Informing Progress – Shaping the Future

A Response by the Forum of Insurance Lawyers to the Scottish Civil Justice Council's consultation on the Simple Procedure Rules.

May 2018

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FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The consultation was drafted following consultation with the membership in Scotland. It has been drafted by Karina Manson, Katie Carmichael, Callum MacKinnon, Clare Crawford, Lynn Livesey, Julia McDonald, Susan Currie and Mark Jamieson.

Publishing preference

FOIL is happy to give permission for its response to be published together with its name.

Any enquiries in respect of this response should be addressed initially to:
Shirley Denyer
Shirley Denyer LLP
FOIL Technical Director

info@foil.org.uk

FOIL
1 Esher Close
Basingstoke
Hampshire
RG22 6JP

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Question 1: Do you have any comments on the way in which a claim is made using simple procedure or the forms associated with this stage?

Whilst Simple Procedure is heavily used for debt recovery, FOIL's response is based on members' experience, which in Scotland generally comprises accident claims where fault or liability is disputed.

We have noticed that individual sheriff courts have their own preferences for the completion of the claim form. There is sometimes insufficient space on the actual form to provide detail of the incident or the issues in dispute. Parties have remedied 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 appreciate clarity and consistency in the meantime.

We submit that any evidence/documentation being relied upon by the claimant in the claim form ought to be lodged with the court and intimated to parties at the outset of a claim. Early disclosure of evidence will encourage meaningful negotiations between the parties at the earliest possible stage.

The agent for the claimant may be 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.

The form itself 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 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 being made.

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?

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 old small claim and summary cause rules. The boxes on the form are not particularly

big for a detailed response to the claim. It would be useful to have a period of adjustment of around three 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 specifying an order allowing adjustment of the forms.

It would be useful if there could 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 admit the circumstances of the incident but dispute quantum. This had previously been an option and we consider it will apply in a high number of actions, particularly in relation to vehicle repairs and credit hire. 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. We have no comment to make in relation to the current time to pay procedure.

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?

Overall having a number of methods of sending and service appears to be working well. Given the high number of party litigants in the simple procedure process, email increases accessibility. It is noted that deadlines in the rules tend to state “by the end of the day”. When using email, party litigants have taken that literally as opposed to by 5pm. An approach similar to the commercial motions team of the Court of Session could be used, i.e. stating in the rules that emails would need to be received by 5pm to be treated as sent that day.

The rules also state that documents can be posted to a party or their representative. It is suggested that this could be clarified to state that where the party sending or serving documents are aware that there is a representative, the documents should be provided to the representative. This would prevent a number of situations whereby clients receive documents they were unaware of, or whereby the client does not provide the document to the representative in time to provide any response required.

In terms of the online portal, it is suggested that further training sessions could be provided on this, however, given that this is a developing matter, it may be more appropriate to consider once it is launched fully.

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?

In general, a prompt response is received from the court with the case being dealt with without delay. However, there is inconsistency of practice across the Sheriff Courts in the way in which some cases are treated.

A Sheriff, in the order after the last date for response, may insist that principal agents appear at a case management discussion (CMD). In addition to being an inconsistent practice, this can be problematic where the date is fixed with short notice and the principal agents are not based near to the Sheriff Court. Fixing a CMD, to take place in court, seems to be the most common 'first order' in defended Simple Procedure cases. Whilst CMDs can be very useful in narrowing the issues in dispute or prompting settlement, we would like to see greater use being made of the provisions for CMDs to be held by video conference or telephone conference call rather than in court. Aside from making it easier for principal agents to attend CMDs, that would also be in keeping with the overarching drive to minimise costs in low value claims.

Hearings on evidence are also, in some courts, fixed at short notice i.e. within three weeks. This causes problems where, for example, an expert report is required or due to witness unavailability. Whilst it is acknowledged that the aim of Simple Procedure is to ensure that cases are dealt with expediently, we submit that the making of such orders/timescales should be reviewed with the aim of achieving consistency and practicality.

If a case is settled before the last date for a response, there is no mechanism whereby decree of absolvitor can be granted to protect a respondent's position. The procedure is to lodge the response form indicating that settlement is agreed. An action is simply dismissed which can leave the way open for claimants to make a further claim in relation to the same set of circumstances. We suggest that there should be an additional option for parties to seek decree of absolvitor albeit alternative/plain English phrasing for non-legally represented individuals.

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?

We consider that the forms at present are not clear or succinct. We believe they are overly lengthy and could be significantly shorter whilst broadly capturing the same information.

Frequently claims forms completed by some representatives do not follow the structure of the form or the spirit of the Simple Procedure rules, instead reverting to traditional styles of pleadings with many simply stating "See Paper Apart" and thereafter containing a number of detailed paragraphs. The Respondent is then left with the difficulty as to whether they respond to the questions on the response form or deal directly with the claim form or both.

In this connection, we would suggest that the courts provide clarity and consistency as to what is allowed to be received both in terms of claim forms and the responses to them if

Simple Procedure is to achieve its stated objectives. We submit that extra room should be provided on the present paper claim form to narrate the claim circumstances leading to and details of the claim. We note that, with the introduction of an electronic version of the claim form, this will not be an issue.

Question 6: Do you have any comments on documents, evidence or witnesses, or the forms associated with Parts 10 and 11?

The length of the forms is at odds with the aim of simplifying court procedure. The forms are extensive, with all the ancillary guidance notes being contained on the form.

The length of the forms is cumbersome when instructing local agents. The information required can result in copious papers being sent to local agents, particularly if evidence has been lodged in advance of the CMD. This is in contrast to the limited information required when instructing a local agent for an ordinary action, for example.

The deadline for lodging documentation two weeks prior to the hearing does not provide sufficient time for parties to consider the documentation and potentially engage in settlement. It can result in late settlement of claims and the expenses arguments that thereafter flow. It can also result in claims settling but no agreement regarding expenses being reached and a separate hearing having to be fixed on that alone. It is proposed that this deadline be brought forward.

In any event, clarity is sought on the Lists of Evidence. We submit that separate List of Evidence forms should be available for the respondent and the claimant to avoid confusion at court. We also submit that the documents on the List of Evidence ought to be intimated to all parties at the same time as being lodged with the appropriate court.

The above observations regarding the deadline for lodging documentation also apply to the deadline for lodging the List of Witnesses Form. In addition, the deadline for serving the Witness Citation Notice is three weeks. It is proposed that this deadline should either be on the same date or after the deadline for lodging the List of Witnesses Form.

There is an inconsistent approach by agents throughout sheriffdoms in terms of how the forms are completed. The courts should adopt a consistent approach in respect of acceptance of incomplete forms to ensure that forms which fail to specify evidence and witnesses are not accepted.

Question 7: Do you have comments on the rules and forms relating to hearings and decisions, including the recall of a decision?

Part 12.6 of the Simple Procedure Rules provides the Sheriff with a wide range of powers to determine how evidence will be given at a hearing. This includes, *inter alia*, imposing conditions on how evidence should be presented and setting time limits for the questioning of witnesses. There is currently no provision in Part 12 to give parties advance notice of any special conditions which are to be imposed. Consideration should therefore be given to the inclusion of a rule requiring an Order of the Sheriff to be issued one week prior to the hearing date. The purpose of such an Order would be to specify any conditions the Sheriff wishes to impose as to the way evidence is to be given at the

hearing. This will provide parties with sufficient opportunity to prepare in advance of the hearing.

In the Application to Recall (Form 13B), we consider a sentence should be included which advises parties that where a claim has been dismissed, the Application to Recall must be lodged with the Court within two weeks of the date of dismissal, as per Part 13.5(2) of The Simple Procedure Rules.

Separately, to allow parties to prepare appropriately, there requires to be consistency in relation to the level of detail of discussion expected at Case Management Discussions (CMD). Parties ought to be encouraged to fully engage in the CMD to either expedite early resolution of cases as appropriate or identify the main issues in dispute.

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?

Although Simple Procedure has been designed to streamline the court process, there now appears to be an increase in the paperwork and hearings involved in these low value cases.

Some of the main areas of dispute currently centre around the calculation of costs.

Some courts have awarded VAT and outlays in addition to capped expenses under the 2016 Order. The stated objective of the Simple Procedure (Limits on Awards of Expenses) Order 2016 is to preserve the old small claims rules which capped expenses at £150 or 10% of the value of the claim, whichever is the higher, in claims worth up to £3,000 in which no exception to capped costs applies. In small claims court actions, VAT and outlays were not awarded in addition to the restricted expenses. Clarification is needed on whether VAT and outlays are indeed recoverable in addition to restricted costs to avoid unnecessary disputes. We submit that VAT and outlays ought not to be payable in addition, in line with the previous small claims regime. Further support for that point comes from the fact that the 2016 Order does not provide for VAT and outlays in addition. If the intention was for VAT and outlays to be payable in addition then the Order could easily have provided for that.

Clarity is also needed on the circumstances where scale, rather than capped, costs are payable in claims worth up to £3,000. The main issue in this regard centres on the exception provided by s.81(5)(a)(ii) of the Courts Reform (Scotland) Act 2014, namely where the respondent “having stated a defence, has not proceeded with it”. The judicial approach to date on this point has been to adopt the approach taken previously in Small Claims that this phrase means “not proceeding with the hearing on evidence and obtaining a decision or judgment of the court” (*Graham v Farrell [2017] SC EDIN (31 October 2017), reported at 2017 G.W.D. 37 -569*). It is respectfully submitted that the position with Small Claims is different in certain material respects to the position with Simple Procedure such that the Small Claims approach should be adapted before it is applied to Simple Procedure cases. The differences which we wish to highlight here are:

(a) The point at which a defence was stated in a Small Claim compared to under Simple Procedure; and
(b) The preliminary procedure prior to the fixing of an evidential hearing as between Small Claims and Simple Procedure. We explain each point in more detail, as follows:

- One of the things which a sheriff had to do at the "first (procedural) hearing" of a Small Claim was to note the factual and legal issues in dispute. It was at this stage that a defence was "stated". In a Simple Procedure case, though, a defence is stated at the outset, before the case is considered by a Sheriff.

- In a Small Claim, the "first (procedural) hearing" was often continued, without a defence being stated, for settlement negotiations. If settlement terms were then agreed, parties would normally agree for capped costs since the settlement was achieved within a period that the court had allowed for that purpose. Under Simple Procedure, on the other hand, on the strength of the written pleadings alone, the sheriff makes first written orders, most commonly by way of fixing a Case Management Discussion (CMD).

We submit that where settlement of a Simple Procedure case is achieved before an evidential hearing has been set, the s.81(5)(a)(ii) exception should not apply. That is not necessarily at odds with the decision in *Graham v Farrell*, in which scale, not capped, costs were awarded in a claim worth less than £3,000 but where settlement was achieved between a CMD and the hearing (i.e. after an evidential hearing had been set). Further, the proposal here makes sense in that, logically, a hearing would need to be fixed before "not proceeding with **the** hearing on evidence" (emphasis added) makes sense in this context. Since the matter is regularly being argued between agents, though, we consider that rules would be welcome to make the position clear.

We submit that the terms "admitted" and "disputed" in the context of the two scales of Simple Procedure expenses should be changed to "undefended" and "defended". That, in any event, seems to be the intention behind the presently used terms. The proposed change is to avoid confusion because certain aspects of a "defended" claim may be "admitted" (liability, for example, could be admitted but the claim could still be a "disputed" or defended one).

Clarity is also sought on whether, and in what terms, a tender may be lodged in a Simple Procedure case. Reference is made in the "disputed" scale of Simple Procedure expenses to a tender, which suggests that one may competently be lodged. Experience has, though, shown that some Sheriff Courts are refusing to accept tenders in these cases. Whilst tenders should be "unqualified", it would also be helpful, again in the interests of clarity, if it was accepted that a tender for up to £3,000 lodged in a Simple Procedure **before** an evidential hearing is set may offer capped costs and still count as a tender.

Finally, in the event that a claimant/claimant's representative does/do not engage in constructive settlement negotiations with the respondent or their agents (as appropriate) within a reasonable time, we submit that clarity on whether the court can modify claimant expenses is required.