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

- Where the area of law is more complex and the risks of litigation are increased due to the level of expenses awardable, we believe having a separate set of procedural rules is understandable. For simpler, lower value claims it is desirable to keep the rules as uncomplicated as possible. Where however the area of law is by it's very nature complicated, a more comprehensive set of procedures will be required to reflect this. If trying to account for all these variations of cases in one set of rules the rules will unavoidably become longer, more complicated and in turn less accessible for the simpler lower value cases currently intended to fall within the principal set of simple procedure rules.

- It must be made clear at the outset of the rules what types of claims are to be raised in the procedure. At the moment this is not clear. Currently Part 1 section 1.1 describing it as a "…procedure for settling or determining disputes" sounds misleadingly open and does not provide enough detail.

- We believe there should be a consultation on the special rules.

Consultation question 2

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

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

Content YES Not content X No Preference X

A concern is that "claim" sounds like it refers only to what has been raised, rather than a collective term for the full procedure. The rules currently use both "claim" and "case". If "claim" is to be used as the term for the whole case then it needs to be used consistently. Alternatively if "claim" and "case" are to be used, as we believe is intended, clear and simple definitions need to be provided ("case" is not currently defined)

- ***Claimant – for pursuer***

Content YES Not content X No Preference X

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

Content X Not content YES No Preference X

We welcome the move away from Defender which has criminal connotations, however "responding party" is wordy. Possibly *Respondent* as this matches claimant. Alternatively, if Responding party is used then *Claiming party* would better match this.

- ***Freeze – for sist***

Content X Not content X No Preference YES

We welcome move away from "sist" which is technical and unclear, however we are unsure if freeze/unfreeze is the best alternative. Perhaps *Pause – Restart?*

Consultation question 3

Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules?

Comments

- Attempts to simplify the language are welcomed, however it must be recognised that the language will still be intimidating and inaccessible to those who have never been involved in a claim before. The rules need a glossary of all the terms used to allow people the opportunity to look up words they are uncertain of. While it makes logical sense to say the "claimant" is the party who raises a "claim", the term "claimant" is still technical language with a specific meaning within the rules, and it is not a word used in everyday conversational language.

- It must be made clear at the beginning of the rules and forms that a glossary is available to be referred to. While those with legal training are used to looking for a definitions and interpretation section at the end of legislation, those without legal training are very unlikely to come across a term they do not fully understand and then continue to read until the latter pages of a 90 page set of rules to check if the term is explained near the end.

- For the rules displayed online it would be good to have any technical language with a hover-over to the definition, so when you hover-over the word with your curser it explains the term without you having to scroll through screens of forms and rules to get to a glossary.

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

Comments

Yes - suggested alternatives are in italics next to the current terms in bold. Not all terms have alternatives suggested, but have been included to highlight particular terms that need to be explained in a clear definitions/glossary section. Please note the following list is not intended to be exhaustive.

Absolvitor -
Additional Responding Party aka Applicant -
Alternative Dispute Resolution -
Case Management Conference –*Case Management Meeting*
Citation [of a witness] -
Claimant -
Conflict of Interest -
Decree / Decree Form–
Freeze / Unfreeze – *pause / re-start*
Fully Implemented -
Interim Order –
Lodge / Lodging – *send / submit*
Parties –
Remuneration -
Responding Party -
Revoke -
Service -

Consultation question 5

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

Comments

- It would be even easier to find relevant rules if the Headings of the 17 Parts were listed at the beginning of the Contents (ie. Part 1: The Simple Procedure. Part 2: Reprsentation and Support - plus the Glossary / definitions section.)

- A concern is that by re-starting the numbering of rules afresh in each part there are too many layers of reference which could cause confusion. Someone could be relying on rule 4.2 but there could be twelve different rule 4.2s across all the different parts. While it is good to move away from the normal legal means of referencing rules which is inaccessible ("rule 2.2 subsection 3 capital A"), a middle ground could be used. Limit it to only numbers, rather than numbers and letters, but include the part number in the referencing. So rather than Part 4 Rule 4.2, have Rule 4.4.2.

- Where the rules refer to forms they should cross-reference them, either by form or page number, so that parties know where to find the paperwork being referred. Eg. Part 10 Rule 2.2 explains to cite a witness you must serve a witness citation notice, but does not then refer the reader to where to find this.

- The forms would be better placed in an Annex at the back of the rules as in practice few people will read or look at the forms until they need to use one, or until they receive one.

- The standard orders should either be separate or Annexed at the back of the rules, as these are used by Sheriffs and not the parties.

Consultation question 6

Do you have any comments about how, and where, the rules should be presented on the internet?

Comments
- They should only be available from a single and clear place on the Scottish Courts Website. Currently, the small claims/summary cause rules, forms, and guidance notes are all under different and separate tabs within the website. A number of people raise claims without even having been aware of the rules or where to find them. - If separation of the rules and forms cannot be avoided due to the current layout of the wider website, then the page for forms should clearly refer people to the rules by hyperlink, and vice-versa. This should also be true for information about the costs and possible places available for information and advice.

Consultation question 7

Do you have any comments on the approach to headings in the Rules?

Comments
- We generally welcome the headings being phrased as questions, as this is more reflective of how people are likely to approach the rules and it is a format people are exposed to in other contexts (eg. consumer FAQ pages).

Consultation question 8

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

Comments - In general it is good to move away from the current process where parties need to come to Court on multiple occasions for matters that could be dealt with via written correspondence. This move should be quicker and cheaper for most parties. - A concern however is that we (Citizens Advice Edinburgh / In-Court Advice Service) meet people who are not confident with literacy skills and find formal paperwork very daunting and inaccessible. These people will now have lost their opportunity to verbally state their position to the Court when a claim has been raised against them. Therefore the forms need to make clear at the very beginning that there are sources of advice and support available. Ideally this would be in the format of a consistent In-Court Advice Service available across Scotland in each Sheriff Court, however due to funding and resources at present not all Sheriff Courts have such a service, and those that do may have limitations to their remit. The forms should make clear where information can be found, either at the Sheriff Clerk's Office or online (with a specific link to a page on the Scottish Court's website listing available advice services).

Consultation question 9

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

Comments

- Generally we feel it is positive that ADR is encouraged throughout the procedure. It would be desirable to have a question asking if parties are willing to try to resolve matters via ADR in the section of the claim/response forms on pre-Court negotiation attempts. A concern is the lack of a consistent, free and accessible ADR service in Courts across Scotland. Without one, there could be a scenario where in principle both parties are willing to try to resolve matters with the support of an independent third party such as a mediator, but they are unable to find a free service to enable this. A model such as the Citizen Advice Edinburgh's In-Court Mediation Service, if taken across Scotland, could greatly benefit parties reach a resolution, improving their access to justice and benefiting the wider judicial system by enabling parties to resolve matters away from Court time and expense.

- A further concern is the lack of clarity around what procedure will be followed to allow parties the time to try ADR. Currently it is common to have cases continued for a number of weeks (typically 6-8 weeks in Edinburgh) to allow willing parties time to organise and attend a suitable date for mediation. If parties decide to try ADR part way through the process will they now have to apply to freeze the action to ensure they do not miss deadlines for the hearing (such as lodging evidence) in case ADR is unsuccessful?

- A further concern is that parties should not feel forced into attempting ADR. A key principle of ADR is that parties enter into the process with an open mind. Part 1 Rule 7.2 for example suggests a Sheriff can do "anything considered necessary to facilitate negotiation or ADR" – it is undesirable for a Sheriff to order parties to enter into ADR if it is unsuitable (eg. the parties are unwilling to compromise on their positions) or if there is not a free available service to facilitate this.

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 - Rules 2.1-2.5 are positive in principle. - Rule 2.5 could be misleading in making parties think they will not need to attend Court in raising a claim.

Consultation question 11

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

Comments

Duties on Sheriffs

- Part 1 Rule 7.13 – It should be made clearer that this section is only to apply within Scotland by stating *"-to another Court within Scotland"*. This rule does not give any indication under what circumstances a case ought to have been raised in another Court. It is appreciated the rules on jurisdiction are complex and separate to these rules, however this is an example where we feel the rules could benefit from accompanying guidance notes. These notes could provide examples that can be referred to separately without significantly increasing the length of the rules themselves.

Duties on Parties

- Part 1 Rule 5.2, 5.4, and 5.7 are generally positive in setting a productive and appropriate tone.
- Given the reliance on paperwork it is of particular importance that the parties' addresses are up to date and correct. An additional rule could require parties to update the Court and other party of any change to their address while they are still a Party to the claim.

Duties on Representatives

- Part 1 Rule 6.5 terminology of "their client" and additional requirement under Rule 6.6 that lay reps must not make arguments without a legal basis seem to be aimed at lay reps from organisations such as Citizens Advice. A lay rep could be someone's family member or acquaintance who is no more legally aware than the party themselves, but they are more confident/able to speaking in public and have been asked to assist by the party. Is it correct to therefore hold these one off lay-reps to a higher standard than the parties themselves? No equivalent duty is stated in Part 1 Rules 5.1-5.7 on the parties. Often parties will not be aware of the legal basis to their position, they simply know their account of the dispute and whether they believe they are owed something. Therefore either (i) the rules should distinguish between a lay rep from an organisation and a one off lay rep, (ii) this additional requirement should be weakened to say something like "must not *intentionally or knowingly* make any claims or arguments which have no legal basis" or (iii) delete this additional requirement.

Consultation question 12

Do you have any other comments on the approach taken in Part 1: The simple procedure?

Comments

- Part 1 Rule 1.1 is misleading. While it is hoped the procedure will be comparatively speedy, inexpensive and informal compared to other legal procedures - many individuals will not find it so. The initial fees, potentially having to pay for Sheriff Officers to serve documents if there are issues around service, paying for necessary evidence such as an independent expert reports, paying for witnesses if the matter reaches a hearing, taking time off work, travelling to Court, and possible costs of enforcement will all add up to being quite expensive in comparison to the principal amount of the claim. In addition if a party raises an action and is unsuccessful and becomes liable for expenses this could become a very expensive matter for them. "Informal" sounds inappropriate for a Court setting where a decree could potentially lead to long-term negative effects on credit ratings and parties becoming liable to enforcement actions. "Speedy" again is a subjective term. At the very least the rule should be amended to state "The simple procedure is intended to be a speedy…"

- Part 1 Rule 2.1-2.5 are clearer and less misleading so Part 1 Rule 1.1 could either be deleted, or substantially altered – for example it could make clear from the beginning that these rules/procedures are for people to resolve certain types of disputes in Court, and one where they should not require legal representation. The latter point is currently in Part 1 Rule 3.7 but it could be made clearer. Part 1 Rule 1 should set out the types of claims that can be raised under the rules (payment of money etc).

- Part 1 Rule 7.8 and 7.9 – another example of where guidance notes would be beneficial with examples of what might be considered to be a "acceptable excuse". For example, some might think saying there was unexpected traffic is a reasonable excuse to having been slightly late, but this wouldn't be sufficient for the Court. The rules should make clear that the excuse needs to have been provided to the Court *in advance* of the hearing.

- Part 1 Rule 7.8 and 7.9 – are these rules on the Sheriff deciding in absence of a party supposed to include non-appearance at a case management conference? If it is – this would need to be made clear in the rules. If it is not –are there no consequences to a party for not turning up to a case management conference despite being ordered by the Court?

- Part 1 Rule 7.11 – This is currently quite difficult to follow due to jargon and complexity of rule it is explaining. Perhaps re-arranging sentence structure could clarify slightly: "The Sheriff may make interim orders before a hearing to protect the position of either a claimant or a responding party making a counterclaim."

-Part 1 Rule 7.12 – This does not provide any information about when a Sheriff might find it appropriate to transfer the case to another Court. Guidance notes with examples could clarify this. Again Rule 7.13 does not give any guidance on when a Sheriff might find a reason "acceptable" – guidance notes could clarify this with examples.

Consultation question 13

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

Comments

- Part 2 Rule 2.3 is a circular definition which is confusing and unhelpful – it should either be deleted, or amended. Perhaps *"A person is entitled to act as a lay rep if they meet all of the requirements set out under the following Rules and is not excluded from acting by the Sheriff"*.

- Part 2 Rule 4.1to 4.8 – it is not clear that this is a checklist and a lay rep needs to meet all of the requirements. A party / lay rep could read the heading "Who is entitled by these rules to act as a lay rep?" and then 4.1 which says you're entitled to be a lay rep if the party authorises you to act for them. This sounds like a closed, rather than a conditional statement. If Part 2 Rule 2.3 is amended as suggested above this could better explain this.

- Part 2 Rule 4.5 – it is not clear when a Sheriff might consider a person to be unsuitable to be a lay-rep. Again, guidance notes with examples could clarify this.

- Part 2 Rule 7.3 There could be confusion around the definition of a lay supporter. Someone may have a mental health support worker who they pay for their services. If the party was involved in a claim and required their support worker to attend would the support worker be excluded on the basis that they receive remuneration for their services? If so, this seems unfair on the party. If not, as the rules are currently drafted there is a risk the party/support worker could believe this to be the case.

- Part 2 Rule 7.2 There could be a scenario where a party had a lay rep, but also had additional support needs eg. from their support worker. The rules seem to say a party in such circumstances would have to pick one or the other, which could be detrimental to their health and/or inhibit their access to justice. Accordingly this restriction should be lifted, as the Sheriff still has the over-all power to refuse a lay rep / lay supporter if they are not being conducive to the process (eg. if both were trying to provide advice at the same time to the party).

- The provisions do not make it clear if a party that is not an individual (company / partnership / charity / association) can have a lay rep or if that lay rep could be a member of the relevant organisation.

- A number of the issues highlighted here around lay representation have been dealt with in a joint report published by Citizens Advice Scotland and Shelter Scotland, available to download from: http://www.cas.org.uk/publications/lay-representation-scotlands-civil-courts

Consultation question 14

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

Comments
- Generally the proposed timetable seems reasonable.

- Part 3 Rule 2.6 needs clarified– it reads as if the Sheriff must consider the case as soon as possible after the date of first consideration, and then issue written orders within 14 days of when they actually consider it. From Part 3 Rule 2.1 (Step 6) and from Part 6 Rule 3.1 it appears the intention of the rules is that written orders must be sent within 14 days of the date of first consideration which is a fixed date.

- It is not clear what happens to the timetable when service is unsuccessful. Where the Clerk's Office was unable to serve by way of recorded delivery, more time may be needed to allow Sheriff Officers to make alternative attempts at service. Presumably the claimant could apply to the Court to fix a new timetable for re-service, but currently no form has been drafted to allow for this and the rules don't cover this scenario.

- Part 3 Rule 4.2 – The current drafting states the Sheriff Clerks "may" enter the claim in the register. This is misleading – unless there is a possible issue with the claim/payment the Clerks *"must"* register it.

- Part 3 Rule 4.5 – The rule states the Sheriff Clerk "must" serve the claim form if asked to do so by a claimant (not a company/partnership or legally represented party). While this is intended to mean the Clerk must make a first attempt to serve the claim form, it could be misleading for what happens where the first attempt is unsuccessful (wrong address, addressee gone away etc) and service is not completed. It would then be for the claimant to try and make further attempts to serve it. This is dealt with in part 5 but these sections should refer to one another or repeat the relevant information in each section.

- Part 3 Rule 4.7 – It is unclear why the Clerks must send a copy of the claim form to the claimant here. It should expressly state "…to allow the Claimant to serve the claim form on the responding party".

Consultation question 15

Do you have any other comments on approach taken in Part 3: Making a claim?

Comments
- Part 3 Rule 2.1 (How to make a claim) – This section would benefit from a flowchart or graphic similar to Part 4 Rule 2.4 as tables of text and numbers can appear inaccessible when there are multiple stages.

Including the example within the rules makes them too wordy and harder to follow, requiring the reader to move between rules and the scenario example. Generally the approach of looking to provide examples is a welcome one, however they are better placed in the margins of the relevant forms and in separate guidance notes. A benefit to having separate guidance notes is that more than one example could be used to cover a wider cross section of typical claims. The current washing machine example is good in that it is simple and easy to follow, but it will not cover a number of different types of potential claims. There is also a concern that when only one example is used people will rely on this as being prescriptive which could cause unintended confusion when their claim differs from the example significantly.

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 flow chart is much better than the previous format of tables that are very wordy. It is clear, logical and feels far more accessible. It should be noted however the time to pay option needs to clarify that it is not an option available to companies etc.

- A concern is that it is not made clear by following the option for submitting a time to pay application that this option will result in a decree passing against you. Some people mistakenly believe a "time to pay" is giving them time to pay a debt off before a decree passes against them. This should be clear before they select this option, as they may actually have a defence but were simply willing to make what they thought was a settlement offer to try and avoid coming to Court / risk of decree.

- Similar flowcharts or graphics could be used in other sections of these rules to further improve their accessibility.

Suggested places include:

Part 3 Rule 2.1 – how to make a claim
Part 4 Rule 7.1 – time to pay applications
Part 5 – service (including confirmation of service, and when service is unsuccessful)
Part 6 - first consideration of the case (including when there is no response)
Part 11 – format of a hearing
Part 12 Rule 5 to 6 – application to revoke
Part 12 – decision and enforcement

Consultation question 17

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

Comments

- Part 4 Rule 2.1 and 2.2 is worded to say paperwork must be "sent" by a particular date, when it means the Court must have "received" it by that date. If a party sends the form by post on the relevant date, and it reaches the Court the following day, this would be past the deadline. This must be made clear.

- Part 4 Rule 6.1 – we generally welcome a set format to raise a counter-claim. A concern is whether a party now has any means of trying to raise a counter-claim after the response date has passed? If they do not, this seems quite inflexible taking into account the type of procedure. On occasion a party will independently submit a response form, but thereafter become aware of available services that provide advice/support. Upon taking advice they may then discover they have a potential counter-claim to raise. It is not clear whether they would be able to apply to do this under Part 8 Rule 6.2 which allows a responding party to apply to amend their response form, given counterclaims are now to be raised via a separate form. A more flexible approach may be more conducive to allowing access to justice in allowing a responding party to apply to raise a late counter-claim, but for it to be at the Sheriff's discretion whether or not to allow it depending on whether there is a good justification for it being raised late and whether it would prejudice the other party to be received late.

The terminology needs to be clarified in the rules. Is a responding party who raises a counterclaim still called the responding party, or are they to be referred to as the responding party and counter-claimant?

- Part 4 Rule 7.1 – "settle" and "settlement" should be avoided where the result will be an decree. These terms are associated with extra-judicial settlements where parties avoid a decision against them. In addition, while it is appreciated the rules on Time to Pay Applications (TTPA) are separate to this consultation, it is important that the rules and forms clearly explain the information to be included in a TTPA, the Pursuer's options to accept and reject offers, when and how the Sheriff decides on one, and how this works for both parties. Again, this is something which would benefit from a flowchart or graphic. It is currently unclear what will happen if a TTPA is rejected, can a Sheriff make a decision on it at first consideration or would the responding party be entitled to a hearing on the application?

- Part 4 does not make clear what is to happen in terms of responding to a raised Counter-claim. Will there be a separate form for responding to a counter-claim? Will the original claimant have a set deadline to respond to the counter-claim by? Will the raising and intimation of the counter-claim have an effect on the Court timetable, or will it remain unchanged and in the first orders will the Sheriff decide when the claimant has to respond by? This could lead to an inconsistent unpredictable process without clarification in the rules

Consultation question 18
Do you have any comments on the approach taken in Part 5: Sending and service?

Comments

- It should be made clear that there are associated costs of service. A new rule could clarify this: *"The sender or server is responsible for meeting the costs of sending or serving something; unless it something served by sheriff clerk and is covered by court fees."* The rules, even if they are not able to directly state the expenses, should refer people to where to find this information (guidance notes?).

- Part 5 Rule 4.2 should come before Rule 4.1 in the rules. In the order it is currently written in, a party might read that service can be done by recorded delivery and then stop reading thinking that their question has been answered and that they can do this themselves. If however the two rules are transposed it will be clear that service can only be done by solicitor/sheriff officer/clerks, and then go on to give further detail on how these people can do it.

- Part 5 Rule 4.4 and 4.5 - it is unclear why confirmation of service of the summons only needs to be provided 2 days before first consideration (this could potentially be 33 days or more after service was completed) but confirmation of service of other documents has to be 7 days after the service takes place. It would be simpler to have a consistent timeframe for all confirmations. Concern that 7 days could be limiting where there are various public holidays and the Courts close, for example around Christmas/New Year.

- Part 5 Rule 5.1 to 5.4 – it should be made clear that there are charges to instruct service by way of Sheriff Officers, where to find out these charges, and who is to pay for them. It does not currently make clear what happens where a claimant passes the 35 day period for effecting service prior to the first consideration. Presumably they will be able to apply to the Court to have a new timetable fixed to allow for re-service? This should be in a set form.

- When referring to "sending", the rules use the term "sending <u>something</u>". When referring to "serving", the rules use the term "serving <u>a Form or Notice</u>". "Something" could be used consistently here for both sending and serving to make the rules easier to follow. It is acknowledged that there may be some benefit in distinguishing the language to emphasize the importance/difference of service vs sending items.

- We are concerned about the lack of reference to the need to have evidence that a document was "sent" and received by the recipient, unlike the more formal serving where proof of serving is required. If one party states they sent something and the other party states they didn't receive it, if there is no proof of delivery then the party who sent it will have no way of showing the Court the things were sent. This isn't explained in the rules. A new rule could clarify this: *"The sender should retain evidence that something has been both sent and received by the recipient, to be produced in court when required."*

- If a party selects the box on the claim / response form to say they wish to be contacted by email, they may not expect to be served paperwork by post. This should be made clear in the rules on sending and service, and also on the forms.

Consultation question 19
Do you have any comments on the proposed procedures for settlement and for undefended actions?

Comments

- This is a section that could greatly benefit from a flowchart. At the moment it is not immediately clear that the Claimant has to contact the Court after the response deadline to check if there has been a response – this is only implied.

- While it does state Part 6 Rules 4.1- 4.3 if there has been no response the claimant must lodge an application for a decision otherwise their case will be dismissed - this would be clearer in a graphic. Without making this clearer it is suspected a number of claimants will fail to put in an application, the claim will be dismissed, and these claimants will subsequently seek to revoke the decision. This is undesirable for the claimants, and will take up further Court time and expense.

- Part 6 Rules 5.1-5.3 do not make clear what happens if a responding party indicates they wish to settle prior to the response date but then fail to do so. Currently Rule 5.2 only allows for a Claimant to make an application for a decision to dismiss the case (where settlement is reached). The Claimant should be able to make an application for a decision in their favour that can be considered by the Sheriff at first consideration. Otherwise the Claimant would have to wait for the Court to issue first orders by default on the basis of there being no application for a decision to dismiss the case made within 21 days of first consideration. This elongates and complicates the process. It is not clear in these scenarios what the Sheriff's orders would be – if both parties have been silent after the initial response indicated an intention to settle, would the Sheriff dismiss the claim or would they order the parties to confirm whether settlement has been reached? Again, due to variable scenarios this would greatly benefit from a flowchart/graphic.

Consultation question 20

Do you have any comments on the proposed model for case management conferences?

Comments
It is difficult to comment on this without guidance on when and how case management conferences are likely to be used over written orders. This could be set out in guidance notes, if not in the rules themselves. In Part 7 Rule 2.5 (c) the Sheriff can make any order, so it is unclear what factors will be taken into account for a Sheriff to decide under Part 6 Rule 6.2 that in the interests of justice a case management conference is necessary over custom written orders. In principle it is good if it allows people who are not clearly expressing their position in writing to come to Court to explain their position verbally, or where the paperwork has raised issues that would benefit from a discussion in person due to complexity. The format of these conferences is unclear – is it to be treated similar to a procedural hearing as under the small claims rules? If so the name "conference" could be misleading to people when they turn up and are faced with a Courtroom layout with clerk and Sheriff sitting above them.

Consultation question 21

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

Comments
- This Part must make it clear that parties should not attend Court on the first consideration date. The relevant forms also need to make this clear. Add at end of Part 6, rule 1.1 *"—without parties being present."* - Under Part 3 Rule 2.6 – written orders are to be made within 14 days of first consideration (unless there has been no response and the claimant fails to apply to the court for a decision, or unless the respondent has indicated an intention to settle but has not done so). This information should be replicated clearly in Part 6 so parties understand what happens around the first consideration.

Consultation question 22

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

Comments

- Part 7 Rule 2.3 should read "Orders may be given verbally to the parties in person at a hearing or…" as currently it could be read to mean the parties would be handed a written order at the hearing. Under small claims / summary cause procedure party litigants are often verbally told something by the Court (eg the date of a hearing) without realising this will be the only time they are told this by the Court. People might expect to receive written confirmation.

- "Given" in writing is not defined – does this mean "sent" and/or "served" and/or handed over at a hearing/case management conference? If the Court is ordering something where the result of not following that order could be a decision against that party, it should be served to ensure the party definitely receives the order. This however could cause difficulty if one of the party does not sign for recorded delivery (eg they do not always have people at their office to sign for letters) - Sheriff Officers would then need to be involved which would increase the costs of the action. If the order did require service in writing, would the Court pay for this? Alternatively, if such orders only need to be sent to a party, and that party then states they never received it (it could conceivably have been lost in the post) – will their only option be to try to revoke / appeal within the relevant timeframes?

- Part 7 Rule 2.5 should not have subsections with letters as this is too many layers of referencing "Part 7 Rule 2.5 Subsection (a)". Rule 2.5 (c) is misleadingly open. It implies you can ask the Sheriff anything because ultimately the Sheriff can order anything. This section could be further clarified by guidance notes explaining when parties might expect to see such an order, and what such an order might deal with.

- No indication is given of timeframes for a Sheriff to give orders in response to an application (eg an application to freeze the case). This should be set out clearly.

Consultation question 23

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

Comments

- The rules currently give no indication under what circumstances it might be appropriate for a party to apply for this, or of what factors a Sheriff might take into consideration when considering an application. There are certain factors that are always taken into consideration (eg. how long the parties believe the claim will need to be frozen for) and therefore these should be referenced in the rules, and the relevant forms should have guidance notes / an example in the margin, similar to the claim / response forms. Separate guidance notes could also be beneficial to provide various examples.

- Currently the rules do not make clear that if you unfreeze a case you need to also have told the Court what you want it to do thereafter (eg fix a hearing because the settlement agreement didn't work out, or dismiss the case because it has now settled). The forms should have a section asking the party looking to unfreeze the case what they want the Court to do if their application is granted and the case is unfrozen.

- Part 8 Rules 3.3 and 4.3 refer to a deadline of "7 days" but do not clarify from what date – the date the application is submitted to Court, the date the application is sent to the other side, or the date when the application is received (which could be a number of days after when it was sent, given under Part 5 Rule 3.1 (b) things can to be sent by ordinary post). If these types of applications are submitted to Court by an unrepresented party, will there be any way for the Court to be satisfied a copy has definitely been sent to the other party if there has been no response received and the application is to be heard without a hearing?

- A concern is the loss of procedure for short fixed periods of continuation (except under Part 11 Rule 3.4). While we generally welcome the objective of minimising the number of hearings, continuations may be more appropriate for certain purposes such as (i) to allow for consideration of late amendments, (ii) to allow for ADR or settlement discussions to take place, or (iii) to allow time for clearance of a settlement sum such as a cheque payment. In these scenarios it may cause more work/cost/delay to the parties and the Court to have to apply to freeze the case and then unfreeze it shortly thereafter. Could an application to continue the claim for a short set period to a special type of hearing (or case management meeting?) for a limited number of scenarios be provided for in Part 8 (applications) / Part 11 (hearings)?

Consultation question 24

Do you have any other comments on the approach taken in Part 8: Applications by the parties?

Comments

- There are certain factors which are consistent for all applications so it would make sense to set these out clearly at the beginning of the Part. For example, explaining that parties must send/serve a copy of their application to the other party as well as the Court.

- It is not made clear how long the Court can take to consider the application, and it is not clear whether the parties are expected to contact the Court after a certain date to find out this information or whether the Court will send/serve them written orders.

- Time to Pays should feature in this section

- Applications to revoke do not feature in this section but are a common thing party's will need to apply for. Parties might expect to find information on applying to revoke a decision in this section rather than under Decisions of the Court (part 12).

- It is good that applications can be sent to the Court by email as this will be the easiest and quickest way of sending an application for some people.

- While there is a benefit to having more prescribed forms rather than the open "Incidental Application" which gives unrepresented parties almost no guidance on what to state, two concerns with the simple procedure rules as drafted are:

(i) they could be too prescriptive/limiting and not allow for the flexibility that is generally desirable at this level of Court, and
(ii) it can become inaccessible trying to read through the 3 pages of rules to see if the thing you are trying to ask the Court to do is one of the allowed applications.

In respect to (i) – There does not seem to be a form for the parties to jointly apply to the Court to do things – for example a joint application to dismiss the claim after a case has settled part-way through the claim (possibly with the assistance of ADR). Another example is there does not seem to be a form for a responding party to request an additional responding party to be brought into the action (eg. where a creditor raises an action against only 1 debtor who is jointly and severally liable with another, and the debtor brought to Court wants to bring the other debtor into the action).

Therefore there should either be:
(a) the set prescribed forms for commonly sought things, as well as an open form that allows for flexibility where the application doesn't easily fit into the prescribed forms, or
(b) more forms to cover every scenario, with the forms cross referenced throughout the rules so they are easier to find.

In respect to (ii) – a summary of the applications a party can make should be set out at the beginning of the section.

- Part 8 Rule 8.1 to 8.6 are not clear or easy to understand. It is complicated by the varying terminology - a person applying to become an additional responding party via an additional responding party application is known as an applicant but if their application is accepted they become a responding party. It could simplified by deleting the term "applicant". Eg. Rule 8.2 could read "The Additional Responding Party must set out in their application why they have an interest in becoming a responding party."

Consultation question 25

Do you have any comments on the approach taken in Part 9: Documents and other evidence?

Comments

- While it is appreciated the rules of evidence do not form part of these procedural rules, the basics should be made clear since the rules are intended to enable and empower people to understand the process and allow for access to justice. The rules would benefit from stating at the start that parties should keep a copy for themselves of anything they have submitted to Court, as they will need their own copy to refer to at any hearings.

- The rules do not currently make clear the importance of evidence – Part 9 Rules 1.1 to 3.4 all discuss evidence that "may" be provided to the Court which suggests clients may not need to lodge any evidence. It should be made clear any evidence a party wants to rely on must be lodged with the court by the relevant deadline (subject to Part 9 Rule 2.3).

- A significant concern is the deadline to submit evidence prior to a hearing (Part 9 Rule 3.5) does not stand out and could easily be missed by parties. This should be clear and at the beginning of the Part.

- Under the small claims / summary cause rules parties have to send their list of documents (and where practicable a copy of their documents) to the other party. Under the new rules this does not need to happen because this information is already stated on the claim / response form. What is not explained is the scenario where part way through a claim a party wants to add new documents. Part 9 Rule 3.1 could be read to cover this scenario potentially, but if it is intended to do so it does not explain that a copy of the list should be sent to the other party.

- While the attempts to simplify the procedures around evidence are generally welcomed, they require more detail. For example, unless it is not practicable to do so (eg the evidence is a broken car part) it seems reasonable to expect the parties to send one another a copy of the documents they want to rely on at a hearing. Otherwise parties will be required to travel and attend Court to inspect the documents and/or take copies to enable them to prepare for their hearing. In the standard order of the Sheriff (Part 16) it states parties must send one another copies of their documents. This Part of the rules on documents and evidence does not explain this. Similarly this Part does not make clear the number of copies of documents Parties need to provide to the Court. If this isn't explained then it could delay matters and make hearings more difficult to conduct as not all the necessary parties (Sheriff / Witnesses / Parties) will have copies to refer to at the Hearing.

- There is also no set form for a party to make their list of documents on. Given the simple procedure seems to be trying to limit errors and incomplete forms by having more prescribed formats – could a template form be used with boxes for the Court, parties names, case reference number and a heading like "Claimant / Responding Party [delete as appropriate] List of Documents dated: [_____]"

Consultation question 26

Do you have any comments on the approach taken in Part 10: Witnesses?

Comments

- It must be made clear who is responsible for paying for a witness at the beginning of this Part. Currently it is not clear it is the party calling the witness.

- Part 10 Rule 2.1 to 2.3 does not explain in any detail what is involved in citing a witness. Will caution need to be fixed - if so what procedure will this follow? If no caution is to be fixed then an expert witness could be cited by a party who is unable to afford the witness. Currently caution can be a significant disinvite for parties due to the costs of doing so against the sums involved in the claim.

- Part 10 Rule 3.1-3.2 - Are there any consequences for a cited witness if they do not attend other than the possibility of being ordered by the Sheriff to attend?

- Part 11 Rule 3.5 explains non-appearance of a witness does not prevent a hearing from proceeding – this would be helpful to replicate in this Part as knowledge of this fact may alter a party's decision of whether to informally ask their witness to appear or to formally cite their witness.

- A concern regarding child and vulnerable witnesses is whether having such witnesses is always appropriate in Simple procedure where parties are likely to be unrepresented and the witness could be subject to questioning from an untrained lay person. Could an additional rule be added in stating that if a child or vulnerable witness application is lodged the Sheriff must at the hearing of the application make an assessment of whether the matter is still able to be competently handled within simple procedure?

- Rules on witnesses are another example of where it would be helpful to have separate guidance notes. For example, many people will not realise they need to ask basic background questions about who a witness is, what they do and what their link is to the claim. This could be overcome by having some simple scenario examples in guidance notes. Something like a "do and don't" section for common issues around questioning witnesses.

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?

Comments
Yes they are, as if the matter does require a hearing a Sheriff can only ultimately decide the disputed facts on the evidence available (documents, evidence, witnesses). If anything, more detail is required in these provisions to clearly set out for parties the importance of evidence.

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
Yes – as highlighted above in Q26 more detail is required on who pays for witnesses, how to cite them, and what happens if a witness does not appear.

Consultation question 29

Do you have any comments on the approach taken in Part 11: The hearing?

Comments

- Part 11 sets out a basic framework only and parties will have little knowledge of what will happen at a hearing. Guidance notes will be required, in addition to more material in the rules.

- Part 11 Rule 3.1 – there is a concern in how far a Sheriff can be expected to "help the parties negotiate", as if the Sheriff took an active role in assisting with negotiation attempts which are then unsuccessful, one or both of the Parties may have concerns over the impartiality of the Sheriff thereafter. Currently Parties will commonly make negotiation offers "without prejudice" specifically to avoid these attempts being used against them in Court. If however such negotiation attempts are encouraged to take place in front of a Sheriff, could an offer which was made on the basis of compromise (rather than admission of liability) be used against that party in the Sheriff's decision? Indeed, parties may be reluctant to enter into such attempts with a willing and open mind if they have their guard up while in a formal setting in front of a Sheriff. One of the benefits to having a separate service such as the In-Court Mediation Service is that parties are more relaxed and are better able to enter into meaningful discussions on the basis that they know what is said during mediation is confidential and separate to Court.

- Part 11 Rule 3.3 – it should be made clear how the Sheriff is to make their decision (if settlement not possible). While format is to be flexible, there will still be a general process of the parties making their submissions to the Court, calling witnesses, speaking to documents etc. This is currently not explained and therefore parties may not be prepared for a hearing due to lack of information setting out what is required. This is another example where a flowchart/graphic could be used as a general guideline for the format of a hearing on evidence. Again, guidance notes could provide examples here that would give parties an idea of how to go through a hearing.

- Currently the rules do not expressly allow for a Sheriff at a Hearing / case management conference to refer to a person of skill to resolve factual disputes. This may be one way of introducing an independent expert to resolve a factual dispute such as the cause of a leak from allegedly defective roofing work. Such a rule could reflect the procedure for this currently in the small claims rules, and would be conditional on both sides agreeing to the independent person's expenses. While it is unlikely to be used regularly, if the focus is more predominantly on negotiation and settlement in the new procedures then having this option could potentially encourage resolution in certain cases.

- Part 11 Rule 3.4 - doesn't make clear how long a continuation could be for. Could a Sheriff at this stage continue the claim to a case management conference? Often by the time matters have reached Court the relationship between the parties has broken down and spirits are high. Currently under small claims / summary cause when the parties come face to face at Court, realise they will need to return to Court again for a proof, and are encouraged by a Sheriff to consider settlement they are willing to try ADR. As the hearing is now likely to be the first time the parties see one another face to face after the claim is raised, parties may now decide to try ADR at this later stage in proceedings. A concern however is if parties have turned up prepared for their hearing and with their witnesses present then they may be far more reluctant to continue the case to try ADR when they can get it over and done with that day via the hearing.

- Part 11 Rule 4.3 – word "genuinely" is not necessary here.

Consultation question 30
Do you have any comments on the approach taken in Part 12: The decision?

Comments
- Part 12 Rule 3.5 – "may" be sent – this needs to be clearer as it sounds as if the Sheriff could make a decision but the clerk's office doesn't then need to send this to the parties. Currently the extract decree is only sent to the relevant person (eg. if decree for payment of money is awarded the extract copy is sent to the person who is owed that money to allow them to enforce it). It would be an improvement if a copy of any decision of the Court could be sent to both parties, so both have a clear record of what was decided.

- Part 12 Rule 4.1 – should not have part – rule – subsection, too many layers in referencing. See consultation question 5 for further detail.

- Part 12 Rule 4.1(c) – sounds misleadingly open, like the Sheriff could order a party to do anything.

- Part 12 Rule 5.1 – 6.2 – the rules around revoking a decision need clarified. The deadlines to submit an application are not made clear and should feature at the beginning of the section. Again, a flowchart or graphic would make this process clearer.

It no longer appears necessary to send a copy of the application to revoke to the other party, as the rules say you need to apply to the Court and then the Court must order a hearing to consider the application. Is it now the Court (when informing the parties of the hearing date) who is to send a copy of the relevant form to the other party? Where the decision was made on the basis of an application for a decision, the responding party must also include a response form with their application. It doesn't make clear if a copy of the response form should be sent to the other side.

When an application to revoke is made and a hearing is fixed, are the parties expected to be prepared to prove their claim to the Court after the application for revocation is dealt with (eg bring witnesses)? If they are expected to do this, they may not realise it as the rules imply the purpose of such a hearing is just to consider the application to revoke. If they are not expected to do this, and the hearing is only to hear the application, then this should be made clearer so parties don't prepare for a full hearing and pay for witnesses to turn up when this is not necessary. If it is only to hear the application, then it may be clearer not call to call it a "hearing", as a party might look up Part 11: The Hearing and not realise that it is a different type of hearing.

Currently when decree is granted the successful party is often sent the principal forms back by the Court. Then when a minute for recall is submitted the other party has to return the principal forms back to Court. Will this still need to be the case, or will parties no longer be sent the principal summons prior to the passing of the deadline for lodging an application to revoke?

If a party doesn't attend a Case Management Conference will a Sheriff be able to decide against them at that meeting on the basis of non-appearance? If so the rules on revocation should include this scenario.

It is not made clear how a Sheriff decides on an application to revoke. The draft form does not allow space for a reason why the application to revoke was necessary – this would seem to suggest it doesn't matter and provided the application is submitted timeously (with a response form if required) then the application will be granted? If this is the case it must be made clear in the rules. If it is not the case, the rules should state what factors are considered by the Sheriff in deciding an application.

These rules are substantially different from current ones - under small claims/summary cause procedure you cannot recall a decision made at a proof (where one party doesn't appear). If simple procedure now allows a party to revoke a decision made at a hearing where the other party turned up with witnesses and ready to proceed, this should be taken into account in any award for expenses.

Consultation question 31

Do you have any comments on the approach taken in Part 13: Other matters?

Comments
Part 13 Rule 2.1 – 2.2 – the rules do not make clear under what circumstances a Sheriff might decide to transfer the case to a new type of procedure. This could be explained in guidance notes with examples (eg. when the law in a claim is particularly complex and cannot be fully dealt with in simplified procedure). Where a case is transferred to ordinary cause the timescales provided are too strict. Typically a party will be unrepresented in a simple procedure case. Therefore if transferred to ordinary cause it seems unreasonable to only allow for 14 days (initial writ) or 28 days (defences) to investigate legal aid, take advice and lodge formal legal documents with the Court.

Consultation question 32

Do you have any comments on the approach taken in Part 14: Appeals?

Comments
- It is not made clear in this Part that an appeal can only be made on a point of law. Again, similar to what we have raised in relation to consultation question 32, we have concerns whether 14 days is too strict a deadline to allow parties to take legal advice where they are likely to have been unrepresented but then need to try and take advice on a legal argument for appeal. It is appreciated this needs to be balanced against the undesirable situation where parties have to wait for long periods of time after Court decisions are made before they can enforce them, but a slightly longer appeal period may be more appropriate

Consultation question 33
Do you have any comments on the approach taken in Part 15: Forms?

Comments

- The "*Rules which apply"* do not match with the actual rules – eg. Application to amend is Part 8 Rule 6.

- The tagline at the top of all the forms stating that Simple Procedure is speedy, inexpensive and informal should be deleted. This is a subjective view that many parties are unlikely to agree with (as previously highlighted in consultation question 12). It adds more words to the forms in turn making the key information less likely to stand out.

- All forms should make clear that the party submitting the form should keep a copy for themselves. This seems like common sense but in our experience many people do not think to do this, and then are faced being asked questions on things in Court that they don't have a copy of and that they completed weeks or even months earlier.

- The claim form explains at the top that there are rules which should be read alongside the form and directs the parties to these rules. This is desirable and should feature at the top of each form. Otherwise if a party receives forms from the Court we rely on them having the prior knowledge that they should go onto the Scottish Courts website to find the rules and/or take advice on them.

- Where the rules refer to forms they should cross-reference them, either by form or page number so parties know where to find the paperwork being referred to as they are reading the rules. Eg. Part 10 Rule 2.2 explains to cite a witness you must serve a witness citation notice, but does not then refer the reader to where to find this.

- The forms would be better placed in an Annex at the back of the rules as they are substantial and in practice few people will look at the forms until they need to use one, or until they receive one.

Consultation question 34
Do you have any comments on any individual forms?

Comments

The lay representative form should ask if you are representing as part of an organisation or as a one off lay-rep. This would provide more information to the Court and would allow the lay-rep to use their organisation/office address.

The claim and response forms - Generally these are better. It is a good improvement to take parties through each element of what the Court needs to know (jurisdiction, facts, law, and attempts to settle) rather than having a blank box stating "Enter your statement of claim here". The example in the margin is generally helpful, and guidance notes could further improve this by providing more in detail examples and further variations on types of claims.

- A concern is when solicitors have been instructed by a party will they write in all the boxes "see attached" and then draft a standard initial writ/defence which doesn't break down the claim into easier sections for the other party who might be unrepresented? As the purpose of the forms is to make the process easier to understand for unrepresented parties it is submitted this should not be allowed, and could be clarified possibly in practice /guidance notes to legal professionals? Clerks could also use their discretion not to accept forms completed in this way which do not fit the requirements of the procedure.

- If a party ticks the box to say they would like to be sent things by email, they should be made aware on the forms they may still receive certain things by post (when something is formally served).

Claim form

– The explanatory note on D2 that states the information about where an event took place is required to determine jurisdiction is misleading. A claimant might think they need to raise the claim where the event happened when the standard rule is that a claim should be raised where the responding party is based. While this information is needed, perhaps delete the sentence beginning "This is so the court and the responding party…". That way the claimant will still include this information for the Court to consider but they will be potentially misled. Jurisdiction is a complicated area of law and this is another example of where separate guidance notes would be helpful, as the margin of the form would not have sufficient space even to explain the general rules/exceptions that parties might need to be aware of.

- The boxes to claim for delivery / to do an obligation do not make clear that an alternative claim for money is required. There should be an additional box for these options asking if this thing they want is not done how much money do they seek as an alternative.

- The Next Steps section could be better explained in a flow chart.

Response form

- The response deadline should be made clearer, rather than being the 3rd of 4 dates listed in a table that isn't highlighted. The warning that you need to respond by the deadline (currently at the end of the form) should be on the front page with the response date in bold.

- The flowchart is good, clear, and accessible and should be a format used throughout the rules/forms wherever possible rather than tables, lists and lengthy prose.

Counterclaim form

- It is good to have a separate counter-claim form that mirrors the claim form. Perhaps a separate section could be included asking what facts link it to the principle claim (to meet condition of Part 4 Rule 5.3)?

Confirmation of Service Notice

- This form should make clear who can competently complete this form (not an unrepresented party).

Claim Service Notice

- "What help is available" – you should contact a solicitor or advice agency could be misleading as generally it is not financially viable to instruct a solicitor for claims of this value. For claims in upper end of simple procedure it may be a worthwhile option to do so, but re-structuring the sentence to "advice agency or solicitor" would improve the emphasis. It should also refer the party to where they can find information on available advice agencies / solicitors. Eg. a centralised list on the Scottish Courts website, or by contacting the Sheriff Clerk's office.

Application to freeze / unfreeze – the explanation of what section each party needs to fill in on the form is quite wordy. A flowchart would be clearer for each party showing what they need to do. The forms should have a section asking the party looking to unfreeze the case what they want the Court to do if the case is unfrozen. Eg fix a hearing date or dismiss the case.

Consultation question 35

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

Comments

- There is a benefit to showing parties in advance the types of things that can typically be ordered, however it adds a substantial amount of pages that do not need to be used by the parties themselves. Therefore if guidance notes are going to be drafted these orders could be moved to the guidance notes to keep the rules shorter and more focused on the information that parties must know. Alternatively, these orders could be put in an Annex at the back of the rules to separate them.

- Orders should state the type of order at the top in bold so that it is clear what the order is. Eg. **ORDER OF THE SHERIFF – <u>ORDERING A HEARING.</u>**

- Where a date is being fixed, eg for a meeting or hearing, this should be in bold and feature at the top of the order form to bring it to parties' attention. The warning about the importance of attending / being represented at that date should also be in bold at the beginning.

Consultation question 36

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

Comments

<u>Ordering a Hearing</u>

This does not make clear how many copies of documents will be required. The party needs a copy for themselves (1), the other party (2), the Sheriff (3) and any witnesses (4). The current wording makes it likely the party will send a copy to the other party (1), give a copy to Court (2) and then bring their originals with them on the day (3).

Consultation question 37
Do you have any comments on the approach taken in Part 17?

Comments
The interpretations section is not helpful or clear. Some examples include: "A decision absolving the responding party means a decree of absolvitor" And "Unfreeze the progress of a case means recall a sist" These are only likely to confuse people and need to be made clearer. - There should be a clear, comprehensive and easy to understand definitions section/glossary either at the front of the rules, or clearly referenced at the front of the rules. This should be separate from any necessary legal interpretations referring to other legislation that is likely to confuse parties.

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

Comments