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
In general we find that some of the boxes on the forms do not have enough space to add all necessary information. While working with the form online the box allows scrolling so that further information may be typed into it. However, if the form is printed off as it may require to be when served on another party, the box remains its original size meaning that some of what has been written does not appear on the printed version.

Claim Form - Form 3A
As a general observation, the layout of the claim form means that it is necessary to go quite a few pages into it to find the details of what the claim is actually for. This is notable because this information was contained on the first page of the former small claims forms and was, therefore, easier to find.

Question A3 - It may be helpful if there were separate boxes for details of organisations and companies to avoid confusion. We have had a few situations where response forms have been returned to us on the basis that they do not include a company number despite the fact that the claimant is either public body or a credit union and therefore does not have company number. This may simply be a staff training issue.

Part B - There is no space in the claim form to add a representative's reference for a case. This would be particularly useful for representatives who are acting in a large number of cases. At present, we add a reference in the postcode box because of the absence of any other space for this but it would be useful if a separate box was added to the form.

Part C - It is not possible to deal with joint and several liability in the space allowed for information about respondents in the claim form. Having to fill in additional forms where there are for more than two respondents causes additional work and means that there is not one single document which contains all the information about the claim. We consider that it would be preferable if this information was contained in one document.

Part D - We have seen differences in approach taken by different court as to what they will accept in papers apart accompanying the claim form. In some cases, courts have accepted a paper apart form which covers response to all questions in Part D of

the Claim Form. In other cases, papers apart have only been allowed where they relate only to Part D1 of the Claim Form.

Question D3 - A clarification of the description of consumer credit agreement in the claim form at question D3 would be useful. At the moment, as guidance on how to respond to question D3 provides "You should select 'Yes' if the claim is about an agreement between you and the respondent in which you provided the respondent with credit of any amount." This is misleading as that is not actually what is required in order for an agreement to meet the legal test of being a consumer credit agreement.

Question D5 - We have had some difficulty in cases involving late payment compensation with claim forms being rejected because they split the a sum sued for into three parts which are (i) the principal sum, (ii) interest on the principle sum, and (iii) late payment compensation. It is necessary for late payment compensation to be calculated separately. It cannot just be included as along with other interest on the principal sum (because it is not interest). If it causes a difficulty for the courts to have this added separately within box D5 then some thought should be given to amending box D5 to deal with this issue.

Documents to accompany the claim - Despite the fact that the rules do not generally provide for documents to be lodged until 14 days before a hearing, we often see orders from courts in requiring the productions of documents, even when no response has been lodged. This issue was however raised in the recent Sheriff Appeal Court in the appeals by Cabot Financial UK Limited [2018] SAC (Civ) 12 so we would make no further comment at this stage.

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
Response form - Form 4A
When completing response form for respondents we often find it easier to use papers apart to avoid some repetition in answers to the questions and ensure that we are able to confirm statements made by the claimant which are denied. This can also assist with the difficulty, mentioned above, where there is not enough space in the boxes of the forms to show all information when the forms are printed.

Time to Pay Application - Form 5A
We have found that having a separate time to pay form can cause confusion for unrepresented respondents. In some cases unrepresented respondents have

completed a response form, meaning that the claim is treated as defended, when in fact they simply wish to make a payment offer so should have competed a time to pay.

We think that it would be helpful if time to pay information could be included within the response form instead of a separate form. If this were to happen then, as time to pay is not available to companies, it may be preferable to have two separate response forms (akin to the separate 1a and 1b forms under the small claims rules) to avoid confusion.

From a practical perspective, when we print out these forms to send to respondents along with a copy of the claim form the boxes at question D1 automatically populated with instalments of £0.00 and then week/fortnight/month and 0 lump sum and weeks/months from today. This can make it very confusing as respondents have to score these numbers out of the form. It would be preferable if the form were set up so that these boxes were left empty for the respondent to complete and some guidance could be added which explains to the respondent how they should fill out the form.

Time to Pay Notice - Form 5B
This form does not have a box which allows us to add in details of what is sought by way of expenses. Some courts have advised us to handwrite details of this onto the form and have also asked for a copy of sheriff officer fee for service. It would be useful if the form could be amended to allow for space for details about expenses to be added.

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
Confirmation of Service - Form 6C
The requirements under rule 18.2(4) and (5) are that, after service had been attempted, a form 6C must be completed with evidence of delivery attached to it and this should be sent to the court within one week of service taking place. The courts tend now to insist on a printout from the Royal Mail website being lodged along with the form and will sometimes return a form to us if this is not available.

Where recorded delivery service is not successful it might be necessary to instruct Sheriff Officers. However, there have been cases where the court has refused to allow the recovery expenses connected to this because it does not have evidence of service first being attempted by recorded delivery. This has happened where we

lodged a form 6C which includes the information about how we have attempted service by recorded delivery but this was returned to us by the court because service was unsuccessful. We think that it would be helpful if the courts were able to accept a Form 6C with details to show service was attempted by recorded delivery in order that this could be retained in process so the court was aware that recorded deliver service had been attended.

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
Response Form - Form 4A
The response form gives respondents the option of checking a box to confirm that they admit the claim and want to settle it by the last date for a response. However, we have seen a number of cases where respondents want to settle their claim but they have failed to lodge a time to pay application in time. If the claim settles after the deadline for a response, it can be difficult to get the court to dispose of the claim appropriately. We have, for example, been asked by the sheriff clerk to formally abandon the action which is obviously not appropriate due to the consequences of abandonment. In other courts, disposal has been much easier and we have just been able to do so by emailing the sheriff clerk. It is, however, unsatisfactory that there is no standard practice and obvious confusion at court as to how cases should be disposed of in these circumstances. We suggest that the rules should be amended to allow for this to be done by way of an incidental orders application.

Application for a Decision - Form 7A
Like the form 5B discussed above, the form 7A does not have a separate box for a claimant to specify what they are looking for in relation to expenses. It would be helpful if there were a box on the form into which a claimant could add details of the expenses which they were seeking.

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
In our experience the number of forms for making different types of applications can cause confusion and can, in some cases, mean that it is necessary to fill in several different forms to achieve one result.

One example of this is where it discovered, following the instructions of sheriff officers to serve a claim form, that a defender has moved address and no longer

resides within the same sheriffdom. In this case it may be necessary to complete forms to (i) amend the address on the claim form, (ii) ask the court to remit the action to another sheriff court.

Another example is where a case has been paused for settlement discussions to take place and a settlement has been reached meaning that parties want to have the case brought to an end. Two application forms can be required, one to seek to restart the case and one to have it brought to an end.

A further example is where a cases have been paused for six months. Under rule 9.5, the sheriff clerk must present the case to a sheriff and the sheriff may then send an unless order to the parties and dismiss a claim if the order is not complied with. We have had a few cases where parties want for the pause to remain in place and the process to obtain this has meant that we have had to first make application to restart the case and, after this is complete, make a further application to pause the case again.

We think it would be preferable if parties could use just one form for making connected applications such as those described above rather than requiring a number of different forms. It would be necessary to ensure that the form had a large enough box for entering all of the information relevant to the application and that this operated in such a way that, when the form was printed off, all of the information entered into the box was showing.

We think it would be preferable to change question C2 on the application forms. This question requires confirmation as to when the application was sent to the court. This is problematic because, under chapter 9 of the rules, applications are not to be sent to the court prior to being sent to the opposing party. The rules provide that an application should be sent to the court at the same time as it is sent to the opposing party. However they also require that evidence must be sent to the court along with the application which show it was sent to the opposing party.

Accordingly, it does not make sense for question C2 to ask when an application was sent to the court. An application will, in most cases, have to be sent to the opposing party prior to the court. It may be possible for it to be sent to both the court an opposing party at the same time by email (which will provide evidence to the court that the application has been sent to the opponent). However, in practice, this is often not possible due to email addresses not always being provided for every party.

Consultation question 6

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

Comments
The recovery of documents application (form 10B) does not contain enough space in the boxes to add detail about all the documents which are sought and a paper apart is generally necessary to accompany this.

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

Comments
No comments.

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
Clarification about the rules on expenses for simple procedure would be helpful. There have been different views reached by courts as to how the cap on expense applies and whether outlays or VAT are recoverable. Having different approaches taken by different courts is unhelpful, causes delay in the settlement of claims and uncertainty.

The point of the cap on expenses was to encourage early settlement of disputes. If the cap were not to be strictly applied when reaching early settlement then such settlement would be discouraged. Worse still, party litigant respondents could find themselves agreeing to settlement of the principal sum plus expenses, only to discover that "expenses" are not limited to the sums outlined in the rules but rather contain various additional unspecified elements such as outlays (which may be significant - such as expert reports) or VAT.

We agree with the approach taken by the Sheriff in Gowans v Miller [2017] SC FOR 82. Having a cap on expenses is in accordance with the principle that parties should only come to court when it is necessary to do so to progress or resolve their dispute. We agree with the sheriff's comments that to interpret the cap on simple procedure expenses as being restricted to a judicial account only and allowing VAT and outlays to be recovered separately would remove predictability for parties when considering the potential cost of litigating low value claims.

Ensuring that parties have certainty about the costs which they may be able to recover when litigating low value claims is important. We have seen situations where the lack of clarity about the expenses which are recoverable has resulted in a delay in settlement. Indeed in both the Gowans v Miller and Martin v Southern Rock

Insurance Company Ltd [2018] SC EDIN 10 parties had agreed settlement of the principal sum and the matters for the courts to determine were simply disputes about expenses. It is unfortunate that settlement of low value claims can be delayed by disputes about the expenses which can be recovered.

We do not consider that it is appropriate for VAT to be recovered in addition to capped expenses in simple procedure claims. In relation to outlays, we consider these should be limited to court fees and sheriff officer's fees (where these have been required because recorded delivery service has been unsuccessful). However, whatever position is decided, it is imperative that the rules very clearly outline precisely what is recoverable and what is not given the apparent confusion amongst practitioners and the judiciary as to what "expenses" actually means.

Some thought on the approach to arrangements for a Case Management Conference (CMD) would be useful. In one case where a CMD was fixed, we and our opponent instructed local agents (who were fully briefed) to attend in order to minimise costs to parties. However the sheriff considered that principal agents should attend a CMD and ordained the principal agents to appear the following week. This significantly increased costs and there was no clear reason why the principal agents were required at the subsequent hearing which took place before a different sheriff. Indeed the second sheriff questioned why principal agents were in attendance. It might be helpful again if there could be greater consistency in approach to these hearings and in some cases if CMDs could take place by telephone, as is the case in available in some commercial cases. This approach may be most helpful where all parties have representatives instructed.

We have seen examples of cases being sent to mediation without there being any option for prior discussion as to whether it would be appropriate in the circumstances. Whilst mediation may be a useful tool in some cases, the fixing of mediation without seeking parties views can be unhelpful and cause further delay. Mediation is, by its nature, voluntary and requires participation by both parties. It may be of no assistance in many cases if, for example, a respondent is simply not willing to make any reasonable settlement proposals.

Some clarification of the procedure to be followed for remitting cases would be useful. We often we have case where it is only at the point of sheriff officers being instructed to serve a claim form that it is discovered that a debtor has moved address. This can make it necessary to arrange for amendment of the claim form, in respect of the respondents address, and to arrange for the matter to be remitted to a different court (as discussed at question 5 above). In these cases it will usually also be necessary to obtain a new timetable for service because there not enough time remaining for service at the new address to be effected before the deadline in the timetable. We have seen cases where delay has occurred because of confusion

between the courts as to which court is responsible for issuing a new timetable or where it has taken a little time for a case to be transferred to a new court.

We think it would be helpful if process for remitting cases within the rules included timescales for the transfer of cases after the order to remit had been made. This could, for example, be a requirement that the case to be transferred from the initial court to the new court within 14 days of an order to remit. It would then be possible for the claimant know the timescales within which the new court would have the case and they could seek a new timetable at that point (which could be issued with the reference assigned to the case by the new court).