Scottish
Civil Justice
Council

The New Civil Procedure Rules - Second Report:

The Procedural Narrative

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Chapter 1. Introduction

The Rules Rewrite Project

1.1 A comprehensive rewrite of the majority of Scottish civil court rules was one of the recommendations of the Scottish Civil Courts Review ("SCCR"), led by Lord Gill. The SCCR concluded that it was no longer sufficient to make piecemeal or incremental reforms around the edges of civil procedure. If the ambitions of the SCCR were to be met, only a fundamental rewrite would suffice. The SCCR also made recommendations relating to the purpose, structure and content of the new rules.

1.2 The Scottish Civil Justice Council ("the Council") is in the second of five stages of the project to completely replace most civil rules. This stage involves the development of a detailed model for ordinary procedure in the Court of Session and sheriff court.

1.3 The model takes the form of a "procedural narrative", akin to a Practice Note. It sets out how the Council envisages an ordinary action progressing through the courts. The procedural narrative starts, as one might expect, with the initiation of the action, and works through the court authorising the involvement of other parties, the bringing in of other parties and the defending of the action (or its disposal as undefended), initial case management and allocation, hearings and the decision.

Scope of this paper

1.4 The procedural narrative only concerns ordinary actions in the Court of Session and sheriff court. Specialised actions, such as personal injury, judicial review, commercial and family actions will be considered at a later stage of the Rules Rewrite Project.

The New Civil Procedure Rules: First Report

1.5 The Council published its First Report on the new civil procedure Rules in May 2017. The report set forward the Council's initial thinking on a number of overarching matters. The Lord President, in his foreword, set out his vision for civil justice:

> *"The courts must provide a system of justice to the public. The public's changed expectations of what services should look like, and how they should work, are therefore key to understanding what fairness will mean…The public has become used to services which are increasingly swift and responsive, automated, available anywhere and accessible in a variety of different ways. Platitudes about justice being seen to be done are not a complete response to a generation that sees no unfairness in transacting some of its most important business entirely online…*
>
> *This task is an ambitious but a necessary one: to build a civil justice system which makes more sense to someone born at the turn of the millennium than to someone born in the previous two centuries".*[1]

[1] The Lord President's Foreword to the New Civil Procedure Rules: First Report (2017), pages 1 and 2.

The Lord President's challenge must be kept in mind. The Rules Rewrite Project is a once-in-a-generation opportunity to improve the way in which civil justice is delivered, make procedures more efficient and bring civil justice into the digital age.

1.6 The First Report was the culmination of the work carried out by the Council during the first stage of the Rules Rewrite Project. Chapter 1 of the First Report provides the background to the Rules Rewrite Project and covers a number of matters including the relevant provisions of the Courts Reform (Scotland) Act 2014; the establishment of the Rules Rewrite Working Group and the Rules Rewrite Drafting Team in the Lord President's Private Office; the scope of the project and matters out with the scope.

1.7 The First Report made a number of recommendations. It contained an agreed "statement of principle" which sets out the purpose of the new rules as a guide to everyone involved in civil litigation. The statement of principle is as follows:

Chapter 1

The principles of civil procedure

The purpose of these rules

1.1—(1) The purpose of these rules is to provide parties with a just resolution of their cause.

(2) A just resolution of a cause is one that is—

(a) in accordance with the substantive rights of the parties,

(b) arrived at within a reasonable time, and

(c) conducted in a fair manner, taking account of—

(i) economy,

(ii) proportionality, and

(iii) the efficient use of the resources of the parties and of the court.

1.8 The First Report also recommended a new case management model for ordinary procedure in the Court of Session and sheriff court. This was one of the core recommendations by the SCCR, which determined that some degree of case management by the judiciary was an essential feature of an efficient justice system. It endorsed the principle that the court should have wide case-management powers to control the conduct and pace of litigation in order to make civil justice more efficient.

1.9 The First Report described the Council's aspiration of a presumption that every step in litigation should be conducted electronically wherever possible. This aspiration is a marked shift from existing procedures which, generally, have paper-based processes as its default with occasional options for electronic processing added as a bolt-on.

1.10 The Council considers that there are clear benefits for parties and the courts in opting for electronic communication, rather than traditional paper-based processes. These

benefits include, for example, reduced postage costs, speed of delivery and the creation of an instant electronic record of lodging or intimation. As alluded to by the Lord President in the quotation above, the presumption reflects the changing public expectation as to how services should be provided in the digital age.

1.11 The historically limited use of information technology within the courts has been transformed in recent years with the creation of an Integrated Case Management System ("ICMS") and the Civil Online portal for simple procedure cases.

1.12 The Civil Online portal enables parties to do the following things online: submit their claim to the court for registration; lodge, or oppose, applications; track the progress of a case; and lodge documents with the court electronically. The portal represents a major transformation for the courts as well as court users.

1.13 ICMS and Civil Online provide the foundation for future reforms, including the new civil procedure rules and the vision for the greater use of technology in the courts.

1.14 It is intended that Civil Online will be extended to accommodate all civil actions.

Work streams

1.15 To develop the procedural narrative, the Council established five work-streams. The work of each was superintended by the Council and the Rules Rewrite Committee. The business of the work-streams was done by a small reference group, consisting of judges, advocates, solicitors, third sector representatives, court staff and others with specialist expertise which assisted the group (for example, sheriff officers).

1.16 The first work-stream considered **commencement and initial case management**. It has made recommendations relating to the form of commencing writ and defences, the case management questionnaire, pleadings, service of the commencing writ, administrative consideration of the writ by the clerk, caveats, preliminary pleas, adjustment, counterclaims, summary decree and initial case management decisions.

1.17 The second work-stream considered **applications and motions**. It developed recommendations on motions and minutes, transfer and remit of actions, and the involvement of third parties (including sist and transference, party minuters, third party procedure, etc).

1.18 The third work-stream covered **decrees, extracts and enforcement**. It developed recommendations on interim diligence, procedure in undefended cases, decrees and extracts, reponing and reclaiming, decisions and reasons and diligence.

1.19 The fourth work-stream considered **evidence, proof and hearings**. Its recommendations related to the mode of proof, the rules of evidence, the judge's evidence and information management powers, hearings and the judge's hearing management powers, expert witnesses, documents, vulnerable witnesses, notices to admit and non-admission, and the recovery of evidence.

1.20 The fifth work-stream considered **access to justice**. It developed recommendations on representation and lay representation, lay support, the withdrawal of agents, time to pay and alternative dispute resolution.

1.21 The work of each stream is conducted under the auspices of the Council and its Rules Rewrite Committee. The Rules Rewrite Drafting Team assisted the streams.

Engagement with the public and the professions

1.22 The Rules Rewrite Committee and the Council agreed in the First Report that open and constructive engagement with the public and the professions throughout the development of the new civil procedure rules is an important way of improving the quality of the Council's decisions and ensuring the success of the project.

Chapter 2. Commencement and initial case management

Commencing an action

Pre-action steps

2.1 In all actions other than (1) where cause can be shown that it is inappropriate so to do; or (2) there is already an effective process of pre-action communication, there will be a requirement for mandatory pre-action communication between parties. The purpose of such communication is to focus the issues between parties. Before an action is commenced, the pursuer(s) must send a communication to the defender(s) setting out the factual and legal basis for the claim. The communication will specify the issues, a summary of key facts and give an indication of remedy/remedies sought. The defender(s) must acknowledge receipt of that communication within a set time period and the defender(s) must thereafter state, within a further set time period, whether he, she or they intend(s) to defend the claim.

The Summons

2.2 To commence an action, the Pursuer must complete a Summons and send it to the court for registration. The purpose of the Summons is to give a party a mechanism by which they can raise an action to obtain a remedy. The Summons also gives the other parties, and the court, fair notice of the basis on which the action is pursued.

2.3 The Summons must set out the following information:

- the details of the court in which the action is raised, and why it has jurisdiction,
- if the action relates to a specialised type of proceeding, the type of action (for example, a commercial action, judicial review or a personal injury claim),
- the details and designations of the parties,
- the essential facts of the dispute, briefly set out in numbered paragraphs,
- the orders sought by the Pursuer,
- the legal propositions supporting the action and the remedies sought (for example, specification of any statutory duties or contractual obligations breached and why such a breach has resulted in loss by the Pursuer), and
- the details of the Pursuer's representative (if any).

The Summons will also include a section for the court reference number to be inserted. This section is to be completed by the clerk when registering the document.

2.4 The Rules Rewrite Project represents a significant opportunity to modernise outdated language where appropriate. For example, articles of condescendence should be replaced with a statement of claim or a statement of facts and propositions.

2.5 During the first phase of the Rules Rewrite Project, the Council concluded that the new civil procedure rules must encourage concise and focused pleading. The judge, as part

of initial case management, may order the narrowing, clarification or expansion of a party's pleadings by adjustment. This is a marked move away from traditional pleadings where the content was largely left to the parties to determine.

2.6 The pleadings must be concise. The overriding requirement is to give fair notice: the purpose of the pleadings is to give notice of the essential elements of the case to the court and the other parties. The content must be as brief as the issues will allow. Even in the most complicated of cases, there is to be an expectation that pleadings will not normally exceed 10 pages of A4 paper (double spaced in font size 12).[2] If a party considers that additional argument is necessary to properly present the case, a brief explanation why that is the case must be provided along with the Summons.

2.7 If the document does not conform to the page limit, without an adequate explanation, the judge may sanction the party in expenses or order narrowing by adjustment.

2.8 It is important that the Summons gives the legal basis of the action and the remedy being sought. However, the Council considers that the wording of pleas-in-law are often perfunctory and meaningless. The approach in personal injury actions in the Court of Session is recommended for all ordinary actions, where pleas-in-law are not required as a separate part of the summons but rather in the part of the Summons akin to the statement of claim. If the Pursuer fails to provide that specification, the judge may use his or her power, after giving appropriate notice, to summarily dismiss the action on the basis that it does not disclose any relevant legal basis.

2.9 Pleadings generally should be drafted as clearly as possible and avoid the use of archaic language and excessive cross-references to other parts of the document. Sentences should be simple and logical, as the circumstances of the case permit. The use of headings to group together paragraphs on similar subjects is encouraged.

2.10 A wet (ink) signature will not be required in the Summons. Such a requirement would be incongruous to the desire that every step in litigation should be conducted electronically. If the requirement for a wet signature were to be retained, a Summons would need to be completed, printed, signed and scanned before it could be uploaded through a web portal developed by the Scottish Courts and Tribunals Service. It is important, however, that the author of the document is clearly identified and that consideration is given, while a portal is being considered and developed, to data security and the electronic authentication of party generated documents.

Court consideration of the Summons

2.11 An action will be commenced at the point the Summons is lodged with the court for registration. The court will be seised on the date the document is lodged with the court or uploaded electronically through a web portal, provided that there is timeous service. It should be noted, however, that moving from a commencement by service model may require further consideration, in the later stages of the Rules Rewrite Project, as to

[2] The Second Report concerns ordinary actions in the Court of Session and sheriff court. The Council will consider in the later stages of the development of the new civil procedure rules whether to increase or dispense with the page limit for specialised actions such as judicial review, clinical negligence or commercial actions.

whether there may be any unintended consequences stemming from this recommendation (for example, in relation to the substantive law of limitation).

2.12 When a Summons is sent to the clerk for registration, the clerk will check that the document conforms to the rules. The clerk will check that the Summons is in the correct form, is accompanied by the correct fee and does not exceed the page limit without an adequate explanation by the party as to why that is the case.

2.13 Except where the Summons is presented by a non-legally represented party, if the Summons confirms to the requirements of the rules, it will be registered by the clerk. An order for service will be sent to the pursuer by the clerk (see paragraph 2.16).

2.14 If the Summons is presented by a party who is representing him or herself, the clerk must place the document before a judge who will determine whether that party should be given permission to proceed with the action.[3] The test for permission to proceed is whether the Summons discloses a stateable case. In cases where the judge is satisfied that the Summons discloses a stateable case, the judge must grant permission to proceed and issue an order for service. However, if no stateable case is disclosed, permission to proceed must be refused and the judge must issue the Pursuer with a brief note of reasons explaining why permission was refused. The judge's decision on permission to proceed is final and not subject to review.

2.15 In relation to caveats, to bring consistency across the Court of Session and sheriff court rules, the form of caveat is to contain a space for the email address of the caveator or their representative. This is currently not provided in the sheriff court.

Service

Order for Service

2.16 When a case is registered, the Pursuer will be issued with an order for service. That order will set out the date by which service of the Summons must take place.

2.17 Service must be carried out within four months of the date of the order. If service is not executed during that period, subject to any extension granted by the judge during that period, the order for service will fall and the court will no longer be seised.

2.18 The judge may vary the period for service or dispense with service entirely.

Service of the Summons

2.19 It is imperative that all reasonable steps are taken to bring the Summons to the attention of the Defender. Consideration has been given to the methods of service which would

[3] The Scottish Civil Courts Review recommended the promulgation of a rule in the sheriff court similar to the rule found in the Court of Session "*whereby the sheriff clerk is given a discretion to refer any ordinary action or summary application presented by a party litigant to the sheriff who may direct whether or not the action should be allowed to proceed. That decision should be based on whether, in the sheriff's opinion, the writ discloses a stateable case. There should be a presumption against an oral hearing unless the party specifically requests it. The decision of the sheriff should be final and not subject to review*" (Chapter 9, paragraph 166).

be reasonable in the 21st Century. The Rules Rewrite Project provides an opportunity to move the process of serving documents into the modern era.

2.20 Service must be carried out by a person with a professional duty to the court. Solicitors, messengers-at-arms and sheriff officers have such a duty and may be subject to misconduct proceedings through relevant regulatory bodies if found to have failed in that duty. In proceedings under the new civil procedure rules, a document may only be served by a solicitor, a messenger-at-arms or a sheriff officer.

2.21 The Summons may be served using one of the following methods:

- by recorded delivery post,
- by personal service,
- with the consent of the person to be served or their representative, by e-mail, or
- by any other method ordered by the judge.

The Defender, or a solicitor acting on his or her behalf, must indicate whether he or she is content to accept service by e-mail. When doing so, the Defender must provide an email address for the purpose of accepting service. A document sent to the given address will be deemed to have been served. The confirmation of service should be accompanied by a copy of the correspondence from the Defender in which receipt of e-mail service was given. Alternatively, the confirmation of service may be accompanied by a copy of an e-mail in which the Defender provided an address for service and a copy of the e-mail in which the document was sent to that address.

2.22 A messenger-at-arms or sheriff officer may serve a document on a person by leaving it in the hands of someone at the person's home or place of business. If unable to do that, the messenger-at-arms or sheriff officer must make diligent enquiries about that person's current whereabouts. Where there are reasonable grounds for believing that the person carried on a business, or resides, at the property, the messenger-at-arms or sheriff officer may deposit the document in, or leave it at, the property in such a way that it is likely to come to the attention of the person being served. There is no requirement to post a further copy of the Summons to the Defender where service is executed by a messenger-at-arms or sheriff officer by the method in this paragraph.[4]

2.23 The judge may order service by any means considered appropriate. If the Defender's whereabouts are not known and cannot reasonably be ascertained by the Pursuer, the judge may order that service is to be effected by publication of the details of the case on the Scottish Courts and Tribunals Service website. Where an action is published this way, the Defender may collect a copy of the Summons from the court.

2.24 The judge may re-order service if he or she considers that there was any irregularity with the attempt at service. Any response to the action would cure defective service.

[4] This requirement exists in the sheriff court under rule 5.4(4) of the Ordinary Cause Rules 1993.

2.25 The confirmation of service must set out who served the document, the method of service used, the date on which service took place and the person on whom the document was served. The confirmation must have attached to it evidence of service (e.g., postal receipts or a report by a sheriff officer) and a copy of the citation.

Citation

2.26 The Summons must be served on the Defender together with a form of citation and a copy of the order for service. The citation must specify:

- the date of service,
- the parties' details, including the details of any representative for the Pursuer,
- in which court the action is being raised, and the case reference number,
- the details of the person who carried out service,
- the steps that the Defender must take to dispute the action,
- a warning to the Defender about the consequences of inaction, and
- a suggestion to the Defender that he or she should seek advice (either from a solicitor or an advice or advocacy organisation such as Citizens Advice).

It is important that the citation is capable of being understood by party litigants. It must not, however, understate the solemnity of the commencement of civil proceedings. The citation must draw the Defender's attention to the fact that a court action has commenced and that consequences will follow if they do not act.

Responding to an action

The Defences

2.27 If the Defender intends to dispute the action, or any part of it, the Defender must complete and lodge Defences with the court. The Defences must be lodged within 28 days of the date on which service of the Summons was executed. A copy of the Defences must be intimated to the other parties to the action.

2.28 The Defences must contain the following information:

- the name of the court in which the action is raised,
- the case reference number,
- the details and designations of the parties,
- a response to the essential fact of the dispute, briefly set out in numbered paragraphs,
- the legal propositions supporting the party's position, and
- the details of the Defender's agent, including any internal reference number.

Given the pre action steps expected prior to the commencement of proceedings, parties will be aware of each other's position so pleadings are to be made in an abbreviated form (rather than the traditional form of pleading). In responding to the Summons, the Defences should focus on identifying the extent of the dispute between the parties. Specifying where there is a dispute is of greater assistance to the judge as it allows the nature of the dispute between the parties to be more readily identified from reading the Defences. The Defences should briefly address each of the essential facts of the dispute. The traditional form of pleadings that has averments admitted, or not known and not admitted, or denied is not necessary. The use of the shorthand quoad ultra denied is discouraged.

2.29 No counterclaim may be pursued without permission from the judge. A Defender may apply for permission to pursue a counterclaim at the same time as lodging the Defences. That application must specify the orders sought and the basis on which the counterclaim, if it is permitted by the judge, is to be pursued.

Time to Pay

2.30 The Defender may apply for a time to pay direction under the Debtors (Scotland) Act 1987 or a time order under the Consumer Credit Act 1974, where such an order or direction is available under primary legislation. The New Civil Procedure Rules will prescribe a form of application for a time to pay application or a time order[5].

What happens to a case

Case management questionnaire

2.31 The *New Civil Procedure Rules: First Report* recommended a new case management model for ordinary procedure in the Court of Session and sheriff court. The active management of cases is strongly in the interests of the court in managing its time efficiently; however, it is noted that this is a resource intensive endeavour which must be reserved for appropriate cases. For the active case management model to be effective, parties must be given an opportunity to inform the judge of their preferences or suggestions for the form of case management that should be adopted.

2.32 The new civil procedure rules will prescribe a form of case management questionnaire, which will take parties through their case management options and seek their explanation of the preferred approach. That questionnaire will ask:

- whether any pre-action protocol has been followed and, if not, why not,
- whether any of the standard orders set out in the rules[6] are appropriate for the action and, if so, whether the timetables within such an order need adjusted,

[5] Consideration will be given in the later stages of development of the new civil procedure rules to whether a form of application will be required for a time to pay order under the 1987 Act.

[6] Standard orders will be boiler plate orders prescribed in the rules which can be adopted, departed from or customised to suit the particular circumstances of a case.

- whether the party considered that there needs to be an initial case management hearing and, if so, what form it should take (for example, in court, by video conference, conference call or by way of an exchange of emails).

2.33 The Council recommended previously that parties should be required to lodge a questionnaire with the originating writ and defences.[7] However, upon reconsideration, it may not be appropriate to require the Pursuer to complete a questionnaire when the action may be undefended and, if there is a response, the Pursuer's case management preferences may depend on what is in the response.

2.34 The Defender must complete a case management questionnaire and lodge it together with the Defences. Both documents must be intimated to the other parties.

2.35 The Pursuer may, if so advised, lodge a questionnaire within 7 days from the lodging of Defences. The judge will consider the questionnaires when making the first order.

Undefended actions

2.36 In an action in which the court may grant decree without evidence, if the Defender fails to respond within 28 days from the date on which service was executed, the Pursuer may apply for decree in absence (or any such other order as is necessary).

2.37 In such an undefended case, if the Pursuer does not apply for decree in absence within 6 months from the last date for service, the judge must dismiss the case.

2.38 An application for decree by the Pursuer must set out: (i) the basis on which the party is entitled to seek decree (for example, because the period for defences has elapsed without the Defender having responded to the action); (ii) the orders sought; and (iii) how expenses are to be dealt with. The application must specify the orders sought in sufficient detail to enable the court to process the application expeditiously. The use of the shorthand "decree as craved" is discouraged. If an initiating document was lodged in hard copy, a copy must be returned to the court by the Pursuer when that party is making an application for decree in an undefended action.

2.39 After considering the application for decree, the judge may grant the application. However, if the judge considers that there is a reason why the application cannot be granted (for example, the potential that the claim has prescribed), the judge must order the Pursuer to attend court for a discussion or order the Pursuer to make written representations in relation to the application. That order must explain the points that require to be addressed before the judge will consider granting decree.

2.40 If the judge is not persuaded by the Pursuer's oral or written submissions in relation to the application, the judge must dismiss the claim.

[7] New Civil Procedure Rules: First Report (2017), paragraph 4.26.

The first case management order

2.41 Where the Defender is disputing the action, or part of it, the clerk must place the Summons, Defences and any case management questionnaire before the judge.

2.42 The judge may make any order to provide a just resolution to the dispute. Such an order may be made at any stage, from commencement through to disposal.

2.43 The first case management order will normally be issued by the judge within 14 days from the date on which the Defences were lodged. Where there is more than one Defender, or the Defender has applied to serve the action on other persons, the judge must issue the first case management order as soon as is practicable.

2.44 In the first case management order, the judge may give any order considered necessary for a just resolution of the dispute, including an order:

- requiring the parties to provide clarification on particular points,
- arranging a case management hearing,
- arranging a substantive hearing, with or without any preliminary procedure,
- giving notice to the parties that the judge is considering summarily disposing of a case (i.e. because the claim or response has no real prospect for success and there is no other compelling reason for the action or response to proceed),
- encouraging parties to consider alternative dispute resolution, or giving the parties an order to encourage settlement (e.g. sisting an action for settlement).

It is expected that any order will be supplemented by appropriate ancillary orders. For example, an order seeking clarification on specified points may: (i) order the parties to address specific issues; (ii) allow a period of adjustment until a set date so that the clarification can be given, and can be responded to by the other party; and (iii) arrange a case management hearing at which the judge can consider the further specification by the parties and decide what further steps would progress the case.

2.45 As part of case management, the judge may order a party, or the parties, to narrow their pleadings by adjustment. This may occur in an action in which the Summons or Defences exceed 10 pages without adequate justification as to why that is required.

2.46 The new civil procedure rules will contain a suite of standard orders to cover each of the options outlined in paragraph 2.44. These will be boiler plate orders which can be adopted, departed from or customised to suit the circumstances of a case.

Judicial continuity

2.47 There will be judicial continuity in actively managed cases. Where practicable, all hearings will call before the judge who issued the first case management order.

2.48 The judge will be expected to front load the process, keep a tight rein over the information to be presented and be flexible in tailoring procedure to suit the case.

Summary decree

2.49 In proceedings subject to the new civil procedure rules, either party may apply for summary decree on the basis that the other party's case has no real prospect of success or there is no other compelling reason why the case should proceed.

2.50 After giving notice to the parties, the judge may, of his or her own initiative, summarily dispose of an action or part of an action. The parties must first be given an opportunity to make verbal or written submissions in relation to the disposal.

Chapter 3. Information and case management

Law of Evidence

3.1 An important question for the Council to consider when developing the new civil procedure rules is whether ordinary procedure is fit for purpose in the 21st Century.

3.2 Our mode of inquiry was inherited from the Victorian era in which there was a need for litigants, representatives and witnesses to attend court on a specified date. The reason for this, as suggested by the editor of *Dickson's Law of Evidence* in 1887 was because "*an examination and cross-examination in open court, under the solemn sanction of an oath, are the best means of securing truth and detecting falsehood*".

3.3 That approach was embodied in the best evidence rule, which continues to manifest in two ways: the primacy of oral testimony given on oath or affirmation by a witness in court; and the requirement to lodge principal or authenticated copy documents.

3.4 Our existing rules are too restrictive. They confine the manner in which "evidence" is presented. Other than where authorised by statute, the normal method by which information is acquired is by witnesses attending court to describe things or events. Real and documentary evidence must be lodged in process and be spoken to by a witness (or be covered by a joint minute). This mode of inquiry may no longer be the best way for information to be presented to the court. With the advent of modern technology, the requirement to lodge principal or authenticated copy documents does not reflect the electronic age. The reality is that nowadays very few documents are "originals" in the traditional sense. It is now increasingly common for a document to be drafted, agreed, signed and stored electronically, without ever being printed.

3.5 Civil procedure ought to keep pace with evolving technology. As one aspect of doing so, the new civil procedure rules will refer to "information" rather than "evidence".

3.6 The judge will have a power to order that witnesses can give their testimony by other means, most notably by written or video recorded statement. The judge will also make an order about how that information is to be tested. A witness should only be required to attend court where required or where expeditious for a just resolution.

3.7 The requirement to lodge principal or authenticated copy documents will be discontinued. However, where the provenance of a document is in dispute or doubt, the judge may order a party to lodge principal documentation in process.

Case management hearings

The purpose of a case management hearing

3.8 The judge may order a case management hearing, either when issuing the first case management order (see Chapter 2) or later in the proceedings if a need arises.

3.9 The purpose of a case management hearing is:

- to establish what preparatory work is necessary for the substantive hearing,

- to identify and narrow the issues in dispute as far as possible, and
- to facilitate and expedite the just resolution of the dispute.

The procedure, form and location of a case management hearing

3.10 The procedure to be adopted at a case management hearing will be as ordered by the judge. The judge will take a pro-active approach. When ordering a case management hearing, the judge may make any order deemed appropriate about the form, location and conduct of that case management hearing. This includes making an order to hold it in court or by conference call, video conference or email exchange.

3.11 When completing a case management questionnaire, parties will have an opportunity to express their views as to the form of any case management hearing. The judge will have regard to any preferences expressed by the parties when making the order.

3.12 The principally instructed legal representatives are expected to appear at the case management hearing. If any practical difficulties are anticipated (for example, the principal solicitor being located a sizeable distance from the court), parties should explain these difficulties when completing a case management questionnaire. In such a scenario, the judge may order the case management hearing to take place by conference call so that the principally instructed solicitor can participate.

3.13 Parties are expected to take all reasonable steps to ensure the attendance of principal solicitors and counsel. However, the judge will not continue a case management hearing solely because principal agents or counsel cannot attend.

3.14 Parties should only have to come to court when it is necessary to progress or resolve their dispute. An action is to be progressed expeditiously, with as few delays as possible. To that end, ordinary actions will proceed on the basis that there will be no more than two case management hearings before a substantive hearing is fixed.

3.15 If there are to be two case management hearings, the first would be akin to a preliminary hearing in a commercial action in the Court of Session. At this case management hearing, there will be a discussion about what steps are necessary to identify clearly and to disclose the factual and legal issues for determination, and to estimate how long will be needed to take those steps. Further specification of the pleadings, the disclosure of the identity of witnesses and documents, and the production of documents, may be ordered. The judge, when making such orders, may specify a time limit or a timetable setting out when the steps must be taken.

3.16 The second case management hearing would be similar to the procedural hearing in a commercial action in the Court of Session. At this case management hearing a decision will be taken on the procedure which would be best suited to resolve the dispute (for example, whether the substantive hearing should be a proof or debate).

The information to be provided by the parties before a case management hearing

3.17 Where the judge orders a case management hearing, each party must lodge a note at least one week before that hearing. The note must, where known, briefly set out:

- the issues requiring judicial determination at the substantive hearing,
- the procedure which should follow the case management hearing (i.e. whether it should proceed to a substantive hearing, or whether there are any preliminary matters, such as adjustment, which require to be addressed first),
- if a substantive hearing is to be sought:
    - the estimated duration of that hearing,
    - a list of proposed witnesses, including a brief description as to the relevance of each witness to either the action or the defence, and
    - a list of proposed documents or other items which the party considers might be used or referred to at the substantive hearing, together with a brief description as to their relevance to the matters in dispute.

The judge will consider each party's note at the case management hearing. The purpose of the note is to assist the judge in determining the procedure at the substantive hearing and, in particular, how information is to be presented by parties.

3.18 Where the parties are agreed on further procedure, the note may be lodged jointly. The parties are expected to identify relevant information that is unlikely to be disputed and are also expected to take reasonable steps to agree such information.

3.19 The substantive hearing may take the form of a proof, proof before answer or debate. This will vary from case to case and will depend on the legal and factual issues to be decided. The new civil procedure rules must be framed in such a way as to give the judge maximum flexibility to tailor the substantive hearing to suit the particular case.

The matters to be considered at a case management hearing

3.20 At the case management hearing, parties will be expected to explain what further preparatory steps are necessary to identify clearly the factual and legal issues to be decided, and how long will be needed to achieve this. Taking these steps into account, the judge may make any order considered appropriate for the expeditious resolution of the dispute. Without limiting that generality, the judge may:

- order parties to provide further specification on particular points,
- allow a period of adjustment,
- summarily dispose of the action or defence, or part of either,
- order parties to disclose the identity of witnesses and documents,
- allow the Defender to pursue a counterclaim, and
- require the Pursuer to prepare and lodge a record.

The judge, when making such orders, may specify deadlines for the steps to be taken and must be mindful that actions are to progress as expeditiously as appropriate.

3.21 The case management hearing is not designed to give the parties the opportunity to formulate their position. The adjustment of pleadings will not always be necessary and parties must not assume that an order allowing adjustment will be made. Adjustment will normally be restricted to clarification of a party's position to ensure that fair notice of that party's position is given to the other party in the case.

3.22 The judge will establish the state of preparedness of the parties to proceed to a substantive hearing. If the parties are not in a position to proceed (because there are preliminary matters to be addressed), the judge may arrange a second case management hearing and specify a purpose for that hearing. At the second case management hearing, the judge will be expected to fix a substantive hearing.

3.23 When arranging a substantive hearing, the judge must consider:

- the date and likely length of the hearing,
- the legal and factual issues to be decided,
- how any witnesses are to present information,
- the timetable for lodging any productions and witness lists[8],
- how long the parties will be given to present information and make submissions during the substantive hearing,
- whether notes of argument are required,
- whether a core bundle is required, and what that bundle should contain,
- whether a joint inventory of productions is required,
- whether principal documents are required,
- the arrangements for any vulnerable witnesses, and
- what other technology (for example, live links) will be used.

The judge and the parties must consider what steps can be taken to limit the extent of oral testimony at the substantive hearing. Oral testimony should only be where necessary (for example, where the judge must take a view on a witness's credibility).

3.24 At the end of the case management hearing, the judge must fix a date and specify a purpose for another case management hearing, or fix a substantive hearing.

3.25 Throughout proceedings, parties are expected to consider and discuss whether alternative dispute resolution might be appropriate in respect of some or all of the issues. Parties are expected to be able to advise the judge on the steps that have been taken to achieve extra-judicial settlement and to advise on the likelihood of such a

[8] As noted at paragraph 3.36 of this paper, productions must be exchanged between parties by the date ordered by the judge and that date must be no later than 8 weeks before the substantive hearing. If documents are to be lodged with the court electronically, the parties must lodge the documents with the court at the same time.

settlement being reached. The judge may order that, before the substantive hearing, a joint meeting between the parties should take place to explore extra-judicial settlement and whether the issues to be determined can be narrowed. The stage of proceedings at which a joint meeting will be ordered will vary. It will ordinarily be held when the judge considers that such a meeting is likely to achieve progress. A joint meeting may take place in person, by conference call or video conference.

Information management

The judge's information management power

3.26 The judge will have a broad power to make any orders about the manner in which information is to be presented during a case. In particular, such an order may:

- restrict the information presented to particular issues or sources,
- require parties to lodge particular documents or other items, or to lead a particular witness, and
- determine the manner in which information is to be presented, whether by oral presentation, witness statement, the production of documents or other items, live link, video recording or otherwise.

The judge will be expected to tailor the procedure to suit the facts and legal issues in dispute. For example, where a decision is sought on the construction of a document, all that may be required for the substantive hearing is a copy of the document. Such a dispute would not require the attendance of witnesses to speak to the document.

3.27 To derive full benefit from the flexible information management power, judges must be provided with the required information in ample time to prepare before a hearing. This is especially so for the substantive hearing. The judge, having digested the information in advance, will be in a more informed position to engage with the parties' submissions. It is intended that this will promote a focused substantive hearing.

Agreeing information

3.28 The parties are expected to identify relevant information that is unlikely to be disputed and to take reasonable steps to agree that information.

3.29 A party may lodge a note to admit information. The note should set out the matters which the party considers unlikely to be disputed. Any other party may lodge a note of objection to a matter set out in the note to admit information within 7 days of the date on which the note was intimated. It is not necessary to present information concerning a matter to which no other party objects.

Recovery of information

3.30 Parties should exercise their right to recover information proportionately. It will be subject to judicial control. As part of case management, the judge should establish what information or documents are reasonably required to resolve the dispute.

3.31 Parties may apply for a commission and diligence for the recovery of documents or other information. The application must specify the documents sought. It must also be intimated to the other parties and, where necessary, the Advocate General for Scotland and the Lord Advocate. If the judge considers that any other person (for example, a third-party in possession of the document or to whom the document relates) should have an opportunity to address the court before the orders is made, the judge may make an order requiring the application to be intimated to that person.

3.32 If the judge grants an application for recovery, the current "optional procedure" will be mandatory, unless the judge otherwise directs.[9] The applicant must serve on the haver a copy of the order and the specification setting out the documents to be recovered. The haver must normally send the documents to the applicant's solicitor, or, where the applicant is not represented, to the court within 7 days from intimation.

3.33 If the applicant is not satisfied that there has been full compliance with the order, or considers that the reasons for any non-compliance by the haver are inadequate, the applicant may proceed to a commission for the recovery of a document.

3.34 The execution of a commission and diligence without intimation will only be permitted in exceptional circumstances, for example where the document is at risk of being lost.

Documents

3.35 It is recognised that the early and appropriate disclosure of information is important to narrow the issues in dispute and mitigate the length and complexity of proceedings.

3.36 Where the judge considers that productions are necessary for the just resolution of the dispute, the parties must lodge an inventory of productions by a specified date. That date will be no later than 8 weeks before the substantive hearing. The inventory and productions must, at the same time, be intimated to the other parties. Except where productions are to be lodged electronically, productions should not be lodged with the court at this stage. The judge will specify a date, no later than 2 weeks before the substantive hearing, by which physical productions must be lodged.

3.37 A production which has not been lodged timeously may only be presented at a substantive hearing with the consent of the other party or the judge's permission.

3.38 Parties must, where possible, exchange draft inventories productions with a view to avoiding unnecessary duplication. They must consider whether it is possible to lodge a joint inventory. The judge may order the parties to lodge a joint inventory.

3.39 Parties must confine productions to those that are relevant to the issues under consideration. If not relevant, the judge may make an order restricting productions.

3.40 Parties will not be expected to lodge documents in respect of matters that are agreed or admitted. To assist the judge in identifying the issues in dispute, the judge may

[9] Procedure will not apply to applications under section 1 of the Administration of Justice (Scotland) Act 1972.

require parties to agree certain matters (such as relevant statutory provisions) or notify the judge of their disagreement on matters before a substantive hearing.

3.41 Where practicable, the court can require documents to be lodged only in an electronic form with the inventory page hyperlinked or bookmarked so that each document can be accessed directly. Bookmarks must be labelled by the name or title of the document so as to identify the document to which each bookmark relates.[10]

Witnesses

3.42 It will not be necessary to cite a witness to attend the substantive hearing if the information which they would be cited to give can be shown in some other way (for example, a witness may not be needed to give an account of an event captured on CCTV). A witness should only attend court where required to resolve the dispute.

3.43 Evolving technology provides an opportunity to improve the accessibility and efficiency of civil procedure. Examples include witness testimony by video link or the prior digital recording of oral evidence. There are a number of advantages to using technology for parties, representatives and the court: reduced waiting and travelling time; overcoming large geographical distances; and the reduction of expense.

3.44 The judge may make orders about the manner in which a witness is to present information. The judge may direct that a witness is to present information by oral presentation, written statement, live link or video recording.

3.45 Where the judge orders the presentation of information by a written or video statement, that statement must include a declaration by the witness that the information presented is the truth, the whole truth and nothing but the truth.

3.46 Information must not be given greater weight solely on the basis of the format in which the information is presented. For example, oral testimony should not automatically be given greater weight than a written statement or video recording.

3.47 The task of evaluating credibility and reliability of a witness will, where required, remain with the judge. If the judge considers that credibility or reliability is at issue, the judge may order a party to cite a witness to attend the substantive hearing, notwithstanding that the information may have been presented another way.

3.48 When ordering the presentation of information by written statement or video recording, the judge must have regard to the right of other parties to test that information. The judge may make any order to enable the other parties to do so. For example, if the judge orders a witness to present information by video recording, that order may provide that the other parties may participate in its production (if the recording has not already been made) or provide that the witness needs to attend the substantive hearing for cross-examination by the other parties.

[10] A hyperlinked or bookmarked inventory of productions may be quite large in file size. The Council and the Scottish Courts and Tribunals Service will consider the portal storage capacity to accommodate the new rules.

3.49 The judge may order that a witness statement or video recording of a witness is to be lodged by a particular date. Any documents referred to by that witness in the in the statement or recording must be lodged at the same time. Where a party has lodged a witness statement or video recording of a witness, other parties may lodge a note of questions or lines of inquiry to be put to that witness. The judge may specify a date by which a note may be lodged. That date must be no later than eight weeks before the substantive hearing. Parties must only lodge one note (except where the judge considers there is a good reason for, and grants an application permitting, further notes). The judge may approve the note, subject to any modifications, and order the party who cited the witness to lodge the witness' answers by a particular date. If the questions to be put to the witness are likely to be extensive, then parties may instead apply to cite that witness to attend the substantive hearing for cross-examination.

Vulnerable and child witnesses

3.50 Parties must consider proactively at an early stage whether any witness is, or may be, a vulnerable witness. If a party intends to seek a special measure for a vulnerable witness under the Vulnerable Witnesses (Scotland) Act 2004, that intention must be intimated to the other party and the court at the earliest opportunity.[11]

3.51 Where it is intended to seek an open commission, it is important that the commission proceeds as early as possible. This way the information is captured earlier.

3.52 A practitioner must take into account the best interests of the vulnerable witness.

3.53 The new civil procedure rules will prescribe a form of child witness notice and vulnerable witness application. The forms will be in broadly similar terms to the versions found in existing court rules.

3.54 A vulnerable witness application must set out the name of the witness, his or her date of birth, the reason why that person is considered a vulnerable witness, the special measure sought to enable the witness to present information, and the witness' views.

3.55 A child witness notice must set out the name of the child witness, his or her date of birth, the special measure sought (or state why no special measure is needed) and the views of the child's parent or person with parental responsibilities.

3.56 After considering a child witness notice or vulnerable witness application, the judge may authorise special measures without any further procedure, or order parties to attend court to provide further information in relation to the notice or application.

3.57 If ordered to address the court in relation to a child witness notice or vulnerable witness application, the parties will be expected to be in a position to assist the court in its consideration of the arrangements (if any) needed to enable the effective participation of the witness. For example, parties should be able to inform the court whether the witness will affirm or take the oath; whether wigs and gowns should be dispensed with; which time and location would be in the witness' best interests; whether any pre-

[11] The Working Group endorses, insofar as applicable for civil proceedings, the contents of the High Court of Justiciary Practice Note (No 1 of 2017) on Taking of Evidence of a Vulnerable Witness.

familiarisation is required; how requests for unscheduled breaks may be notified and dealt with; and the likely lines of inquiry to be pursued.

3.58 The judge may review the arrangements for a vulnerable witness and may vary an earlier order by adding, substituting or deleting a special measure.

3.59 Where the judge makes an order that a witness, including any vulnerable witness, is to present information by commission, that commission is to proceed without a formal set of written questions (interrogatories) unless the judge otherwise directs.

Expert witnesses

3.60 An expert witness should only be cited to present information reasonably required to provide a just resolution to the dispute. The judge may restrict the information presented. The judge's case management power will be broad enough to make orders about who should be presenting information, the issues which they are expected to speak to and when any report prepared by the expert should be lodged in process and intimated to the other parties. A report or statement by an expert must include a declaration to the court that the information contained is accurate.

3.61 Where a party is considering instructing an expert, that party must inform the other parties as early as possible. If the parties are agreed that an expert would be useful, parties must consider the joint instruction of an expert.

3.62 A party who intends to produce information from an expert must lodge a note setting out: (i) the identity of the expert, if known; (ii) why the information is reasonably required for a just resolution of the dispute; (iii) whether the parties have considered or agreed to instruct a joint expert; and (iv) the likely completion date of any report(s).

3.63 Where the parties intend to cite more than one expert, the judge may order the witnesses to present information concurrently. When making such an order, the judge must direct how that information is to be presented (for example, by a judge questioning the witnesses directly, inviting the witnesses to discuss a particular matter between them, or allowing the parties to put questions to the witnesses).

3.64 The judge, after considering the contents of any report or document lodged, may determine that proof is unnecessary on a particular issue or matter.

Lay representation and lay support

3.65 The Access to Justice Committee of the Council completed a review of lay representatives and lay support in April 2018. The Council agreed that the undernoted recommendations should be given effect in the new civil procedure rules. The Working Group for work stream 5 considered the recommendations and was of the view that "always" should be omitted from sub-paragraph (g) on the basis that this will allow the judge to exercise discretion to permit a lay representative to appear in the absence of the party they represent:-

a) the definition of lay representative should be harmonised across the new civil procedure rules;

b) the application form for a lay representative to appear should be harmonised across the new civil procedure rules;

c) an application for a lay representative to appear should be capable of being made at the bar, provided the prescribed information about the lay representative can be provided at that point;

d) the court rules should provide that when a party becomes legally represented, the lay representation ceases;

e) the prohibition on lay representatives receiving payment should remain in place;

f) the court rules should be clarified to allow lay representatives to be permitted to receive reimbursement for reasonable travel and subsistence outlays from the party they represent;

g) lay representatives should always appear in the presence of the party they represent;

h) court rules should provide for lay representatives to be entitled to see the same documentation and information as the party they represent is entitled to see; and

i) nomenclature of "lay supporter" should be changed to "courtroom supporter".

Withdrawal of agents

3.66 In the event that an agent withdraws from acting for a party to an action, the agent must intimate withdrawal by letter to the court and to the other party to the action. To bring consistency across the civil procedure rules, the court will pronounce an order of its own accord requiring the party whose agent has withdrawn ("A") to advise the court within 14 days (or such other period as the court, on cause shown, thinks fit) whether or not he or she intends to proceed[12] . If A does not respond indicating that he or she intends to proceed, then the court may grant such decree, order or finding as it thinks fit. A hearing should not be fixed automatically, and should only be fixed if required[13].

[12] Currently, in the Court of Session the onus is on the other party to the action to enrol a motion asking the court to pronounce an interlocutor.

[13] Currently a hearing is automatically fixed in the sheriff court under rule 24.2 of the Ordinary Cause Rules 1993.

Chapter 4. Applications

Applications generally

4.1 Under the new civil procedure rules, the general presumption will be that actions should be pursued online. However, there should be provision in place for paper based application and intimation. This will be particularly important for those who are unable to progress an action online, whether by reason of inability to use the necessary technology or by reason of inability to access it. It is anticipated that those who fall within this category would mainly be unrepresented litigants.

Types of application

4.2 The existing rules prescribe several different types of application – including motions, minutes, notes and letters. The new rules should replace these various types of application with a single type, which would simply be called "an application". This would simplify and streamline the rules.

4.3 Under the existing rules, applications made in process after final decree are often made by minute. Under the new civil procedure rules, these will be made by application.

Forms

4.4 The existing rules prescribe many different bespoke forms. Whilst it is recognised that bespoke forms can provide guidance to litigants, the new civil procedure rules will streamline and reduce the number of bespoke forms as far as possible. Generalised forms can be adapted flexibly to fit different applications. The preferred approach is for fewer, generalised forms, unless there is a real and specialised need to prescribe a bespoke form.

Presentation of information to the court

4.5 Under the existing rules, the term "minute" (in addition to being used to describe a type of application) is used to describe a document which presents information to the court. For example, there are minutes which state the intention or define the position of parties, which sometimes require an ancillary motion to invite the court to give effect to what is contained in the minute e.g a minute of amendment.[14]

4.6 There are also minutes which simply express a party's position on a certain matter. These usually lie *in retentis* until the merits of the case have been determined by the court e.g. a minute of tender.

4.7 Finally, there are joint minutes, in which parties jointly state their intentions or define their positions. In some instances, such minutes will express agreed terms on which a case is to be disposed. In such cases, parties will normally make a joint motion to the court to interpone authority to the joint minute, and to grant decree in accordance with the agreed terms. There are also joint minutes which may not of themselves require further action; for instance, a joint minute of admissions. Such a minute simply details

[14] MacPhail, Sheriff Court Practice, 3rd edition, paragraph 5.57.

certain matters on which parties are agreed, and in respect of which proof will be unnecessary. Under the new rules, this category of document will be called a "note" or "statement", rather than a minute.

Signature of applications

4.8 There will be no requirement in the new civil procedure rules for an application to be signed. The only exceptions will be: (i) a joint application settling an action, and (ii) an application to abandon an action. The new rules will make provision in relation to what should happen in the event of an application being made without proper authorisation and agreement to make such an application, and should allow parties to apply to recall any order made on such an application.

Content of applications

4.9 The new civil procedure rules will be clear about what is to be included in an application. For example, an application for abandonment should make it clear how expenses are to be dealt with.

Hearing on applications

4.10 Subject to the requirements of primary legislation, the judge will decide whether a hearing on an application is required (rather than a hearing being assigned automatically). This is in line with the general move towards increased judicial case management.

4.11 The fact that an application is opposed will not automatically give rise to a hearing; the judge will have the discretion to decide an opposed application on the papers. Equally, the judge should have the discretion to assign a hearing even where an application is unopposed. Parties will also be given the opportunity to state whether, in their view, a hearing is required.

Procedure for making an application

4.12 The procedure for making an electronic application will be modelled on current Court of Session e-motions procedure[15]. Therefore it should, in general, be as follows:

- The applicant (**A**) intimates his/her intention to lodge the application to the other party or parties (**B**) to the action, setting out **A**'s view on whether a hearing is required,
- **B** responds to **A** in a prescribed form stating: (i) whether **B** opposes the application; and (ii) whether or not in **B**'s view a hearing is required,
- Late opposition to an application should be sent directly from **B** to the court and may only be allowed with the leave of the court,

[15] See chapter 23 of the Rules of the Court of Session 1994

- **A** lodges the application, stating **A**'s views on the necessity of a hearing. At the same time, **A** lodges the prescribed form received from **B** (which states any opposition and **B**'s view on the necessity of a hearing),
- The judge considers the views of all parties at the same time, and decides whether a hearing is required. The judge can ask parties for further clarification if required, and
- If the judge decides that a hearing is required, he/she must set out in the court's order any steps that parties are required to take in advance of the hearing.

Form/location of hearing

4.13 The judge will have discretion to decide on a case-by-case basis the form, location and conduct of a hearing (e.g. in a court room, email exchange, by video-conference or by telephone).

Timescales for making applications

4.14 The rules will prescribe timescales in relation to applications procedure, as they currently do for motion in the Court of Session. It is anticipated that the timescales for making paper based applications will, in most if not all circumstances, allow for more time than electronic applications. This is to allow sufficient time for sending and receiving documents by post.

4.15 Generally, timescales for electronic applications will be prescribed as follows. After intimation of the application, the other party/parties must intimate any opposition not later than 5pm on the second court day after the application was intimated.

4.16 The new civil procedure rules will prescribe a shorter period for urgent applications.

Applications for transfer and remit

Applications for transfer and remit in general

4.17 Currently, the procedure for applications for transfer and remit is largely prescribed by primary legislation. The court rules which implement that legislation should, so far as possible, harmonise court procedure in relation to such applications.

Transfer from one type of sheriff court procedure to another

4.18 The procedure for transfer from one sheriff court procedure to another should be the same as existing procedure, which is currently governed by the provisions of the primary legislation[16].

[16] This procedure is currently prescribed by sections 78 – 80 of the Courts Reform (Scotland) Act 2014.

Applications for transfer from one sheriff court to another

4.19 The procedure for transfer from one sheriff court to another will be similar to the existing procedure[17]. The undernoted procedures are to remain in the same as the existing procedures:

Applications for remit from sheriff to Court of Session,

Procedure where the value of proceedings exceeds £100,000,

Procedure where the value of proceedings does not exceed £100,000,

Remit other than under section 92 of the 2014 Act,

Transmission on contingency,

Applications for report to Inner House, and

Applications for remit from Court of Session to sheriff.

Applications involving third parties

Sist and transference – substitution and transference

4.20 The new civil procedure rules will include a procedure similar in substance to the existing sist and transference procedure, but with modernised terminology. "Sist" in this context will become "substitution"; and "transference" should stay the same.

Application for "substitution"

4.21 Where a party dies or comes under legal incapacity while a case is in dependence, any person claiming to represent that party or his or her estate may apply to the court to be substituted as a party to the case. That person will be known as the substitute.

4.22 Where a question of liability is the subject of proceedings before the court, and the effect of any statutory transfer while the case is depending before the court is to transfer the liability (if proved) to a person other than an existing party to the case, any party to the proceedings may apply to the court to have the case transferred in favour of or against (as the case may be) the person to whom liability has been substituted.

Application for "transference"

4.23 Where a party dies or comes under legal incapacity while a case is depending before the court and the substitution procedure is not invoked, any other party may apply to the court to have the case transferred in favour of or against (as the case may be) any person who represents that party or his or her estate.

4.24 Where an application for transference has been lodged in process, the court will pronounce an order:

[17] This procedure is currently prescribed by Chapter 26.1 of the Ordinary Cause Rules 1993.

(a) granting warrant for service of a copy of the application for transference, a copy of the pleadings (including adjustments and amendments) and a copy of that order on such a person; and

(b) allowing such a person to lodge an objection to the application for transference within such period as the court thinks fit.

Further provisions – death of a party

4.25 As soon as reasonably practicable after the death of a party, any agent who immediately prior to the death was instructed in a case by that party must notify the court of the death.[18] The notification must include an estimate of the length of time required for confirmation to the deceased party's estate by an executor (where required).

Third party procedure

4.26 The existing Ordinary Cause Rules and Rules of the Court of Session both make provision for third party procedure (allowing a party to an action to request the court to convene a third party). The new civil procedure rules will allow a party to an action to request the court to convene a "third party".

4.27 The Ordinary Cause Rules make provision for party minuter procedure (allowing a person who is not a party to the action to ask the court for leave to enter process and lodge the responding document). Similar in substance to the existing party minuter procedure, the new civil procedure rules will allow a person who is not a party to the action to ask the court for leave to enter process and lodge the responding document, also to be called a "third party". This will be available in the Court of Session too.

4.28 Therefore, under the new civil procedure rules, a "third party" could become involved in an action in the following ways:

1. A responding party may apply for an order for service of a notice on another person for the purposes of convening that person as a third party to the action, or
2. A person who has not been called as a responding party or been called into an action by a party may apply for leave to enter the process as a third party.

Third party – application by party to the action

4.29 The responding party may make an application where he or she claims that he or she has, in respect of the subject matter of the action, a right of contribution, relief or indemnity against any person who is not a party to the action.

4.30 Alternatively, the responding party may make an application where a person whom the initiating party is not bound to call as a responding party is solely liable, or jointly or jointly and severally liable with the responding party, to the initiating party in respect of

[18] The RCS contain special rules in relation to sist and transference in personal injuries actions. These will be considered along with other specialised actions at a later stage in the rules rewrite project.

the subject-matter of the action; or liable to the responding party in respect of a claim arising from or in connection with the liability, if any, of the responding party to the initiating party.

4.31 The third party procedure will also be available to an initiating party against whom a counterclaim has been made, and to an additional party convened in the action.

4.32 Where a responding party intends to apply for an order for service of a notice before any closing of the record ordered by the judge, he or she must set out in the responding document the legal basis on which he or she maintains that the proposed third party is liable to him or her by contribution, relief or indemnity or should be made a party to the action, and the factual basis for this.

4.33 A notice must be served on the third party within such period as the court specifies in the order allowing service of the notice. Where service is not made within the specified period, the order for service will cease to have effect, and no service may be made unless a further order for service has been applied for and granted. The following must be served along with a notice:

- A copy of the pleadings (including any adjustments and amendments),
- A copy of the order allowing service, and
- Where the pleadings have not been amended in accordance with an application to amend, a copy of that application.

4.34 The responding party who served the notice must lodge in process:

- A copy of the third party notice.
- A copy of the order allowing service of it, and
- A certificate of service.

4.35 The third party may lodge the responding document within 28 days of the date of receipt of the notice. The court may vary the period of 28 days, on cause shown.

4.36 If the third party fails to lodge the responding document, the responding party may apply for such finding, order or decree against the "third party" as may be appropriate to give effect to the claim in the notice. Where an application to amend has been lodged, the responding party may not apply for a finding unless, at or before the date on which he or she makes that application for a finding, he or she amends the pleadings in accordance with the application to amend.

4.37 Where such finding, order or decree is made against the third party by the court, it may not be reclaimed against. However, the third party may apply for recall and to allow the responding document to be received.

4.38 The judge may order the responding party (who has served the notice) to lodge an open record incorporating the pleadings of all parties.

4.39 The provisions of the new civil procedure rules will, with the necessary modifications, apply as between the responding party and a third party, or the initiating party and a third party (as the case may be), as they apply to the action between the initiating party and responding party. This is subject to other requirements and with the necessary modifications.

Third party – an application for leave to enter process (currently party minuter procedure)

4.40 A person who has not been called as a responding party may apply for leave to enter process as a third party and to lodge the responding document. The application must specify the applicant's title and interest for entering the process, and the grounds of defence he or she proposes to state. After hearing the applicant, the judge may, if or she is satisfied that the party has demonstrated title and interest, grant leave and make such order as to expenses or otherwise as he or she thinks fit. Where an application is made after the closing of the record, the judge must only grant leave where he or she is satisfied as to the reason why earlier application was not made.

4.41 A hearing will be required if the judge considers refusing the application.

Chapter 5. Substantive hearings, decrees and enforcement

The substantive hearing

5.1 The purpose of the substantive hearing is to determine the dispute between the parties. A substantive hearing will take place in open court, except where it is in the interests of justice or in the public interest for the hearing, or part of it, to be in private.

5.2 The procedure at the substantive hearing will be as ordered by the judge.

5.3 Where the judge has ordered the parties to submit a joint timetable for the presentation of information and submissions during the substantive hearing, the parties are expected to take all reasonable steps to adhere to that timetable. If no such timetable has been ordered, or the parties were unable to agree one, the judge may, with appropriate notice to the parties, impose a timetable on the parties. Should the timetable need to be varied or departed from during the presentation of information, parties must advise the judge of that fact as soon as is convenient.

5.4 The judge will administer the oath or affirmation to any witness appearing in court.

The decision

5.5 At the conclusion of the substantive hearing, the judge will advise the parties of how he or she will make the decision. A decision may be expressed:

- orally, at the conclusion of the substantive hearing, or
- in a written judgment or opinion.

It will be for the judge to determine how a decision should be communicated. That determination will depend on the subject matter of the dispute. A written judgment would only be expected in cases of legal or factual complexity or importance.

5.6 Where the judge issues a decision orally, a party may ask the judge to append to the order giving effect to the decision a note of his or her reasons for the decision and his or her findings in fact or law. The judge must provide such a note where the request is made within 7 days of the date on which the decision was expressed orally.

5.7 In an appeal to the Sheriff Appeal Court, an appellant must, where a sheriff's note is not available, indicate in the note of appeal: (i) whether the appellant has requested such a note and is awaiting its production; (ii) whether the appellant requests a note; or (iii) whether the appellant considers that an appeal is sufficiently urgent that the Sheriff Appeal Court should hear and determine the appeal with the note.[19]

[19] This process is currently provided for in rule 6.2(2)(d) of the Sheriff Appeal Court Rules 2015.

Decrees

Extracting a decree

5.8 Extracting a decree is a vital step in litigation. An extract of the decree is required if a party intends to, or has to, take steps in order to enforce the judge's decision.

5.9 A party may request an extract decree by submitting a request to the clerk. As an extract is requested rather than applied for the full application process will not apply. There are certain specialised types of action in which a decree is extracted automatically.[20] This narrative focuses only on ordinary actions, extracting a decree in specialised actions will be considered at a later stage of the Rules Rewrite Project.

5.10 A decree in absence may be extracted after 14 days from the date of the decree. Where a case is defended, a decree may be extracted after whichever is the later of:

- the expiry of the period within which an application for leave to appeal may be made and no application has been made,
- the date on which leave to appeal is refused and there is no further right of appeal against the refusal,
- the expiry of the period within which an appeal may be marked and no such appeal has been marked, or
- the date on which any such appeal is finally disposed of.

If the judge reserved the question of expenses, a decree may be extracted after 14 days from the date of the order dealing with expenses. A party may apply for an extract to be issued earlier than the date set out in this paragraph. Except where decree in absence has been granted, an application for an early extract may only be granted in the presence of the other party or where the judge is satisfied that the other party has received proper intimation of the application for early extract.

5.11 The extract decree, and all orders, should be drafted using plain English when possible. An extract decree will contain the following information:

- the name of the court and the case reference number,
- the date of the decree,
- the details of the parties, including whether the decree was in absence,
- the terms of the court's decision, including any expenses, and
- the date on which the extract was authenticated by the judge or clerk.

The judge may correct any minor or typographical error in an extract decree. The extract will authorise the lawful enforcement of the judge's decision.

[20] A decree of divorce is extracted automatically (see rule 7.2 of the Rules of the Court of Session 1994).

Recall of a decree

5.12 Where the judge grants decree in the absence of a party (including a decree of dismissal), that party may make an application to recall the decree. Any application must be made before full implementation of the decree in absence.

5.13 A party may only apply to recall a decree in a case once. Any subsequent application by that party is not competent and will be rejected by the court.

5.14 The application to recall a decree must set out the reason why the party failed to take a required step (for example, failing to respond to the action timeously or failing to attend a case management hearing). The application must also set out the proposed defence to the action, or the orders sought by the party to progress the case.[21]

5.15 The party seeking to recall the decree must send the application to the court. The court will check whether the application is competent (for example, making sure it is the first such application by the party making the application). If it is, the court will order the party making the application to send a copy of it to the other parties.

5.16 A party who has received intimation of an application to recall a decree must not enforce that decree until the judge has decided whether to grant the application.

5.17 The party who receives the application must intimate any opposition not later than 5 pm on the second court day after the application was intimated.

5.18 After the objection period, the judge will consider the application. The judge may grant or refuse the application on the papers, or order the parties to attend a case management hearing at which the judge will decide whether to recall the decree.

5.19 If recalling the decree, the judge must also give orders to allow the case to progress. For example, the judge may arrange a further case management hearing or require one of the parties to provide information on an aspect of the case by a set date.

5.20 The judge will have a power to grant relief to a party from the consequences of failing to comply with a rule or an order which is shown to be due to a mistake, oversight or other reason. That relief may be subject to any conditions considered appropriate. Such relief may include the judge, of his or her own accord, recalling a decree granted where doing so is considered appropriate in the circumstances of the case (for example, if a party was unable to comply with an order of the court because the order was not intimated to that party or was sent to an incorrect address).

Interim diligence and diligence

5.21 It is not within the Court of Session's rule-making power to alter the substantive law of interim diligence and diligence. The law in this area is largely provided for in primary legislation, in particular the Debtors (Scotland) Act 1987 ("the 1987 Act"); the Debt

[21] The new rules will not continue the requirement for a defender, in a Court of Session action, to pay the pursuer the sum of £25 when seeking to recall a decree (see Rules of the Court of Session 1994, rule 19.2).

Arrangement and Attachment (Scotland) Act 2002 ("the 2002 Act"); and the Bankruptcy and Diligence (Scotland) Act 2007 ("the 2007 Act").

5.22 Any rules in relation to interim diligence and diligence must be drafted to support the primary legislation. The following paragraphs are concerned only with the civil procedure supporting the substantive law, rather than the substantive law itself.

Procedure to apply for interim diligence

5.23 A party may make an application asking the judge to make an interim order to secure that party's position until the case is determined. That application must specify the order sought (for example, an arrestment on the dependence of an action under section 15A(1) of the 1987 Act), why the judge should make the order sought, and whether the application should be determined without calling in court. The application should also give the details about any other interested party.

5.24 If an application for an interim orders is to call in court, the judge will order the party making the application to give notice of the hearing to the other parties in the case.

5.25 Where the judge grants the interim order sought, the Defender or any other interested person may make an application to loose, restrict, vary or recall an interim order. That application must specify the name and address of each party and, where it relates to an inhibition, contain a description of the inhibition, including the date on which it was registered in the Register of Inhibitions and Adjudications.

Executing interim diligence

5.26 The procedure by which interim diligence is to be executed should largely replicate the existing procedure prescribed in the current civil procedure rules.

5.27 For example, before executing an interim attachment of an article, a messenger-at-arms or sheriff officer must show the persons present a certified copy of the order authorising the interim attachment and make enquiries as to the ownership in common of the article in question. The messenger-at-arms or sheriff officer must prepare and sign a schedule of interim attachment. A copy of that schedule must be sent to or be left with the person who was in possession of the articles and, if the person in possession was not the debtor and it is practicable to do so, the debtor.[22]

5.28 An inhibition on the dependence is made effective in accordance with section 148(3)(b) of the 2007 Act and the Diligence (Scotland) Regulations 2009. Where the Defender's whereabouts are not known and cannot reasonably be ascertained, an inhibition on the dependence is made effective by a messenger-at-arms or sheriff officer sending a copy of the schedule of inhibition to the Defender's last known address and publishing details on the Scottish Courts and Tribunals Service website.

[22] This procedure is currently prescribed by rule 6C of the Rules for Applications in the Sheriff Court under the Debt Arrangement and Attachment (Scotland) Act 2002 (see S.S.I. 2002/560).

Charge for payment

5.29 The current form of charge is prescribed by the Act of Sederunt (Form of charge for payment) 1988. That instrument sets out that a charge should give:

- the details of the parties,
- the date of execution of the charge,
- the date of the court's decree,
- the method by which the charge has been served,
- the name of the messenger-at-arms or sheriff officer executing the charge,
- the name of the person who witnessed that execution,
- the period of time within which the debt must be satisfied,
- a warning that, if the debt is not satisfied, further action may follow,
- an itemised breakdown of the sum due to be paid, and
- guidance that, if the person receiving the charge is uncertain about what it means, they should consult a solicitor or advice organisation.

The Charge must retain a degree of formality, to underscore the serious consequences of inaction and to prompt an unsuccessful party to engage with the process. However, a balance must be struck as the Charge, while retaining formality, must not use antiquated or inaccessible language. It must be clear and concise.

Alternative Dispute Resolution

Definition of Alternative Dispute Resolution

5.30 The term "alternative dispute resolution" ("ADR") is not defined in the 2014 Act. It follows that the term has its meaning in common parlance. The term would seem to be self-explanatory – it is an alternative means of resolving a dispute which does not involve court action. The 2014 Act does not give the Court of Session powers to make rules which would in any way narrow the scope of ADR as provided in the primary legislation. The new civil procedure rules will define ADR as "*a collective description of methods of resolving disputes other than the normal court process."* That description can be read alongside the 2014 Act[23].

[23] The proposed text is based upon the terms of the glossary in the Civil Procedure Rules which apply in England and Wales, where it sets out the meaning of ADR. The only difference is that the proposed text here proposes "*normal court process*" where in England and Wales this is "*normal court process*" which had been considered by the Working Group previously but had been discounted.

Cases where ADR will be suitable

5.31 The new civil procedure rules will not make ADR compulsory[24]. Nor will they exclude any particular type of action from ADR. It will be for the court, in the exercise of its case management function to consider whether it is appropriate to encourage parties to use ADR. The court will have discretion not to encourage ADR where it thinks it would not be suitable in any particular case.

Discussion of ADR at case management hearings

5.32 The new civil procedure rules will be permissive, allowing the option of ADR to be considered throughout the process including at a suitably early stage of the process. A judge will be obliged to ask parties at case management hearings whether they have considered ADR. The role of the judge in this regard will be one of information gathering rather than a prescriptive one.

Cost sanctions for failure to consider ADR

5.33 The new civil procedure rules will not contain a rule providing for cost sanctions for failure to consider ADR. Rather, the importance of parties considering ADR and the possibility that failure so to do can result in cost sanctions should be set out elsewhere e.g. in a Practice Note.

[24] The Working Group wished to formally note its recognition that before the Rules Rewrite Project reaches its next stage, primary legislation may be introduced making ADR compulsory. The Working Group wishes to make it clear that should that transpire, the procedural narrative in relation to the Rules Rewrite project should recommend to the Scottish Civil Justice Council that there be a power available to judges to exclude cases from that compulsion on a case by case basis, possible by "*special cause shown*". That should form part of the judge's case management function.