

ANNEX B CONSULTATION QUESTIONNAIRE

Consultation question 1

Do you have any comments on the approach taken to splitting the Simple Procedure Rules into two sets of rules?

Comments

This seems sensible. It enables the core simple procedure rules to remain succinct and easy to follow.

Consultation question 2

Are you content with the use of the following terms in the rules?

- *Claim – for a standard simple procedure case*

Content Not Content No Preference

- *Claimant – for pursuer*

Content Not Content No Preference

- *Responding party – for defender*

Content Not Content No Preference

- *Freeze – for sist*

Content Not Content No Preference

Consultation question 3

Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules?

Comments The draft rules seem clear and intelligible. We are not best placed to comment on whether the language achieves the objective of being suitable for lay litigants rather than practitioners.
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Consultation question 4

Is there any terminology remaining in the draft simple procedure rules which you think is unfriendly or difficult for the lay user to understand and, if so, what alternatives would you suggest?

Yes

No

Comments No comment.

Consultation question 5

Do you have any comments about the approach taken to the numbering and layout of the rules?

Comments Good clear structure. Easy to follow.

Consultation question 6

Do you have any comments about how, and where, the rules should be presented on the internet?

Comments

We assume that the rules will be accessible via the SCTS website. We are not as well placed as other respondents to comment on how and where the rules and forms are best presented on the internet.

Consultation question 7

Do you have any comments on the approach to headings in the Rules?

Comments

The headings are generally clear and easy to follow. We suggest a separate heading between parts 4 and 5. After part 4 “settling a claim”, the section on “your options” at part B of the response form (page 48/49) is clear. It would be helpful if there was a corresponding separate section in the rules rather than limited rules in part 6 or referring to the response form in order to identify the procedure for settlement of cases.

Consultation question 8

Do you have any comments on the approach taken to minimising the number of hearings?

Comments

In place of a hearing fixed in terms of rule 9.2 of the existing small claim rules there will be “a first consideration” of a case in terms of part 6 of the new rules. Part 6 paragraph 6.1 provides that “normally” a (proof) hearing will be fixed. In certain cases a “CMC” may be fixed in terms of paragraph 6.3, but it appears to be envisaged that this will be the exception rather than the rule. We do not consider that a chambers consideration of the case and the issue of written orders will result in the resolution of many cases prior to the (proof) hearing. We have commented in further detail on this issue in our responses to questions 9, 1 and 21.

Consultation question 9

Do you have any comments on the approach taken to alternative dispute resolution in the rules?

Comments

The existing small claim rule 9.2(2)(a) directs the sheriff to seek to negotiate and secure settlement of the claim at the preliminary hearing. Many cases are referred to mediation at this stage. The availability of an in court mediation service who have representatives in court during the hearing is invaluable in securing successful referrals and the resolution of many cases. Other cases are resolved by sheriffs in terms of the rules. Parties may be encouraged to settle when the strengths/weaknesses/potential pitfalls/ evidential burdens/ requirement for witnesses or supporting evidence/ costs of proceeding are discussed. At the preliminary hearing stage there has been limited expense incurred and the parties are less vested in achieving an outcome or having their day in court. The same success rate in settling cases or making referrals to mediation will not be achieved if the first real opportunity to consider this option is normally on the day of the (proof) hearing when parties attend court having prepared their case for proof, have their witnesses with them and have already incurred much of the expense in proceeding to proof/ preparing for the hearing. In part 11 paragraph 3 of the new rules the sheriff is directed to help the parties to negotiate a settlement – this comes at a late stage in the case. The existing rules achieve a far higher success rate in settling cases at an early stage and successful referrals to mediation.

Consultation question 10

Do you have any comments on the proposed principles of simple procedure as set out in Part 1 Rules 2.1 – 2.5?

Comments

We have concerns about part 1 paragraph 2.5 “parties should normally only have to come to court when it is necessary to do so to resolve their dispute”. Our concerns are articulated in our responses to questions 8, 9, 11 and 21.

Consultation question 11

Do you have any comments on the proposed duties on sheriffs, parties and representatives?

Comments

Part 1 paragraph 7 re. the sheriff's powers - the existing small claim rule 9.2(1) provides that if the sheriff is satisfied that the claim is incompetent or that there is a patent defect of jurisdiction, he must grant decree of dismissal in favour of the defender. The equivalent provision in the new rules is at paragraph 7.7 which provides that the sheriff may decide a dispute without a hearing (if the parties' only need a decision on a matter of law) but may only do so if all parties agree. The mechanism for all parties agreeing is unclear and in practice we submit is unlikely to arise. In real terms the new rule means that incompetent claims are unlikely to be dismissed prior to the (proof) hearing unless a case management conference is fixed. We see no reason why when first considering the case the sheriff may not simply dismiss incompetent claims or those where there is a patent defect of jurisdiction without the parties' consent. If it is considered that in order to be article 6 compliant the parties require to have a fair hearing before an incompetent case is dismissed, then this supports the proposition that a preliminary hearing is helpful in achieving the resolution of a case at an early stage.

The existing small claim rule 9.2(2)(a) directs the sheriff to ascertain the factual basis of the claim, any defence and the legal basis upon which the claim and defence are proceeding. The sheriff is also directed to identify and note the issues of fact and law which are in dispute and any matters capable of agreement at the preliminary hearing. The forms annexed to the new rules (if properly completed) should make identification of the factual and legal issues more achievable. The new rules envisage that this will be done by the sheriff at a first consideration of the case in chambers. The standard orders allow the sheriff to require the parties to provide further specification of their claim/defence and to lodge supporting evidence. However, what is perhaps not fully appreciated by the drafter of the rules is the extent to which party litigants will fail to complete forms properly, will not understand the required factual or legal basis of their claim/defence or appreciate the evidence required to support this. In practical terms it is far easier for the sheriff to discuss the required basis of a claim/defence to explain the relevant law to parties and the information required by the court when they are present at a hearing than to do so by the issue of written orders. In many cases where gaps in the evidence or legal issues are identified by the sheriff this results in a resolution of the case at the preliminary hearing. In our view dealing with the first consideration as a chambers exercise will result in a significantly increased administrative burden for the courts and is very unlikely to result in the resolution of more cases at an early stage. In part 1 rule 7.3 the sheriff is given the power to "do anything and may order the parties to do anything considered necessary to determine the dispute". While in some cases (e.g. requiring a party to produce the contract upon which a claim is based) this will work productively (particularly where the standard form page 88 "possibility of dismissal" is used), in many other cases the complexity of the issues and the parties' partial compliance or failure to understand what is required of them will simply result in more convoluted procedure.

Consultation question 12

Do you have any other comments on the approach taken in Part 1: The simple procedure?

Comments No comment.

Consultation question 13

Do you have any comments on the approach taken in Part 2: Representation and support?

Comments No comment.

Consultation question 14

Do you have any comments on the proposed timetable for raising a simple procedure claim?

Comments No comment.

Consultation question 15

Do you have any other comments on approach taken in Part 3: Making a claim?

Comments No comment.

Consultation question 16

Do you have any comments on the flowchart (at Part 4 Rule 2.4) setting out the options available to the responding party when responding to a claim?

Comments No comment.

Consultation question 17

Do you have any other comments on the approach taken in Part 4: Responding to a claim?

Comments No comment.

Consultation question 18

Do you have any comments on the approach taken in Part 5: Sending and service?

Comments Part 6; rule 6.6 – “what if the responding parties address is not known”; We appreciate the view taken that service by newspaper advert or service on the walls of court often serves little purpose that a suitable alternative may be publication by advertisement on Scottish Courts and Tribunals Service website (paragraph 6.2). However, appropriate steps ought to be taken to trace the responding party. In our view the rules should require the claimant to instruct a trace of the responding party and/or to attempt service by a next of kin address available before making an application for service on SCTS website.

Consultation question 19

Do you have any comments on the proposed procedures for settlement and for undefended actions?

Comments

It is to be hoped, that the majority of cases will settle either before the last date for a response or prior to a hearing being fixed. The applicable rules are found at part 6 paragraph 5. It may be better if there were a separate section headed "settlement of claims" with the rules more clearly identified both in relation to settlement prior to the last date for a response and in relation to applications for time to pay, freezing for the monitoring of payment arrangements etc.

Consultation question 20

Do you have any comments on the proposed model for case management conferences?

Comments

We envisage part 6 paragraph 6.2 being utilised in a far greater proportion of cases than is envisaged in the consultation paper. The rules for a case management conference effectively allow the sheriff to undertake the same role as that currently exercised in terms of rule 9.2 of the small claim rules. In the majority of cases the issues requiring to be addressed by way of case management would more effectively be dealt with at a hearing rather than by the issue of written orders.

We do not understand the thinking behind paragraph 6.4 "the sheriff may make a decision at a case management conference, but only with the consent of the parties". If the parties are present, why may a sheriff not simply dismiss an incompetent claim or one where there is a patent defect of jurisdiction or indeed resolve the case on the basis of submissions made by the parties where the matter concerns an issue of law?

Consultation question 21

Do you have any other comments on the approach taken in Part 6: The first consideration of a case?

Comments

SCTS will require to be aware that the first consideration of cases in chambers will require a greater level of shrieval resource than is currently allocated to a small claims/summary cause court. This is because when cases call in court many resolve or parties are represented and the issues summarised by agents. The new forms contain significantly more detail and require the submission of supporting evidence. Sheriffs will require to very carefully consider the issue of standard orders or craft bespoke interlocutors and to consider both legal and factual issues in every case. This will take at least the equivalent time of the court day which would have been allocated to the small claims/summary cause court and will require a significantly greater level of administrative/clerking support.

Consultation question 22

Do you have any comments on the approach taken in Part 7: Orders of the sheriff?

Comments

The standard orders are a welcome development and are helpful. We have no further comment in relation to the wording of part 7 of the rules.

Consultation question 23

Do you have any comments on the proposed model for freezing and unfreezing cases?

Comments

The procedure in terms of part 8 seems appropriate.

Part 8 paragraph 7.6 perhaps should be in a separate section as there may be a number of circumstances where a claimant may wish to abandon a claim.

We prefer “suspend” and “reinstate” or “re-enrol” to freeze/unfreeze.

Consultation question 24

Do you have any other comments on the approach taken in Part 8: Applications by the parties?

Comments

We have no other comment to make on terms of part 8.

Consultation question 25

Do you have any comments on the approach taken in Part 9: Documents and other evidence?

Comments

The case management provisions enabling a sheriff to order the production of documents and the standard order incorporating “possibility of dismissal” where parties fail to comply with orders are welcome.

Consultation question 26

Do you have any comments on the approach taken in Part 10: Witnesses?

Comments

No comment.

Consultation question 27

Do you have any comments on whether the detailed provisions on documents, evidence and witnesses are necessary in the Simple Procedure Rules?

Comments

The provisions are necessary.
Perhaps a proforma application for a specification of documents would assist the parties where documents such as medical records etc require to be recovered from a third party.

Consultation question 28

If you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision.

Comments

No comment.

Consultation question 29

Do you have any comments on the approach taken in Part 11: The hearing?

Comments

The rules envisage that in the normal course, a (proof) hearing will be fixed in most cases where a response form is lodged. This will result in a massive increase in the number of cases set down for proof. In such circumstances either sheriffs will be faced with a proof court with a vast number of hearings where effectively they will endeavour to resolve as many cases as possible without hearing evidence and discharge a substantial number or alternatively SCTS will require to allocate significantly more court time for these hearings.

The existing small claim rule 9.3(6) provides “evidence will normally be taken on oath or affirmation that the sheriff may dispense with that requirement if it appears reasonable to do so”. It does not appear that this provision has been replicated in the new rules. This is a very helpful provision where sheriffs are conducting hearings with parties who are also the key witnesses in the case and often do not appreciate the difference between submission and evidence. This assists the sheriff in taking a proactive approach in eliciting information from the parties about the issues in the case.

Consultation question 30

Do you have any comments on the approach taken in Part 12: The decision?

Comments
No comment

Consultation question 31

Do you have any comments on the approach taken in Part 13: Other matters?

Comments
Part 13 – No comment.

Consultation question 32

Do you have any comments on the approach taken in Part 14: Appeals?

Comments
No comment

Consultation question 33

Do you have any comments on the approach taken in Part 15: Forms?

Comments

No comment.

Consultation question 34

Do you have any comments on any individual forms?

Comments

Claim form p38 – p40 D “about your claim” / response form p50 D ;
The question “what is the background to your claim/response” is not a helpful one. This is likely to elicit a lot of irrelevant information and will not focus the basis for the claim.

We suggest that the forms require more specific information – effectively that they cover the existing small claim rules 4.2 and 4.2A requiring specification of the basis of the claim including relevant dates and if the claim arises from the supply of goods and services, a description of the goods or services and the dates they were ordered and supplied. In consumer cases there should be information regarding the existence and details of the relevant agreement.

Consultation question 35

Do you have any comments on the proposal to include standard orders in the rules?

Comments

We welcome their inclusion.

Consultation question 36

Do you have any comments on the terms of the standard orders included in the draft rules?

Comments
No further comment

Consultation question 37

Do you have any comments on the approach taken in Part 18?

Comments
No comment.

Consultation question 38

Do you have any other comments on the draft Simple Procedure Rules?

Comments
Section 35 of the Sheriff Courts (Scotland) Act 1971 provides that no enactment or rule of law relating to admissibility or corroboration of evidence before a court of law shall be binding in a small claim. This is a useful provision, especially in relation to copy documents, which should continue to apply in in the new rules.