

## ANNEX B CONSULTATION QUESTIONNAIRE

### Consultation 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?*

Comments

Yes. We consider that the forms are too long and that there are too many of them. There must be a method of accommodating all Claimants and Respondents within one Claim Form. Also, it is not helpful to have a separate "Timetable" (Form 3D) when all that is included is a date for service and a date for response. The original draft Simple Procedure rules envisaged three dates. A timetable would suggest dates and deadlines for the entire action. (or at least a reasonable portion of the action, as in Form G in Ordinary Actions). We cannot see why the service and response deadlines cannot simply be notified by the sheriff clerk to the Claimant in the form of a letter or email. This information does not seem extensive enough to justify another form.

We are not sure about the expectation that a Claimant must state at the outset the evidence and witness details required by the Rules. The extent of the evidence needed depends upon how much of the claim is going to be disputed. The temptation is to list every conceivable document, witness and item of proof, especially where there is scrutiny by the summary sheriff in chambers and where the risk exists that he or she will find the material to be inadequate and dismiss the Claim.

### 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

Again, the Form 4A is lengthy. And the same comment applies in relation to the listing of productions, witnesses and evidence (though at least the Respondent will have a better idea of what is disputed than had the Claimant when he or she submitted the Form 3A.

The Form 5A causes confusion. It allows Respondents to apply for either a Time to Pay Order under the Debtors (Scotland) Act 1987 or a Time Order under the Consumer Credit Act 1974. However, both orders, while very different, are referred to as “time to pay” in the Form. There is only one section in the Form for the Respondent to complete. At no point is the Respondent required to confirm whether he/she is applying for a Time to Pay Order or a Time Order. Accordingly, it is not clear from a completed Form which order the Respondent is seeking. This has led to confusion and has meant that many Claimants oppose any order being made because they are unsure about what type of order has been applied for. When cases call in Court, Sheriffs have been equally unsure of what type of order is being applied for and cases have been continued for that to be clarified by the Respondent. That causes unnecessary delay and expense to litigants. This problem could be addressed by having two separate forms, one for a Time to Pay Application and one for a Time Order application, or by having clearly demarcated sections in the existing form so that Respondents complete only the section relative to the type of order they are seeking.

**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

Under Summary Cause and Small Claim procedure the summons was returned, warranted, to the Pursuer for service. By contrast, under Simple Procedure the sheriff clerk retains the Claim Form (ie summons).

We think that Rule 6.12 (which allows service by advertisement on the SCTS Website in relation to Respondents whose address is unknown) is an excellent development, and provides a much better method of service than either newspaper advertisement or display on the walls of court.

There are problems with intimation of Response Forms, Lists of Evidence, etc, when parties are party litigants, which is often the case in Simple Procedure. Unrepresented Respondents typically fail to intimate their Response Form on the Claimants. Claimants then require to obtain copies of the Response Form from the Court and are charged copying fees by the clerk's office. It is plainly unfair that Claimants are being put to expense due to a breach of the rules by Respondents.

**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

We are not comfortable with a system where a case can be decided *in absentia* of the parties. The rules allow the sheriff to do that. It is frequently stated that this procedure is “informal” but that is of no consolation to the Claimant who loses his £102 fee because the claim is dismissed in chambers and it is even less comfort to the Respondent who finds himself the subject of a decree with all the credit blacklisting consequences that that entails. There are limits to how far it is appropriate to make a court action “informal”. We think that where a summary sheriff is minded to find against a party the least that that party can expect is a hearing where he or she has the chance to try to dissuade the court from giving the decision it was minded to give. We appreciate that courts will often put the case out to call in these circumstances, but we think that fairness demands that it should be obligatory for the court to do so.

**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

A multitude of forms is not conducive to a procedure that is supposed to be user friendly. Especially where they bear headings such as “Provisional Orders Reconsideration Application”. The previous system used a very basic style of incidental application, which could be adapted in practice to many uses. It is simply unnecessary to devise an array of forms designed to cover every conceivable scenario that might arise.

The procedure for lodging an intimating Incidental Orders Application is unnecessarily confusing. In our experience, party litigants do not understand it. The previous incidental application system was far clearer and more user friendly.

In addition, we are concerned that Incidental Order Applications can be granted by a Sheriff without a hearing, even where they are opposed by the other party. Rule 9.8(4) provides that a Sheriff, after considering the Application and any objection, can either grant the Application, refuse it, or order parties to attend a discussion at court. We consider that Applications which are opposed should not be granted without the opposing party being given an opportunity to address the Sheriff.

**Consultation question 6**

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

Comments

We consider that the procedure (in relation to this area but generally too) seeks to micromanage cases which could better be left to the common sense of summary sheriffs. They have the knowledge and experience of how best to manage litigation, and we do not see why they cannot be left to do that in the same way as happens in Ordinary Cause family actions, personal injury and commercial cases.

The List of Evidence Form only has 10 sections for documents. In many cases, more than 10 documents will be produced in support of a claim. The Form is inadequate.

**Consultation question 7**

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

Comments

The same comment applies as above.

**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

Money Advice Scotland suggested in its response (1<sup>st</sup> March 2016) to the draft Simple Procedure Rules that at hearings a name plate identifying the sheriff be placed on the bench. We agree with this suggestion in helping to diminish the formality of the court. We recall a sheriff formerly of Glasgow Sheriff Court who adopted this practice *ex proprio motu* in all civil courts where he was presiding.

In our experience cases governed by Simple Procedure rules are no more speedily disposed of than were Summary Cause payment actions or Small Claims. We are not sure why Simple Procedure is repeatedly described as “speedy”.

We feel that the text used in the forms should be more succinct and grammatically correct. This would help shorten the forms and make them easier to follow.

For example, Form 3A states that;

“To make a claim using the Simple Procedure, you must **complete this Claim Form** and send it to the sheriff court to register your case. You should either complete the form yourself or, if you have someone assisting or representing you, you should complete the form with them (sic.)”.

What is the need for the second sentence here?

and

B2 asks “Who is your representative? If a family member or friend, please give *their* full name.” (Italics ours). Why not be correct and state “his or her” full name? It is not difficult to avoid sloppy grammar; these are meant to be legal papers.

Another criticism we have is over the change of terminology (eg. “claimant” and “pauise” instead of “pursuer” and “sist”. If the new terms have to be explained anyway they have no benefit over the traditional ones.

For example, we do not understand why the form, instead of stating [at C] “The person who you are making the claim against is called the respondent” cannot instead say “The person against whom you are making a claim is called the Defender”.

We think also that deciding cases behind closed doors is not necessarily the way to persuade members of the public (who are meant to be the beneficiaries of the new system) that the decision making process is open and transparent. Their perception matters.

