 5: Sending and service?

Comments

Under reference to the observations in Q2 above, note the use of the term 'someone' in rules 1.1 and 1.2. As observed at the Focus Group meeting, consideration should be given to the requirement to insist on service in terms of the Citation Amendment (Scotland) Act 1882 having regard to the Gill review observation that 'The basic structure of civil jurisdiction in the Scottish courts remains much as it was in the late nineteenth century'. The 1882 Act was actually an enabling provision, not a mandatory one, and yet its provisions regarding service appear to have been made mandatory. The issue is whether as a matter of principle or practice they have any continuing relevance to the digital age in the 21st century. Why is it that a party litigant can be entrusted to draft a writ and conduct his case to a conclusion but not to send a recorded delivery letter, a device he will no doubt be familiar with and is commonplace in the sending of important documents be they passports, driving licences, or title deeds etc. The reality is that it is virtually, if not completely, impossible these days to find a solicitor who is prepared to act as postman in the despatch of a recorded delivery letter. That means using the Sheriff Officer. At Haddington there are no Sheriff Officers. To employ them means bringing them in from either Dunbar or Edinburgh principally to pick up e.g. an intimation of recall of decree from the CAB office, cross the road, and 'serve' it on the local council opposite. The cost of that exercise is over £ 60, a sum which a social tenant in arrears is most unlikely to be able to afford. By contrast the alternative which involves using the Royal Mail 'Signed For' service which enables the delivery process to be tracked online and the recipient's signature to be recovered digitally costs just £ 6. Using the Sheriff Clerk to effect delivery of the principal claim is an improvement but it is to be hoped that this service will be extended to all documents that require to be served and not just the principal writ. Is it really necessary to lodge confirmation of service when the digital signature can be e-mailed to the Sheriff Clerk ? The provisions regarding service which have been borrowed largely without change from the existing procedures need to be revisited with a view to achieving the Gill Review aims of expediency, reduction in cost, and avoidance of unnecessary bureaucracy and taking into account the actualité of practice.

Consultation question 19 ***Do you have any comments on the proposed procedures for settlement and for undefended actions? No***

Consultation question 20
Do you have any comments on the proposed model for case management conferences? No.

Consultation question 21
Do you have any other comments on the approach taken in Part 6: The first consideration of a case?

Comments "for a Decision to the court before for the date". Delete the word 'for'.

Consultation question 22
Do you have any comments on the approach taken in Part 7: Orders of the sheriff?

Comments Rule 2.2. There is no mention of the Sheriff's power to give orders orally (albeit as stated above I prefer the term 'verbally'). That would appear to be an omission.

Consultation question 23
Do you have any comments on the proposed model for freezing and unfreezing cases?

Comments Rule 4.2. This should read "The application to unfreeze must set out the reason for applying to have the progress of the court unfrozen."

Consultation question 24
Do you have any other comments on the approach taken in Part 8: Applications by the parties? No.

Consultation question 25
Do you have any comments on the approach taken in Part 9: Documents and other evidence? No.

Consultation question 26 ***Do you have any comments on the approach taken in Part 10: Witnesses? No.***

Consultation question 27
Do you have any comments on whether the detailed provisions on documents, evidence and witnesses are necessary in the Simple Procedure Rules? No.

Consultation question 28
If you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision.

Comments R 4.3. "provide for further information". Delete 'for'. R7.1. "sending to the court". Insert 'to'. R7.5. "send to the parties". Insert 'to'. R8.4. "what they are what they are". Delete 1 x 'what they are'.

Consultation question 29
Do you have any comments on the approach taken in Part 11: The hearing? No.

Consultation question 30
Do you have any comments on the approach taken in Part 12: The decision? No.

Consultation question 31
Do you have any comments on the approach taken in Part 13: Other matters? No.

Consultation question 32
Do you have any comments on the approach taken in Part 14: Appeals? No.

Consultation question 33
Do you have any comments on the approach taken in Part 15: Forms? No.

Consultation question 34

Do you have any comments on any individual forms?

Comments
Claim Form.

C About the Responding Party

"The person whom you are making the case against".

Response Form

Para 3 "There are guidance notes to the left of each part of the form."

E "Witnesses - your response may require no witnesses other than you and the responding party." Delete 'responding party' & substitute 'claimant'.

Consultation question 35

Do you have any comments on the proposal to include standard orders in the rules?

No.

Consultation question 36

Do you have any comments on the terms of the standard orders included in the draft rules?

Comments
Application for a decision.

D1 -orders in claim form
-dismiss the case

This form should make reference to decree of absolvitor.

So far as dismissal and absolvitur is concerned there is no mention of expenses. Expenses may be agreed in one of three forms in relation to either head : (1) Expenses to the claimant
(2) Expenses to the responding party
(3) No expenses due to or by.

Allowance should be made for the parties' agreement in relation to expenses where the action has settled.

In the Decision Order there ought to be provision for where an Order is made in favour of the responding party against the claimant arising from a successful counterclaim.

Consultation question 37
Do you have any comments on the approach taken in Part 18? No.

Consultation question 38
Do you have any other comments on the draft Simple Procedure Rules?

Comments There are some unhappy grammatical errors in addition to the more straightforward issues that have been singled out above. No doubt proof reading will sort these out.