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

The claim form is lengthy and can be difficult to navigate. A cover sheet with the essential information including party names and the sum sued for (similar to that in small claims) would be of assistance to both agents, party litigants and to the court. We hope that the online portal will allow printouts to omit unanswered or unnecessary questions to reduce the number of pages in the form. In the meantime we suggest that perhaps having a claim form that only has questions and space for answers would cut down on unnecessary papers as guidance could be included in a separate document.

We consider it would be helpful if both the claim form and response form had a section for parties to specify any orders sought. This would prevent a number of additional incidental application orders to be made.

There are differing practices in sheriff courts regarding acceptable forms. There can be insufficient space on the form to provide detail of the incident or the issues in dispute. Parties might remedy this by using a paper apart. However, not every sheriff court will accept a paper apart with a more detailed description of the accident. While we anticipate this will be resolved when claims can be made online, we would welcome clarity and consistency in the meantime.

The agent for the claimant has, on occasion, been provided with a tight timescale for service once the claim form is returned by the court. If service by recorded delivery is unsuccessful then agents require a reasonable time frame for the instruction of sheriff officers to serve the claim form.

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

The respondent has a limited time in which to respond to the claim form. There is a lot more information required in a simple procedure response form than was required under the small claim and summary cause rules. The boxes on the form are not big enough for a detailed response to the claim.

It would be useful to have a period of adjustment of around 3 weeks to allow the claimant to respond to the response form, and to allow the respondent to obtain all the information required to complete the response form. As suggested above, if it is not appropriate to automatically allow for this, parties could indicate where this was necessary by seeking an order allowing adjustment of the forms.

It would be useful for there to be a box on the form to state if liability is admitted. It would be useful to have a box on the form to state if quantum is agreed. This would assist parties in narrowing the issues in dispute. Having these on a cover page as mentioned in answer one would be of assistance to everyone involved.

There is no option to indicate on the form that liability is admitted but quantum is dispute. This had previously been an option in small claim and summary cause procedure and we consider it will apply in a high number of actions. Again, this might be appropriate to display on the cover page. It would assist in narrowing the issues in dispute between parties.

It would be useful if there was a section on the response form or the claim form which allowed parties to indicate what their preference would be in terms of further procedure.

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

We take the view that intimation and service of forms and documents should reflect simple procedure's overarching principle; where possible it should be speedy, inexpensive and informal. To that end, we consider that the claimant should be required to specify an email address in the claim form where they are represented by solicitors, and otherwise unless there is good reason. The same ought to apply to the respondent when completing the response form, which would allow for forms and documents to be sent or served electronically by parties and the court from the outset.

We endorse the ability to send forms and documents by email. We consider that there should be greater consistency across sheriff courts in allowing this; our experience is that hard copies are often insisted upon.
We refer to recent changes in the form of the compulsory pre action protocol for personal injury actions where documents that require to be intimated or sent should, where possible, be intimated or sent by email using an email address supplied by the party. We would suggest a replication of this practice within simple procedure for intimation, serving and lodging of all documentation.

Where a party is represented we would suggest that all correspondence, documents or orders are sent to the representative rather than the party direct.

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

Taking each of the five possible written orders in turn we would comment as follows:-

1. ADR

Our limited experience to date would suggest that ADR can lead to increased costs and delays in settlement being achieved. The efficacy of ADR would appear to be impacted by the availability of suitable providers of ADR. It would be helpful if, when ordering that parties engage in ADR, the court was to produce details of ADR services available to parties.

2. Case Management Discussion

Overall our experience of Case Management Discussions has been very positive. Sheriffs are familiar with cases and take a proactive approach appropriate to the type of case being pursued. For example, our experience is that in credit hire cases sheriffs will make specific orders relevant to the issues arising and order the production of evidence relating to impecuniosity and loss of use dates.

The Case Management Discussions provide a useful forum to raise matters which may have prevented settlement of an action pre-litigation and often information is produced following a case management discussion which leads to settlement.

3. Arrange a Hearing

In some cases where a Hearing has been fixed the date can be very close in time to the last date for a Response.

We have had experience of the Evidential Hearing being fixed three weeks after the Response date. This provides a very limited time to cite witnesses or lodge documents. This can be compounded by the fact that quite often it takes some time for parties to be advised of the first written order, although the use of Civil Online will assist in alleviating this particular issue.

In appropriate cases proceeding directly to an Evidential Hearing allows for an efficient resolution of the matter, however fixing this date at too short notice defeats this object when parties cannot be in a position to proceed on the date assigned.

4. Indicating the Sheriff was considering deciding a case without a Hearing

In our view the intention of this option is unclear. We have not had any direct experience of this option being utilised and it is unclear, if an indication is made by the Sheriff that he/she is considering making a decision without a Hearing, what the next stage in that process may be. Is a decision then made? Are parties invited to provide further information before a decision is reached?

This option appears to us to be little used and ambiguous.

5. Dismiss the case, as a result of incompetency or on the basis of no real prospects of success

We have experience of this option being properly used in appropriate cases, although we also have an experience of a case which presented many valid reasons for dismissal which instead proceeded to three Case Management Discussions.

In our experience the level of case management is high and the level of judicial involvement and proactivity in cases is to be welcomed. There are however inconsistencies in practice depending on the sheriffdom and a greater consistency of approach would be welcomed.

If a case settles before the last date for a response there is no method for seeking decree of absolvitor with no expenses due to or by either party. Presently if settlement terms have been agreed it is common for the respondent to lodge a response form indicating the settlement terms have been agreed and an application to pause at the same time. Once settlement cheques have passed then an application to restart is lodged with an incidental order application seeking decree of absolvitor with no expenses due to or by either party. This process could be streamlined with an option to seek absolvitor when the claimant lodges an application for a decision.

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
Our view is that the rules should provide for electronic submission to sheriff courts of incidental order applications, rather than insisting on post. We consider that there should be uniformity across sheriff courts in allowing incidental order applications to be intimated via email, particularly where both parties are represented. The same applies in respect of proof of sending. Our experience is that the 10 day period to oppose can lead to undue delay where an application is unopposed. We would therefore welcome sheriff courts taking a more proactive approach where consent is marked via email by granting unopposed applications more quickly. In a similar vein, we consider that there should be provision for joint incidental order applications, particularly where seeking disposal of an action following resolution.

Consultation question 6

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

Comments
It would be helpful if the List of Evidence and List of Witnesses forms could be edited. At present there are a set number of boxes which means that where there are only 1 or 2 witnesses, paper is wasted. On the other hand, on the rare occasions there are more than 10 witnesses, parties are required to use two forms which, at present, cannot be distinguished (see below). It is not immediately clear whether a list is for the claimant or respondent. It would be helpful to add in a number and a party e.g. First List of Evidence for the Respondent. Often there are multiple lists of evidence and this can cause confusion at a hearing when referring the sheriff or witness to a document.

Consultation question 7

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

Comments

It would be useful if both parties could be provided with a copy of the final decision of the sheriff. In many simple procedure claims only the claimant's agents are informed and the respondent's agents require to contact the court for updates.

If a sheriff assigns a diet of assessment and a diet of approval, it is common practice for the successful party to be ordered to lodge their account with the court by a specific date in order that the sheriff clerk can assess the account. It would be useful if parties could indicate to the court whether or not diets of assessment or approval will be required. It has been common practice for represented parties to negotiate summary cause expenses with minimal court hearings. We would suggest that parties be provided with a period of 30 days to agree expenses and if matters are not capable of resolution the sheriff can issue an order assigning a diet of assessment and a diet of approval.

We would welcome the opportunity for the paying party to provide the sheriff clerk with comments on the account in order that those can be considered when the account is assessed. We would suggest that a period of 2 weeks after the account has been lodged and intimated would be a sufficient period for the paying party to respond.

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

We have only encountered one sheriff court which allows case management discussions to be held by telephone conference call. We conduct as many as possible with conference call with Hamilton sheriff court. We have found this to be a particularly useful practice. The matters in dispute are focused by the sheriff during these calls. We would welcome the opportunity to hold more case management discussions by telephone conference call in other sheriff courts.

It would be of assistance for all of the provisions in relation to expenses to be consolidated in one place. We have been referred to a spreadsheet circulated to the courts setting out expenses in admitted claims. The origin of the spreadsheet is unknown and it is not clear in what circumstances this would be used.

Furthermore we encounter large numbers of cases in which liability is admitted and quantum disputed. The case ultimately settles below the sum sued for but the courts have found, under section 81 of the Courts Reform (Scotland) Act 2014, that the defenders have not proceeded with their defence. If the defence is that the sum sued for is excessive and they are successful in that respect, in that the case settles at an amount lower than that sought, we consider the cap on expenses should still apply. The legislation, as is stands, discourages settlement, contrary to the principles of the simple procedure rules. We would welcome a review on this aspect of the expenses legislation.

At the moment simple procedure is very paper heavy. We understand that the courts are not yet able to accept documents by email. It would assist parties if each sheriff court had a dedicated email address for intimation of documents by email. We understand that Civil Online is in the early stages and look forward to the next stage as matters develop.

We would welcome the ability to counter claim in simple procedure. It was possible to counter claim in both small claim and summary cause actions and it would be useful to counter claim in simple procedure.