



Law Society  
of Scotland

# Consultation Response

Consultation on simple procedure rules

24 May 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Access to Justice committee welcomes the opportunity to consider and respond to the Scottish Civil Justice Council *Consultation on the Simple Procedure Rules*. Our committee has the following comments to put forward for consideration.

## General comments

The simple procedure rules were launched in 2016 with the intention of making court procedure for low value claims more accessible. As the Lord President, Lord Carloway, said at its launch, "The simple procedure has been designed with the party litigant in mind, using accessible language and incorporating user friendly guidance into the rule".

We do recognise the significantly more accessible and comprehensive language used. We understand from the Scottish Courts and Tribunals Service, however, that the new procedure has not seen any significant increase in the number of self-representing claimants, remaining at around 11% overall. If not already undertaken as part of the current consultation, we believe that it would be important to seek feedback from members of the public who have used these rules in bringing or defending a civil claim.

It may be that the number of self-representing claimants increases over time in any event, as the process becomes more familiar and as the Civil Online portal develops the functionality to assist people through the court process. We are also supportive of the commitment from the Scottish Civil Justice Council that there should remain alternatives to online access, as there remain persistent issues around digital poverty across Scotland.

### **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?**

We believe that further consultation with the public around the usability of the claim form (Form 3A)<sup>1</sup> would be helpful. The feedback received from our members around the usability of the current forms suggests that these are complex. From a claimant's perspective, the forms to be completed in raising a claim take longer to complete due to the volume of pages. This is time consuming and laborious and the number of fields to be completed seems excessive. We also find, from contact with respondents, the form is unclear in respect of information contained on the front page: it does not seem clear to respondents what the form actually is, which court this relates to, or what sum of money is being claimed.

The development of the Civil Online platform also offers an opportunity to deploy intelligent and branching forms, for instance, only asking relevant questions (so, for instance, if the claimant indicated there was only one respondent, not to be presented with questions around the contact details for respondents two and three). This could also obviate, at least for online submission, the need for forms 3A and 3B for further claimants and respondents, and also the need for additional sheets to be submitted at question D1 of the current claim form, should claimants wish to provide more detail on the background of their claim.

There is an opportunity to learn from the development of the Online Court in England and Wales, a technology-led forum for the resolution of low value civil claims. Triage software will be used to assist claimants in formulating their claims, as Lord Justice Briggs highlighted in his interim report:

“In most current civil litigation, stage 1 consists of the litigant turning a blank sheet of paper into particulars of claim, an adversarial process which LIPs tend not to perform with distinction. By contrast, online stage 1 triage software for use in the OC [Online Court] would guide the litigant through an analysis of his or her grievance in such a way as to produce a document capable of being understood both by opponents and by the court.”

With information stored electronically in a standard format as Civil Online develops in Scotland, there might also be opportunities to assess trends, for instance, particular sections of the form that see more frequent rejection by Scottish Courts and Tribunals Service staff, which would allow for improvements to be made or, indeed, to use online verification rules to ensure that forms contained all relevant information before submission. Bearing in mind the amount of information required in order to complete a claim form, any interactive form would need the functionality to be able to save progress and continue at a later stage.

We have some observations around the current Form 3A which we hope are constructive:

- Question A5 – the term “responding party” is used, though “respondent” is used elsewhere in the form (and the latter term is not defined in guidance until question C1)
- Question B1 – if a claimant is representing him or herself, instruction to disregard questions B2 to B5 may be helpful

<sup>1</sup> [http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/simple-procedure-forms/form\\_3a.pdf?sfvrsn=6](http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/simple-procedure-forms/form_3a.pdf?sfvrsn=6)

- Question C10 – it may be helpful to include in guidance whether there is a cost for service by the court, or constitutes formal service if a claimant representing him or herself wishes to serve personally by reference to Part 6 of the rules
- Question D5 – it may be helpful to clarify in guidance the rate of interest that is permissible, particularly because of the significant difference between judicial interest rates and Bank of England base rates
- Question D6 – it may be helpful to clarify in guidance what may constitute expenses, for instance, including court fees. It may also be helpful to note that if unsuccessful, the respondent may look for the same (subject to expenses caps)
- Question E1 – requiring the claimant to detail the names and addresses of any witnesses highlights data protection as an issue. Scottish Courts and Tribunals staff and members of the judiciary have a lawful basis for processing personal data – public task or legal obligation – though it may be helpful to include in the claim form some details around how the information provided will be used.

Around the rules for the making of claims, we would suggest that if, at 3.7, paper applications require two copies to be sent to the court, this should also be included as a reminder on Form 3A. Around formal service, though this is referred to in Form 3A, it is not mentioned in the rules, which consider instead the last day of service at 3.11.

## **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?**

It can be difficult to ascertain if a response to a claim has actually been lodged. Our members are not always sent a copy of the response, either by the respondent or by the court. Prior to the commencement of simple procedure, practitioners would receive a copy of the response form from the court, but this no longer happens in all cases. Many members are not using the Civil Online platform for this as they require to continue with paper forms due to the volume of Claims they are raising. When raising volume or bulk claims, this is done using a case management system and the time associated with then inputting the information into Civil Online would prohibit them from using this. We would highlight that, as these online platforms develop, it is crucial that these can integrate with common case management systems to allow for straightforward processing of volume claims.

As the format of Form 4A follows, in part, that for Form 3A, a number of our comments above are relevant. Form 4A, and also Form 5A, highlight that time to pay orders are not available to a company or another type of organisation. We believe that it would be helpful to clarify the position, in guidance to the form, for sole traders.

## **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?**

We have no difficulties with the way in which forms and documents may be sent or served. Many practitioners follow a procedure of serving the claim form by 'signed for' post or failing which service by Sheriff Officer. With regard to other forms, such as List of Evidence or Incidental Orders Applications it is helpful that these can be issued by way of email, if the respondent has provided an email address, as this can save time.

As we highlighted around Form 3A, we believe that it would be helpful to include in guidance, for the benefit of claimants representing themselves, reference to the rules and forms on formal service should they decide not to have the court do so on their behalf.

#### **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?**

There are more avenues available to try to resolve a claim without a formal response being lodged. For instance, if the respondent makes contact in relation to the claim and wishes to try to resolve the dispute, it is possible to pause the claim for negotiations or to monitor repayments. It is also easier to amend the respondent's details in the event of, for example, a change of address. With regard to the application for a decision, these are returned more quickly, which is beneficial. It is also of benefit that the decision is issued in electronic format.

In instances in which the claimant and respondent have agreed a settlement between them, however, the feedback that we have received suggests that the remaining formal court process can be onerous. In one instance, a respondent negotiated with the claimant to agree a settlement figure. The respondent had to still return the form, complete the time to pay and the Sheriff awarded the interest payments to the claimant even though a figure had been agreed without these sums included.

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

The application procedure is user friendly and straightforward, which is beneficial. We find that applications are processed more quickly and easily by the Court.

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

The forms associated with Parts 10 and 11 are easy to follow and easy to complete and we find no difficulties with these.

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

The rules and forms relating to hearings and decisions are generally self-explanatory and consequently easy to follow. Orders and decisions are straightforward and clearly state what is expected of each party and what has happened following a hearing. Recall of a decision is straightforward and the associated form is not problematic.

The recent Sheriff Appeal Court decision in *Cabot Financial UK Ltd v Robert McGregor*<sup>2</sup> raised issues around the extent of the more interventionist or inquisitorial role of the judiciary in managing and resolving disputes under simple procedure. In this decision, the evidence of the claimant in three undefended debt recovery actions was queried by the Sheriff through use of an ‘unless’ order, requiring additional information to be provided within 28 days or see the cases dismissed. The Sheriff Appeal Court considered that this exceeded the role of the Sheriff in undefended cases:

“Although technically competent, the use of "unless orders" in undefended proceedings is not appropriate other than to determine matters within the court's limited scope of enquiry such as jurisdiction, competence and prescription. Otherwise, we do not consider that they have a place in undefended proceedings. Their use in undefended claims such as these risks not only the court exceeding its jurisdiction but will inevitably lead to an inconsistency of approach and involve the judiciary, parties and the court system in an intolerably burdensome and unnecessary procedure which would have the effect of delaying justice and imposing unwarranted costs on parties and the justice system.”

We appreciate the rationale for this approach, but consider that it could, in a small number of cases, prevent a just outcome. Our concerns around judicial discretion are not limited to simple procedure (and, indeed, are more acute for summary warrant). As simple procedure currently stands, the main substantive check on the claim where undefended is verification by Scottish Courts and Tribunals staff that the form is complete prior to formal registration. We believe that the more inquisitorial or interventionist approach that could be adopted for contested claims should equally be possible for undefended claims, particularly as should a judgment later be contested on appeal, this is limited to law rather than fact.

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

Regarding expenses for simple procedure cases, these are capped by Article 3 of the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016/388. There has been dispute over whether the

<sup>2</sup> [2018] SAC (Civ) 12

“expenses” referred to in the article are inclusive or exclusive of VAT and outlays. In *Gowans v Miller*<sup>3</sup>, it was determined that cap was intended as inclusive. Summary Sheriff Jillian Martin-Brown stated, “That interpretation is in keeping with the principles of quick resolution at least expense and only coming to court when necessary. To interpret the cap as restricting the fee element of a judicial account only and allowing VAT and outlays to be recovered separately would remove predictability for parties when considering the potential costs of litigating low value claims.” In *Andrew Martin v Southern Rock Insurance Company Ltd*<sup>4</sup>, it was held that the cap on expenses under the 2016 Order did not include the court fee of £100 (or the VAT chargeable on that fee), which could be recouped. We believe that it would be helpful to amend the 2016 Order to clarify the position on how the cap applies to professional fees, court fees, expert fees, other outlays and the VAT charged for each of these.

## Conclusion

From a claimant's perspective and indeed from the perspective of raising volume claims, the simple procedure system is beneficial. In undisputed claims, it is easier to reach resolution if appropriate or to obtain a decision form quickly and electronically. The volume of pages within the claim form is detrimental, though the procedure itself is more straightforward. With regard to disputed claims there is more interaction by the Sheriff and there appears to be more referral to mediation which can be of benefit if avoiding a full evidential hearing. However, the front page of the claim form does lack important information such as details of the court at which the claim is raised and basic details of what the claim is actually for, i.e. payment of a sum of money. We also believe that more use of technology could be considered, such as procedural hearings via telephone or videoconference. The significant changes being brought about through the development of the Online Court in England and Wales may also offer an opportunity to understand the ways in which technology can assist the resolution of civil disputes.

We hope this submission assists the Scottish Civil Justice Council in its review of simple procedure and would be happy to provide any further information the Council may find useful in its scrutiny.

<sup>3</sup> 2018 S.L.T. (Sh Ct) 11 (Sh Ct (Tayside) (Forfar))

<sup>4</sup> [2018] SC EDIN 10



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