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

I agree that there is merit in having a clear and basic set of rules for what might be termed a "straightforward" claim and separate rule(s) for claims the nature of which inevitably involve more complicated procedural specialities.

Consultation question 2

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

- ***<u>Claim</u> – for a standard simple procedure case***

Content x☐ Not content ☐ No Preference ☐

- ***<u>Claimant</u> – for pursuer***

Content x☐ Not content ☐ No Preference ☐

- ***<u>Responding party</u> – for defender***

Content ☐ Not content x☐ No Preference ☐

- ***<u>Freeze – for sist</u>***

Content ☐ Not content x☐ No Preference ☐

Consultation question 3

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

Comments

I agree that the considerable effort taken to express the rules in language which will be more readily understandable to lay persons is desirable. I am sure that the best measure of whether the language achieves that purpose is to obtain the views of lay people who are expected to use the procedure. The interested lay organisations would obviously be the first port of call for those views but with all due respect to them, many of them will have such practical experience of current court procedures etc that this may not reflect the way in which an independent lay person, coming to these court procedures and rules for the first time, would find them.

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 x☐

Comments
As a practising solicitor and solicitor advocate with detailed knowledge of court rules and procedures generally, I am not sure that I am in a position to judge. See the comments to Q.3

Consultation question 5
Do you have any comments about the approach taken to the numbering and layout of the rules?

Comments
I have no comment on the numbering and lay out.

I am not sure about the chart of options which comprises rule 2.4 but that is probably just a matter of opinion. I do not think it would be particularly easy for a lay person to follow.

Consultation question 6

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

Comments

I think that the rules should be readily accessible on the Internet. I assume that there would be a separate link to them on the SCJC website or the Scottish Courts website.

I think that there would be considerable merit in having a video explanation of them and an illustrated guide to how one would complete forms etc perhaps also with some more illustrations or examples of what might be said in a claim/defence. Written guidance alone may not be user friendly. For example, when I last looked, the written small claim guidance seemed to be considerably longer than the rules themselves and that could be quite off putting for the public. People are more used to going on Youtube and watching and listening to explanations of a variety of matters and there is no reason why this could not be done for these rules and procedures.

At Strathclyde our civil litigation course which introduces students to civil procedure rules includes webcasts, multi media resources, and immediate links to examples and guidance in relation to the particular part of the rules being studied. Something similar would, in my opinion, be highly desirable and that resource could be easily accessed in a way which would be in keeping with how members of the public expect to receive information nowadays.

Consultation question 7
Do you have any comments on the approach to headings in the Rules?

Comments
No. I think the headings are very clear.

Consultation question 8
Do you have any comments on the approach taken to minimising the number of hearings?

Comments
I agree with the principle. Ideally the only hearing at which parties should have to attend should be the (full) hearing at which a decision on the merits is to be made. I can well see the benefit in having a CMC for good reason. There is scope for inconsistency about what sheriffs would regard as a good reason for fixing a CMC (or even more than one CMC) and differences in practice between different sheriff courts and sheriffs.

I think that the rules could perhaps distinguish more clearly between what is a "hearing" (Part 11) and what is a "hearing" (Rule 6.1). Perhaps change the wording of 6.1 so that "hearing" only has one meaning – a calling in court where the parties must attend and the sheriff will decide the case once and for all. In my experience it might help if everyone (including solicitors who might be consulted by a lay person after he/she had started proceedings) knew that when the court fixed a "hearing" it was a "hearing" of that kind.

Consultation question 9
Do you have any comments on the approach taken to alternative dispute resolution in the rules?

Comments
No. I am not sure if I understand the "approach" taken by the rules to ADR.

I am having difficulty in envisaging what a sheriff might actually do in a CMC under Part 6 rule 6.3. Can a sheriff fix a CMC for the sole purpose of discussing ADR (Rule 6.3(b)) for example ?

How does a sheriff interpret Part 11 Rule 3.2 and 3.4 at a hearing on what is supposed to be the final decision-making date. If ADR has not been considered by then, a continuation of the case on that occasion to see if it could be resolved, in some vague sense, would surely not be desirable.

I do not know what "available means of ADR" -Rule 3.2 above – will mean in practice.

If the first time that the sheriff or parties think about ADR is at the full hearing of the case, does that not defeat the purpose of 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 No.

Consultation question 11

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

Comments
No.

The sheriff's powers and duties are very wide-ranging and could lead to a considerable variety of application in practice. This may be no bad thing but again there would be a problem if courts and sheriffs applied them inconsistently. I understand that inconsistency of approach is a frequently voiced complaint by lay representatives and organisations.

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 No.

Consultation question 14

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

Comments
It strikes me that the lay out of Part 3 Rule 2.1 looks a bit cumbersome and difficult to follow.

I appreciate the difficulties in explaining the process in simple language but I am wondering if a lay person will be able to follow Rules 2.1 to 2.6.

Consultation question 15
Do you have any other comments on approach taken in Part 3: Making a claim?

Comments
The section on "What has to go in the Claim Form" - Rules 3.1 to 3.7 seems too complex and complicated for people to understand properly.

Based on my experience of teaching civil procedure and practice for many years, law students find the drafting of even a simple claim a difficult task when they come to it for the first time. Very few people are able to express such a claim clearly and succinctly. To me, the illustrative example does not help. For example, there are no dates or other details on the factual background and I can envisage people being misled by that despite the terms of Rule 3.2. I appreciate that the Form of Claim itself mentions things like dates but I do not think that including the running example in this section of the rules assists understanding of them.

It may be unreasonable to expect a lay person to identify "why ..the claim should be successful" in any meaningful or helpful way.

If the parties do not list witnesses what does the court do if they bring them along ? If witnesses are still of some importance in these cases, might it not be useful to have a requirement for them to be named specifically and separately at the outset. In other words, it is to be assumed that the claimant will "front load" the preparation for the claim and not start thinking about witnesses until there is a hearing. Or is it unreasonable to expect that and does the sheriff have a role in helping the claimant (and the respondent) to identify witnesses at some stage of the claim ?

As previously suggested, there might be a benefit in having a number of real examples and guidance for completing claim forms on the internet in some form of video resource. This section of the rules could actually contain the link and I think that would look better and work better than the "example" paragraphs which are interspersed throughout the section.

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
I am not sure if it is that easy to follow.

I would put the options more starkly in writing. This is not the place to set out an alternative but to me there is merit in giving the outline of the procedure in a very simple way in the rules in the first instance and then adding the detail later. Something to say, roughly :-

ADMIT - (a) will pay in full - **FORM X**
(b) will admit/pay in part - **FORM XX**
or (c) time to pay - **FORM Y**

DENY - statement of defence (response Form) - **FORM Z**

COUNTERCLAIM - what it is (and wording to emphasise what is <u>not</u> a counterclaim) – **FORM A**

Consultation question 17

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

Comments No.

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

Comments No.

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

Comments
Re settlement – I think the sheriff has a duty and a wide discretion to encourage settlement and it will no doubt help if the sheriff can explain this to parties. The sheriff's powers enable the court to do virtually anything to resolve the claim. There are no specific "procedures" as such. Will the sheriff be expected to come up with something like continuing a CMC for (say) 6 weeks to allow the parties to discuss matters/submit to ADR/ consider a suggested compromise ? Would a sheriff be encouraged/discouraged from sisting an action in those circumstances ?

Re undefended actions, it may just be me but I am not sure if the rules make it clear enough that if the Response Form is not returned then Decree will be granted. What happens if the Response Form is a day late ? Can a respondent make an application for it to be received late or is there no option to that effect ? Is there scope for a "recall" of a decree in absence ?

These are not uncommon occurrences and it might be worth considering simple procedures to permit such procedural slip ups to be remedied and minimise any additional administration arising from a respondent's mistake, ignorance or oversight.

Consultation question 20
Do you have any comments on the proposed model for case management conferences?

Comments
I am not sure that I can identify a proposed "model" for case management conferences in the rules. I can see that the sheriff has a very wide discretion to decide whether to arrange one and it seems that the sheriff can deal with a CMC in any way considered appropriate.

I can see merit in appropriate cases having a CMC in the interests of justice and the need to have extremely flexible rules to enable the sheriff to do what is required. There might however be a danger of a CMC being a norm or, at least, quite a regular occurrence and that would immediately start to "unsimplify" the Simple Procedure. It may be that all but the most simple of cases would benefit from a CMC, or none but the most complex and difficult to understand cases should have a CMC assigned. There is no guidance to the sheriff or to the parties on this.

Consultation question 21

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

Comments

No. I think it might be extremely difficult for a sheriff to be satisfied about the issues arising in cases where the Claim and Response are both expressed briefly and in imprecise language, which is quite possible through no fault of parties.

My impression is that the sheriff will be expected to consider all cases in the first instance entirely on a reading of these two papers (what about documents/productions/other evidence that might ultimately be lodged ?) and that might give rise to the sheriff making a long list of orders for information, specification, and agreement in many cases. Alternatively, the sheriff might consider it appropriate to assign a CMC to find out what the case is really about rather than trying to pick their way through the claim/response documents themselves.

The sheriff may, in effect, plead and prepare the parties' cases for them by making orders based on the Claim/Response. Is that the intention ?

Consultation question 22

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

Comments No.

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

Comments No. I do not like “Freezing” and “unfreezing” as terms, especially “unfreezing”. See my comments at the end.

Consultation question 24

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

Comments No.

Consultation question 25

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

Comments

There can often be a benefit to a court in seeing the documents on which a case or a defence depends right at the outset. The rules do not make it necessary to lodge these documents with the claim form. The claim form seems to require them to be listed but seems to suggest they should not be lodged. Is that the intention ?

I think it would help the first consideration if parties were able to lodge and were encouraged/ordered to lodge documents that were important to their case at the outset.

Consultation question 26

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

Comments
The rules seem inconsistent regarding the role of witnesses.

The rules of evidence do not apply to Simple Procedure so you do not need witnesses ? The draft proposed standard order for a hearing does not tell parties to bring witnesses.

The sheriff can conduct the hearing as appropriate, which may or may not mean having witnesses. Can a sheriff order a party to bring witnesses or certain witnesses ? Can a sheriff at a CMC dispense with witnesses or some of them and then a different sheriff at the hearing be obliged to conduct it in a way that may not be considered appropriate ?

There is basic provision for citation of ordinary witnesses. How would a lay person know whether they were expected to bring a witness or witnesses or what witness(es) were being brought by the opponent ?

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
See above.

The difficulty is in striking a balance between formality and informality. At one extreme parties could be made to set out all of their witnesses and documents at the Claim Form/ Response Form stage. At another, the parties could just bring along whatever and whoever they liked on the day of the hearing.

If a sheriff could see that witnesses and productions would be helpful to enable the dispute to be resolved – which frankly is almost bound to be the case in any claim – then might any sheriff be tempted to fix a CMC simply to identify the evidence and ensure that parties knew what might be needed. In other words, try to anticipate what would be needed to decide the case appropriately at the hearing.

What if a different sheriff took the hearing, as is likely, and took a different view about "evidence" etc. ?

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 comment

Consultation question 29
Do you have any comments on the approach taken in Part 11: The hearing?

Comments
No additional comment apart from those above

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

Comments No.

Consultation question 31
Do you have any comments on the approach taken in Part 13: Other matters?

Comments No

Consultation question 32
Do you have any comments on the approach taken in Part 14: Appeals?

Comments

I think it should be made clear somewhere in the rules that a party can only appeal on a point of law and that this should be explained in a language that a lay person would understand.

This will be difficult to do, but might help in some way to deter appeals simply on the grounds that a party was unhappy about the result.

Consultation question 33

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

Comments
No.

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

Comments
The Claim Form does not allow enough space for most people to set out their claim in sufficient detail to enable the sheriff to consider it properly at the first consideration. In my experience, most people (not just solicitors) will prefer to set out the circumstances of their claim etc on a paper apart. The box is never big enough.

Consultation question 35

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

Comments

No.

Consultation question 36

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

Comments

No

Consultation question 37
Do you have any comments on the approach taken in Part 18?

Comments

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

Comments

With some diffidence, can I refer to my book on "Civil Procedure and Practice" (4th edition) and in particular chapter 12 on Small Claims in which I make certain observations about the small claims philosophy. These apply to the present proposed procedural rules.

I think it is critical for sheriffs to decide what standard of specification of claims and defence will be allowed to go to a (full) hearing without any intervention at a CMC. This might mean turning a blind eye to some deficiencies in presentation of claims/defences on the basis that the gist of the dispute is identifiable and dealing with evidential problems as and when they arise at the hearing. Similarly, sheriffs might have to be more relaxed about the formalities of cases and pay more regard to the broader aims of the justice reforms than they might otherwise have been inclined to do.

Consistency in approach will be very important but the rules understandably leave a wide discretion to sheriffs as to how they might handle cases in practice. I do not think that they require more precise expression but, if I understand them properly, there is going to be great emphasis laid on the first consideration, which will be a paper exercise presumably carried out by sheriffs in chambers. I see nothing wrong with that but if that is going to be important then perhaps some more emphasis should be placed in the rules on letting litigants know that this is so and that they ought to take time and care in setting out their original claim/defence.

I think it would be invaluable if the public had access to a good short explanatory video about the rules including guidance about how to go about raising/defending an action. Multi media resources could be embedded in the video with guidance and examples for illustrative purposes.

I am not sure about the standing orders and whether they will actually assist in developing consistency. I am sure that they will work for basic procedural issues but they may be too inflexible for more complex cases and their particular circumstances.

I recently chaired a conference in Glasgow on civil procedure for lawyers (around 65 delegates) and, for what it is worth, canvassed views on the terminology.

"Claim" seemed perfectly acceptable, as did "Claimant".
"Responding Party" was not much liked. "Respondent" seemed much more appropriate to all.
"Freezing" and "unfreezing" were universally disliked.
"Suspend" "Pause" "Defer" "Postpone" were suggested with "Revive" or "Restart" considered acceptable options.