RESPONSE TO CONSULTATION ON PROPOSED ORDINARY PROCEDURE RULES

I would like to respond to the consultation on the proposed Ordinary procedure rules. I spent over forty years as a solicitor in private practice handling all types of civil litigation in both the sheriff court and the Court of Session. I was a member of the Sheriff Court Rules Council in the 1990s. I have taught and written about civil procedure and practice in Scotland for many years and although I am now retired from practice I continue to teach and write about civil actions and procedures. I recently spoke at an event at the Royal Faculty of Procurators in Glasgow attended by about fifty practising litigators at which the proposed rules were discussed. This was a reasonable cross section of lawyers with current daily experience of the realities of court practice and this response also reflects views expressed there.

I understand that the principal aim of the proposed reforms is to introduce a unified procedure for certain actions in the sheriff court and the Court of Session in which the active case management of actions by the judge will be the central feature. I agree in principle that all defended cases should be managed by judges, that the rules for Court of Session and sheriff court actions should be the same, that the language of the rules should be modernised and that the impact of modern technology and communication should be recognised and, where possible, anticipated. I assume that the proposed Rules would be intended to replace the current rules for ordinary actions, petitions, and summary applications, and that the existing special procedures for commercial actions, family actions, PI actions, and Simple Procedure claims, all of which are "case managed" in different ways, are to be retained.

I appreciate that the consultation is limited in scope and that the worked example of the draft rules is primarily intended to promote discussion and feedback. I do not intend to focus overmuch on the precise wording of individual rules but confine my response to the broad themes arising in them. I appreciate that this is simply the beginning of a lengthy consultation process and I intend these to be constructive comments.

QUESTION 1 Will the "look and feel" of these consolidated rules provide court users with the simplified, harmonised and user friendly procedure sought ?

I am afraid that my answer to that is no. I appreciate the importance of providing access to justice for all and the concern that lay persons should not be excluded from a litigation by the language and complexity of the rules, but in many places the attempts to simplify the language cause more problems than they solve. It should be accepted that the primary "users" of the rules are judges and solicitors representing clients. The terminology of the current rules is well understood by those practising in the courts. Updating and modernising the language (e.g. calling a "Motion" an "Application", or not using terms like "proof") could be justified as a form of modernisation or simplification of language, but "users" know what a Motion is and the term proof is quite easy to understand. I do not recall any of my clients being mystified by that kind of terminology.

"Application" is used in the Simple Procedure rules and is presumably thought to be more "user friendly" in that context, but is there a good reason to change the word in these rules? Compare that with "Summons" – a technical legal term which could be replaced by "Claim" (as per the Simple Procedure language), but every lay user would know, or have a very good idea, of what a "summons" was. If there is a justifiable reason to modernise the language then so be it (e.g. "reponing note" or "interlocutor" seem outdated, even to lawyers) but, in many of the proposed rules, the attempts to modernise or simplify confuse rather than clarify matters. Where technical legal terms are used in the rules, a preferrable option would be to have a glossary – as in many other sets of rules – explaining any technical legal meaning for lay people. That might avoid unnecessary confusion arising from efforts to redefine terms that are well known to users and well understood. The influence of the Simple Procedure rules is apparent in the language of the proposed rules but largely inappropriate for a form of procedure which is not "simple".

I find the lay out of the rules – Chapters, Parts, and individual rules – confusing. The sequence of the rules is not very logical in my opinion. The headings and content of the individual Chapters and Parts are clumsy to say the least. For example, *"Chapter 4 – Early decision or disposal of a defended case"* has only one rule, viz, Rule 17 *"summary decree"*. The current rules have a Chapter simply entitled *"Summary Decree"*. Why change that ? If the reason is a concern that lay users would not know what the Chapter heading meant, then that could be explained in the glossary but even that seems unnecessary. Whilst on that point, I would observe that the draft rule tells us what a summary decree is and the interpretation section (Rule 87) defines a summary decree as being what rule 17 says it is. I appreciate that this may have been intended to simplify the rule, but it just unnecessarily complicates matters. Again, I can see this perhaps arising from a general desire to assist party litigants rather than the vast majority of users. There are other similar examples throughout.

The lay out of the rules may be regarded as a matter of opinion or style rather than substance, but it might be worth observing in this connection that I understand these rules are intended to replace the current rules for ordinary actions etc, and I am not sure if thought had been given to what that would mean in the overall context. Broadly speaking, the current Sheriff Court rules include chapters/sections dealing with basic incidental and procedural matters such as service, motions, decree by default; sections dealing with administrative issues regarding transfers or remits etc; and chapters dealing with individual forms of procedure, such as ordinary actions, PI actions and Family actions. How will the proposed rules, which only contain specific provisions about ordinary actions, be applied to other categories of civil action ? In the interests of clarity and simplicity – but perhaps not brevity – should these new rules also include the specific provisions applying to family, PI and any other actions ? In other words, should the structure of the rules not have general procedural rules and administrative rules applying to <u>all</u> civil litigation followed by individual chapters on the specific rules for Ordinary, PI and Family? I wonder if that has been considered. I think that would

mean one comprehensive "Rule Book" for all types of civil litigation. Amongst other things, that might avoid a proliferation of Acts of Sederunt in the future which can be confusing even to experienced "users". Having to search through different Acts of Sederunt to piece together the applicable rules is not simple nor user friendly. Would there be merit in considering this ?

QUESTION 2 - Are there any individual rules you think might be difficult to implement and comply with, and if so what would you do differently ?

Questions do arise from many of the individual rules and, for the sake of brevity, I have simply selected some examples rather than attempt to provide an exhaustive list.

Rule 18 Judicial Continuity

I am aware that other responses to the consultation have raised considerable concerns about the practicalities of this rule. A similar rule was introduced for sheriff court family actions just a couple of months ago and I understand that family lawyers are already experiencing problems with judicial continuity.

It is axiomatic that effective case management of any action is dependent on the court administration being able to allocate sufficient time and resources to ensure that there is continuity of judges hearing a case and that individual judges have sufficient time and opportunity to prepare fully for hearings. A pertinent example is Options Hearings in the 1993 OCR. Judges were not allocated sufficient time to prepare properly for them and over time they became largely ineffective.

Rule 6 Intimation of potential case

In principle, most lawyers would see the benefit of having prior intimation of an intention to raise court proceedings. Numerous practical issues would arise however. Will this have to be in the form of a specific formal letter, for example headed up "Under Rule 6.." ? Or will a course of correspondence or meetings or phone calls amount to such an intimation ? What penalties (if any) would be incurred in the absence of such intimation or the inadequacy of such intimation ? Would a failure to intimate (or intimate "properly") be a "default"? Or would it only have an effect on expenses ? What would be an acceptable style ? What if a claim is successful or defeated on grounds not contained in the prior intimation or in the light of the emergence of significant facts unknown at intimation ?

Ironically, I note that although the broad content of the formal intimation is specified in this rule, the requirements for the content of any subsequent summons is not mentioned in any rule. I suspect that this is an oversight and would be added in due course. That would be a critical provision in my opinion, and I will comment further on this later.

Rule 17 - Summary decree

This gives judges power to grant summary decree entirely on their own initiative. It seems unlikely to me (and undesirable to the parties and judges) that this would ever happen. The wording of Rule 17 (1) appears to be wrong, as it appears to me to give a judge such power, if satisfied solely that *"there is no compelling reason for the case to proceed'*. The notion that a judge would have an inquisitorial function in relation to the merits of the dispute is hinted at here and can be seen in other rules. I doubt if that is intended, but such provisions, here and elsewhere, would create considerable uncertainty for all concerned in a litigation.

Chapter 5 - Case management

Before commenting on the specifics of the rules in this chapter, can I query the need to introduce a completely new procedural regime for case management of ordinary action when an existing case management regime in Commercial actions has been operating very successfully for over twenty years. The broad approach to this Chapter owes more to Simple Procedure ideas of procedure than anything else, and I think that reflects a lack of understanding of how real litigation actually works. Separately, I wonder if there are any reliable statistics to demonstrate how many defended ordinary actions are likely to require case management in this way. My impression is that there will be relatively few, especially in the Court of Session. There may be no great benefit in introducing a whole new mechanism for case management for such a small number of cases, when we already have rules regarding case management of Commercial actions in both courts which are relatively brief (albeit supplemented by "guidance") and are tried and trusted. It seems to me that there have been remarkably few reported cases of problems arising from the operation of these procedures.

Why adopt a more regulated Chapter of rules and why not simply adopt or adapt the existing commercial action rules ? Is there any good reason to introduce a different model of active case management to that which seems to have operated successfully in commercial actions in both courts for over twenty years ? The practical experience with commercial actions demonstrates that giving a judge flexibility in the management of proceedings would be preferrable to introducing detailed rules and forms - including questionnaires - which may be difficult to operate in practice and involve parties, lawyers, clerks and courts in far more work than may be necessary. For example, there seem to be nine fairly lengthy draft rules about and around case management hearings, and it seems to me that this over formalises and potentially overcomplicates the procedure.

I can see that the potential downside to giving judges largely unfettered discretion on procedures could create uncertainty amongst litigants and unpredictability in court proceedings which would not make them "user friendly". I do not know if there are plans

to have particular sheriffs or judges designated as “case management” sheriffs/judges but, if so, the use of such specialists, along with appropriate Practice Notes and guidance would soon lead to an appreciation of what is required by litigants in such a procedure and what is likely to happen. That is what has happened with existing commercial procedure and allowed the rules and practice to develop sympathetically with cooperation and collaboration between the bench and bar.

Rule 19(1) Case Management orders ; general

As I have observed, this is just one rule in the Chapter on case management and I query the need for so many rules. Looking specifically at this rule as an example, I am not sure if this CMO is to be made solely on the basis of consideration of the summons and defences, along with completed questionnaires (if sought) whose scope is not specified yet. If so, I think this would be unsatisfactory to all concerned. In my opinion, there ought to be a hearing (online, unless an in-person hearing was preferred) before a court starts making important orders about the case. There should be a “discussion” of some kind – not just perusal of written documents by a judge – to assist effective management of any case by the judge who, it is hoped and presumed, will be managing it throughout. The various orders (are these intended to be exhaustive ?) compare unfavourably with the orders specified in, for example, Rule 40.12 (3) of the OCR.

Rule 32(1) – Orders about presenting information.

I assume that the terminology has been used to try and avoid referring to “evidence”. I am not sure why. I do not see any benefit in diluting the importance of evidence in the decision making process. Forms of evidence other than traditional oral evidence in person and in court have been used more frequently nowadays and there is no reason to complain about that, but this rule opens up a whole new concept of “information” which practitioners do not understand. Rule 32(2) also seems to suggest that a judge can tell a party who to call as a witness and what to ask them. That would be unacceptable in an adversarial system and unless the intention is to make a fundamental change to that system this should have no place in case management. Finally, I note that the definition of “information” includes… (why “includes” ?) “ items and oral evidence”. I do not understand what that is trying to say nor what is envisaged.

Rule 57 - Witness statements

I find this a very strange rule I am afraid to say. For what it is worth, nobody at the Royal Faculty of Procurators event I referred to earlier could understand what it was trying to achieve and ss. (3) and (4) mystified everyone, myself included. If the intention is to make a rule about how witness statements/affidavits can be used for proof, then this is confused and confusing. There is excellent guidance on this type of thing in the Court of Session and if it is felt that a rule is required then reference ought to be made to that.

It will be obvious from what I have said, that the language used in many of the rules leave a number of issues open to doubt. The rule about alternative dispute resolution (Rule 3) begs numerous questions, and the rules about the terms of the Summons and the defences (Rules 8 and 12) would undoubtedly make practitioners uncertain about how to frame their case/defence. In my opinion, judges would be assisted considerably in their case management role if there were specific requirements about what written claims and defences should contain. I appreciate that this might be seen as harking back to the bad old days when written pleadings were minutely scrutinised to the detriment of the progress of an action, but for a judge to manage a case effectively they have to know what the case is about and what is in dispute. Requiring a pursuer to express their written case intelligibly and the defender to respond fully in writing on the facts, law and the remedies sought should provide judges with a good idea of the "case" they had to manage, rather than the judge having to search for it or quiz parties about it at a hearing. Whilst putting a word limit on the parties' pleadings might not be a bad idea, a rule about what they should be saying would be a real benefit for case management.

QUESTION 3 - Can you suggest any additional rules or changes in lay out that would improve these consolidated rules. ?

I have already suggested that I think an alternative mechanism for focussing issues prior to case management hearings ought to be explored and I think that there should, in every case, be a substantive hearing at an appropriate time prior to a court giving case management directions. Those directions could also include a direction that the case should not be "case managed",but continue in some form of case flow management with a substantive hearing on the merits being fixed at some specific date in the future.

I also wonder to what extent the cost of litigation and the control of the cost of litigation has been considered in these rules. In England, there are extensive rules designed to give the court control of the cost of litigation as well as its conduct. Is there a case for introducing a similar set of provisions in Scotland ? It may not be considered necessary and would undoubtedly impose further burdens on the judiciary, timetabling and administration. However, Rule 2 sets out the "purpose" of the rules which includes references to "economy" and "proportionality" and it may be argued that there should be additional rules to support these aims.

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1. 28 November 2023.