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

1. The Claim Forms appear to be confusing (and too long) for Party Litigants

Nolans are in the fortunate position of being able to note feedback from many Party Litigants. Due to our obligations to protect consumers in terms of TCF, vulnerability policies, mental health policies, etc we require to review a vast number of phone calls with consumers/party litigants. This allows us to sample wide feedback from party litigants. The feedback we hear is that the Simple Procedure Claim Form is too long and thus difficult for them to understand. In many cases the complaint we receive from Party Litigants is that they do not understand that a court action is being served upon them. Some Party Litigants seemed to believe that they were only served with a letter, albeit the form is complex and seems to outline what it is on the front page. We note that the paperwork required has increased from 2 pages in the Small Claims/Summary Cause forms to 6 (x 2 copies) pages to the Court and 11 pages to each party. In England, concern was expressed on the environmental impact of extra paperwork. We do not know what the environmental impact might be, but the printing and stationary costs for the new procedure have vastly increased by many thousands of pounds.

2. Important information on the Claim Forms is not obvious - Party Litigants

From the feedback that we receive, Party Litigants tend to only read the first few pages of the Claim Form (and even then, they tend only to read the matters highlighted in boxes). However the factual background to the claim is not disclosed until page 6, the sum sued for is several sections away on page 7 and the expenses on page 9. (Because the expenses claim is quite far away from the principal sum claim, we find that a lot of party litigants do not understand that expenses are due as well). From the feedback from Party Litigants we understand that if the boxes stating the background, the sum claimed for, the expenses and the parties involved could be moved to the front of the Form then this could be more understandable to a Party Litigant. We do fully appreciate that the forms are designed with the anticipation of everything being moved online. We are not sure of the basis of algorithm that the department have used to produce the forms.

3. Important information on the Claim Forms is not handy or obvious – Courts and Practitioners

We find many hearings (including CMCs, Proofs and even Appeals) can be slowed down somewhat as the court and the parties leaf through the many pages of the Claim form to find, variously, the designation of the parties, the Statement of Claim, the various sums sued for, the interest, the expenses, etc. As narrated above, the factual background to the claim is not disclosed until page 6, the sum sued for is several sections away on page 7 and the expenses on page 9. We feel the important matters should feature in the first 2 pages of the Claim form.

4. Claim Forms do not allow for Claims in the name of Trading Names

In Scots Law you can sue in a trading name alone, and thereafter enforce against the individual/company. This is a time-saving and efficient feature of Scots Law which stops many false and dilatory defences. (For example a Defender trying to avoid liability by stating that a third party is liable. The Sheriff Officer can verify the entity at the point of serving the action or the Decree and wasted court actions are avoided.). This is of particular benefit to Consumers and Party Litigants, as Companies/Club can sometimes be hard to identify but their trading names are obvious to the consumer. The Ordinary Cause Rules incorporate this at Rule 5.7. The Summary Cause Rules incorporated this at Rule 5.2. The Small Claims Rules incorporated this at Rule 6.1. The Simple Procedure Rules make provision for this at rule 3.6. (This is correct as the purpose of the Rules is not to change the law). However the Claim Forms make no provision for this at all. The Claim Forms require a party to name an individual or a limited company. The Claim Forms do not adhere to the rules or the law. The Claim Forms should allow for a Claimant to sue in the trading name. This can cause unnecessary expense and undue delay in many, many cases. It also allows many costly, complicated and unnecessary defences.

5. Boxes E1, E2 and E3 – Presumption of any Defence leads to a conflict of interest

The Civil Justice Committee confirmed that the intention of the Simple Procedure Rules was not to change the law in relation to the pleading of evidence. This was reassuring and in line with the Courts' observations in *Npower v Low* and *Cabot v McGregor and others*. Our understanding is that the Rules are not designed to change the law on pleading evidence. However Boxes E1, E2 and E3 of the Claim Form ask a party to plead a list of the evidence and witnesses which may be produced. This should not be required in 84% of actions, as they are undefended. Our issue is that the listing of evidence can only proceed on the (mostly wrong) assumptions that a) an action is going to be defended and b)that the Claimant knows what the defence will be. The difficulty for a practitioner is that he must act for his client. However, in order to fill out these boxes, he must draft a hypothetical defence to the action

(against his clients' interest) and then tell the court what evidence he would produce to combat this hypothetical defence. This is clearly not a fair or just position and may well be a conflict of interest. We would suggest that these boxes should not require completion until after it is ascertained a) if there is a defence to the action and b) what that defence is. To illustrate the difficulty with reference to consumer contract law, any List of Evidence would differ depending on the particular Defence. For example if there is no dispute as to the agreement but the Defender simply contends that the debt is prescribed, the only evidence required would be a Statement of Account showing the last payment date. (A plea of prescription is mutually exclusive to a denial of any agreement.). Conversely if the Defender denied the debt entirely then the Agreement (or other evidence) would require to be produced showing that the Defender entered into the Agreement. A Statement of Account would not be required at all (as a plea that the sum sued for is excessive is mutually exclusive to a denial of any agreement.). There are many, many other instances. It should not be the Pursuers responsibility to create Defences for the Defender and then, in anticipation of these Defences which do not exist yet, tell the Court that they will lodge unnecessary documentation and witnesses. In view of the fact that 84% of all cases in Scotland are undefended (with our firm this figure is higher as we do a lot of pre-litigation work to avoid unnecessary time and expense to the courts), we feel that Claimants should not be placed in the position where they require to guess defences for the remaining 16%. (A provision confirming, in accordance with Scots Law, that there is no requirement to plead evidence may be something that the Committee may wish to consider)

<u>6. Jurisdiction - Section D2 does not allow for this to be properly specified</u>

Section D2 is set out in the following terms;-

"Where did this take place?"

"You should set out where the events described above took place. If any part happened on line, please state this. This is so that the Court and the respondent can make sure that this is the right Court to hear this claim."

However this does not cover all aspects of jurisdiction. For example jurisdiction in Consumer cases generally bears no relation to where the events took place. It is based on the Defender's domicile. Jurisdiction in asset recovery cases would be based upon where the asset is situated. Importantly there is only one box but different parts of the claim may have taken place in several places and there may be several possible jurisdictions. The section makes no provision for any prorogation of jurisdiction. We appreciate that this section was probably drafted with Personal Injury actions in mind. However Sheriffs have, on occasion, taken issue with this and dismissed claims partly on the basis that the form is wrongly completed. However it is impossible for practitioners to complete this part of the form properly as it is currently drafted.

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

1. The Form does not specify which remedy the Defender is seeking

The form refers to both

a)*"Time to Pay under the Debtors (Scotland) Act 1987"* (Time to Pay Directions) and

b) to *"Time to pay under the Consumer Credit Act 1974"* (Time Orders).

However, the Form does not state which of these the application is for. The Form should state whether the application is for a Time to Pay Direction or a Time Order. We should be obliged if consideration could be given to further clarification within the Form to separate Time to Pay Applications from Time Orders and explain to both the Court and Party Litigants the very fundamental differences between the two. We find that this does confuse party litigants.

2. The Income/Expenditure information requested could be more detailed

Applications for Time to Pay Directions mainly relate to consumer credit cases. The FCA have provided certain current practices on what income/expenditure detail creditors should consider. Priority Bills should be identified (including the current court action as a priority bill). Given the purpose of these forms, it may be an idea to use the "Common Financial Statement" as a template for these forms. Alignment of the practices of the Courts and the FCA may lead to a simpler resolution for consumers/party litigants.

3. The Form does not appear to request the information required for a Time Order

The available remedies under s129 of the Consumer Credit Act 1974 are much wider that just seeking time to pay. The consequences of a Time Order may result in further interest and charges to a Defender if it is not kept up. Additionally a defender can only miss one payment (whereas in a Time to Pay Direction a defender can miss 3 payments). The factors that a Sheriff can consider in a Time Order are more restrictive than those in a Time to Pay Direction. A Time Order should not simply relate to income and expenditure and the sums due etc. The Simple Procedure Forms do not really seem to take account of this and this seem to be leading to much confusion in Courts. It may well be that a Time Order should be made by way of separate application (as a Time Order can be applied for at any time) and not in the current process.

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

1. Certification by Officer of Court

Other than a mention of the name, the forms make little provision for service by an officer of the court. If a party is represented, then a form of wording should be on the forms to confirm that the officer of the court (be that a solicitor, clerk or Sheriff Officer) has been sent. The statutory duties of these parties provides the court with more certainty that an action has been served.

2 Reference to "evidence of delivery" in Rule 18.2(4) should be removed.

Rule 18.2(4) narrates

"After formally serving a document, a Confirmation of Formal Service must be completed and any evidence of delivery attached to it."

However the long established presumption in Scots Law is that *"….a letter which is posted is received…."*. Accordingly proof of postage is therefore sufficient evidence of delivery. (In other contexts see *Chaplin v Caledonian Land Properties, 1997 SLT 384*, *Walker & Walker, Evidence*, para 3.6.6 and *McBryde, The Law of Contract in Scotland*, *3rd Edn*, para6-116). The Simple Procedure Rules follow the dicta in *Npower v Low* and *Cabot v McGregor and others*¸ that the aim of procedural rules is not to change the law but simply to enable actions to proceed in an orderly and regular fashion to achieve a just result. Accordingly we would suggest that the text in Rule 18.2(4) is clarified to read "evidence of posting".

In support of this principal, we note the prejudice that could be caused to both parties if any evidence of delivery (as opposed to evidence of posting) was insisted upon. Leaving to one side the lack of any reliable method to prove delivery at all, a Claimant can be prejudiced by a denial of his legal rights if a Respondent simply evaded a claim by refusing a letter. However a Respondent is not prejudiced if the letter is sent and proof of sending is lodged as, in the worst case, he can recall the decree at almost any time.

Furthermore we become concerned when some courts interpreted this rule as an endorsement of Royal Mail "Track and Trace" procedure. This is an unregulated and, in our experience, unreliable procedure that often produces wrong results and rarely coincides with the time limits specified in any of the court 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

1. Suggest a procedural/negotiation pre-CMC hearing.

-The current rule/principal in encouraging settlement is one of the most beneficial innovations of the Simple Procedure Rules. The interlocutors issued by Sheriffs on this point seem to have assisted in bringing many, many matters to a conclusion with little delay and expense. (As solicitors we always try pre-litigation correspondence but, for many reasons, sometimes Parties do not engage until the helpful court interlocutor.)

- One of the most frustrating aspects of the Simple Procedure Rules is a failure of a party to adhere to Rule 4.4 (see below). This means that a Claimant can end up at a Proof without knowing what the Defence is. At present some courts simply use the CMC to send the case to Proof without ensuring that rule 4.4 is adhered to or the issues are identified.

If the Rules could accommodate a pre-CMC hearing at which the parties could negotiate and ensure that the process is complete (without looking at the merits at that stage) the Rules reduce the amount of cases proceeding and at the same time avoid the "Proof by Ambush" that can currently arise under SPR rules.

2. Rule 4.4. Not complied with in the majority of Defended cases.

We have found that Rule 4.4. is not complied with in the majority of Defended cases. We attend CMCs not knowing what the defence is. Some courts do not allow for this and simply assign a Proof. Can we suggest that a mechanism could be put in place to allow that to be remedied. (As above, maybe a pre-cmc where the issues are not addressed but tidying up process and negotiation/communication are encouraged? Or even just a simple rule ensuring that no Proof can be assigned unless Rule 4.4 has been complied with.)

3. Adjustment

Following on from Rule 4.4 being completed (and intimated) properly, the parties may be able to dispose of certain matters with responses in writing. The rules may wish to give consideration to a dedicated hearing for this purpose.

4. Obligation on Sheriff to identify the issues in dispute and to Note, in writing, issues for Proof.

The Summary Cause/Small Claims rules used to have such a provision. As a result both the Claimants and the Respondents knew exactly what they had to prove at any proof. Under the Simple Procedure Rules this is not the case. Given that, in many cases, Rule 4.4 has not been complied with (or the Defence can be a

scattergun approach) many claimants cannot properly prepare for Proof. (Or they require to spend great time and expense on preparing unnecessary and large aspects of a case). This is neither Simple nor is it a Procedure. We would respectfully suggest that consideration is given to placing a similar provision in the Simple Procedure Rules to simplify the procedure.

4. Can the Rules make provision for a CMC to be discharged if settlement is achieved.

Currently some courts insist that there is no provision for this, even if both parties are agreed. Accordingly when settlement has been achieved and effected, the hearing still requires to proceed and agents, clerks and Sheriffs require to spend time preparing for same. It would be inkeeping with the ethos of the Simple Procedure Rules if such a provision could be considered.

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

1. A Rule that a copy of any response should be sent to the other party.

Currently, when an application is opposed, the respondent replies to the court setting out his/her basis of opposition. However we do not see this. The hearing goes ahead and we cannot prepare for same as only the court and the opposing party know the basis for opposition. It would be in the interests of justice for a rule that both parties should know the basis of opposition before attending any hearing (and for the rule to be enforced).

2. Unless Orders (Rule 8.4) – Not in undefended actions

Following on from the decision in *Cabot v McGregor and others*, we feel that there should be some specification that these should not be used in undefended actions. Pars Judice matters can (and should) be dealt with by way of pleadings alone. Some specification on this may be of assistance to courts and parties, but evidence shoud, in general, not be pled. (A provision confirming, in accordance with Scots Law, that there is no requirement to plead evidence may be something that the Committee may wish to consider)

3 Unless Orders (Rule 8.4) – Checks and balances -

While Sheriff has, correctly, more inquisitorial role in Simple Procedure, a defence must not be Sheriff led. Accordingly, without adequate definition on the role, this potentially creates a difficult and unsustainable role for the Sheriff. We appreciate that all Sheriffs are attempting to define and carry out this role well. However, we feel that, if rule 8.4 is not qualified (so that such orders must have relevance to the defence led, must not be speculative, etc) then the Sheriff's role and the parties expectations are not adequately defined (and thus cannot constitute a procedure). A provision should be made to allow a party to ask for such an order to be reviewed to ensure that it is relevant and not speculative. (Similar to the current law on Motions for Specification). This is important, particularly given the draconian consequences of not being able to adhere to an irrelevant order. (By way of example, we have had orders for Default Notices to be produced, where the 1974 Act specifically says a Default notice is not required. We have had Courts looking for copies of assignations where the assignation is not only not denied, but is already in process).

4. The number of Different Forms

In the previous rules, an Incidental Application could ask for anything. In the current rules there are separate applications to pause a case, to restart a case, to continue a case, to amend a case, etc. We feel that one form for all of these would be simpler (especially for party litigants)

Consultation question 6

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

Comments

1. There is currently no scope to identify different List of Evidence Forms

In actions under other procedures, there is scope for lodging a 1st Inventory of Productions, 2nd Inventory of Productions, 3rd Inventory of Productions, etc. This allows for evidence to be lodge in batches, depending when if is received/required/relevant. This List of Evidence Form currently lack any similar identifier. Thus in many actions you could have 3 or 4 items marked "C1"

(We currently operate around this informally with the permission of the individual courts. However this is a manner in which the form could be improved.)

Consultation question 7

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

Comments

1. Suggest a procedural/negotiation pre-CMC hearing (which does not address the merits).

As suggested in our answer to Question 4, we feel that such a hearing would reduce the number of defended actions considerably and be inkeeping with the ethos of the Simple Procedure Rules, in getting to a resolution quickly. The reason being that, if a court can simply send the matter to proof without the issues being identified or notice of the parties whole position being put forward, then the case may actually be longer than it should be. If there were a hearing where negotiation and process were simply addressed, we would expect the bulk of defended actions to be resolved early (or at least have the disputed issues defined)..

2. Guidance to Courts on Timetable and for Proofs

Something that court users tend to ask is how long the process will take. In Ordinary Cause procedure there are set time guidelines. However with Simple Procedure we are unable to properly advise a client on this. In general the procedure takes quite a lot longer that Summary Cause/Small Claims procedure. (We fully appreciate that some of this may be down to new systems and the bedding in of the Simple Procedure Rules.) However there are some courts where hearing are assigned so quickly that there is little or no time for preparation.

Some guidance on time for timetables and hearing would be of assistance to both courts and court users.

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

1. Expenses in undefended actions appear to be missing

There is no provision for a party to recover the expenses of various hearings in undefended cases (Time to pay appearances, continuations, etc.).

We believe that this is simply an oversight. The general rule in expenses is that the successful party can recover their expenses. Again, as narrated in *Npower v Low,* the aim of procedural rules is not to change the law but simply to enable actions to proceed in an orderly and regular fashion to achieve a just result. Ordinary Cause, Summary Cause and Small Claims procedure all provided for recovery of same. In view of this, we should be obliged if this provision could be re-instated.

2. Expenses in both undefended and defended

The principals of the Simple Procedure are to be lauded. However they do cause a lot more work than the old rules, a lot more printing and stationary, a lot more negotiation and a lot more guidance. We feel that the current recoverable expenses should be looked at in light of this.

3. Inconsistency of Approach

As the Rules have been set in layman's terms (for a valid reason) there is less specification of language. This has meant that courts do not always take a uniform approach. In some cases this has led to us providing clients with different advice, depending on the jurisdiction of the case.

4. The delay in receiving a Decision Form

We appreciate that there are reasons for this delay to be in place. However it does deprive a successful party of their rights for a longer period of time. In some cases we have seen assets disposed of with a view to avoiding diligence.