Consultation; Ordinary Procedure Rules Response by the Scottish Law Agents' Society

1) **Question 1. Will the "look and feel" of these consolidated rules provide court users with the simplified, harmonized and user friendly procedure sought?**

We are more concerned with the content and substance of the rules than their cosmetic appearance.

At first blush, it may seem that simplified rules mean simplified procedure. This does not follow. A rule that "The sheriff shall determine the evidence to be led at a proof" is simple, but it would create procedure that was anything but simple, because the parties would have no control over the conduct or the cost of a proof.

The rules are certainly harmonised, which is a good thing. In addition, and far more broadly, we wonder whether any area of litigation that is within the competence of the sheriff should be excluded from the Court of Session, leaving the latter to deal with judicial review, some types of reduction, exercise of the *nobile officium* etc.

A lot of the procedure is relatively easy to follow.

We consider that some of the reforms are to be welcomed;

We agree with the proposal that a summons must be raised within four months of warranting rather than within a year and a day. A warrant will become stale if not used within a reasonable time, and four months is reasonable. A year and a day is too long.

We agree with the proposal that summonses and defences should not ordinarily exceed 5000 words. That length should be adequate to state a case.

We agree with the proposal that the same judge or sheriff should, if possible, hear the case from start to finish. This is far more efficient than one sheriff having to familiar himself with a case for perhaps just one calling and then a different sheriff having to do so for another calling (as happens traditionally).

However, we do not believe that the rules make for predictable procedure. To that extent they are not "user friendly".

The mechanics, time and cost of a case have to be reasonably predictable in order for there to be "user friendliness". For one thing, someone may be willing to spend £5000 pursuing a claim in the courts but unwilling to spend £15,000. Although, superficially, the language of this draft is "user friendly" we feel that these draft rules do not lead to predictability. Where the judge or sheriff is a referee (as is still essentially the case now), the parties retain responsibility for how they present their case, and how much they are willing to spend doing so. The draft rules appear to compel the judge or sheriff to become a participant in how the case is presented, but do not clarify how much responsibility rests with the agents or counsel. This is not "user friendly". A client who asks "Who will be called as a witness?" or "How much is this case likely to cost me?" is not going to be happy to be told that "It is up to the sheriff". People will be reluctant to litigate at all if they face the risk of paying expenses in a case over which their agent has limited influence.

The rules are clearly intended to introduce case flow management across the board. However, some types of actions lend themselves to this more than others. Personal injury cases pioneered this kind of judicial management 20 years ago. However, such actions are quite formulaic, and most of them settle, as was recognized by the Coulsfield Report. The course of a personal injury case was always predictable, even before they were subject to case flow management. Many other types of action seen in the courts follow their own unique course.

Take the example of a dispute over a house extension where the project is worth around £100,000 and there is a dispute over incomplete works or snagging to the value of £25,000. Some elements of the sum

sued for will be easier to prove than others. This type of case frequently requires that various building professionals give evidence as to the quality and cost of work. It can be time consuming and expensive. If the parties have the choice of who the witnesses will be, what they will be asked about and the documents to be lodged they have a measure of control over time and cost. They may decide that some elements will be uneconomical to prove and they may decide not to seek to lead evidence about them.

If this control is given to the court the parties run even greater risks than at present. They could find themselves having to foot the bill for extra days of proof, incidental procedure, witnesses, shorthand writers and others when that expenditure is the result of decisions taken by the sheriff over the presentation of the case. None of this could conceivably be described as "user friendly".

Whilst agents and counsel are able to present a case as they wish the litigants whom they represent have some degree of control. If case flow management is applied to these cases there will be a lack of predictability as to how they will proceed. It will be hard if not impossible to advise clients about what will be required of them by the courts, and the costs and timescales of this. The late Sheriff Principal Taylor said at a presentation that "How long is a piece of string?" should never be the answer to a client's question as to the likely cost of a litigation. Yet, depriving solicitors and counsel of the control of a civil action diminishes their ability to predict its cost.

The Scottish Legal Aid Board requires that agents estimate the probable cost of a civil action and will impose a cost ceiling accordingly. Again, judicial control of litigation undermines the agent's ability to estimate the cost of a case.

These rules would make going to court riskier than it is at present. This is not friendly to court users. Their advisors would have to warn them that although they bear the expense, control of the presentation of pleadings and the evidence rests with the court and not with them. "Orders about presenting information" let the court direct the evidence which is led. This is a radical departure from conventional litigation.

Even as matters stand, our members have conducted proofs in which the sheriff has asked almost as many questions of a witness than the agent himself. These rules seem to us to facilitate such judicial intervention. Incidentally, the same sheriff would discourage litigants from leading corroborating evidence on the basis that it was unnecessary under the Civil Evidence (Scotland) Act 1988.

These draft rules would lead to a more interventionist and more inquisitorial approach, with rules such as that the sheriff "may require a party to present information from a specific witness".

This all begs the question; who is conducting the case, the agents or the sheriff? It is unreasonable for the solicitor to be deprived of the control of a litigation but at the same time left exposed to a complaint by the client if it does not go his way.

2) **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?**

We do not agree that litigants should be forced to lodge summonses, defences etc online. The fact is that many people, particularly older people or those unfamiliar with technology, struggle with online procedures. If the rules are supposed to be aimed at serving the general public rather than professional advisors or SCTS, allowances have to be made for, and there should be no discrimination against, those who are more comfortable with paper format. They deserve to be served by this procedure equally well as those who prefer online systems.

What we would do differently is allow paper submission as a choice. This choice was promised when Civil Online was introduced in relation to Simple Procedure, and it was soon removed. That lack of freedom of choice should not be exarcerbated.

An interesting point arises over when an action is "raised" for time bar purposes. At the moment this is clear; an action is raised when it is served, not when a writ is lodged or warranted. By contrast, draft rule 8(2) states that "a case commences when a summons is lodged for registration". It also provides at rule 9 that the court will not automatically register a lodged summons. If it is registered, the pursuer has four months to serve it.

So whereas at the moment someone knows whether a claim against him is time barred (because 3 or 5 years have elapsed without his receiving service a summons), under the draft rules the position is far less clear. At the expiry of the triennium or quinquennium a summons may have been lodged - thereby preventing the claim being subject to limitation or prescription – but it could be months before it is actually served on the defender.

There are no specific rules that ought to be difficult to implement, but, some of the terminology creates confusion, needlessly; We do not see what purpose is achieved by the draft rules avoiding the term "evidence" and favouring "information" instead. In fact, this is pointless and is bound to lead to confusion.

Rule 28(2) refers to the court putting on oath a "witness who is to provide information at the hearing". We find this use of the word "information" completely erroneous. Witnesses do not provide "information". They provide "evidence.".

The current system is clear. Written pleadings and oral submissions convey information which may or may not be correct. The parties lead evidence to prove that their pleadings and submissions are correct. Evidence is not the same as information. Chapter 7 of the draft rules ("Handling of supporting information") are likely to baffle party litigants (if not many solicitors). There is the risk that litigants will think that their written pleadings are enough when, plainly, they are not.

We do not see what purpose is achieved by the draft rules using the term "substantive hearing" instead of proof, debate or proof before answer. These specific terms have well established meanings. They have stood the test of time. Anyone who goes into court should be able, without too much difficulty, to learn their distinctions and how they should be conducted. Making language "user friendly" can also be regarded as "dumbing down". That is the case here. So is using a heading such as "Things to do with enforcing a case"; Part 5.

Doing away with terms of art for the sake of it serves no useful purposes. We question the point, for example, or replacing the term "motion" with "application".

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

The layout is good. The issues lie not in the lack of rules as in the effect of the draft rules as they stand and, in particular, the confusing terminology used (see above) and the inquisitorial nature of the court's management of litigation.

The harmonizing of procedure by the application of the same draft rules in both the sheriff court and the Court of Session is a good idea but it would be helpful to retain specific rules, as present, to govern certain types of less common action, such a multiplepoindings, actions of division and sale etc. The current rules, which do contain such provisions, are useful in explaining logically the steps which are appropriate.

The Scottish Law Agents' Society

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