

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

It is difficult for us to fully comment on this approach without having seen the proposed Special Claims Rules.

Our primary focus around the current Small Claim and Summary Cause Procedures – and on the proposed new Simple Procedure – is on Actions for Recovery of Heritable Property, and our response to this Consultation should perhaps be read with this in mind.

We agree that Heritable Actions do require some special provisions, because of the severity of the potential consequences of a Defender failing to properly engage with the process.

We feel strongly, for this reason, that heritable cases should Call in Court - and a provision mirroring the existing Summary Cause Rule 7.1(4) should be incorporated into the Simple Procedure to ensure this.

In the absence of having seen the proposed Special Claims Rules, we have no clear view as to whether it may be best to incorporate a requirement that Heritable Cases should always Call in Court or whether, perhaps, the special provisions required for these can be contained in the Core Rules rather than be in the Special Claims Rules. We have no specific experience of the other types of Actions proposed for the Special Claims Rules so can't meaningfully comment on the complexity of those other Special Cases. It may be that some form of Special Claims Rules are required in order to cater for those types of Actions.

Could a provision covering this be inserted into the Core Rules at Part 6 (p16 of the Consultation Paper) – perhaps by inserting a clause mirroring SC Rule 7.1(4) at a new SP Rule 4.1.1?

Consultation question 2

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

- Claim – for a standard simple procedure case

Content X

Not content

No Preference

- Claimant – for pursuer

Content X Not content No Preference

- Responding party – for defender

Content Not content X No Preference

We would prefer to use of Respondent, rather than ‘Responding Party’. Claimant ... Respondent, sounds clearer.

- Freeze – for sist

Content Not content X No Preference

If the concept of Sist has to be re-imagined then we would prefer to use the phrase "Put the Case on Hold". We have a slight concern that ‘Freeze’ may be open to misinterpretation. In our experience the concept of a Sist is more often explained in the context of a ‘hold’ in Action rather than a ‘freeze’.

Consultation question 3

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

Comments

We are generally in favour of this approach, but not everything needs to be changed to achieve the intended simplification of the Procedure Rules. For example:

On Page 28: Part 12, at 5.1, we are not in favour of the use of the term 'Revoke' to replace ‘Recall’. In our view, the term ‘Revoke’ is no more (and perhaps less) clear than the existing term 'Recall'.

At p16 - amend Rule 2.1 to remove potential confusion in the use of the word ‘consider’ and ‘first consideration’. A Sheriff would already be ‘considering ‘a case at the First Consideration. We would suggest re-wording Rule 2.1 to:

“The Sheriff must *progress* a case as soon as possible after the date of first consideration”

At p 16, Rule 4.3 take out the word 'from' at line 1. The Rule then reads more clearly.

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 X No

Comments

Having put so much effort into simplifying the language used in the Simple Procedure Rules, it appears odd that the Interpretation Section (Part 17, on p89) then goes on to define some of the new terms in relation to the, presumably more obscure, language that it is seeking to replace.

For example, having decided to replace 'Sist' with 'Freeze', the Interpretation section then defines 'Freeze' as 'Sist the Case'.

Similarly, the use of the Latin equivalent is used to define 'A decision ordering the responding party to do something for the claimant'.

It almost appears that having spent the preceding 88 pages making the language as accessible as possible for a lay user, the Interpretation Section has been written so that lawyers can comprehend the simpler language used!

Consultation question 5

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

Comments

In our view the Numbering system would be easier to follow and more accessible if the individual rules were numbered to reflect the Part of the Rules in which they appear. For example, the Rule 6.1 at Part 6 (p16) would be more clearly differentiated from other Rules numbered 6.1 if the numbering for it followed the Part. So, that Rule would be numbered 6.6.1 etc

Consultation question 6

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

Comments

In our view the Primary place for presenting the new Rules on the Internet should be the Scottish Courts Service website, with links to it on a variety of other websites

We would like to see access to the online rules via a 'Landing Page' that asks questions which take users straight to the relevant Rules / Sections

In support of the general intention to make the new Procedure user friendly it may be worth investing in a graphic/web designer to make the layout more accessible than may generally be the case of the Scottish Court Service website. Having it available in other, commonly used, languages may also be worth considering.

Consultation question 7

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

Comments

We think that the approach taken works well. It's logical and makes sense, and it is relatively easy to follow the steps through a case

Consultation question 8

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

Comments

This approach probably works in money only actions, but doesn't reflect the reality of the often regular changes in circumstances in respondents in Heritable cases.

Regular and frequent changes in income and other circumstances are, in our experience, at the heart of Heritable Actions. It is often against this backdrop that Actions of this type are brought to Court. The majority of Heritable Actions (at Edinburgh Sheriff Court, anyway) involve Social Rented Sector tenants – and these are often the sector of society most vulnerable to the vagaries of the economy, or who may have a background of social issues which lead them to be particularly vulnerable. The removal of Private Rented Sector Repossession Actions to the First Tier Tribunal by around the time that the Simple Procedure is implemented will further concentrate these types of Actions in the Court.

It is not uncommon for a Defender's income and other circumstances to change at least once, or more often, in the Course of a 7 week Continuation between Hearings. Minimising the number of Hearings, while understandable in terms of Court Administration, may not work in the interests of Defenders (and Justice!) if these realities are relegated as secondary to the administration of the Court.

We fully appreciate that it is not the role of the Court to monitor payment arrangements, so in our view a possible 'good practice' compromise may be to look to Sist (freeze/put on hold) cases earlier in the process than may currently be the practice. We understand it may be difficult to incorporate this approach into the Rules, but guidance to Sheriffs on implementation may help.

Alternatively – and again without having seen the proposed Special Claims Rules – perhaps if these are going to specifically address Heritable (and other) 'special' Actions then those may better reflect that fluidity of Defender (Respondent) circumstances.

There is also the reality that The Housing (Scotland) Act 2001, at Section 16(1) 2001 Act continues to give a Sheriff the power to adjourn proceedings for undefined periods, with or without the imposition of conditions. This primary legislation will, presumably, continue to govern procedure over the Simple Procedure Rules.

Having read the proposed Rules, and participated in a couple of Consultation Sessions, we also have a concern that – in the absence of provision for specific 'Proof' Hearings - that, potentially, every Hearing may become a 'Proof'.

If so, this may imply that Parties would have to attend 'every' Hearing prepared that it may become a 'Proof/Evidential' Hearing. This would place an impossible burden on Parties and their representatives.

It would also be impractical in terms of Court time. The Heritable Court at Edinburgh Sheriff Court is held on a Friday morning, and generally has between 120 to 150 Cases listed. If even 10% of those Cases required to be heard to a conclusion (and bearing in mind the general assumption in the proposed Rules against repeated Continuances) - including examination of key documents and witnesses - it would be almost impossible to conclude the Court on that day.

We are trying to avoid being in the position of arguing against a general approach that Hearings should be minimised, but have very significant concerns that the unintended consequence of 'rushing to justice' in these particular cases may be an increase in Repossession Decree, and evictions. This may not be the Court's problem, but it is society's.

Consultation question 9

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

Comments

We support the approach taken to encouraging alternative dispute resolution, but note the comments made by several participants at the Consultation events we attended that access to such services across Scotland is patchy. However well-intentioned, if – in practice – there is no access to ADR, then it will have limited effect.

We would support any further development of ensuring ADR services were available consistently across Scotland.

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

With the reservations about the practicalities of resolving Heritable cases ‘too’ quickly expressed above (in response to Consultation Question 8), we are generally in favour of the proposed principles outlined at 1.2.1 – 1.2.5.

Consultation question 11

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

Comments

We support the approach taken in the proposed Rules.

Consultation question 12

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

Comments

No

Consultation question 13

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

Comments

There has already been some debate about the definition of a ‘Lay Representative’ outwith this Consultation, and the way that ‘Lay Representative’ is generally defined negatively – i.e. a ‘Lay Representative is not a Solicitor’ etc. That wider debate may continue, and may – indeed – become more important as the role of Lay Representative appears to expand and develop in the Court process.

We note, in this context, that there is presumably a typo at 2.2.2 (p4), with the word ‘not’ being missed out in relation to the standard definition referred to above.

In this specific case, however, we also note that the definition of a Lay Representative in the proposed Simple Procedure Rules (at 2.2.3: p4) is somewhat circular and not all that helpful: ‘A lay representative is a person entitled to act as a lay representative’. This lacks meaning.

Consultation question 14

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

Comments

These seem straightforward and appropriate.

Consultation question 15

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

Comments

We feel that the wording in the Rule 3.4.2 (p8) needs to be amended. Rule 3.4.1 stipulates that the Sheriff Clerk might return a Claim Form to a Claimant where there are problems with it. Rule 3.4.2 applies where there are no such problems. However, as currently worded it only provides that the Sheriff Clerk 'may' enter the Claim on the Register of Simple Procedure Claims. If the Claim Form is fully complete, and there are no problems with it, we cannot see why this Rule allows discretion that the Claim still may not be entered. In our view it would make more sense for the word 'may' in Rule 3.4.2 to be replaced with 'shall'.

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

We think this form of graphic representation of the process is very helpful, and much more accessible for lay users of the Procedure.

Consultation question 17

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

Comments

We would propose deleting Rule 4.2.2 (p9). This places an additional and unreasonable burden on the Defender (Respondent) to copy the completed Response Form to the Claimant, as well as the Court. It should be sufficient just for the Defender (Respondent) to respond to the Court. The Claimant initiated the Action, and will be aware of the relevant response dates. Responsibility to check with the Court for a response should rest with the Claimant.

We also have some concern that the requirement on Respondents, at 4.3.5 and 4.3.6 (p10) that they 'must' list any documents, evidence or witnesses they will rely on at the Response stage is too onerous and may be too prescriptive. Again, in our experience of Defenders in Heritable Actions, they may well not fully understand the importance of particular documents or witnesses at the point at which they are initially responding to a claim. A Rule which appears to require these at Response Stage, would imply that it may then be difficult, if not impossible, to introduce these at a later stage, where they may then have the benefit of advice. Evidence and witnesses are able to be introduced at a much later stage in the current Processes, and that should remain possible in the Simple Procedure (although please also note our concerns about Hearings potentially being 'Proofs – at Consultation Question 8, above)

Consultation question 18

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

Comments

We welcome the option for Service to be carried out by the Sheriff Clerk, and hope that this becomes the default option – particular for any Notices requiring to be Served by Defenders/Respondents (e.g. Minute for Recall of Decree)

Consultation question 19

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

Comments

We commented at Consultation Question 3 about the wording of Rule 6.2.1 & Rule 6.4.3 (p16).

Consultation question 20

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

Comments

We support the concept of Case Management Conferences.

Consultation question 21

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

Comments

No

Consultation question 22

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

Comments

No, except to note that at Rule 7.2.4, the reference to 'Part 17', should read 'Part 16'

Consultation question 23

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

Comments

We commented on the terminology around this issue at Consultation Question 2, above.

In terms of the proposed model, we feel that it would work effectively, although we would reiterate our point – outlined in our response to Consultation Question 8 – that any part of the Simple Procedure process at which Decree for Repossession may be granted in a Heritable case should be required to Call at Court.

Consultation question 24

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

Comments

At Rules 8.7.1 – 8.7.6 (How can a claimant abandon a claim?) (p20) there doesn't appear to be any process for a Claimant to Abandon a Claim without seeking expenses. Provision should be made for the administrative Abandonment of a Claim by the Claimant, with no expenses due to or by either Party. If Parties are in agreement with this approach, then there should be no need for a Hearing.

Consultation question 25

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

Comments

We commented on, what we consider to be, the overly prescriptive requirement on Defenders/Respondents to note all evidence relied on in their Response Form at Consultation Question 17.

Rule 9.2.3 (p22) appears to allow some discretion for the relaxation of that requirement, but as it is only operative at the discretion of the Sheriff it doesn't guarantee a cure to the potential detriment to a Defender who only subsequently realises that s/he has omitted a crucial piece of evidence in support of their Case. Relaxing the earlier requirement to list ALL evidence at Response stage may make the Rule at this at Part 9 more permissive.

Consultation question 26

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

Comments

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?

Comments

No specific comment on this issue

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

No specific comment on this issue

Consultation question 29

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

Comments

There appears to be a lack of consistency between Rules 11.3.3 and 11.3.4 (p27). Rule 11.3.3 requires ('must') that the Sheriff decide the Case at 'that' Hearing (assuming no settlement or ADR available), but Rule 11.3.3 provides for a potential Continuation. Which Rule takes precedence?

Also, as we have outlined in our response to Consultation Question 8, in Heritable Cases there is primary legislation which allows a Sheriff to Adjourn Cases of this type, with or without condition. A strict interpretation of Rule 11.3.3 would conflict with that existing legislative power.

Consultation question 30

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

Comments

We have already commented on the terminology around 'Revoke/Recall' in our response to Consultation Question 3, above.

The only further point we would make with regard to Part 12 is that, perhaps, Rule 12.4.1 be amended to include that any of the Orders listed may be made with, or without, an accompanying Order for Expenses.

Consultation question 31

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

Comments

No specific comment on this Part.

Consultation question 32

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

Comments

No specific comment on this Part.

Consultation question 33

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

Comments

We generally support the approach taken in the Forms, and consider them to be as straightforward and accessible as they can realistically be given that any legal process will have some degree of complication.

We have already commented, at earlier Questions responses, on issues such as terminology (Freeze & Revoke) and on the requirement to list ALL evidence to be relied on at Response Form Return stage.

Consultation question 34

Do you have any comments on any individual forms?

Comments

See above

Consultation question 35

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

Comments

We agree that listing the Standard Order to Sheriff any make in these Cases helps demystify the Process.

We note that there is no Standard Order relating to Repossession of Heritable Property, and assume that this may form part of the proposed Special Claims Rules. It would, nevertheless, be useful to list ALL available Orders in this Part of the Core Rules.

Consultation question 36

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

Comments

No specific comment on this Part.

Consultation question 37

Do you have any comments on the approach taken in Part 18?

Comments

We assume this refers to Part 17? In which case we have already made comment on that in our response to Consultation Question 4

Consultation question 38

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

Comments

No