ANNEX B CONSULTATION QUESTIONNAIRE

Consultation question 1

Do you have have any comments on the way in which a claim is made using simple procedure or the forms associated with this stage?

Comments

In our view the forms are too lengthy, unclear and complicated. Under the old Small Claim/Summary Cause rules it was clear on the first page who the pursuer(s) are, who the defender(s) are, the sum being sued for (or order sought) and the relevant dates. By contrast Form 3A does not name the respondent until page 3; only begins to describe the claim at page 6, and only specifies the Orders being sought on pages 7 or 8.

It is not clear the extent to which the old forms were not understood by parties, but it seems to us that in seeking to add further explanation (and perhaps in seeking to create a form suitable for data entry) simplicity has been lost rather than gained. As a firm which has raised in excess of 12,000 Simple Procedure actions on behalf of clients since the rules came into force, we understand that we are the largest single user of the process in Scotland. Our experience is that respondents find the forms lengthy, difficult to read and unhelpful. We are regularly telephoned by respondents who ask us to explain what the forms mean. We do not think that the current forms are a success and that a radical overhaul should be considered, with the forms simplified and shortened significantly.

Where actions are commenced in paper format, we would also question whether the need to lodge the form in duplicate is strictly necessary. The form is at least 11 pages long, plus any annexes. Usually this means each action raised requires 24 pages of printed matter to be lodged with the court (more if there are additional respondents requiring further forms). Under the old rules only 3 to 4 pages required to be lodged. We would suggest that the new rules are a step backward in that regard, not least from an environmental point of view.

As to specific issues with the form, we think that box D2 could usefully be clarified. It is assumed that what the rules envisage here is the basis of jurisdiction. However jurisdiction is not governed exclusively by "where events take place". In a consumer credit agreement concluded online, for example, it is impossible to submit an address where the contract was concluded (and indeed it would be irrelevant in any event, given the rules governing jurisdiction over consumer contracts), yet we have experienced pushback from some courts for failing to include an address in such circumstances.

We would also question whether, at D5, three different boxes are required in relation to three different types of order.

We think that box D8 is an excellent innovation of the rules, and forces litigants to truly consider whether they are treating court proceedings as a last resort.

Finally, section E deals with witnesses, documents and evidence. Whilst we can see the sense in ensuring that a litigant has considered the strength of their case and the evidence that they have available in advance, our experience is that this section causes confusion. Part 10 of the rules provides that Lists of Witnesses, evidence and documents must be lodged two weeks prior to a Hearing. The purpose of listing that evidence at the outset, therefore, is unclear. Witnesses may change as a case progresses. Likewise different documents may end up being required depending upon how a defence develops.

Our experience is that some courts have used this section as the basis of further inquiry, and we have experienced sheriffs refusing to grant decree in undefended matters without production of documents referred to in the Claim Form. It is assumed that this was not the intention of the new rules (and indeed a recent Sheriff Appeal Court judgment (http://www.scotcourts.gov.uk/search-judgments/judgment?id=32904fa7-8980-69d2-b500-ff0000d74aa7) has cast significant doubt upon this practice). The purpose of this section of the form is therefore unclear, and we would question whether it is required at the outset of the claim.

Consultation question 2

Do you have any comments on responding to a claim, the way in which time to pay may be requested or the corresponding forms?

Comments

In our view the response forms are subject to many of the same criticisms as the claim form itself.

In our experience they are too long, and many respondents do not appear to read them in full. Given that in most cases the respondent will be served with the Claim Form (c.11 pages), a response form (8 pages), a 2-page notice of claim, a timetable and in most cases a time to pay application form (5 pages), it is perhaps unsurprising that many respondents appear to us to be overwhelmed with the volume of paper they receive and unable to fully digest it.

More generally, however, we think that the requirement to include more detail of a proposed defence at an early stage is a positive improvement over the previous system.

Some practical issues which we have encountered would include the following:-

- In cases where we have sought return of an asset, with an alternative claim for payment, we have seen a number of cases where the respondent has lodged a time to pay application (TTPA). Notwithstanding that we do not wish to insist on payment unless and until the asset is dealt with, the courts appear to wish to deal with the TTPA before granting a Decision.

- In cases where there are two respondents and one lodges a TTPA and the other does not, we have found that some courts require us to lodge our application for decision in relation to the non-responding party, and will separately fix a hearing to consider the TTPA. The result has been that we get two Decisions in relation to the same debt, but with different dates from which interest runs, which can make it difficult to calculate what is actually due.

- The Response Form does not name the Claimant, which can cause issues in cases where we are dealing with a number of different respondents with the same or similar names.

Consultation question 3

Do you have any comments in relation to the ways in which forms and documents may be sent or formally served in a simple procedure case?

Comments

Rule 18.2 states that where a document requires to be formally served "the first attempt must be by a next-day postal service which records delivery". On the face of it, therefore, service by Sheriff Officer should not be attempted in the first instance. We consider that this rule should be changed. There can be very good reasons for a party serving a document by sheriff officer, most notably in cases which are approaching a time bar date. We consider that it is sufficient to provide that if a party chooses to serve a document by sheriff officer in the first instance, they will be unable to reclaim the cost of sheriff officer service. To go further, as the present rule does, risks severe prejudice to a claimant.

Whilst not something covered by the rules, we have found that a number of courts now insist that claimants not only specify that service was carried out by post, but insist on the provision of "Track & Trace" information from the Royal Mail website to prove that it was delivered. We consider that this goes too far. The issue which we have encountered is that the website in question does not always confirm that a document has been delivered and will quite often simply report the document as "pending". We would suggest that the rules could be usefully clarified to state that a certificate by a solicitor to the effect that the document was posted and that it has not been returned ought to be sufficient evidence, as it remains under the Ordinary Cause Rules.

Consultation question 4

Do you have any comments on what can happen to a case after the last date for a response, or the Application for a Decision Form?

Comments

We have encountered issues at a number of courts where cases are undefended and an application for decision form is lodged, the sheriff appears to treat the actions as though they are defended and seek further evidence and/or to be addressed on certain matters. The recent judgment of the Sheriff Appeal Court referred to in question 1, above, may alter this practice. We would suggest, however, that the Council should seek to put the matter beyond doubt.

We also regularly receive payments from respondents following service of the Claim, and therefore seek dismissal of the action. A number of courts insist that we must include a reason why we are seeking dismissal. We see no basis for this in the rules nor in the application for decision form, but it appears to be a relatively common practice. We consider that such a practice serves no purpose and we would suggest that the rules be clarified in order to abolish it.

Consultation question 5

Do you have any comments on the way in which applications can be made in simple procedure, including any of the prescribed forms?

Comments

We have no issues with the application forms and consider that they work well.

Consultation question 6

Do you have any comments on documents, evidence or witnesses, or the forms associated with Parts 10 and 11?

Comments

In terms of Parts 10 and 11 lists of witnesses and documentary and other evidence requires to be lodged two weeks prior to a hearing. However the rules also give Sheriffs more proactive powers in relation to ongoing claims, and it is often the case that the Sheriff orders production of documents or other evidence at a far earlier stage, usually before a case management discussion. This creates an inconsistency and lack of predictability about the rules.

We consider that the rules should be clarified in order to address the circumstances in which evidence requires to be lodged earlier than two weeks prior to a hearing. In the absence of such clarification, the two-week rule serves no purpose.

Consultation question 7

Do you have comments on the rules and forms relating to hearings and decisions, including the recall of a decision?

Comments

Our experience to date has been that the Sheriffs have been using their more proactive powers in order to limit the number of cases reaching a Hearing. In many cases this results in Case Management Discussions becoming akin to mini-Hearings with discussion of evidence and legal submissions. Again, this can make the process far less predictable, and can make Case Management Discussions difficult to prepare for.

We find the list of evidence form to be somewhat cumbersome. It is not clear why evidence cannot be set out as a straightforward list rather than listing each item in a separate box and requiring further narrative as to its "relationship" with the case. This is particularly so where the Sheriff tends to explore the available evidence at the Case Management Discussion prior to the hearing.

We think that the process for recall of a decision is an improvement on the previous rules. In particular we welcome the additional scrutiny which sheriffs are now able to bring to bear on such applications.

Consultation question 8

Do you have any comment on any other aspect of the Simple Procedure Rules, or any general comments about the rules or forms?

Comments

Whilst we fully understand the reason for the four-week hold on enforcement under rule 15.2(1), we consider that the failure to include any provision for the equivalent of immediate extract is unhelpful. In a case seeking return of an asset, for example, any delay in enforcement can result in the asset being moved or hidden. We think that the rules should include provision to allow a Decision to be enforced immediately if ordered by the sheriff on cause shown.

We have also had cases where Decision forms have required to be sent back to the court for amendment and are then reissued. In those circumstances it is unclear whether the date that the decision is "sent" in rule 15.2(1) is the original date or the date when the amended Decision is sent. We would suggest that the rules be amended to refer to the date of the Decision being granted rather than the date "sent".

We would also mention First Written Orders. We understand that there is a template order (not contained in the rules) which is used by the Courts and to which the Sheriff will add any specific orders which he or she may consider necessary. In our view the template can be far too long and complex, even for those with legal training. It contains standard wording interspersed with specific direction from the sheriff. On occasion the standard wording and the wording inserted by the sheriff conflict with each other. In other cases the "meat" of the Order is concealed amongst other standard wording and can readily be missed. Our experience is that respondents who are party litigants often do not understand what they are being asked to do, and that this can cause delay in the process.