

# Scottish Courts and Tribunals Service



Legislation and Information Unit  
Legislation Implementation Team  
O1 Spur, Saughton House  
Broomhouse Drive  
Edinburgh  
EH11 3XD  
DX: ED 545309

By email to: [scjc@Scotcourts.gov.uk](mailto:scjc@Scotcourts.gov.uk)

31<sup>st</sup> October 2023

Dear Sir/Madam,

## **The New Civil Procedure Rules**

I refer to the above consultation to which I respond on behalf of the Scottish Courts and Tribunals Service (the SCTS). The response is submitted by the SCTS acting in its role to provide efficient and effective administration to the courts and tribunals and does not include the views of the Judiciary.

The SCTS recognises the efforts of those involved in the project to date. The reform and modernisation of the civil courts is a key commitment for the SCTS. We fully support the SCJC policy objectives to streamline, harmonise and simplify civil court procedures and welcome the opportunity to respond to the consultation.

The SCTS acknowledges that the aim of the consultation is to seek feedback on the general approach to the rules using a worked example to reflect this. We provide some observations on the draft rules below, but would note that it is difficult to fully envisage how a civil court action may proceed without sight of the rules in full. The current iteration appears to be silent on a number of matters, for example requirements to set out the grounds of jurisdiction in a summons<sup>1</sup> and providing evidence of intimation/service of documents.

The SCTS would welcome the opportunity to review the rules in their entirety once finalised.

### **Question 1 – Will the “look and feel” of these consolidated rules provide court users with the simplified, harmonised and user friendly procedure sought?**

The SCTS considers that the move towards employing plain English rather than complex legal terminology is commendable and will result in greater understanding of civil procedures, especially by party litigants. The intention to streamline forms is

---

<sup>1</sup> See current Ordinary Cause Rule 3.1(5)

welcome and we consider that this will help make ordinary court proceedings more accessible. To further aid understanding, which is a policy objective of the review, we believe that it would be beneficial to incorporate user friendly guidance into the rules, an approach that was taken with the Simple Procedure Rules. There are a number of points that could be clarified in the rules. For example, it may not be clear to a party litigant what the reference to a “written case” is. Similarly the current draft does not make clear to party litigants who can intimate and serve documents.

## **Question 2 – Are there any individual rules you think users might find difficult to implement and comply with, and if so what would you do differently?**

### **Impact on the SCTS and Judiciary**

Whilst acknowledging that the pre-action steps set out in the rules may reduce the number of cases coming to court, the SCTS notes that a number of rules in the current draft would appear to place additional duties on clerks and the judiciary. These will have consequential resourcing implications, particularly in the sheriff court, where the volume of cases is higher. Some examples of this are provided below.

#### **Commencing a case**

Rule 8(1) specifies additional information to be included in the summons regarding pre-action requirements. Clerks of court will require to carry out extra checks to ensure that this information is included in each summons lodged.

Rule 9(2) requires that where a summons is lodged by a party litigant, the court is to consider whether it contains an arguable case. Clerks of court would not be able to assess this, therefore every summons presented by a party litigant would have to be placed before the judiciary. This is not a practice that currently exists in the sheriff court, where initial writs are not routinely checked by the judiciary prior to a warrant to cite being issued.

It is likely that IT functionality will require to be developed to facilitate these provisions particularly to ensure that the judiciary can consider party litigant applications pre-registration and the order made can be recorded on the system.

#### **Order for service of a summons**

Rule 10(2) states that the order of service is to specify the date by which service is required, which must be 4 months from the date of order of service. This reduces the current period, of a year and a day, significantly. Whilst accepting that service may be effected by electronic transmission in a number of cases, the reduction in this period where other methods of service are used may give rise to a number of applications to extend or vary the period. This may particularly be the case where service of the summons is required on a person who is abroad.

#### **Counterclaim**

Rule 13 requires an application to be made for a counterclaim. In the sheriff court a counter claim would generally be stated in the defences. As this is an additional step, additional staff and judicial time will be incurred when processing and considering such applications.

#### **Undefended cases and decree in absence**

Rule 15(6) would appear to require court staff to monitor undefended cases to ascertain those where an application for decree/other order is not made within 12 months of the order of service. Under the current provisions, where no application for a decree in absence is made, the instance will automatically fall after the relevant period has elapsed. Therefore this is an additional duty. It is unclear how this will operate where an application to extend/ vary the order for service has been made or where there are multiple defenders/ parties with different orders for service applying. This is likely to make the task more complex for court staff to complete and/or IT functionality to be developed.

### **Case management orders: general**

Rule 19 makes provision for case management orders. Whilst acknowledging the content of the procedural narrative on this point, the SCTS considers that the lack of set procedure may result in inconsistency across the courts. This would appear to be counter to the policy objective to promote consistency between courts and they will impact court staff and the judiciary. For example in sheriff court ordinary causes at present, on the lodging of a notice of intention to defend, a timetable is automatically generated on certain key dates being entered into the civil case management system. There is rarely any judicial involvement in this process. Under the new rules all defended cases will have to be put before the judiciary for consideration and bespoke orders/timetables will have to be produced by the clerk in each case. Similarly, summary applications are generally registered, a first hearing assigned and a warrant to cite is issued. Unless questions around intimation or other concerns arise, there is no judicial involvement in this process. There will therefore be resource implications associated with this provision.

### **Case management questionnaire**

Rule 20 makes provision for the lodging of a case management questionnaire. Where the court orders the pursuer to lodge a questionnaire, the pursuer only has 7 days to do so. In our view this period may be too short. It is unclear to the SCTS from the current draft rules the point at which the court will consider whether this is required, however, judicial resource will be required to do so. Judicial availability and the time that will be required to make the order and intimate it, will limit the time available to the pursuer to lodge the questionnaire. Further, the consideration of additional documentation lodged, over and above parties' pleadings, is likely to require longer hearings which may impact on court programming and associated resources.

### **Judicial Continuity**

Rule 18 requires the court to ensure that all hearings in respect of a case are to be heard by the judge who issues the first case management order. Whilst the SCTS acknowledges the rule contains the caveat "where practicable and appropriate" expectations will be that judicial continuity is the norm. This is likely to cause considerable issues for court programming, in the sheriff courts in particular. Delays in the progress of cases will likely arise due to the availability of the judiciary e.g. as a result of other duties, for example some sheriffs are appointed as Sheriff Appeal Court or Temporary judges. Floating sheriffs and part time sheriffs are also used in the sheriff court, which will further impact on the ability to ensure judicial continuity without delaying the progress of cases.

## **Case management hearings: procedure and case management hearings: information**

Rules 24 and 25 make provision in relation to case management hearings. Given the court is to determine the form and procedure for these hearings, this may lead to inconsistency of approach across the courts. Additionally, as indicated in the context of the case management questionnaire, further time will require to be taken to consider the note to be lodged by each party under Rule 25(1). This will also impact on the length of case management hearings in particular where a party sets a number of matters out at great length which the court must consider. It is not clear from the rules whether the word count for such a note is to be restricted in any way.

### **Withdrawal of legal representation**

Rule 56 relates to withdrawal of legal representation. At present, in the sheriff court, a hearing (peremptory diet) would be assigned for the person to appear before the court. The draft rule moves this to an administrative process, introducing additional duties for the court. This includes a requirement for the court to identify cases where the party whose legal representative has withdrawn has failed, within the required timescales, to notify the court and other parties whether they intend to proceed with the case. The SCTS will need to consider how to facilitate this, for example through amendment to the civil case management system, so that the court can consider what order should be made.

### **Question 3 – Can you suggest any additional rules, or changes in layout, that would improve these consolidated rules?**

As noted elsewhere, we appreciate that the consultation is based on a worked example rather than a full set of rules. However, we note that there are a number of key areas that are not yet covered or where there is some ambiguity. For example, the current draft does not appear to cover the sisting of cases or jurisdiction, and an expedited procedure, which is referenced in Rule 21(2) and does not appear to be covered elsewhere.

Additionally, whilst Rule 4 makes provision for sanctions where a party is in default, it is unclear why some rules refer back to that rule and others do not. As a result in some cases there is ambiguity over the consequences should a party fail to do something. For example, if an application where service of the summons, under Rule 10, is not effected within the 4 month period and no order to extend is received, it is unclear what would happen to the summons. For example, would it be considered deemed dismissed under Rule 15(6)? The SCTS has also identified a number of minor points which it will raise directly with the SCJC secretariat.

The SCTS remains supportive of the work to rewrite court rules given the ultimate aims which will benefit service users and the wider justice system. However, it is clear that implementing reform of this magnitude will have a significant impact on the SCTS. Particularly in relation to court programming, the increase in administrative duties, staff training and IT changes. There will be costs associated with these, which may be substantial. As the SCJC have noted in the BRIA, the respective Fee Orders for the Court of Session and Sheriff Court will require alignment with the new rules. We anticipate that this work will be significant, particularly in the case of the Sheriff Court. There may also be amendment required to terminology used in the Sheriff Appeal Court Fees Order.

The SCTS is keen to engage with and support the SCJC as the rules develop, including agreeing appropriate lead in times to ensure effective implementation

If you need any further information, please let me know.

Yours faithfully

Kirsty Hyslop  
Legislation Implementation Team  
Legislation and Information Unit  
Scottish Courts and Tribunals Service  
Team Mailbox: [litenquiries@scotcourts.gov.uk](mailto:litenquiries@scotcourts.gov.uk)  
[www.scotcourts.gov.uk](http://www.scotcourts.gov.uk)